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A special issue devoted to Visions of Law and Social Change

Guest Editors
Zuhairah Ariff Abdul Ghadas & Ida Madieha Abdul Ghani Azmi

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The Introduction explains the scope and objective of the study in the light of current knowledge on the subject; the Materials and Methods describes how the study was conducted; the Results section reports what was found in the study; and the Discussion section explains meaning and significance of the results and provides suggestions for future directions of research. The manuscript must be prepared according to the Journal's Instructions to Authors.

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A manuscript is normally reviewed by two referees, but may be reviewed by three referees if considered necessary. Manuscripts are sent to referees within four weeks from the receipt of manuscripts. If any referee disagrees with the decision of the editor, a second referee will be invited to review the manuscript. The response to referees' comments is the responsibility of the corresponding author. The manuscript is revised and resubmitted to Pertanika within 12 weeks from the receipt of referees' comments.

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1. The Journal's chief executive editor and the editorial board examine the paper to determine whether it is appropriate for the journal and should be reviewed. If not appropriate, the manuscript is rejected outright and the author is informed.

2. The chief executive editor sends the article-identifying information having been removed, to three reviewers. Typically, one of these is from the Journal's editorial board. Others are specialists in the subject matter represented by the article. The chief executive editor asks them to complete the review in three weeks. Comments to authors are about the appropriateness and adequacy of the theoretical or conceptual framework, literature review, method, results and discussion, and conclusions. Reviewers often include suggestions for strengthening of the manuscript. Comments to the editor are in the nature of the significance of the work and its potential contribution to the literature.

3. The chief executive editor, in consultation with the editor-in-chief, examines the reviews and decides whether to reject the manuscript, invite the author(s) to revise and resubmit the manuscript, or seek additional reviews. Final acceptance or rejection rests with the Editor-in-Chief, who reserves the right to refuse any material for publication. In rare instances, the manuscript is accepted with almost no revision. Almost without exception, reviewers' comments (to the author) are forwarded to the author. If a revision is indicated, the editor provides guidelines for attending to the reviewers' suggestions and perhaps additional advice about revising the manuscript.

4. The authors decide whether and how to address the reviewers' comments and criticisms and the editor's concerns. The authors return a revised version of the paper to the chief executive editor along with specific information describing how they have answered the concerns of the reviewers and the editor, usually in a tabular form. The author(s) may also submit a rebuttal if there is a need especially when the author disagrees with certain comments provided by reviewer(s).
5. The chief executive editor sends the revised paper out for re-review. Typically, at least one of the original reviewers will be asked to examine the article.

6. When the reviewers have completed their work, the chief executive editor in consultation with the editorial board and the editor-in-chief examine their comments and decide whether the paper is ready to be published, needs another round of revisions, or should be rejected.

7. If the decision is to accept, an acceptance letter is sent to all the author(s), the paper is sent to the Press. The article should appear in print in approximately three months. The Publisher ensures that the paper adheres to the correct style (in-text citations, the reference list, and tables are typical areas of concern). The authors are asked to respond to any minor queries by the Publisher. Following these corrections, page proofs are mailed to the corresponding authors for their final approval. At this point, only essential changes are accepted. Finally, the article appears in the pages of the Journal and is posted online.
In 1927, Roscoe Pound from Harvard Law School, in his address before the Indiana Conference on Social Work, titled Law and Social Change, discussed the need to bridge the gap between what the law is and what the law ought to be due to social changes. What Roscoe was propounding is the need to train lawyers to be social fighters, seeking to advance social justice and not just legal justice.

What Roscoe propagated is not something new. The law must constantly evolve to be relevant to the society, otherwise it runs into the danger of being obsolete. The alignment of legal position with social reality must not take place at the Parliament alone but also at the courts as well as legal firms. That was the core thesis of Roscoe, i.e. even lawyers must be sensitive of changes in cultural symbols, rules of behaviour, social organisations or even value systems.

This special issue is a culmination of a two-day discussion at the 5th International Conference on Law and Society 2016. The conference which was organised by four faculties from 3 different countries within the ASEAN region i.e. Faculty of Law and International Relations, University Zainal Abidin, Ahmad Ibrahim Kulliyah of Laws and Universitas Muhammadiyyah Yogyakarta, hosted more than 60 academics to examine the broad theme of the conference titled Visions of Law and Social Change. The theme aptly describes the challenges currently confronting legislators and policy makers to keep national countries law up to date with social changes. The Conference which took place on the 18th and 19th April 2016 at the beautiful campus of Fatoni University, Pattani, Thailand, was a convergence of like-minded academics discussing the impact of social change on legal framework with heated passion and enthusiasm.

The specially selected 26 papers in this Special Issue examines the linkage between law and social change from a wide variety of angles including family, medical, company, international, contract, constitutional, human rights and land law. Readers may find that although the term 'social' appears only in three titles, the majority of the papers focus on contemporary social issues that necessitate a fresh look into the existing legal framework. In the context of human rights, for example, one cannot overlook the many social values that drive norm setting or mull over the social benefit of equal opportunity rule in take over and mergers. In other areas, the social need is even more wanting such as children's right to education, religious freedom, constitutional democracy, refugee crisis, shareholders activism and shareholders' power, internet policing, apology as a mode of resolution of medical disputes or even philanthropy and social justice in waqf administration.
All the papers published in this edition underwent Pertanika's stringent peer-review process involving a minimum of two reviewers comprising internal as well as external referees. This was to ensure the quality of the papers justified the high ranking of the journal, which is renowned as a heavily-cited journal not only by authors and researchers in Malaysia but by those in other countries around the world as well.

In the context of Shariah, social changes may also challenge the existing legal norms that have become sine qua non to many Muslim scholars. In this issue, one paper seeks to revisit the understanding of the concept of punishment and propose for the imposition of community service as an alternative punishment in Shariah.

Not to be forgotten are proposition of new technologies that have revolutionised business practices. Two papers in this special issue address how information technology can be used to the advantage of small businesses, such as the usage of mobile apps for enhancing legal knowledge or e-accounting system information system for small legal firms.

So intimate is the relationship between law and social changes that socio-legal study has become one of the entrenched research methodologies. Law in its black letter alone is no longer sufficient, instead it must be understood in its context; hence, the socio-legal approach. In this Special Issue, two papers adopt this socio-legal approach in examining family law i.e. claims of intangible interest as matrimonial property and cross border marriages.

We thank the Chief Executive Editor, Dr. Nayan Kanwal for his tremendous efforts, leadership, courage and dedication to improving the quality of this issue.

As final words, it is hoped this collection of papers would provide a better understanding of how social change could contribute to a better vision of law in Malaysia.

Happy reading!

Guest Editors:
Zuhairah Ariff Abdul Ghadas (Prof. Dr.)
Ida Madieha Abdul Ghani Azmi (Prof. Dr.)

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The Role of Apologies in Resolving Medical Disputes

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ABSTRACT

In the wake of medical errors and potential lawsuits, apologies made by medical practitioners to their patients have the ability to defuse prospects of litigation. Often, when things go wrong, patients want to know what actually happened, why it happened and be assured that it will not happen again. At this juncture, apologies which are ‘statements acknowledging error and its consequences, including accepting responsibilities and communication of regrets’ can reduce the anger as well as patient desire to retaliate. Nevertheless, apologies may also have the potential to be seen as admissions of guilt by the medical practitioner, thus, exposing him to risks of impending lawsuits. In weighing the drawbacks of apologies against their benefits, several countries have enacted ‘apology laws’ that mandate open disclosure of medical errors but shield those who apologise from legal liability. This paper seeks to discuss the role of apologies in the resolution of medical disputes and the barriers faced by medical practitioners in subjecting themselves to acts of open disclosure after a mishap. Nevertheless, the inculcation of a sustainable culture of honesty, openness and respect is fundamental to improve patient safety and public trust in the healthcare system.

Keyword: Apology, apology law, medical error, negligence, open disclosure

INTRODUCTION

Apology has always been viewed as an important social conduct that is able to heal and preserve relationships. By apologising, a person shows respect and empathy towards the wronged person. Subsequently, if it is done sincerely and effectively, the negative consequences of the wrong actions can be avoided. A person who has been harmed is usually overwhelmed by anger, frustration and a desire to retaliate. An apology made by the wrongdoer has the ability to disarm a person’s anger as well as vengeance and subsequently, opens the door to forgiveness towards the wrongdoer.
In the case of medical negligence that results in injuries and death of a person, it is almost inevitable that the affected person and his families will be consumed by anger. Consequently, the injured victims or their families will resort to court litigation as a means of showing their anger as well as dissatisfaction and at the same time, demand monetary compensation to ensure medical practitioners pay for their losses (Robbennolt, 2009). Apologies made by the medical practitioner at this point may prevent prospects of litigation and reduce the anger of the affected parties. However, medical practitioners are in constant dilemma fearing that apologies may be interpreted as admissions of guilt and used against them in legal proceedings (Mastroianni, Mello, Sommer, Hardy, & Gallagher, 2010). It is thus, pertinent to explore benefits and the drawbacks of apologies in resolving medical disputes and the legal implications if apologies are being placed in a proper regulatory framework to ensure its validity of its consequences.

THE CONCEPT OF APOLOGY IN MEDICAL DISPUTES

Apologies are statements acknowledging errors and their consequences, including accepting responsibilities and communication of regrets. Apologies can be defined as a “written or spoken expression of one’s regret, remorse or sorrow for having insulted, failed or injured, or wronged another” (Dictionary.com). Besides expressing one’s regret, apologies may signify an admission of responsibility or become part of a confession (Slocum, Allan, & Allan, 2011).

The act of apologising is remedial and has healing values to both parties. Studies have also shown that anger is the main motivator for the start of a litigation process, thus, an apology offered at this time may be able to defuse the desire to litigate as it is able to reduce the patient’s anger and creates an open communication between the doctor and the patient to voice their concerns (Slocum et al., 2011). At this juncture, possibilities of settling matters out of court may be forthcoming (Allan, 2008). Settlements out of court may be beneficial to both parties as it not only able to reduce the confrontational attitudes amongst the parties in the court room but would also be able to reduce the backlog of cases in the court of law (Hodge & Saitta, 2011).

THE BENEFITS OF APOLOGISING IN MEDICAL DISPUTES

Apology is recognised for its psychological effect as it is a remedial behaviour with a potential to make wrongful behaviour acceptable either verbally or by acts that attempt to explain the real situation and showing of compassion and regret (Ohbuchi, Kameda, & Agarie, 1989). Although apology cannot undo the outcome of the negligent act, the words of empathy may have the ability to defuse anger and can undo the negative effect or consequences of the act of negligence (Hodge & Saitta, 2011). Other than offering psychological benefits, the law on apology also provides legal benefits which are discussed below.
Discourage Litigation

Apology encourages or influences reconciliation. As anger is the main motivation for litigation related to medical negligence, apologies has been found to be effective in reducing patient’s anger, increase communication between the medical practitioner and patient which ultimately reduces the latter’s desire to litigate (Slocum et al., 2011). Although the patient realises the outcome of the act cannot be reversed, in certain circumstances, the affected party only wants to know how and why the incident happened and they also want to be assured that the medical practitioner will take preventive measures so the incident is not repeated (Szostak, 2011). Besides that, apology promotes emotional healing as it will remove the hatred between the patient and medical practitioner. Subsequently, the patient will no longer perceive the medical practitioner as a personal threat (Engel, 2002) and there will be no issue of prospective litigation fostering the ‘name, blame and shame’ culture.

Promote Fast Settlement of Claims

Litigation is a lengthy and tedious process both to the patient as well as the medical practitioner. The substantive law of medical negligence coupled with complex procedural aspect of a tort based civil claim will not assist the patient much in procuring compensation for the physical and psychological injuries suffered (Kellett, 1987). In some cases, the court takes years to come up with a decision after the claim has been initiated by the patient. This will not only delay the patient’s right to get compensation for the losses suffered but it will also increase the tension as well as anger between the patient and the medical practitioner. At this juncture, encouraging mediation and apologising can promote settlement and protect the emotional well-being of both parties (Barcena, 2013).

Promotes Disclosure and Transparent Communication

Good communication incorporating an apology is important in maintaining a cordial relationship between a medical practitioner and the patient after an adverse event (Ebert, 2008). If there is a breakdown in communication, it will have adverse consequences for the relationship. Further, good communication tends to decrease the likelihood of a lawsuit and increase positive perceptions portrayed by the medical practitioner. It will undeniably lead to better outcome and automatically discourage litigation (Lester & Smith, 1993). In certain circumstances, a medical practitioner tries to prevent himself from making any contact with the patient after an adverse event. However, if the medical practitioner has been more transparent, the patient’s anger will not be aroused. When the medical practitioner apologises, it will usually be accompanied with justification or explanation of what really happened which is desirable to the patient (Szostak, 2011).
THE DRAWBACKS OF APOLOGISING IN MEDICAL DISPUTES

Although apologising has its benefits, their drawbacks need to be weighed against their benefits. Medical practitioners are often hesitant to apologise fearing the negative consequences of such actions. The setbacks of apologising are discussed below.

Admission of Fault

An admission is a statement against a person’s own interest, and is generally considered in the court of law to determine the liability of the parties (Rehm & Beatty, 1996). The rationale for such acceptance is that, a person will not make a statement against his own self or interest unless it is true. In the course of litigation, an apology may constitute an admission because in the normal course of human behavior, a person will not make a testament against themselves unless they were true (Taft, 2005). This is the most important factor which prevents medical practitioners from apologising.

Fear of Litigation

Although a patient is amenable to an apology by the medical practitioner, the fear of litigation has always been a major impediment for the latter. This fear has led to defensive and strategic disclosure practised by the medical practitioners (Taft, 2005). Lawyers usually encourage medical practitioners not to apologise and label such action as a “legal suicide” as it can be used by the patients against them in court, which in turn may jeopardise their insurance claims (Ebert, 2008). The medical practitioner is usually required not to make any form of admission in the insurance coverage. Thus, medical practitioners are not encouraged to apologise fearing their insurance will not cover such actions (Cohen, 1999). Medical practitioners are wary of being dragged into the intricacies of court trials which are usually lengthy and cumbersome. The threat of litigation compels the doctor to view his patient as a future adversary in a courtroom proceeding. Even if the negligence claim is settled out of court, there is still an effect on the doctors as settlements out of court leave them with no chance of vindicating themselves. They may still feel a cloud hanging over their head.

Personality of the Medical Practitioner

Society always have high regard towards medical practitioners due to the nature of their profession. This perception has created the ‘non-apologetic’ culture among the medical practitioners as by apologising, a person is in a way admitting his fault and consequently, lowering his position amongst his peers (Ebert, 2008). Therefore, when a mishap occurs, medical practitioners do not want to apologise as they believe that they are in higher position than the patient. These egos on the part of the medical practitioners, unfortunately, shield them from expressing apologies or remorse whenever there is a dispute with their patients.
THE ROLE AND WORKINGS OF ‘APOLOGY LAW’ IN MEDICAL DISPUTES

Although apologies offer much benefits in defusing the desire for patients to litigate, it also has the effect of being a ‘double-edge’ sword and be seen as self-incriminating. In other words, apology made by the medical practitioner can be seen as an admission of guilt and be tendered as evidence in court proceedings. This has led to several countries enacting ‘apology laws’ that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability (Raper, 2011). There are two types of apology law (Wheeler, 2013). The first is the ‘full apology law’ that protects the medical practitioner against any expression of regret and remorse for what has happened, statements of sympathy and also any acknowledgement of that person’s wrongdoings including statements that contain admission, fault, mistake, errors and liability (Carroll, 2014). The second type is the ‘partial apology law’, which only protects the medical practitioner against statements of sympathy, commiseration, condolences and compassion alone without any expression of admission (Ho & Liu, 2011). In some jurisdictions, the law give protection over apology made by a medical practitioner and will not allow it to be used in determining his liability in court. However, such apology may be used by the medical board in a licensure actions brought by the state (Mongiello, 2012). In such cases, the medical practitioners will still be subjected to internal or domestic inquiry by the relevant authority. The workings of apology law differ from one jurisdiction to another and it is thus, important to examine the relevant jurisdictions that have implemented apology law for resolving medical disputes.

Australia

The issue of legislating apologies was initiated by a Legal Process Reform Group with support from Australian Health Ministers’ Advisory Council after they were asked to report on issues concerning medical negligence. They recommended for legislation that provides an apology “made as part of an open disclosure process to be inadmissible in an action for medical negligence” (Vines, 2005, p. 2). This recommendation was made in reference to the development of the Open Disclosure Project and the National Open Disclosure Standard for Public and Private Hospitals developed by the Australian Council for Safety and Quality in Health Care, which included expression of regret as part of important element in an effective disclosure (Australian Commission on Safety and Quality in Health Care, 2008). This reform was aimed to ensure that an effective disclosure will be made to help the patients in the healing process, better learning for the medical practitioners and ultimately, reduce the rate of medical negligence litigation (Vines, 2005). The application of apology law in Australia is rather unique because the types of apology vary in different states throughout Australia (Barr, 2009). States such as New South Wales, Australian Capital Territory and Queensland enact
the ‘full apology law’ whereas the rest such as Victoria, Northern Territory, South Australia, Tasmania and Western Australia offer the ‘partial apology law’ (Wheeler, 2013), which only ‘protects expression of regret and sympathy alone (Carroll, 2014) and will no longer protect the apology if it contains any *mea culpa* (‘through my fault’) statements (Studdert & Richardson, 2010).

For states that offer ‘full apology law’, the definition of apology does not only cover expression of sympathy or regret but it also includes expression that implies admission or fault related to the matter (section 68 Civil Liability Act 2002) (section 72C Civil Liability Act 2003 Queensland) (section 13 of Civil Law (Wrongs) (Australian Capital Territory) 2002). The law in these states specifically provides that an apology is not admissible in any civil proceedings as evidence of fault or liability. This can be seen from the provisions in the above stated legislations that these states give full legal protection for all types of apologies made by any member of the community including admission of fault by a medical practitioner (Wheeler, 2013). The workings of ‘full apology law’ require three main elements that concern the position and consequence of such apology, i.e. declaratory element, relevance element and procedural element (Wheeler, 2013). For instance, in the Civil Liability Act 2002 (NSW), section 69(1)(a) declares that apology is not an admission of fault or liability. This refers to the first element which is the ‘declaratory element’. Second, in determining a fault or liability on the part of the defendant, section 69(1) (b) excludes apology from being taken into account as a relevant fact in determining fault. This provision is concerned with the ‘relevance element’. Third, with regards to the ‘procedural element’, from the law of evidence perspective, apology made is inadmissible as evidence of fault and therefore, cannot be used in court against the person who gave it according to section 69(2). Although the application of apology in Australia is not uniform (Finlay, Stewart, & Parker, 2013), its workings in the tort law reform has significantly reduced number of new claims for compensation, increased number of closed claims and eventually, reduced proportions of large damage awards (Corbett, 2011).

**Canada**

The bill on apology law in Canada was drafted based on New South Wales Civil Liability Act 2002 (Barr, 2009). However, the British Colombia Apology Act incorporated not only the essential elements based on the Australian legislation but also included specific provisions for insurance contracts. This is an extension of the protection where the law does not only render such apology inadmissible in court but also prevent the insurance contract from becoming void if apology was made (Ministry of Attorney General (Canada), 2006). Legislators in Saskatchewan, Manitoba, Alberta and Ontario have also passed similar law reform as British Colombia. Further, the protection given by the Canadian apology law is applicable to all civil claims (Worton & Pavlovic, 2015) except in the province of
The Role of Apologies

Prince of Edward Island where the protection for apology is exclusive for healthcare related cases only (Barr, 2009). The Apology Act in British Colombia was given royal ascent in 18th May 2006. The Act defines apology as “an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate” (Apology Act (BC) 2006). The Act also provides that an apology does not constitute an express or implied admission of fault or liability and does not void, impair or otherwise affect any insurance coverage that is available, or that would be available by the person who is connected to the apology. It further provides that apology must not be taken into account in any determination of fault or liability in connection with that matter (Apology Act (BC) 2006). Currently, most states in Canada have adopted the Uniform Law Conference of Canada Uniform Apology Act (Worton & Pavlovic, 2015). The purpose of this uniform legislation is to promote uniformity on the substance of the law as well as the application of apology law throughout Canada (Uniform Law Conference of Canada [ULCC], 2007). Before the enactment of apology law in Canada, some apologies are already protected by law such as admission made without prejudice and also apologies made in the course of confidential dispute resolution proceedings such as mediation. However, after the apology legislations in Canada came into force, the law now explicitly precludes parties from relying on the apology as an admission of fault or as evidence to prove liability of the parties (Worton & Pavlovic, 2015). Nevertheless, even though the Canadian apology law protects apology from being admissible in court, it does not protect all types of apology. The law only gives statutory protections over apologies that fall under the definition of “apology” under the legislation. Therefore, it does not cover extraneous statements that are not part of the apology such as statement about restitution and repayment of debt or any admission related to the facts of the dispute (Worton & Pavlovic, 2015). One of the major implications of this is the contract of insurance as the apology laws prevent insurance company from refusing to give protection to the insured medical practitioner on the grounds that the latter apologised and thus did not cooperate with them to defend the case (Barr, 2009).

CONCLUSION

The benefits of apologising are beyond dispute and it is understandable that patients want a sincere apology and acknowledgement of the harm they have suffered. However, in encouraging medical practitioners to practice a culture of transparency and openness, the legal consequences of apologising need to be stated in a clear legal framework so that medical practitioners are aware of the outcome of apologising to their patients. Malaysia should enact apology laws that allow medical practitioners to receive legal protection in certain circumstances when
apologies for unintentional wrongdoings are made. Lessons can be learned from the Canadian and Australian experiences in drafting and legislating apology laws as well as making amendments to the law of evidence in their quest to resolve medical disputes in a more amicable manner. A structured apology law will reduce the number and severity of medical practitioners’ liability claims, prevent or minimise prospects of litigation and ultimately, preserve the relationship between medical practitioners and their patients.

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The Role of Apologies


Shareholders’ Activism and their Power to Instruct

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ABSTRACT
An important measure of shareholders’ power is their ability to initiate and approve proposals. However, in many countries which have transplanted or inherited the Anglo-Saxon model of governance, shareholders intending to present their proposals to a general meeting often face a significant legal barrier due to the division of power doctrine. This article examines recent decisions within the Commonwealth where attempts have been made to reconfigure the division of power which confers to the board the power to decide on management matters. The article adopts a qualitative research method using case study of decisions in several Commonwealth countries where shareholders have attempted to present proposals on matters which ordinarily fall within the board’s jurisdiction. Despite the strong opposition that shareholders face to reconfigure the division of power there is an increasing trend of shareholder-initiated proposals within the Commonwealth, reflecting changing community expectations.

Keywords: Board, Commonwealth, division of power, reconfigure, shareholders

INTRODUCTION
Shareholder activism is a means to address mismanagement and ensure director’s accountability. A regime that does not empower shareholders will result in poor accountability as it creates mandatory deference to management (Bebchuk, 2005; Fairfax, 2008; Smith, Wright, & Hintze, 2011). There are many forms of shareholder activism, one of which is shareholders filing their proposals (Sjöström, 2008; Levit & Malenko, 2011). The shareholders’ ability to propose and initiate proposals is considered crucial and significant to measure the level

*Activism can be conducted via direct dialogue with corporate management or the board, during open sessions in corporate general meetings, writing open letters or by filing formal shareholder proposals (see Sjöström, 2008).
of minority shareholder empowerment and protection in a particular jurisdiction (Anderson, Welsh, Ramsay, & Gahan, 2012a, 2012b; Armour, Deakin, Lele, & Siems, 2009; Holger, 2010; La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1998; Lele & Siems, 2007). However, shareholders intending to present their proposals to a general meeting often face significant legal barrier due to the “division of power” doctrine prevalent in countries which have transplanted or inherited the Anglo-Saxon model of governance as practised in the UK. This is a major setback to shareholder activism (Choo, 1993; Harris & Raviv, 2010; Rachagan & Mohd-Sulaiman, 2013; Sealy, 1997). Based on this doctrine, most shareholder proposals will not be added to the agenda because it relates to a matter that the general meeting has no power to decide.

Shareholder proposals are therefore quite rare in the common law world because company law rules in general do not support the argument that shareholders should have the power to propose matters which are within the board’s authority. The “division of power” doctrine in a majority of Commonwealth countries, including Malaysia, has primarily been in favour of conferring power over business decisions to directors. On a wide range of issues, shareholders have the power to approve business decisions but very limited authority to propose business decisions (Koh, 2005; Levit & Malenko, 2011). The prevailing view within the Commonwealth countries is that shareholders cannot interfere or intervene in the directors’ exercise of their powers to make business decision; shareholders also do not have the power to instruct the board.³ The director primacy theory is backed by efficiency arguments, specifically that modern companies can only function efficiently if shareholders cede control to a select group for expeditious business decisions (Bainbridge, 2006a, 2006b). A corollary to the director primacy theory is that although shareholders may convene meetings themselves or request the company convene a meeting on behalf of the requisitionists, and put items on the agenda, the purpose of the meeting must not be an improper one and that the agenda cannot include resolutions that the general meeting has no power to pass (NRMA Ltd v Parker (1986) 6 NSWLR 517; 4 ACLC 609).⁴ This restriction applies even where the resolution is expressed to represent a non-binding opinion or request.

³ See John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113; Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame, [1906] 2 Ch 34; Baldev Singh v Mahima Singh [1974] 2 MLJ 206; dicta in Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors [2012] 2 MLJ 521, citing these cases. See also NRMA Ltd v Parker (1986) 6 NSWLR 517; 4 ACLC 609 and contrast with Credit Development Pte Ltd v IMO Pte Ltd [1993] 2 SLR 370 criticised in Choo (1993).

⁴ In this case, the purpose of the meeting was to instruct the board of directors to conduct the election of directors in a particular way. Under the company’s constitution, the decision as to the manner in which the elections should be held was one that belonged to the directors.
Nonetheless, there are recent decisions within the Commonwealth where attempts have been made by shareholders to reconfigure the division of power. These cases indicate an increasing trend of shareholder activism within the Commonwealth, reflecting changing community expectations.

SHAREHOLDER PROPOSALS BY SOCIAL ACTIVISTS

Activist shareholders have been quite active in challenging the division of power doctrine (EY Centre for Board Matters, 2015; Buchanan, Netter, Poulsen, & Yang, 2012). They are often identified as shareholders who desire to influence companies to adopt socially responsible practices and policies particularly relating to environmental, social and governance issues (ESG). In 2015, the Federal Court of Australia handed down its judgement in Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia [2015] FCA 785 (ACCR v CBA) which reiterated the director primacy model of governance for Australian companies. The case arose out of attempts by the Australasian Centre for Corporate Responsibility (ACCR) to include several of its social and environmental proposals in the agenda of the annual general meeting (AGM) of the Commonwealth Bank of Australia (CBA).

In ACCR v CBA [2015] FCA 785, ACCR lodged its proposals to be considered at the company’s AGM. The proposals were:

(1) In the opinion of shareholders, it was in the best interest of the company for directors to provide a report outlining the quantum of greenhouse emissions that CBA was responsible for financing, the risks to the company from un-burnable carbon and the current approach adopted to mitigate those risks (the First Resolution);

(2) That shareholders express their concerns as to the absence of a report identifying the level of greenhouse gas emissions CBA was responsible for financing and associated risks (the Second Resolution); and

(3) That each year at about the time of the release of CBA’s annual report, the director’s report to shareholders on their assessment of the quantum of greenhouse gas emissions CBA was responsible for financing (the Third Resolution). The ACCR proposed for CBA’s constitution to be amended to incorporate this resolution.

However, on 15 September 2014, CBA published its notice of meeting for the 2014 AGM which included only the third resolution, and ACCR was informed that the other two resolutions cannot be presented for voting as they encroached on the board’s authority to make business decisions. The notice also included a statement by the CBA’s board that it did not consider the resolution in the best interest of shareholders and recommended shareholders to vote against the resolution. The CBA’s announcement to the ASX included the same statements.
The ACCR then brought an action for an injunction for CBA to include the two excluded resolutions arguing the company could not refuse to include the matter on the agenda to be voted as it was merely recommendation of a non-binding nature and would therefore not be in contravention of the rule that the board has the power to manage the company’s business. The court had to consider whether the board was correct in refusing to include two out of the three resolutions presented in the notice of the AGM. The court decided that:

“…the CBA constitution vests all powers concerning the business of CBA in the board (or in management under the board’s direction). The only powers that shareholders have are those which the Act “requires” be exercised by the company in general meeting and none of those powers include a power to pass non-binding advisory resolutions. The terms of the constitution, which make clear that management of the company is vested exclusively in the directors, preclude the implication of any power in the general meeting to pass resolutions proffering opinions on the way in which the board exercises its powers.”

The court also decided that under the Australian Corporations Act (ACA), there is no power given to shareholders to pass non-binding resolutions; this is only available for a listed company’s remuneration report. In addition, though the legal framework give the shareholders power to ask questions and comment on the management of the company in the general meeting, this is merely to enable them to express views on the company’s management and not to pass non-binding resolutions or make recommendations to the board.

SHAREHOLDER PROPOSALS ON BUSINESS AND OPERATIONAL MATTERS

There have been several recent decisions involving shareholders’ proposal on operational matters. In Re Molopo Energy Limited v Keybridge Capital Limited [2014] NSWSC 1864, a substantial shareholder of the company lodged a request for the company to convene a general meeting. The requisitioned meeting was for the purpose of proposing amendment to the constitution conferring the power to the general meeting to decide on a reduction of share capital and a further resolution to effect reduction of share capital. The company then applied to court for a declaration that the board was not required to convene the meeting as requested by the shareholder. This was on the basis that the general meeting has no power to propose a reduction of capital but only to approve it and “the shareholders, as a body in general meeting, are not an apt body to make a decision to effect a reduction in capital where the reduction is not proposed by the directors (para 77).”

In Re Molopo Energy, the shareholders proposal was in the form of an amendment to the constitution which confers management
powers to the board. Although the court conceded shareholders may present a proposal to amend the constitution, it did assert that the amendment was intended to affect a capital reduction. Therefore, it is not possible to do so as this would be in contravention of other provisions in the ACA.

*Re Molopo Energy* highlights a criticism often made against enabling shareholders to propose resolutions, that is, shareholders will encroach on operational matters with adverse impact on shareholder value (Bainbridge, 2006a, 2006b). For example, there are shareholders who have agitated for higher payment of dividend or for the company to return capital by way of a share buyback (Behrmann & Humber, 2013; Satariano, 2013). This type of shareholder proposals could hinder directors making decisions in the best interest of the company and could be detrimental to creditors’ interests.

Nonetheless, *Re Molopo Energy* provides some evidence that this concern may not be as grim as it appears. The courts are unlikely to allow the exercise of power to override the board’s management decision if it affects creditors’ interests (Watson, 2015). Various corporate transactions require compliance with specific procedures or requirements with the corollary liability on directors and/or the company for non-compliance. The payment of dividends for example or reduction of capital cannot be made by directors. Directors also have control over reporting of the firm’s earnings which will be the basis for any decisions relating to return of capital to shareholders. Further, when these rules are breached, liability may be attached to directors and shareholders who approve the dividends with awareness or knowledge that the company may not be able to comply with dividend rules. The courts would also be guided by the directors’ duty to act in the best interest of the company. It is unlikely that in the absence of bad faith or conflict of interest, the directors could be ordered to issue debentures instead of issuing shares or raising capital via private placement instead of a public offer.

In *Petroceltic International PLC v Worldview Capital Management SA & Anor* [2015] IEHC 612, the Irish High Court was asked to grant an injunction preventing a shareholder of the company from convening an EGM to consider the passing of a shareholder sponsored resolution. The resolution was related to Petroceltic decision to issue bonds. The company had written to Worldview that the requisition would be against the articles of association and therefore could not be validly made. It requested Worldview to withdraw the notice of the EGM and to inform the shareholders that it will not take any action regarding the EGM. Worldview

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refused to do so. The company then applied for an injunction. The court decided that since the power is power is given to the directors under the article of association, the members, in general meeting, cannot, by ordinary resolution, seek to override or fetter that exclusive power. The court followed the decision of the English Court of Appeal in *Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham* [1906] 2 Ch. 34, stated clearly that the division of powers between the board of directors and the company in general meeting dependent, in the case of registered companies, entirely under construction of the articles of association, and that, where powers have been vested in the board, the general meeting could not interfere with their exercise. The articles were held to constitute a contract by which the members had agreed that the directors should manage certain aspects of the company’s affairs.

One reason why the court granted an injunction in favour of the company was because of the possibility that successive resolutions seeking expressions of opinion could be abusive and could, therefore, be prevented by court if repeatedly made. In this case, Worldview had on four previous occasions requisitioned an EGM. The court stated that:

“To allow resolutions “for the expression of opinion” which in varying degrees would amount to a de facto restraint or impediment

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*Para 4 of the judgment: “In the calendar year of 2015 three E.G.Ms. have taken place due to the requisition of the defendant company, in addition to an A.G.M.”*

in market terms would be adding an intolerable risk to the jungle of risks faced by those working in the commercial world, so that the creation of value added such as employment, product, interest, and profit would, be greatly hampered. It was submitted by the defendants that to deny the possibility of such resolutions expressing opinions would amount to “disenfranchisement and marginalisation” of the members on key issues and the suppression of their freedom of expression and the damage which would result to the members from that course of events is self-evidently inestimable; and further, that it was “counter intuitive” that shareholders cannot collectively express an opinion on the matter of concern in an era of increasing incorporate democracy and shareholder activism. However, the artificial construct of the company does, in fact, in an ordered way restrict the decision-making powers of the shareholders. The articles of association of any company may in particular cases increase such involvement with decision making and therefore aid democracy of shareholders but it is difficult to envisage any changes however liberal which would not at least in some way seek to put order on the expression of shareholders views so that such expression did
not have the direct or indirect effect of altering the way in which the company did business as it was intended by articles, statute and regulation, or (as in this case) to have to face de facto market impediments engendered by such “expressions of opinion”.”

Malaysian decision in Expo Holdings Sdn Bhd v Toyo Ink Group Bhd [2014] 10 MLJ 674, on the other hand, was an attempt by the shareholders of a Malaysian company to challenge the board’s decision to make a bonus issue of shares. The minority shareholders challenged the bonus issue and the special resolution amending the memorandum and articles of association to enable the board to make a selective bonus issue of shares. They sought to declare these resolutions void. The court held that although sect 60 provides that the amount in the share premium account can only be used for certain purposes, the section does not require that if the share premium account is utilised to pay for the bonus shares, the bonus shares must be issued to all existing shareholders. Although the question in this case was whether there was a breach of duty by making a selective bonus issue, the court reiterated the view that the directors have the discretion to decide how to utilise the shareholders’ funds and to capitalise sums in the reserves and share premium account as conferred on them by the constitution. Challenges through legal proceedings in this manner is quite rare in Malaysia although Malaysian shareholders have been vocal at general meetings (Lim, 2014).

DEVELOPING LEGAL ISSUES

The Future for Directors Primacy

Several common law jurisdictions have embarked on reform of corporate law and the issue on whether shareholders could initiate proposals on matters which were traditionally within the board’s domain are being reviewed. A case in point is Malaysia. The Companies Act 2016 was passed by the House of Representative on 4th April 2016 and introduced wide ranging reform, amongst others, section 195 which will enable shareholders to give instructions to the board relating to board’s management functions.

Section 195 of Companies Act 2016 provides

“(2) A meeting of members may pass a resolution which makes recommendations to the Board on matters affecting the management of the company.

(3) Any recommendation shall not be binding on the Board, unless the recommendation is in the best interest of the company, provided that—

(a) The right to make recommendations is provided for in the constitution; or

(b) Passed as a special resolution.”

Section 195(3) lays down several conditions before the board is obliged to act in accordance with the general meeting’s instructions. The recommendation is binding if the right to make such recommendation
is conferred to the general meeting by the constitution. Although sub 195(3)(a) does not specify the voting threshold, the constitution may specify situations where the general meeting may make recommendations that will bind the board as well as whether an ordinary resolution or any higher percentage is needed. Alternatively, where the constitution is silent, the general meeting must pass a special resolution to instruct the board to do or refrain from doing something. The implication of these provisions is that even when the general meeting’s power is expanded so that it has reserve power to instruct the board in managing the company, shareholders would still require at least majority support for any such proposal. Without at least majority support, the board retains decision making authority regarding management of the company.

From a comparative law perspective, the change places Malaysia in a unique position compared with other common law jurisdictions such as UK, Hong Kong, New Zealand, Singapore and Australia.

The present model Articles of Association for companies limited by shares in the UK Companies Act 2006 has made the UK the most shareholder-centric jurisdiction (Enriques, Hansmann, & Kraakman, 2009). The Malaysian Companies Act 2016 arguably will make Malaysia more shareholder-centric than the UK (Mohd-Sulaiman & Rachagan, 2017). Unlike the UK where the statement regarding the power to instruct is placed in the constitution and its binding effect is dependent on the constitution stating so, the new power to instruct the board given to the general meeting in Malaysia is embedded in statute and cannot be contracted out. The New Zealand Companies Act is one of the earliest legislation to confer on shareholders the power to make binding via section 130 of the New Zealand Companies Act 1993. However, this section states that the recommendation is only binding if the constitution so provides and if it does not intrude on the ‘reserve list’ i.e., schedule 2 which contains a list of transactions which are within the board’s power. Reform is also underway within the European Union with its Shareholder Rights Directive 2007/36/EC adopted in July 2007, which introduced among others, minimum standards for admission to meetings, shareholders’ access to meeting-related information, proxy allocation and distance voting, and participation rights in terms of shareholders asking questions and tabling their own proposals.

Australia did consider expanding the shareholders’ power but the law reform committee decided not to recommend any changes to the existing practice. (Companies & Securities Advisory Committee, 2000) Singapore embarked on a review of its company law and in 2002 published the Report of the Company Legislation and Regulatory Framework Committee, Ministry of Finance with another review undertaken in 2007 by the Steering Committee for the 7 Model Articles for Private Companies and Model Articles for Public companies under The Companies (Model Articles) Regulations 2008.
8 Model articles under Hong Kong Companies 2014.
Review of the Companies Act which was completed in 2011. The respective reports stated that the review followed closely the development of the UK law reform development. However, to date, Singapore has not followed the UK Companies Act 2006 in giving shareholders power to make binding recommendations. Its model constitution for companies limited by shares does not have the equivalent of the UK model article. The Indian Companies Act 2013 identifies matters that are reserved for the board and provides that the constitution may provide for additional matters that are also reserved for the board. While there is no explicit provision giving the general meeting power to instruct the board, section 179 of the 2013 Act states that the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do but this may be limited by the Companies Act, the constitution or regulations made by the company in general meeting. Malaysia, on the other hand, has introduced Section 195, Companies Act 2016 that arguably expands general meeting’s power to make binding recommendations on the board, subject to certain conditions being met.

Legitimate Strategies to Influence the Board

It is worth noting that in ACCR v CBA, the court affirmed shareholders have the power to propose amendments to the constitution even if the amendment has the effect of making directors subject to shareholders’ instructions. In an earlier case, Woolworths Limited v GetUp Limited [2012] FCA 726, Getup requisitioned an EGM to consider a proposal to alter the Woolworths’s constitution for the company not to be involved in electronic gaming machines. Woolworth’s applied to the court for an extension of the time to convene the requisitioned meeting to coincide with the company’s AGM. The Federal Court granted the application. However, the proposal obtained minimal support with 2.5% votes in support. In 2003, the Wilderness Society presented a proposal to amend the constitution of National Australia Bank to preclude any investment in logging of old-growth forests. Other banks which were targeted included ANZ, Westpac, and CBA. Although the proposal did not obtain the required votes for a special resolution, it was reported that in 2013, the resolution secured 125 million votes out of a total of 553 million votes at National Australia Bank’s meeting. Earlier, during CBA’s meeting, over 94 million voted in support of an identical resolution. Similarly in Petroceltic, the court stated that the legitimate avenues open to the shareholders are in the form of obtaining support to pass a resolution where 50% of shareholders are required to change directors or 75% to alter the articles of association. These two strategies are within shareholders’ existing rights.

9 See more at: https://www.wilderness.org.au/4-billion-capital-supports-forest-resolution#sthash.mpDA9Gwn.dpuf. (accessed on 28 March 2016)
CONCLUSION

It is likely the debate regarding shareholders’ right to initiate resolutions, to propose, approve or review corporate actions and attempts to reconfigure the division of power doctrine will continue. This is due to law reform and, in some cases, perseverance of activist shareholders. The environmental and social activist initiatives do not show signs of abating. The ACCR has not considered the ACCR v CBA judgment as a setback and has not slowed down its ESG proposals. With other activist shareholders such as Getup, the Asset Owners Disclosure Project and a number of ethical financial advisers, it has lodged shareholders proposals with Origin Energy, Origin Australia and AGL, three energy companies, seeking to require further information about ongoing power generation and supply chain emissions management and public policy positions relating to climate change in these companies’ annual reports. Unfortunately, none of these have been successful. Nonetheless, the ACCR v CBA litigation is an example of a departure from the normal strategy adopted by activist shareholders who often do not litigate. By and large, activist shareholders often rely on persuasion. Even in the US, where shareholders proposals are not uncommon, shareholder proposals are relied on:

“... to trigger dialogue and help ensure a topic is raised at the board level. Investors that submit proposals generally view them as an invitation to a discussion, preferring to reach agreement with the targeted company without the proposal going to a vote. If an agreement cannot be reached, they generally believe that votes on shareholder proposals provide management with valuable insights into investor views.” (EY, 2015)

The ACCR v CBA case was not the first where activist shareholders tried to change a company’s strategy and practices to consider environmental, social and governance issues. There were attempts since 1999 where environmental and union activists in Australia utilised the right to convene AGM to highlight concerns about environmental degradation and protection of employees’ interests in companies such as Rio Tinto and Westfarmers (Anderson & Ramsay, 2006; Biefeld, Higginson, Jackson, & Ricketts, 2004). The ACCR website also listed several other shareholders resolutions involving ESG related proposals which it and other activist shareholders had presented to various energy companies.10 There could also be more ESG proposals in the future given the focus on sustainability reporting.

In cases such as Re Molopo and Petroceltic, the traditional view that the general meeting has no authority to instruct the board on matters reserved for the board prevails. But this was due to the constitution of the respective companies. It could be argued that if general meeting’s power is expanded by statute, the outcome of these cases could have been different as is likely to be the case in Malaysia.

However, even if the constitutions were

10 See http://www.accr.org.au/australia
changed to enable shareholders to instruct the board, shareholders are generally “aware of their own ignorance” and normally ‘insert’ themselves in management only when necessary (Fairfax, 2008; Listokin, 2010; McDonnell, 2011). Shareholders are more likely to respect management views and policies unless there are clearly visible signs of managerial failure - such as repeated unsatisfactory dividend distributions, continuous share price drops or blatant private rent extraction by directors (Dignam & Galanis, 2004). In addition, the shareholders’ power to instruct does not allow them to order the board to enter into a course of conduct which contravenes any other provisions of the Companies Act. In these situations, the power to instruct does not mean that shareholders recommendation even if passed as a special resolution has the effect of waiving compliance with statutory procedures and requirements (Mohd-Sulaiman & Rachagan, 2017; Re Molopo Energy Limited v Keybridge Capital Limited [2014] NSWSC 1864).

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Transpacific Partnership Agreement and Future of Internet Policing of Copyright Infringement in Malaysia

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ABSTRACT

Internet Service Providers (ISPs) are the gatekeepers of internet and free flow of information and expression. The ISPs can also play a strategic role in policing the Internet from copyright infringing materials. As gatekeepers, they can block access and force others to identify the origin of the materials making them the best organisation to take action on the internet materials. The abandoned Trans-Pacific Partnership Agreement (TPPA) between Malaysia, United States of America (US) and another 10 countries in Asia and Pacific Region contains obligations that mandates ISPs to expeditiously remove or disable access to alleged infringing material upon acquiring actual or even with constructive knowledge of the infringement. Although TPPA is theoretically dead after the withdrawal of the US, it is still pertinent to consider its provision as it is the first global standards on ISP liabilities though negotiated under a free trade agreement. This paper examines the obligations under Malaysian Copyright Act 1987 and compare them with TPPA provisions on ISPs. It concludes that unless there is latent defect with the Malaysian notice and take down procedure, there is no compelling urgency for Malaysia to revise her procedure.

Keywords: Copyright infringement, Internet Service Providers (IPS), Internet policing, Trans-Pacific Partnership Agreement (TPPA)

INTRODUCTION

Internet Service Providers (ISPs) stand between users and online content. As a gatekeeper to the Internet, ISPs are poised to be the ideal body to take action against copyright infringing material either by blocking access or taking them down altogether. As the controller of Internet traffic, ISPs can track the traffic of infringing
copyright content and notify the copyright owners of crucial information pertaining to it. As a result, a system of notice and take down procedures has been introduced in many countries as a legitimate measure to combat copyright infringement. In Malaysia, such procedure was introduced in 2012 vide the Copyright Amendment Act 2012. This procedure complements an earlier notice and take down procedures already in practice under the Communications and Multimedia Act 1998.

This paper begins with a description of the notice and take down procedure under the Malaysian Copyright Act 1987 and the Communication and Multimedia Act 1998. The second part of the paper delves into the TPP provisions on ISP’s liabilities. The paper ends with a brief comparison of notice and take down procedures practised in other countries before concluding with some suggestions on the way forward.

OVERVIEW OF LEGISLATION AND SOME RECENT DEVELOPMENTS

In Malaysia, the communications and multimedia industry is regulated by the Communications and Multimedia Act 1998. The Act was enacted to promote national policy objectives and to establish a licensing and regulatory framework for the communications and multimedia industry. The Act is significant in the sense that it enables the establishment of the Malaysian Communications and Multimedia Commission (MCMC) to play the role of a regulator after the merging of communications and multimedia industry including telecommunications, broadcasting and on-line activities. The establishment of MCMC could be traced back to the government’s effort to move the nation towards becoming an information society. Despite the great challenges, the basic question remains as to as to whether the country is progressing or regressing in realising its goal of becoming an information and knowledge society (Ramasamy, 2010). Legislative approach is one of the methods to encounter the challenges, in particular, to deal with illegal and unlawful content available on the internet (Nawang, 2014).

In March 2001, the MCMC designated the Communications and Multimedia Content Forum of Malaysia (CMCF) as the Content Forum. The CMCF governs content by self-regulation by setting up a Content Code (Code) that is applicable to all industries. The Code is a set of industry guidelines on the usage and/or dissemination of content for public consumption. As far as ISP liabilities are concerned, the Code has set out the guidelines to be followed by an Internet Access Service Provider in Part 5 of the Code, i.e. they are expected to block access to or remove ‘prohibited Content’ if there has been a complaint against such content. The definition of ‘prohibited content’ is broad enough to cover all infringing content including content which infringes other parties’ intellectual property or contains element of fraud. As such, the Notice and Take down procedure applies equally to copyright infringing material. In fact, in Malaysia, all take down procedures on copyright infringement to date are
undertaken by MCMC.

Traditionally, an ISP has been equated with that of the traditional telecommunications carrier. It is a conduit that passively allows the transmission of data and is therefore not responsible for the nature, or character of that data. The argument is based on the reasoning that it would be unjust, unreasonable and impractical to expect an ISP to monitor all of the services that it may give access to. In reality, ISPs usually host a myriad of web-based services which provide access to a worldwide audience. From this angle, the imposition of a heavy burden of internet policing or monitoring would adversely affect the free flow of information on the internet. Nevertheless, from another angle, the ISP is seen as the best avenue to block and remove offensive materials. Thus, by insisting that ISPs respond to abuses of the internet, this can ensure that the internet remains as a safe super information highway and does not become a haven for illegitimate and illegal activities. Some of the main issues encountered by the ISPs revolves around content liability, intellectual property rights as well as crime detection and surveillance (Cooray, 2015).

Australia, New Zealand, Japan and Canada, and USA have taken efforts to regulate Internet access. The role of ISP as a mere conduit was also debated. There was a myriad of discussions and debates over the efficacy and feasibility of such a system. The governmental and legislative support is seen as a positive effect to curtail online distribution of illegal and illicit content including copyright infringing materials. Many are of the view that the ISPs operation should be regulated in some way to ensure that they play a proactive role in stemming the traffic of copyright infringing materials. Australia for instance, has been very active in regulating the Internet as early as 1995 with the creation of ISP Code of Practice (Goode, 2005).

The most commonly used means of enforcement are takedown notices — demands sent from content owners to ISPs or website hosts to remove infringing content hosted on websites under their control. Depending on the circumstances, an ISP may be compelled upon receiving a takedown notice to remove infringing content from a hosted website, or in some cases, an entire website, for a temporary or for an extended period (Michels, 2013). In the US, the Digital Millennium Copyright Act (DMCA) was adopted by the Congress and enforced since 1998 in attempts to curb infringing online activity by a private notice system. It has been argued that the broad scope of the take down procedure disrupts the balance between the copyright holders and ISPs. Besides, it can lead to misuse of the system and increases the risk of wrongful take down (Tehrani, 2012). It has also been reported that several industry stakeholders were sometimes hesitant and doubtful when they were obliged to take proactive steps in handling online copyright infringing materials, for inter alia, fears related to possible breach of contractual liability with subscribers. More so, copyright infringement is a contentious allegation
and something that is best established by a court of law (Byron, 2008). All in all, internet use and policy development, as well as measures to tackle challenges posed by the rapid growth of internet, may vary between countries and from one jurisdiction to another, so legislation for one state or country may not work for another (Hornle, 2011).

The paper continues with a discussion on the provisions of the Copyright Act 1987 that deals with notice and take down procedure for copyright infringement.

**ISP’S LIABILITIES – THE MALAYSIAN POSITION**

Provisions on ISP’s liabilities were introduced in Malaysia vide the Copyright Amendment Act 2012. As these provisions are rather new, they have not been tested in the court of law. According to the provisions, ISPs are subjected to private notice and take down procedure and what type of exemptions from liabilities they enjoy once they undertake the procedure. The ISP provisions have been hailed by the US as one of the reason why Malaysia was taken out from the United States Trade Representative (USTR) watch list in 2012 (United States Trade Representative [USTR], 2012). In the course of revising the law, Malaysia took into consideration legislative provisions in the UK, US, Australia and EU (Azmi, 2013). The provisions are detailed, as a new part, Part VIB, was devoted solely for ISP’s liability. The following sections will discuss in detail the provisions under the Copyright Act 1987 on ISP’s liability.

**Definitional Issues**

Under the Act, the type of obligations and the immunity enjoyed depends on what type of ‘service provider’ you are. This is reflected in Section 43B of the Copyright Act 1983 which defines ‘service provider’:

- (a) for the purpose of section 43C, means a person who provides services relating to, or provides connections for, the access, transmission or routing of data; and
- (b) for the purpose of this Part other than section 43C, means a person who provides; or operates facilities for, online services or network access and includes a person referred to in paragraph (a).

The above definition seems broad enough to encompass ISPs such as TMNet, P1, and Maxis as well as any person who provides or operates facilities for online services or network access. Therefore, it seems possible for the operators of websites, such as Facebook and YouTube for instance, to fall within the definition of “service provider” for the purposes of the aforementioned provisions.

The reason why the distinction is made is that for those falling under category (a), their obligation is relatively minor as they are only considered as mere conduit. Their connection to the internet content is only technical, i.e. for the transmission, routing and provision of connections. They are nowhere involved in the creation of the content and therefore should not be
responsible for the content.

The second category of service provider has more stringent obligation in relation to notice and take down procedure. These are services that operate online facilities and include system caching under 43D and storage and information location tools under section 43E. In relation to copyright infringing materials, even though system caching and information location tools are not involved in the creation of the content, they have the power to stem the further distribution of such content. Their role in policing copyright infringement is therefore very important.

Notice and Take Down Procedure

As far as the ISP liabilities are concerned, Sections 43B to 43I set out the responsibilities of ISPs vis a vis online content.

Section 43H confers the right on the owner of a copyright which has been infringed to notify a service provider to remove or disable access to the electronic copy on the service provider’s network. A service provider who has received such notification is required to take action within 48 hours from the time of receipt of the notification, otherwise, the former may be equally implicated for the infringing activity, most probably as contributory infringer for enabling the infringing act to take place.

As at times, defining infringement is not an easy task. The Act provides for mechanism for the disputed online content to be put back online through a counter notification procedure. The person whose electronic copy of the work was removed or to which access has been disabled may issue a counter-notification to the service provider, requiring the latter to restore the electronic copy or access to it. The service provider must promptly provide a copy of the counter-notification to the issuer of the notification and inform him that the removed material or access to such material will be restored in 10 business days. At this juncture, it is still possible for the copyright owner to delay the restoration of the online materials by seeking a court order to restrain the issuer of the counter-notification from engaging in any infringing activity in relation to the material on the service provider’s network.

Exemption of Liabilities

What is the incentive for ISPs in playing their role in the notice and take down procedure? This is important as the ISPs may run the risk of forsaking their contractual duties with their subscribers in taking action against the complained content.

Sections 43C to 43E exempt a service provider from liability for copyright infringement by reason of the following activities; (i) transmitting, routing or providing connections of an electronic copy of the work through its primary network or any transient storage of the electronic copy of the work in the course of the aforesaid activities (Section 43C); (ii) making any electronic copy (system caching) of the work from an electronic copy of the work made available on an originating network, or through an automatic process, or in response to an action by a user of the service.
provider’s primary network, or to facilitate efficient access to the work by a user (Section 43D); and (iii) storing an electronic copy of the work at the direction of a user of the service provider’s primary network or linking a user to an online location on an originating network at which an electronic copy of the work is made available by the use of an information tool such as a hyperlink or directory, or an information location service such as a search engine (Section 43E). A service provider must satisfy the various conditions set out in Sections 43C to 43E in order to obtain the benefit of the exemptions under the respective provisions.

All the various section provides the ISPs immunity from any liability if they take action within the stipulated time. Speedy action from the ISPs assist in preventing the distribution of copyright infringing materials. Section 43H further requires the owner of the copyright to compensate the service provider or any other person against any damages, loss or liability arising from the service provider’s compliance with the notification.

It is also clear that under the current law, take down procedure only arises upon notification from copyright owners. Section 43E of the Act does not require the ISPs to remove or disable access to the infringing material even if they may have slightest information about possible infringement from events taking place elsewhere. The ISPs are only obliged to do so upon receipt of a notification from the copyright owners. In this way, the ISPs are not expected to conduct any form of independent internet policing except to investigate complaints from copyright owners. That give the ISPs some freedom in operating their business and not be unduly hampered with excessive policing.

One important safeguard introduced in the Act is the imposition of penalty for those who issue a false notice. For this purpose, a person who makes a statement outside Malaysia may be dealt with as if the offence was committed in Malaysia.

The discussion now moves to the notice and take down obligations underlined under the TPPA. Although TPPA is now abandoned, the comparison is necessary as TPPA is a major regional framework that deals with standards on ISP duties for the first time. There were never any free trade agreements that dealt with ISP obligation before TPPA. As a result, TPPA remains an important regional initiative that should be considered as a ‘benchmark’ for future negotiations.

### TPPA’s Provisions on ISP

Transpacific Partnership Agreement (TPPA) has been hailed as the 21st century trade rules that has rewritten the rules for global trade. By creating a single set of trade and investment rules on trade areas, TPPA promises to provide greater certainty and predictability for business by creating harmonisation of standards enabling parties to compete on a more level playing field. It is comprehensive in its coverage, extending traditional trade issues such as market access, and

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1. Section 43I of the Copyright Act 1987.
2. Section 43I (2) of the Copyright Act 1987.
technical barriers to trade, sanitary and phytosanitary measures to non-traditional trade issues such as labour standards and capacity building. The harmonisation of intellectual property rules is established through the intellectual property chapter, one of the biggest chapters in the TPP.

The ISPs liabilities are part of the binding commitments under the TPP. These provisions are far from being non-contentious as they integrate US style safe harbour provisions as a platform for regional integration. This paper outlines the ISP’s obligations under the IP chapter with the aim of analysing whether the ‘red flag’ obligations underlined under TPPA is really essential in improving the internet policing of copyright infringing materials.

**Definitional issues.** Under the Agreement, the term ISP has a broad meaning. Article 18.81 of the said Agreement, defines ‘Internet Service Provider’ to mean:

(a) a provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, undertaking the function in Article 18.82.2(a) (Legal Remedies and Safe Harbours); or

(b) a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d) (Legal Remedies and Safe Harbours).

For greater certainty, Internet Service Provider includes a provider of the services listed above that engages in caching carried out through an automated process.

From the above definition, it is clear that the term ISP will not only cover the companies that provide telecommunication services but also content services, data storage, domain hosting, cache and other related services related to the Internet.

The binding commitments on ISPs, however, do not extend to those who serve only as conduits in the whole process. The categories of services which are considered as mere conduits are routing, mere transmission and connections, intermediate and transient storage, cache, storage, linking and directories. Footnote 153 further clarifies that the storage of material may include e-mails and their attachments stored in the Internet Service Provider’s server and web pages residing on the Internet Service Provider’s server.

The definition is explicit in the sense that categorisation of services captured under the notice and take down procedure is the same as in the Malaysia. Both targets not only companies that provide technical access that offer all kinds of services on the internet including as mentioned as content services, but also data storage, domain hosting, cache and other related services related to the Internet. As mentioned earlier, the second category of services may have closer connection to content and therefore, would have stronger obligations regarding infringing copyright materials.
‘Incentives’. The TPPA creates a form of legal incentives for ISPs to participate in controlling the traffic of copyright infringing materials in return for some form of security against possible adverse action by internet users known as safe harbour. As the provision explicitly uses words such as legal incentives, it presupposes that other forms of incentives besides safe harbour can also be introduced to encourage cooperation from the ISPs. Further, the action taken can go beyond notice and take down procedure as TTPA allows ISPs to take other action as long as they are targeted at unauthorised storage and transmission of copyrighted materials. To that effect, it has been questioned whether the termination of licence or service could be considered as a valid action for purposes of TPPA. It is further made clear in footnote 152 that storage can include the act of hosting content such as blogs, web page, portals and the like.

In return, the ISPs get exemption from monetary relief for their actions. The reason for this immunity is that they are not involved in the infringing action. These activities are beyond their control, not initiated and originated from them even though they take place through the systems that they control.

Red flag vs. wilful ignorance. ISPs are required to take action upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent. The language of the provision entails that the ISP’s action does not depend on notice given by the copyright owner. If it comes to the ISP’s knowledge that certain suspicious activities are taking place, they are oblige to take action. The red flag obligation originates from the US Digital Millennium Copyright Act 2000. Mableson (2013) highlights some of the important factors that should be considered in assessing ‘awareness’ here. Factors include whether there are blatant indicators or signs that raises alarm such as the employment of the terms ‘pirate’ or ‘bootleg’ in their URL or header. The standard of awareness has been judicially considered in Viacom International, Inc. v YouTube, Inc. where the Second Circuit explained the standard to be referred here is ‘wilful blindness’ or ‘conscious avoidance’ which implicates deliberate closing of one’s eyes to a blatant infringing activity. This goes further than the system that Malaysia is currently practising which is, ISP can only take action if there is a specific notice by the copyright owner. The rationale is that ISPs must not turn a blind eye to certain red flag activities on the basis that the copyright owner fails to submit the notice required under the law.

Countries that practice the notice and take down procedure will normally outline the requirement of the notice, in order for them to be valid. The TPPA has a much more relaxed requirement for the contents of a takedown notice. The applicant does

3 footnote 149 of TPPA. For greater certainty, the Parties understand that implementation of the obligations in paragraph 1(a) on 'legal incentives' may take different forms.

4 676 f.3d 19 (2d Cir. 2012)
not need to state his or her good faith belief that the material identified in the notice is being used unlawfully. As long as there is enough information about the identity and the location of the infringing materials, an ISP is obliged to take a necessary action (Bridy, 2015). What TPPA requires in the footnote is that such notice must contain information that:

(a) is reasonably sufficient to enable the Internet Service Provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement; and
(b) has a sufficient indicium of reliability with respect to the authority of the person sending the notice.

The TPPA envisages that some member countries have yet to put in place a notice and take down procedure. It accepts an alternative system which is ‘effective and consistent’. The speed of which the take down process take place must not be hampered by processes which do not impair the timeliness of the process and does not entail advance government review of each individual notice. As made clear from the Agreement itself, an alternative way of complying with the obligations is by establishing of a stakeholder organisation responsible in verifying the validity of each notice as practised in Japan. Once the verification process takes place, the ISPs must promptly remove or disable access to the copyright infringing materials.

**Monetary incentives for abuse of the system.** The main criticism against the private notice system is that it is a powerful tool to act against infringing copyright material. Once notice is given, an ISP would speedily take down or block material without having to conduct any form of investigation or verification process. An important safeguard against possible abuse of the notice and take down procedure is Article 18.82.4 which provides for monetary compensation for knowing material misrepresentation in a notice or counter notice that cause injury to any interested party. However, the term ‘interested party’ here is confined to only ‘those with legal interest recognised under the member countries’ law. The provision of such penalty is a testimony that some form of balance has been provided for in the Agreement. In the US for example, monetary remedies for material misrepresentation are available in take down notices (Bridy, 2015). In addition, the DMCA also provides for the recovery of attorney’s fees and costs in order to reduce the prospect of abusive takedowns.

**CONCLUSION: POST TPPA AND THE WAY FORWARD**

Critics have raised a number of arguments against the private notice system. It has been said that legal incentives for self-regulation might lead to a privately created

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5 footnote 154 of TPPA
6 footnote 154 of TPPA
7 footnote 158 of TPPA
systems of easy and presumably illegal takedown of content, and rules which violate consumer interests. It was feared that such private notice might lead to surveillance of contents or deep packet inspection, in order to fulfil the intended ‘cooperation’ with copyright holders. As reported, Google for example has received 77 million copyright takedowns in past month. This has led to the fear that the overzealous removal of materials may raise concerns of censorship.

The choice of a private notice system over other existing system currently practised in the world raises the issue as to what is the optimal form of controlling copyright infringing traffic on the internet. The UK for example, allows the tampering of the Net traffic only if there is a court injunction. The UK Copyright and Related Rights Regulations 2003 allows the grant of an injunction against a service provider only in instances where the service provider has “actual knowledge” of another person using their service to infringe copyright. What amounts to actual knowledge? This refers to a clear notice from the copyright owner containing the specific allegation of infringement.\(^8\)

Canada practises the notice and notice procedures. This requires the copyright owner to file a notice to the ISP who is then duty-bound to notify the alleged infringer. The notice is mandated to be kept for six months in ordinary circumstances. If any legal proceedings are initiated against the owner of the web site, such notice is to be kept for a longer period, i.e. 12 months. The aim of the notice and notice procedures is to assist copyright owners to build their case against the infringer and not to take down the material. It allows the copyright owner to retain the notice as evidentiary tool or proof of wilful infringement if the web site owner does not to take any action after receiving the notice. It enables the copyright owner to claim additional damages for such wilful infringement.

Chile also practices a notice and take down procedure that is mediated through court proceedings.\(^9\) The system which was introduced in April 2010, where right holders are required to obtain judicial orders to take down or block access to infringing content. Although the system was introduced after the signing of the US-Chile Free Trade Agreement, it differs from the US Digital Millennium Copyright Act (DCMA) safe harbour system in many critical areas. Chile opted for judicial mediated notice and take down procedure due to overriding concerns over the protection of Internet users’ constitutional rights. Commentators highlighted that such system provides more balance to conflicting interest between the copyright owners for reducing illegal online content and internet users’ want for freedom of expression. By requiring a judicial order, it enables an evaluation of the legitimacy of the copyright owners claim as opposed to a simple private notice. In turn, the likelihood of false and abusive notices would be reduced tremendously. There will also no

\(^8\) s 97A (2) UK Copyright and Related Rights Regulations 2003.
\(^9\) https://cdt.org/files/pdfs/Chile-notice-takedown.pdf
overzealousness of taking down materials as the claim has to be evaluated through a judicial process first before an action can be taken. More fundamentally, ISPs are only duty bound to take action when they have “actual knowledge” of infringing activity. This could remove the possible discretionary effect of removal of content solely based on red flags.

Another major concern is that TPPA does not give recognition to the whole list of accepted uses and exceptions recognised under the copyright law. Such exceptions play a major role in the context of user-generated content. For example, use for satire and parody and the use of clips for criticism and teaching (with attribution) are well accepted exceptions in many jurisdictions. By not acknowledging such rights, the notice and take down procedure under TPPA is skewed in favour of the copyright owner. In the US, the applicability of fair use defence in notice and take down procedure has been considered in Lenz v. Universal Music Corp.\(^\text{10}\) The Court in that case decided that copyright holders must determine first whether the use of their materials is somehow not covered under the fair use exceptions for it to be ‘unauthorised’ in the first place. On this, Kathleen O’Donnell was of the opinion that this fair use determination is to ensure that the interests of the users are not unnecessarily impeded by the notice and take down procedure.

Counter notice is only discretionary under the TPP. This underscores the importance of providing the affected party the avenue to raise their objection against action taken under the notice and take down procedure. Counter notice is mandatory in Malaysia.

The attempt to covertly transpose US style notice and take down procedure through free trade agreements raises the question whether having higher standards on ISP liabilities are necessary in the first place. Now that TPPA has been abandoned, there remains a question as to whether its spirit is going to be revived in another forum. That raises the question as to whether the existing practices on ISP’s liabilities are inadequate in any manner or that the US style is more efficient that it should be the global standard. Until this issue is resolved, there is no reason why the Malaysian notice and take down procedure should be revised.

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Philanthropy and Social Justice in Waqf Administration in Morocco: Lessons Learnt from the History

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ABSTRACT
The Qarawiyyin University in Morocco represents the oldest waqf with an integrated system of education. Employing a qualitative research method, this paper uses a historical institutionalism approach, which includes reviewing literature on history of waqf in Morocco and interviews with officers in charge of waqf in order to understand the challenges inherent in waqf administration there. Although waqf has been practised since the country was formed, the development of waqf properties here is relatively slow in terms of developing creative instruments of waqf. It remains traditional and religious in nature. Thus, this study recommends Morocco government to develop waqf practices in order to fully utilise its benefits. Moving along the spirit of waqf in making changes for the Muslim, Malaysia can learn from Morocco’s history.

Keywords: History, Morocco, Muslims, practices, Qarawiyyin University, waqf

INTRODUCTION
This study was motivated by reports that University Qarawiyyin in Fes is the oldest endowment university in the world. The university is located in North West Africa, al-Maghreb or Mamlakah al Maghribiyyah or in Morocco. The authors embarked on a journey to this university and realised information or knowledge on waqf in Morocco was not confined the university alone; instead, habs, ahbas, habous, Andalusia Mosque, Maryam al Fihri, the Marinids, the Bou Inaniyya, the stork or Laqlaq, the Madrasa ben Yousif, the Maristanat, and other interesting information was acquired along the journey. The bulk of the knowledge on waqf are not only for those who are proficient in Arabic but also Spanish, French as well as English.
The long history of Morocco started with the Berbers, and later the Romans and subsequently the Arabs. The importance corpus of knowledge that Islam offers attracted many Muslims and non-Muslims to Fes, Morocco. As result, Al Maghreb has attracted and received many scientists and Muslim jurists such as Ibn Tumart, (1078-1139); IbnBajjah (Avempace); Ibn Rushd or better known in Latin as Averroes (1126-1198), Ibn Tufayl (Abubacer); Ibn Sina (Avicenna), Ibn Khaldoun and Ibn Batutah among others.

HISTORY OF WAQF ADMINISTRATION IN MOROCCO

The history of Morocco helps us to understand the rise and fall of the benevolent act of waqf in Morocco. During the early settlement of the Arabs, waqf contributions were tremendous. The impact was felt and known to the present day not only in Maghreb but other parts of the Muslim world (David, 2011). The rulers of Morocco have shown good examples in instilling good practices through waqf. In fact, the people of Morocco themselves have sacrificed their wealth for Islam and have acknowledged the importance of waqf or Islamic philanthropy throughout the history of Morocco. Tracing the history of endowment in Morocco, one will acknowledge two things; endowment has been encouraged by those in the high position of the state as well as the commoners (Raissouni, 2001). It arose out of their faith in Allah (swt) and seeking blessing for life after death.

Secondly, many have related the support of the rulers for waqf through benevolent act not only for religious objectives but also for political and social solidarity, security and to improve the deficiencies of the public authorities (Penz, n.d.).—The evidences show that many religious institutions, hospitals, educational centres, public bath and spas, the source of water and even the chandelier in Qarawiyyin mosque came from the generosity of its people (Penz, n.d.). The legacy of waqf or religious endowments in Morocco is therefore proven with the existence of various types of waqf in various administration.

The types of waqf in Morocco are not only confined to traditional waqf centred around spiritual development. Even if the activities were religious in nature, the waqf was mostly self-sustained. For example, waqf of the Mosque Qarawiyyin by Fatimah al Fihri (245H) and Jami Al Andalus by Maryam al Fihri(247H) were not only meant to function as a mosque, but supported the function of the mosque as a centre of learning such as the Qur’anic schools, libraries, ablution facilities, wages for caretakers, muezzin and sermon maker (Colette, 2013; Raissouni, 2001).

The extension of the Mosque of Qarawiyyin was carried out using rentals from the waqf houses, incomes from (public bath and spa (hammam), hotels (funduk). It was reported that the incomes from the properties endowed to Mosque of Qarawiyyin totalled 80,000 dinars (Awqaf Meknes, 1/48). Thus, the Qarawiyyin Mosque became self-sufficient and free from its dependency on Baitul Mal.
During Almohad (Muwahidun) period (1147-1269), there were significant developments in terms of the quantity and the quality management of waqf properties and it is said that habous institution attained its peak during this period and the Marinid (Penz & Charles, 1956). All waqf properties in Fes were dedicated to Qarawiyyin Mosque such as the hotels (funduk), bakeries (farran), soap factories, leather factory (ma’miljild), houses for rent, stalls (qaisariyah@hawanit), schools (madrasa), khazanah (libraries or resource rooms), hospitals and water supplier (sikhayah) (Fez Qabla Himayah, 1/378). The benefits of waqf were distributed to imam, muazzin, ulama’, qadhi, the orphans and the homeless. Some of the practices remain but their functions are managed through the respective ministries or departments. The benefits of waqf were also used for humanitarian works. More interestingly, waqf properties have been properly recorded known as “Mustawda’ Awqaf”, built on a piece of waqf land near Qarawiyyin Mosque. It was initiated by Faqih Muhammad Yashkur Jauraei (died 598H). There were three different officers in charge of the opening of the doors. Nevertheless, it was reported that during the period of Qadhi of Fes, Abu Imran, there were cases of theft in Mustawda’ Awqaf (Fez Qabla Himayah, 1/378).

Waqf was further developed beyond religious needs and duties especially during the Marinid period (Arabized Berber was formed in 1244). The leaders realised the importance of waqf and seriously promoted it among the people as part of their political agenda. Waqf spread beyond Fes and which included hospitals and animal shelters (Kogelmann, 1999; Luccioni, 1953). Waqf for education was not confined to Fes alone but included other states such as Taza, Marakech, Sale and Septah. Profit from awqaf increased by 10,000 silver dinars for the first half of the year. The profits were used to maintain mosques outside Fes (Shatzmiller, 1991). Madrasah Andalusiyyah was set up at the West of Fes. Special waqf chairs were endowed for the use of the teachers (Mu’allim) especially for Qarawiyyin Mosque (Shatzmiller, 1991). Sultan Yusuf Yaacob filled up the library for Madrasah Halfawiyah in Fez with manuscripts returned by King of Sancho 1 from Castille, Portugal while Ibn Khalidun dedicated “KitabIbar” to the students of Qarawiyyin. Sultan Abi Inan dedicated al Quran which he personally had inscribed (Daily Sabah, 2016) and Sultan Abu Hassan Al Marini endowed the book written by Ibn Rusd Al Jadd (died 520H) entitled “Al Bayan Wa At-Tahsil Lima Fi Mustakhrajah Min Taujih Wat Ta’ ilil. In one of the Maristan known as SidiFarj, musical instruments were also endowed to help release the tension of the patients (Kogelmann, 1999).

DISCUSSION AND ANALYSIS

Slow-down of Waqf Activities in Morocco

The records show endowments during these two periods diminished. Poor management of waqf, lack of qualification for the Nazir to manage waqf, war and misuse and mismanagement in waqfihurri are among
the reasons. The *waqf* spirit decreased during the period of Sa’adiyyin (1549-1659) but gained its momentum during Alawiyin (1631). The leaders of this dynasty realised the importance of *waqf* properties and its contribution to the well-being and security of the country. They took step to personally oversee the management and administration of *waqf*. Thus, *waqf* was managed through royal orders and royal instructions and it prospered through a close monitoring system by the King. Sultan Maulay Ismail set up the Ministry of *Habous*. The monarch was also responsible to appoint suitable and trusted staff and assigned the Qadhi known as *QudatSyari’yyin* and Nuzzar *Waqf* to carry out the duties. A special record known as *hawalatIslam‘iliyyah* was introduced to record and identify the object of *awqaf* properties (A’lah, 1992). The productive *waqf* was continued by the subsequent monarch including Sultan Sidi Muhammad Abdullah, Sultan Maula Abdulrahman and Sultan Sidi Muhammad Abdulrahman. Among their contributions were rulings that *waqf* properties either whole or in part are not to be exchanged, sold, charged or wasted (A’lah, 1992). Nevertheless, the system began to decay during the reign of El Hassan (1873-1894) (Penz, 1956). Many reasons were associated with this development; a lack of religious awareness and education, and of charitable bequest and the *habous*. Interference of the Europeans often rendered the administration of *habous* difficult (Penz, 1956). The worst abuses took place during the Maulay Hafid (1908-1912). From 1912, in conformity with the Treaty of Fez, the principle of inviolability of the *habous* was asserted but with a reorganisation of the institution and it was allowed to evolve based on its traditional plan, guided by *Shari‘ah* and customs.

Some of the common forms of *waqf* known in the history are:

(a) *Waqf* to support Muslim in distress (Luccioni, 1953 (as cited in Kagelmann, 1999); Peretie, 1912);

(b) *Waqf* to purchase the freedom of prisoners of war (At-Tazi, 1995, pp. 57-64);

(c) A pious endowment provided for a weekly concert for the inmates as a kind of forerunner of modern music therapy (Luccioni, 1953, p. 463);

(d) *Ahbas* for medical purposes (Kagelmann, 1999);

(e) *Ahbas* for burial of poor people, the needy and to feed the poor; (Kagelmann, 1999);

(f) Winter clothing for the poor (Kagelmann, 1999);

(g) Income from *Ahbas al Maristan* is for survival of 500 inhabitants from the Village of Beggars in Arsat al-Qadi (Kagelmann, 1999);

(h) *Waqf* for Shelter/Accommodation (*Aqqarat*);

(i) Houses built for the elderly sponsored by Sultan Abu Hasan (Shatzmiller, 2001);

(j) Houses for the poor people (Raissouni, 2001);

(k) Venues for a special ceremony like weddings for those who cannot afford to rent such venues.
Interestingly, it was reported that a waqf house is among the big houses or mansions in Fes. This means waqf receives special attention (Raissouni, 2001);

(l) Siqayat or waqf of water;

(m) Use of waqf incomes to provide interest-free credits to settle debts. The capital was provided by the Sultan with a special staff to record the details of the debts. The first clerk appointed was Ibn Hajj An Namari (died 774H); and

(n) Waqf specially for animals such as the horses, the cows, sheep, etc.

Waqfdhurri in Morocco

There are three types of waqf that are well known in Morocco - waqfam (or khairy) and waqf family (or waqfdhurri or muaqqab) and waqf mushtarak (mixed waqf). While other countries took the steps to prohibit waqfdhurri or gave less attention to it, Morocco left the waqf in their own phase but monitored by the Nazir for whatever waqfdhurri came to their knowledge. Administration of awqaf was not uniform in Morocco (Cizakca, 2000). The General Directorate of Habous (Vizirate) and Directorate of Sherifian Affairs were formed under the authority of the Sultan, administering the public waqf and exercising stricter control of family waqf and monasteries (Penz & Charles, 1956). Efforts were made to record waqf properties to help in ascertain their value. It was reported that in almost 20 years (1740-1759), nearly 40% of all the registered waqfs were established (138 waqfs), and after 1810, only one waqf per year was established. About 31% of the individuals who established these awqaf were women (Cizakca, 2000).

Colonial Influence

One of the legacies of French colonialism is the introduction of centralised waqf administration during the 16th century when a central office ran the Qarawiyin mosque. The family waqfs on the other hand, enjoyed substantial autonomy. By the 18th century, the Sultans were trying to expand their control over the whole system. They established the office of nazir an-nuzzar and a centralised system of waqf registers. The rulers who were behind these developments were motivated to centralise the awqaf as a reaction to the alleged role the waqfs played in the uprisings (Cizakca, 2000; Raissouni, 2001). Increased centralisation saw the rulers intervening in the management of the waqfs. This occurred, on the one hand, by subjecting the appointment of a trustee to the approval of the ruler and, on the other, by direct interference in the management of the waqf properties. The European influence continued with the grant of concessions which were basically in the form of ibdal/istibdal (migration of the waqf assets). This led to the usurpation of the waqf properties.

Nevertheless, the organisation of the waqfs and the trustees being appointed by the Sultan remained untouched. The introduction of various rules and regulations had to a certain extent, limited the power of these trustees. In the French zone,
muraqabah offices were established in Fes, Meknés, Marrakech, Rabat and Mazagan. By 1912, a General Directorate of Habous was established which was later known as the Ministry of Habous in 1915 under the purview of the central organisation. The ministry was not only empowered to control the monthly accounts of the waqfs, but could also take decisions concerning long-term lease, or even ibdal/istibdal of waqf properties. The King and the related office may decide on the matters concerning istibdal. The organisation of the habous management is an example of the typical French colonial influence but in reality, all the decision-making powers that mattered which used to be vested with the locals were abolished (Cizakca, 2000).

The administration of waqf and its organisational structure based on the French model was maintained even after independence of Morocco but led by the Moroccans. Major changes continued until 1970s when the land leased by the French settlers were taken over by Moroccans and a Direction des Affaires islamiques was established. The management of the waqf is now completely subject to the ministry. A special ministry was formed in 1955, earlier known as WizarahHubs. Its jurisdiction is clearly stated under Article 1, MudawwanahAwqaf 2010. Directorat Awqaf is one of the central divisions under the Ministry (Aj’un, 2006). The Directorat has five different divisions, namely the Waqf Property Division; the Waqf /Real Estate Investment Division; the Waqf Assets Division; The Treasury and Waqf Dispute Resolution Division. Every division is further divided into another four departments (Habous, 2006). The Directorate also has to monitor the Nazir who is appointed by the Minister of Waqf (Muhammad Idrisi, Nazir Fes, (5 February, 2016, Personal Interview). Every Nazir is given an office and is in-charge of several small departments under his supervision. Nazir job scope includes (Khalid Masluhi, Jan 28, 2016, Personal Interview):

(a) To record all waqf using a system known as rasmagari;
(b) To manage all public waqf (am);
(c) To make profit from waqf properties (Muhammad Idrisi, (Feb 5, 2016), Personal Interview).

CONCLUSION

Although there are allegations that pious endowment has been used as part of the political agendas among some of the leaders, endowment was part of the culture of Moroccans. First, the religious awareness of the people including the leaders prompted voluntary contributions for religious endowment. Second, earlier leaders used religious endowment to fund their social welfare programme. The acts ranged from providing free water to free education and medical needs. Although the zeal of waqf is decreasing, the modern waqf system in Morocco has maximised the benefits of waqf and from time to time, works towards a better management of waqf in the country. Furthermore, Morocco has followed other countries to legally strengthen the waqf
administration with the introduction of Mudawwanah Awqaf in 2010.

The centralisation of waqf administration has its own strengths and weaknesses. It has, to a certain extent, provided a stricter check on the management of waqf with a standard practices and regulations. Nevertheless, the management may subject waqf administrators and trustees to many bureaucracies that will slow down the development of waqf properties. It is also noted that the flexibility of the Maliki school of thought has contributed to vast activities of waqf including the practice of ibdal / istibdal. The history of waqf in Morocco points to the importance of creating and reviving waqf based on the foundation of Shari’ah with positive impacts. In addition, Morocco has shown the importance of waqf in academic and scientific progress through research funds, infrastructure as well as logistics. Waqf contribution has been channelled towards creating job opportunities, improving job opportunities and boosting the income level of the ummah.

Lastly, the long tradition of recording waqf properties and their details have safeguarded some of the waqf properties till present. At least, the size of waqf land, the details of waqf properties and the trustees are known to the people, if not to the government.

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Regulating Charitable Organisations in Malaysia: Challenges and Recommendations

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ABSTRACT
Charities in Malaysia are regulated by a few Acts which has its origins in the English law, whereby the concept and purpose of the charity has its origin in the Preamble to Charitable Uses Act 1601. In England and Wales, the prevailing Act on charity is the Charities Act 2011, in which 12 types of charities are acknowledged. The English Charities Act gives power to the courts and the Charity Commissioners to regulate and enforce charitable purposes in order to prevent abuses. In Malaysia, there is no single regulator or monitoring body that oversees these charitable organisations which has led to rampant abuses reported in charity organisations. This paper proposes a uniform law and procedure relating to charitable organisations and a competent body to deal with matters exclusively related to charities within the purview of local legislation, society and customs in Malaysia.

Keywords: Abuses, charities, English Law, monitoring body, uniform law

INTRODUCTION
The word charity in Malaysia has many different meanings and perception, and it can be viewed from civil and shariah law perspectives. Charity under the civil law is a direct descendant of the Latin word ‘caritas’, meaning ‘love’. Charity under Islam refers to help given to anyone in need. In addition, there are many charitable acts whose concept is broad compared with legally recognised charities under the civil law.

The charity law in Malaysia is adapted English law, whereby the spirit and intendment of Charitable Uses Act 1601 together with four main charitable purposes as introduced by Lord MacNagthen in 1891 are applied (Income Tax Special Purposes Commissioners, 1839). The purposes of the charities are for: relief of poverty,
advancement of education, advancement of religion, purposes beneficial to the community which is not falling under any of the preceding heads. Under the English Charities Act 2011, charity means any institution which is established for charitable purposes and governed by the law relating to charity. There are 13 charitable purposes laid down by this Act, which can be considered as a huge extension compared with the earlier four principal purposes of charity.

Charitable trust is a trust for specific purposes and its existence is in perpetuity. Having a charitable status, there is no need to identify what are the objects for its existence or who are the beneficiaries. What needs to be proven is the element of public benefit in each charitable purpose (Robert, 2008). More importantly, any trust or organisation which is charitable in nature will be tax-exempted.

The provisions relating to charities in Malaysia can be found scattered in a few Acts and Enactments. The absence of a monitoring body is conspicuous. Therefore, this article discusses the need to have a proper body or mechanism to monitor and regulate charitable organisations in Malaysia while comparing the situation in England and Wales which has the Charity Commission as a regulator and backbone in any matters relating to charitable organisations.

**CHARITY IN MALAYSIA**

There is no single statute in Malaysia that governs charity and references have been made to English principles of charitable trusts. Under the Ninth Schedule of the Federal Constitution of Malaysia, matters relating to charities and charitable institutions; charitable trusts and trustees (excluding *wakafs* and Hindu endowments) are within the Federal purview. There are a lot of charitable organisations in Malaysia and these usually come either under the purview of the Registrar of Societies of Malaysia or the Company Commission. There is no single regulatory body that is assigned to monitor the movement or administration of charitable organisations in Malaysia. Thus, the exact number of registered charitable organisations in Malaysia and their purview remain unknown.

Despite not having a single statute on charity, the fiscal advantages relating to charity can be seen in some provisions under the Income Tax Act 1967. Section 34 of the Income Tax 1966 deals with adjusted income from businesses that are tax deductible and this section has laid down several acts that can be considered charitable although there are no specific provisions. Since matters relating to charities are under the Federal list, section 9(1) of the Government Proceedings Ordinance 1966, which is considered a mandatory provision, (Letcheumanan, 1993) has clearly stated that in case of any alleged breach of any express constructive trust for public, religious, social or charitable purposes or where the direction of the court is deemed necessary for the administration of any trust, the Attorney General or two or more persons having interest in the trust and having obtained consent in writing of the Attorney General may institute a suit or
be joined as a party in any existing suit on behalf of the Government or the public for the purpose of obtaining relief specified in the subsection.

The Attorney General is considered the protector of public charitable trusts (Commissioner of Taxation, 2009). Nonetheless, the office of the Attorney General is not involved in ensuring integrity and good governance of any charitable organisation are fully enforced and monitored.

**MONITORING COMMISSION IN MALAYSIA**

Does Malaysia need a monitoring commission? There is a need to have a proper monitoring mechanism in order to boost public confidence and at the same time to detect fraud and abuses. Two main bodies are involved in establishing and monitoring any organisation, not necessarily charities, namely The Registrar of Societies and the Companies Commission. Each possesses different mechanism as the focus and purpose of these regulators are different.

**Registrar of Societies (ROS)**

The establishment of any society or organisation of any nature is under the purview of the Registrar of Societies (ROS) and this is governed by Societies Act 1966. The ROS is a department under the Home Ministry handling non-governmental organisations and political parties. The objective of this department is to ensure growth and development of a healthy and orderly society which is not in conflict with peace, welfare, security, public order or morals. Under section 2 of this Act, society refers to any club, company, partnership or association of seven or more persons whatever its nature or object, whether temporary or permanent.

There are a few types of societies which are under the jurisdiction of this Act including religious societies, trade related societies including financial institutions, developers or manufacturers and chambers of commerce or entrepreneurs. Besides that, political organisations and societies focused on the environment, consumerism and international friendship fall under this. Though in some categories, the element of charity can be found, it is not the task of the ROS to ensure or declare these societies are charitable in nature. The division in charge of enforcement will have to ensure that all societies registered with the office followed the rules and regulations under the Societies Act 1966. Intelligence works will be carried out to stamp out illegal societies in addition to investigating and coordinating complaints from the public and also other agencies such Public Complaints Bureau, police and others. Currently any decision made by the office of the ROS that relate to the establishment, enforcement and dissolution are subject to judicial review by the courts in Malaysia (Kerajaan Negeri Selangor, 2012).

**Companies Commission of Malaysia**

Prior to the establishment of the Companies Commission of Malaysia (CCM), the Registrar of Businesses (ROB) and Registrar of Companies (ROC), were the
two government’s divisions, which are responsible in managing the system of registration of business and companies. Although these two divisions are independent from each other, both have the same objectives, namely to ensure that the registration of companies and business are done effectively and efficiently. Taking into consideration the rapid growth of business in Malaysia, the Ministry of Domestic Trade and Consumer Affairs proposed the establishment of (CCM), which merged both the ROC and ROB. This Commission has the power to regulate companies and businesses in Malaysia and to administer any law, which confers functions and the powers of the Commission. The intention is to ensure the Commission is managed efficiently and effectively in order to monitor the increasing number of charities which are growing in sophistication and dynamism.

The main powers of the CCM include the power to process, approve and register companies and businesses, and the power to call for information and to conduct inspections and investigations of companies and businesses. It also has the power to enforce respective laws, such as rights to undertake proceedings for any offence against the respective laws, and power to enforce and collect fees as an agent of the government under the laws. The CCM reports to and advises the Minister of Domestic Trade and Consumer Affairs on all matters concerning companies, corporations and businesses which are related to respective laws.

The CCM is also an agency to register foundations including foundations that are established for charitable purposes. The foundations shall be registered as a company limited by guarantee and the authorised share capital required is RM1 million. The main difference between a foundation and a corporation is that the former does not have any shareholders. Assets that are held in the name of the foundation are to be used for purposes clearly defined in its constitutive documents. The administration and operation of the foundation are set out in contracts, not fiduciary principles. Foundation can also be created under the 1952 Trustee Incorporation Act.

CHARITY COMMISSION IN ENGLAND AND WALES

In England, charities come under the Charities Act 2011. The Preamble to the English Statute of Charitable Uses Act 1601 laid down the basic foundation or useful guidance as to what can be considered as charitable. One very significant step taken by English Parliament in order to monitor any negligent and mismanagement of charitable funds was the establishment of the Charity Commission under the Charitable Trust Acts 1853, 1855 and 1860. For the past 50 years, following enactments of the Charities Act 1960, 1993, 2005 and the final one in 2011, the monitoring power of the Commission was further expanded and strengthened. The Commission is an independent regulator, and non-ministerial government department which is accountable to the Home Secretary (Hayton & Mitchell, 2005). Its functions are...
to promote the effective use of charitable resources by encouraging better methods of administration, advising the trustees and investigating and checking abuses. Its objectives are set out in the statute, namely public confidence, public benefit, compliance, charitable resources and accountability. This is provided under section 14 of Charities Act 2012.

Therefore, a proper monitoring body to regulate matters relating to charities is important. The Commission’s objectives to increase public trust and confidence as well as and promote awareness and understanding of the operation of the public benefit requirement and under Part 2 of the Charities Act 2011 are very important. Section 15 of the Act laid down the Commission’s general duties which include among others, determining which institutions can be considered charities, and encouraging and facilitating their administration. The latter can be done by giving advice and guidance to charities as the Commission considers appropriate. More importantly, the Commission has a duty to identify and investigate mismanagement in the charity.

In order to ensure proper monitoring, any registered charities which register a gross annual income exceeding £100,000 must submit annual accounts to the Commission. What is so unique about this Charity Commission is that it has the same power as the Attorney General, whereby in case of enforcing any obligation against a default charitable organisation or its trustee, they are allowed to take the case straight to court. The Commission is also given a restricted concurrent jurisdiction with the High Court to try cases pertaining to charities. This basically covers three matters - first, to establish a scheme for the administration of charity; second to appoint, discharge or remove a charity trustee or trustee for charities or to remove an officer or employee and third, to vest or transfer property to a person entitled to it.

Although the Home Secretary appoints the Commissioners, the former has no power to direct the latter on the exercise of their statutory functions, and no parliamentary questions can be addressed to them s in particular cases, as the Commission is only responsible to the courts. (Hayton, 2003). The need to have a regulatory body in England and Wales has been solved by forming the Charity Commission. Nonetheless, reforms are needed due to mounting calls for more transparency and accountability of charities.

**CONCLUSION**

The move to have a single regulatory body to monitor charitable organisation is encouraging as this has not been widely promoted by the current ruling party in Malaysia. The act of giving is indeed part and parcel of Malaysian society and charitable organisations are allowed to be in existence although in so many different forms. The Registrar of Societies is very concerned with ensuring peace, welfare, security, public order or morals in society. The *Kerajaan Negeri Selangor & Ors* (2012) case clearly showed that although
the decision of the ROS was subject to judicial review, there was a clear need for a single regulator to monitor activities of charitable organisations. The court can go to the extent of deciding whether there is any infringement of legal right and legal interest and the question of integrity and transparency that has no relation with the latter will unlikely produce positive outcomes. The announcement by the Minister in the Prime Minister Department on the need to monitor non-profit organisations (NPOs) in order to ensure there is no profit-making business deals should be viewed seriously. This will come under the Legal Affairs Division of the Prime Minister’s Department together with Bank Negara Malaysia and the Inland Revenue Board (LHDN). The minister added NPOs are encouraged to register under the Trustee (Incorporation) Act 1952 and to date, there are 371 NPOs registered under this Act with the number steadily increasing. In 2014, RM 1.3 billion in tax exemption was given to these NPOs (“PM’s Department”, 2016). This proves the need for monitoring not only for tax exemption purposes but more importantly, to strengthen the integrity of these charitable organisations without which negative impressions can be created as a result of mismanagement of public fund.

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Judicial Review of Shariah Criminal Offence in Malaysia

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ABSTRACT
This article examines the role of civil court’s judicial review pertaining to the enforcement of shariah criminal offence in Malaysia. The civil court has the power to judicially review the decisions of administrative authorities including any enforcements carried out by government officials and their subordinates whether it is in tandem with law and legislation or not. It assesses the validity of the enforcements and whether the procedural aspect has been legally adhered to. Similarly, the court also has the power to review shariah enforcement actions. Recently, three cases which had been reviewed judicially, namely, the seizure of a book entitled Allah, Love and Liberty, the Muslim men cross-dressing cases and the Kalimah Allah disputes. In these cases, the shariah enforcement actions have been declared unconstitutional, as they infringed the principles of freedom of expression enshrined under the Malaysian Constitution. The primary objective of this paper is to examine the position and implication of such judicial review over shariah criminal offence enforcements. Additionally, examine whether the civil-law trained judges have the necessary expertise to review the shariah related enforcement actions or not. Finally, repercussions of these reviews to the position of Article 121(1A) of the Federal Constitution of Malaysia are also assessed. This article employs full library research as the main source of data and collection content analysis is applied throughout the discussion.

Keywords: Judicial review, Malaysia, shariah criminal offence

INTRODUCTION
Superior courts have two types of jurisdiction over lower courts or inferior tribunals, appellate and supervisory jurisdictions. In exercising their appellate jurisdiction, the superior courts in hearing appeals against the decision of a lower court can consider the case denovo, examine the evidence
in the light of its own understanding and appreciation, and substitute its own judgment in the place of the judgment of the lower court (Anantaraman, 1994). In explaining what judicial review is, Jemuri Serjan Supreme Court Judge (as he then was) observed: “It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable” (ibid). In our daily lives, we are subjected to many administrative decision and enforcements issued by the authorities. Many times, it will result in some infringement of rights and there lies the need for the redressal of our grievances (Jain, 1970). Judicial review as it is widely known and practised, is considered the proper mechanism to redress these infringements. It is concerned with the process of upholding the principle of legitimacy of public law, that the actions of administrative authorities are based on legitimate foundation (Ahmad & Hingun, 1995; Ahmad & Nik Mahmod, 2006; Mokhtar & Alias, 2013).

Halsbury’s Laws of Malaysia (Malayan Law Journal, 2001) concurs and defines judicial review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. Fordham (1997), speaks of judicial review’s function to curb abuse of executive power. In Malaysia, the power of the High Court to exercise judicial review is stipulated under section 25(2) of the Court of Judicature Act 1964:

(1) Without prejudice to the legality of Article 121 of the Constitution, the High Court shall on the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia day and such other powers as may be vested in it by any written law in force within its local jurisdiction

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating the same”

Relevant provision in Para1 of Schedule 1 of the Court of Judicature Act 1964 highlights further power of the High Court as “power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose”.

The application for judicial review is currently regulated by Order 53 of the Rules of Court 2012 which was previously
regulated by Order 53 of the High Court Rules 1980.

The aggrieved party must have a valid grievance to be a successful applicant. Order 53 of the Rules of Court 2012 again reiterates that: “Any person who is adversely affected by the decision of any public authority shall be entitled to make an application for judicial review. Prior leave of court also has to be obtained.”

LIMITS OF COURT’S JUDICIAL REVIEW

Woolf, Jowell and Le Sueur (2007, p. 15), leading administrative-law jurists, explained that there is almost no limit to judicial review. Nevertheless, there are some exceptions, for example certain decisions which courts cannot or should not easily engage, mainly limitation of constitutional and institutional capacity. This position can be examined in several jurisdictions. England, for instance, within the perspective of the separation of powers, matters of social and economic policy are vested upon the legislature and not with the judiciary. Therefore, courts avoid interfering in official discretions in pursuit of policy enforcement (Woolf et al., 2007, p. 16). Similarly, it is not for judges to weigh utilitarian calculations of social, economic or political preference (ibid). Regarding institutional capacity, there are some decisions which courts are ill equipped to review or are not amenable to the judicial process, such as distribution of resources among competing claims, national security and local councils’ expenditure, which should be determined by other bodies like the Parliament (Woolf et al., 2007, p. 18). Control of these functions is essentially a matter for administrative and political means (Bradley & Ewing, 1997).

Similarly, the limits also applicable to several other jurisdictions such as Australia, Canada, India, New Zealand and South Africa. In fact, these jurisdictions enacted specific legislations which clearly prevent courts from asserting their review on several decisions (Woolf et al., 2007, p. 25). For instance, the provisions of the Human Rights Act 1998 of England states that no public authority may interfere with the Convention’s rights. In Australia, the Administrative Decisions (Judicial Review) Act 1977 excludes prerogatives, decisions and conduct of the Governor General from being reviewed by courts. Similarly, according to Al Omran, judicial review is set aside under Islamic Law if it infringes the shariah principles (Al Omran, Abualhaj, & Mohd Yusoff, 2015).

JUDICIAL REVIEW OF SHARIAH CASES IN MALAYSIA

Notably in Malaysia, the federal judiciary is vested in the High Court as specified under Article 121(1) of the Federal Constitution. As the High Court assumes federal status, its jurisdiction covers a wide range of subject matters while Shariah Courts are vested with powers of shariah cases and shariah related matters, as provided under Article 74 and List 11 of the Ninth Schedule of the Federal Constitution. More often than not, jurisdictional conflict arises between Civil and Shariah courts due to the parallel
jurisdictions. This was evidenced in the cases of Tengku Mariam Tengku Sri Wa Raja v Commissioner for Religious Affairs Terengganu [1969] 1 MLJ 110; [1970] 1 MLJ 222, Myriam v Ariff [1971] 1 MLJ 265, Ainan bin Mahmud v Syed Abu Bakar [1939] MLJ 209 and Nafsiah v Abdul Majid [1969] 2 MLJ 174. In avoiding this prolonged conflict, the Federal Constitution of Malaysia by a constitutional amendment in 1988, has amended article 121(1) by inserting the present additional clause 1A to the Article, in which the article currently reads as follows:

“(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

The effect and implication of this amendment had been debated by legal scholars. Ahmad Ibrahim concluded that one important effect of the amendment is to avoid any conflict between the decisions of shariah court and civil court. Another legal scholar, Syed Jaafar Hussain, concurred with Ahmad Ibrahim (Buang, 1993, p. 11; Hussain, 1993, p. 12).

The case of Mohd Habibullah vs Faridah Dato Talib [1992] 2 MLJ 793, was the immediate positive response to the amendment whereby the Supreme Court emphasised that the amendment’s objective is to avoid any interference of civil court over shariah cases. On the contrary, Andrew Harding, another legal scholar, is of the opinion that the amendment has not affected the power of civil court to review shariah cases (Harding, 1996). Nevertheless, despite few conflicting opinions regarding the implication of this amendment, the amendment’s objective is to avoid any interference of civil court over decisions of the shariah court. However, the post-amendment period of the article has indicated the jurisdictional conflict still has not been resolved completely. Many shariah related cases within that period had been decided by the civil courts which were devoid of the spirit of the Amendment. Notably, such cases include Jamaluddin Othman [1989], Teoh Eng Huat [1990], Ng Wan Chan [1991], Tan Sung Mooi [1994] and Lim Chan Seng [1996] which were tried in the civil court and decided accordingly.

RECENT JUDICIAL REVIEW OF SHARIAH CRIMINAL OFFENCES

The recent judicial reviews exercised by the civil courts over shariah criminal offences cases in Malaysia were observed in three decisions, namely, the seizure of book entitled Allah, Love and Liberty, the Male Muslim cross-dressing case in the state of Negeri Sembilan and the Kalimah Allah case.


On May, 23rd, 2012 enforcement officials of the Federal Territory of Islamic Religious Department seized several copies of a book entitled, Allah, Liberty and Love, which was written by a woman writer, who
was based in Canada. The book which was on sale in a bookstore, Borders, was regarded as contrary to the Islamic teaching because it promoted *pluralism, liberalism* and different interpretation of the precepts and tenets of Islam. On May, 29th, The Ministry of Home Affairs declared, both its English and Malay versions, banned in Malaysia. Subsequently, in June 18th, 2012, the bookstore had filed a leave seeking a judicial review from the High Court in a bid to declare that the act of seizure by the officials was invalid and unconstitutional. Meanwhile, the store manager, a Muslim, was charged in the Shariah Court for selling books which were considered an offence under the Shariah Criminal Offences Act 1997 and upon conviction, she is liable to three thousand ringgit fine or imprisonment of up to two years or both. Meanwhile, in June 25th, 2012, the management of the bookstore successfully obtained a leave to challenge the validity of the seizure. They were granted a *certiorari* to set aside the conviction of the sales manager by the Shariah Court previously. They were successfully granted with an order to restrain the officials from further conducting raids on the bookstore. In July 30th, 2012, the religious officials objected, insisting that the restraint order issued by the High Court was akin to interference with the Shariah Court’s Order and there was no urgent and special situation for the court to grant such order. The Court allowed the objection to be raised and instead, ordered the bookstore to have the restraint order filed in the Shariah Court. The bookstore subsequently filed an appeal against the High Court decision to the Court of Appeal and successfully obtained an interim Order to defer further seizure by the officials. In another parallel decision, in March 22nd, 2013, the High Court of Kuala Lumpur granted a *certiorari* to invalidate the officials act of raiding and seizing copies of the book. Aggrieved by the decision, the Islamic Department filed an appeal with the Court of Appeal. However, the Appeal Court affirmed the High Court decision and further made other declaration that the seizure of the book can only be exercised if the Home Affairs Ministry duly declared that the book was an undesirable publication in accordance with the Printing, Presses and Publication Act 1984 provision. On the other note, the Appeal Court further affirmed that High Court had jurisdiction to hear the case as conferred to the court in Article 121 of the Federal Constitution and had the power to interpret the application of the Printing, Presses and Publication Act 1984 over the Islamic Criminal Offences Act 1997.

**Male Muslim Cross-dressing Case in Muhamad Juzaili bin Mohd Khamis & Ors. v State Government of Negeri Sembilan & Ors. [2015] MLJU 65.**

This case concerned the shariah offence of cross-dressing women’s attire by a few Muslim men in Negeri Sembilan which was heard in the High Court of Seremban. The plaintiffs, Muhamad Juzaili bin Mohd Khamis and several others had filed an application to the Court seeking judicial review of the Shariah enforcement action in convicting them in accordance
to with the provision of section 66 of the Shariah Criminal Enactment 1992 of Negeri Sembilan. The provision criminalises Muslim men wearing the women’s attire. The plaintiffs declared this provision was unconstitutional as it contradicted interalia, with Article 5(1), 8(1), 9(2) and 10(1)(a) of the Federal Constitution which guarantee the citizen to freedom of life and liberty, equality before the law, freedom of movement and freedom of expression. Their application for judicial review, however, was dismissed by the court on October 11th, 2012 and they subsequently filed an appeal to the Court of Appeal against the decision. The appeal was allowed: “We therefore, grant the declaration sought in prayer… that section 66 of the Syariah Criminal Enactment 1992 is void by reason of being inconsistent with the articles above.”

Dissatisfied with the decision, the State of Negeri Sembilan filed an appeal to the Federal Court in the subsequent case of State Government of Negeri Sembilan & Ors. v Muhammad Juzaili Mohd Khamis & Ors. [2015] 8 CLJ 975. The Federal Court in allowing the appeal stated that the application for declarations sought by the respondents before the High Court by way of judicial review was in fact a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents wanted was to limit the legislative powers of the State Legislature, by saying that despite its powers to legislate on matters on Islamic law having been given to the State Legislature by article 74 of the Federal Constitution read with List II in the Ninth Schedule thereof, that legislation must still comply with the provisions on fundamental liberties enshrined in articles 5(1), 8(2), 9(2) and 10(1) of the Federal Constitution. The Court further held that the application for the declarations sought by the respondents were incompetent by reason of substantive procedural non-compliance with clauses 2 and 4 of article 4 of the Federal Constitution, and should have been dismissed by the High Court on the ground that the High Court had no jurisdiction to hear the matter.

**Dispute Pertaining to “Kalimah Allah” in Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor. [2010] 2 MLJ 78**

In the case of Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor. 31 The Titular Roman Catholic Archbishop of Kuala Lumpur as the applicant, was granted a publication permit by the first respondent, the Minister of Home Affairs, to publish the Herald-the Catholic Weekly. On 8th January, 2009, the applicant received a letter dated 7th January 2009 from the first respondent approving the publication permit for the publication period of 1st January 2009 until 31st December 2009 subject to the condition that the applicant was prohibited from using the word Allah in the publication. This was the applicant’s application under Order 53 rule 3(1) of the Rules of the High Court 1980 for judicial review of the impugned decision of the first respondent. By way of this application the applicant sought leave for an order of certiorari to quash the impugned decision and for an order for stay of the impugned
decision pending the court’s determination of the matter, and for various declarations with costs in the cause.

The applicant’s grounds for the reliefs of certiorari and declaration were premised on the unconstitutional acts and conducts of the Respondents, which were inconsistent with articles 3(1), 10, 11 and 12 of the Federal Constitution, namely that the applicant’s right to use the word Allah stemmed from the applicant’s constitutional rights to freedom of speech and expression and religion and in instructing and educating the Catholic congregation in the Christian religion. In reply to this contention, the first respondent emphasised that it was acting within the four corners of its jurisdiction and had taken into account relevant considerations such as the status of Islam under the Constitution, the various Enactments on control, government policy, public security and safety and religious sensitivity. The respondent also averred that the use of the word Allah should be restricted to its use in the Bible as the Bible was not meant for Muslims but only found in the possession or use of Christians in churches. In fact, the action by the Appellant in using the Kalimah Allah in their publication was contrary to the fatwa issued earlier and therefore infringed the the shariah criminal provision. The High Court in its reported judgment in December 31st, 2009, allowing the appeal stated that the first respondent in the exercise of its discretion to impose further conditions in the publication permit issued had not taken into account the relevant matters alluded to by the applicant, hence committing an error of law that warranted judicial interference. The Court further held that pursuant to article 3(1) of the Federal Constitution, Islam is the official religion of the federation but other religions may be practised in peace and harmony in any part of the Federation. As there is no doubt that Christianity is a religion, the question that had to be considered was whether the use of the word Allah is a practice of the Christian religion. Whether a practice is or is not an integral part of the religion is not the only factor to be considered and there are other equally important factors. Thus, for these reasons the condition imposed that the applicant was prohibited from using the word Allah in its publication. Similarly, the appeal to the Federal Court in Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors. [2014] 6 CLJ 541, was dismissed by the court.

CIVIL COURT JUDICIAL REVIEW OVER SHARIAH CASES: FUNDAMENTAL REPERCUSSIONS

It is submitted that judicial reviews exercised by the civil courts in the above cases have certain repercussions on Islamic law and the position of Shariah Court in Malaysia. It has mainly reverted the position of Islamic law to its old status. This study pointed to a few interesting findings.

Firstly, the amendment of Article 121(1A) has been enacted not without its purpose. It takes away the jurisdiction of Civil Court over Shariah Courts in matters of Islamic law or Hukum Syarak as seen in the List 11 of the Ninth Schedule of the Federal
Constitution. This has been affirmed by the Supreme Court in the decision of Faridah Dato Talib’s as above and in several other decisions. The amendment without doubt, be interpreted to prevent the civil court from reviewing shariah cases or shariah related decisions.

Secondly, Islamic Law has been reverted to its inferior position as its subject matters, including enforcement actions, are reviewable judicially by the civil court. It is submitted that the Supreme Court’s judicial approach in the case of Mamat Bin Daud & Ors. v. Government of Malaysia [1988] 1 MLJ 119 should instead be adopted by the civil court. In this case, the petitioners were charged for an offence under section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion as they were alleged to have acted as unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without valid appointment. The issue was whether the amended Act 1983, that is section 298A above, ultra vires article 74(1) of the Federal Constitution, since the subject matter of the Islamic legislation is reserved for the State Legislature and therefore beyond the legislative competency of Parliament. It was held by the Supreme Court that in the subject of religion, only states have power to legislate under Articles 74 and 77 of the Federal Constitution, since the subject matter of the Islamic legislation is reserved for the State Legislature and therefore beyond the legislative competency of Parliament. The principles of this case, despite of the amendment of the federal law, it does not prevail over state’s subject matter (matters of Islamic law) of which the jurisdiction lies within the states.

Thirdly, the jurisdiction and powers of Islamic Enforcement Officials in enforcing shariah offences will be restrained as shown in the case of seizure of the book Allah, Liberty and Love above. The enforcement, according to the review, requires a condition that the Home Ministry must have banned publications contrary to the Islamic teachings prior to the seizure of the publications.

Fourthly, as it has been elucidated in the case of Mohd Juzaili Khamis above, application for judicial review is akin to invalidating shariah criminal offences which is validly enacted by the State Legislatures. This is a serious implication for the shariah law. Finally, civil judges do not have the necessary expertise to determine matters pertaining to Islamic law and related matters. As they are untrained in Islamic law, the power should be vested with the Shariah judges. Therefore, it is just and proper for the civil court judges to recuse themselves from reviewing shariah cases and shariah related cases.

**CONCLUSION**

It is submitted that relevant laws to be amended in the future to restrain the civil courts from exercising their judicial review over shariah matters such as amendment to the relevant provision of the Court of Judicature Act 1964 and the Court Rules 2012. Alternatively, Shariah court should
be conferred with an exclusive jurisdiction to exercise judicial review pertaining to shariah matters. A special law similar to the Administrative Decisions (Judicial Review) Act 1977, Australia must be enacted to exempt civil court from exercising judicial review over administrative and enforcement decisions of the Islamic authorities. Ultimately, a constitutional amendment similar the amendment of the article 121(1A) has to be incorporated in the Federal Constitution which will take away the power of the High Court to review shariah matters and decisions.

REFERENCES


The Role of Non Signatory State to the 1951 Refugee Convention: The Malaysian Experience

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ABSTRACT

The protection of refugees, asylum seekers, and stateless people is fragile and unpredictable in ASEAN countries, principally because majority of its member states are not signatory to the 1951 UNHCR convention. Consequently, there is lack of national legal frameworks to offer adequate protection to refugees. In fact, some states have introduced restrictive policies such as denying safe disembarkation or access at the airport and narrowing protection space and access to asylum seekers. There is also an increase in maritime pushbacks and instances of refoulment. As a result, all asylum seekers and refugees are treated as irregular migrants, and in the absence of substantive engagement by the authorities, UNHCR remains the last option for refugees protection responsibilities. This paper examines the status of refugees in Malaysia, a non-signatory party to the Refugee Convention. It lacks legislative and administrative framework to address concerns of refugees and therefore, the study proposes mechanisms that can be adopted by the country to protect and safeguard the interests of refugees without affecting Malaysia’s sovereignty.

Keywords: ASEAN, asylum, convention, human rights, mechanisms, refugees, sovereignty, UNHCR

INTRODUCTION

The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest hallmarks of human civilisation. References to it are found in texts written 3500 years ago, during the blossoming of the great early empires in the Middle East, such as the Hittites, the Babylonians, the Assyrians, and ancient Egyptians. Over three millennia later, the protection of
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Refugees was made the core mandate of the UN refugee agency, UNHCR, set up to look after refugees, specifically those waiting to return home after the end of World War II (The UN Refugee Agency). The 1951 Geneva Convention is the main international instrument that governs refugee interest. The Convention provides a clear definition of a refugee and their legal protection as well as social rights they are entitled to from signatory countries. The Convention also outlines the refugees’ obligations towards their host governments. It also describes certain categories of people, such as war criminals, who do not qualify for refugee status. Although the Convention was limited to protecting mainly European refugees in the aftermath of World War II, its 1967 Protocol expanded the scope of the Convention, as the problem of displacement spread around the world (Hathaway, 2002).

According to the 1951 UNHCR Convention, a refugee is a person who, owing to his well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, unwilling to avail himself of the protection of that country (Melander, 1987). In other words, a refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. Due to fears of persecution, most of them do not return home. War and ethnic, tribal, and religious violence are leading causes of refugees fleeing their countries. Compared with economic migrants who are protected by their home country and have freedom of movement, refugees have the right to safe asylum only outside of their country’s borders. Malaysia has taken in a significant number of refugees and asylum seekers under its care, despite not being a signatory to the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (Kaladan, 2009).

ASEAN AND THE REFUGEE CRISIS

The growing Southeast Asian refugee crisis, largely involving Myanmar’s persecuted Rohingya minority has strong similarities with the humanitarian disaster Europe is facing with its Middle Eastern and African refugees (Muntarbhorn, 1992). In recent years, thousands of refugees from Myanmar and Bangladesh, have fled their home country due to persecution. The Rohingyas have been denied Burmese citizenship, and regularly subjected to violence at the hands of the military. It is alleged that not less than 25,000 people had left the Bay of Bengal in the first quarter of 2015, double the number in 2013 and 2014. It is also reported that no less than 300 of them have lost their lives while attempting to escape into neighbouring states (Paul, 2015).

Majority of ASEAN members have not signed the 1951 UN Refugee Convention or the 1954 Statelessness Convention. In Malaysia, for example, refugees who arrive are unable to work legally and often forced into low-paying exploitative labour (Hathaway, 2002).
While the proximity of the source of the problem might otherwise provide an opportunity for an effective solution, in Southeast Asia, it has only highlighted limitations of the capacity for cooperation. There exists a spirit of non-interference in domestic affairs of ASEAN member states, a policy inherited from opposition to colonialism and the military expediency of the Cold War and a conflicting regional mix of cultural and religious histories outlined in ASEAN’s founding charter, namely the 1967 Bangkok Declaration adopted by all primary members of ASEAN. The bloc focuses on issues of collective gains, such as economic and security partnerships (Chang, 2015). Most criticisms of ASEAN focus on its unwillingness to address human rights abuses. This includes failure to censure the Myanmar government throughout its long history of state-sanctioned violence and taking too long to respond to the upheaval caused by East Timor’s independence from Indonesia in 1999-2000. It should be noted that ASEAN has made some progress towards modifying its non-critical position during the past decade, including offering a strong and unified rebuke of the Burmese junta following its crackdown on civilian protestors in 2007. However, efforts supposedly aimed at boosting ASEAN’s human rights-promoting infrastructure have frequently been derided. The ASEAN Intergovernmental Commission on Human Rights (AIHCR), established in 2009, is seen by many as toothless, while ASEAN’s Human Rights Declaration of 2012 has also been dismissed as a declaration of government powers disguised as a declaration of human rights (Ahmad, Sulhairil, Muhammad, Mohd Ashraf, & Hudrus, 2011).

 MALAYSIA AND THE UN CONVENTION ON REFUGEES

Malaysia is not a signatory to the UN Convention on Refugees. Asylum seekers who flew to the country lead a precarious existence on the margins of society, at risk of arrest as illegal immigrants. Malaysia’s constitution makes no distinction between undocumented or illegal workers and refugees. A majority of them live in urban areas and have no right to work or to send their children to school. In 2011, a well-known Malaysia Arrangement was signed between Australia and Malaysia which stipulated the role of Malaysia in Clause 10, which allows the transfer of individuals who have already engaged Australia’s international protection obligations to a country which is not bound by equivalent obligations under international law or its own law, and which cannot be relied upon to behave as if it were (Harriet, 2011).

According to Human Rights Watch, Malaysia’s willingness to recognise a group of asylum seekers as being lawfully present is a positive development. However, creating an exception for 800 swapped people while 90,000 other refugees and asylum seekers on Malaysian soil remain illegal migrants and subject to deportation is unacceptable and contradictory. There was outcry within and outside Malaysia regarding the deal. Domestically, people believed that the
country would look silly in the eyes of the international community because it is not a party to the UN Refugee Convention of 1951. Others opined that the country need not burden itself for pursuing something totally illegal, and even contradicting domestic laws. Similar criticism was voiced by activists and human rights organisations against the Australian government, calling it to change the agreement. As a result, the Australian High Court declared it invalid for asylum seekers who entered Australia via Christmas Island to be transferred to Malaysia (UNHCR, 2016).

REFUGEES AND ASYLUM SEEKERS IN MALAYSIA

Malaysia’s experience with refugees and asylum seekers began in the aftermath of the fall of Saigon in 1975, Vietnamese refugees arrived by the boatloads and the first boat that arrived consisted of 47 Vietnamese, and Malaysia became the temporary home to more than 250,000 refugees, all from Vietnam. Despite that, Malaysia was not a signatory to the Refugee Convention. It was only willing to act as an offshore processing entity as it deemed the influx of such vast numbers and their ethnic makeup especially ethnic Chinese, can pose challenges to Malaysia’s demography. Under the Comprehensive Plan of Action for Indochinese Refugees of 1989, Malaysia became the first country to offer safe space for these boat people. They were housed in camps and had to wait several years before resettlement in a third country. In 2005, the last of the Vietnamese refugees left Malaysia and were voluntarily repatriated to Vietnam after spending more than 20 years here (Melander, 1987).

Although the situation has improved over the last few years with the increase in raids and less overt rent-seeking on the part of the authorities, refugees and asylum seekers continue to face tough challenges in Malaysia, as UNHCR does not provide them with housing and food. They resorted to illegal work to support themselves and their families. Thus, they began a treacherous journey by boat to Australia. In Malaysia alone, there are around 100,000 asylum seekers and refugees registered with UNHCR, while additional tens of thousands of asylum seekers remaining outside of the purview of UNHCR. Due to lack of legal status, the vast majority have limited protection in Malaysia; many have work and some access to community-run schools and health centres. In 2011, UNHCR resettled 8370 refugees to third countries (Martin, 1997).

Malaysia wants to provide refugee protection on its terms such as when and for whom it provides protection. At present, there are over four million foreign workers in Malaysia, about half of them working illegally such as at construction sites, plantations, and as kitchen and waiting staff. The UN has stepped up calls to register people more effectively and allow them to work. In November 2002, the Home Minister told the parliament that the government was considering that option for the Rohingya Muslims, Myanmar’s persecuted Muslim minority, who have
been coming to Malaysia for decades and currently number around 50,000 (Hathaway, 2002).

MALAYSIAN HANDLING OF REFUGEES

For the past 40 years, Malaysia has been a major destination for refugees seeking either temporary or permanent refuge from devastating conflicts in their home country. Unlike many ASEAN member states, Malaysia is not a signatory to the 1951 Refugee Convention and its 1967 Protocol and therefore, refugees and asylum seekers who find themselves in the country lead a precarious existence on live on the margins of society, at risk of arrest as illegal immigrants, since Malaysia makes no distinction between undocumented workers and refugees. Asylum seekers include Filipino refugees from Mindanao who arrived during the late 1970s and early 1980s, and over 50,000 of them fled to Sabah. There were also Cambodian and Vietnamese refugees during the 1980s and 1990s, a small number of Bosnian refugees in the early 1990s, and Indonesians from Aceh in the early 2000s (Human Rights Watch, 2004).

Malaysia also continues to be an attractive destination for refugees from Myanmar’s troubled ethnic minorities, the stateless Rohingya. Despite not being a signatory to the UN Refugee Convention, Malaysia does allow the presence of refugees in the country on the basis of humanitarian grounds and cooperates with the UNHCR in addressing these issues. The discussion below focuses on refugees from Vietnam, Myanmar, Bosnia, and Syria who chose Malaysia as their destination (Ahmad, 2016).

Vietnamese Refugees in Malaysia

Vietnamese refugees fled Vietnam by boat and ship after the Vietnam War, especially during 1978 and 1979, continuing until early 1990s. It is estimated that 2 million refugees left Vietnam between 1975 and 1995, while the number of boat people leaving Vietnam and arriving safely in another country totalled almost 800,000 during the same period. The immediate destinations for them are Southeast Asian countries such as Hong Kong, Indonesia, Malaysia, the Philippines, Singapore, and Thailand (McInnes & Mark, 2007). While North Vietnam had been the object of a US trade embargo since 1964, Vietnam’s military action against the Khmer Rouge provoked further condemnation by the US and its allies, resulting in additional harsh economic sanctions being imposed on Vietnam by a number of countries and subsequent exodus of refugees from there due to economic hardships. The economic sanctions imposed on Vietnam by the United States and its allies were lifted in 1994-5, and Vietnam was re-admitted to the Association of Southeast Asian Nations. As a result, thousands of refugees returned to Vietnam, and their number declined drastically from their host nations (Cockburn, 1994).

On August 8th, 1978, Bidong was officially opened to house refugees from Vietnam. However, people from Vietnam had lived on the island soon after Saigon
fell into communist hands. In the late 1970s, Malaysia was also home to Cambodians fleeing the Khmer Rouge regime. In the early years, people lived in the trees, tents, or anything they could find to avoid the hot tropical sun, rain, and ocean storms. A few years later, the Malaysian government, the Malaysian Red Crescent Society (MRCS), UNHCR, and other relief agencies developed the Bidong Island which now has houses, hospital, schools, clinics, temples, churches, coffee shops, a post office, a vocational school, and some refugee-owned shops such as bakery shops, tailor shops, fruit stands, and small markets (Guy & Jane, 2007).

During this time, the Malaysian Police Task Force was created, and it did an excellent job preventing the refugees on the island from illegal fishing, illegal wandering into the mountains for wood, and from crimes and general disorderly conduct. The Monkey House jail was built to imprison people who violated the island's policies. Later, the task force set up multiple security offices in each residence zone along with the main Island Camp Office, in which the refugees would vote or appoint officials to enforce policies, nightly patrol, and security. About 90% of the island was considered a forbidden area. Only a small portion on the south side was used to house UNHCR staff and the refugees (Lamvi, Rosli, & Ghani, 1992). Although Pulau Bidong camp and Sungai Besi camps officially closed in 1991 and 1996 respectively, the last of the Vietnamese refugees finally left Malaysian shores only on 28th August 2005 (Bram, 2005).

Bosnian Refugees in Malaysia
A small number of Bosnian refugees arrived in Malaysia in early 1991. A sense of Islamic solidarity made Malaysia offer asylum to 350 Bosnian Muslims fleeing the carnage of genocide in former Yugoslavia. The Malaysian government provided scholarships for students, and basic housing and jobs for these refugees from Bosnia. Besides being one of the strongest supporters of the Bosnians, Malaysia remained the only Asian country to accept Bosnian refugees. During the Bosnian war, Malaysia had sent its trop to be part of the UN Peacekeeping force there. Many Bosnian students also studied at the International Islamic University Malaysia and when the war ended, majority of the Bosnians residing in Malaysia returned home (Kate, 2014) (see Figure 1).

Refugees from Myanmar and the Rohingya's in Malaysia
Tens of thousands of Muslim Rohingyas fled Myanmar, many of them embarking on a treacherous sea journey in the spring of 2015 to try to reach Indonesia, Malaysia, and Thailand. A long-simmering crisis between the Buddhist and Rohingyas in Myanmar led to their exodus. The discriminatory policies of the Myanmar government in the Rakhine State caused hundreds of thousands of Rohingya to flee since the late 1970s. Their plight was aggravated by the lack of response from many of Myanmar's neighbours, who were reluctant to take in these refugees for fear of a migrant influx they feel incapable of handling. According
Malaysia’s role in Managing Refugee Crisis

In May 2015, amid international pressure, Indonesia and Malaysia offered temporary shelter to thousands of migrants. Malaysia launched search-and-rescue missions for stranded migrant boats, while Thailand agreed to halt pushbacks. Myanmar’s navy also conducted initial rescue missions at the same time. Similarly, in June 2015, several secret mass graves were found by Malaysian police along the Thai border in the town of Padang Besar. In its 2014 Trafficking in Persons Report, the US State Department downgraded Thailand to Tier 3 as a source, destination, and transit country for men, women, and children who are subject to trafficking. As of March 2017, Malaysia has accommodated 134,175 refugees and asylum seekers with majority being Rohingyas (Mark & Peter, 2015).

Syrian Refugees in Malaysia

The UNHCR estimates that Syria’s bloody five-year civil war has created more than 4.6 million refugees, while another 7.6

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**Figure 1.** Rohingya and Bangladeshi migrant movements 2014-2015
million people have been displaced within the country. The overwhelming majority have sought refuge in Turkey, Lebanon, Jordan, and other countries in the Middle East. However, others, especially those who have some money, travelled all the way to Southeast Asia, and the Malaysian office of the UN’s refugee agency said it had registered 822 Syrians by the end of December 2013, compared with 285 in October, and about 8 before the war started. Refugee activists who work in close collaboration with the community say that because of the length of time it takes to register the refugees officially, the actual number is probably even higher. Having recognised that, in 2015, the local office of UNHCR thanked the Malaysian government for not forcibly returning any Syrian asylum seekers to their homeland (Kate, 2014). The Malaysian Social Research Institute works with what it calls minority refugees including Afghans, Somalis, and the new arrivals from Syria. In October 2015, during his speech at the 70th United Nations Assembly, Prime Minister Najib Razak promised to welcome 3,000 Syrian refugees in three years to help with the refugee crisis. A few months later, Zahid Ahmad Zahid, the Deputy Prime Minister and Home Minister, declared that five Syrian refugee families had been brought into the country under the first phase and that the government was now in the process of bringing in the second group of Syrian migrants. He explained that the government will give priority to Syrian students in Malaysia who want to bring their families and families of Syrian workers working in Malaysia (Kate, 2014). Zahid also said the Syrian immigrants would not be granted a Malaysian passport, but emergency travel documents as they do not have international passports (Bernama, 2016). Ahmad Zahid also launched the Syria Immigrant Humanitarian Fund with the collaboration of nine non-governmental organisations. Due to concerns from certain quarters, Zahid further downplayed the danger Syrians may cause if terrorists found their way through the refugee umbrella; he pledged that thorough screening will be done with the cooperation of Interpol and the UNHCR to ensure they are bonafide refugees (Bernama, 2016).

RECOMMENDATIONS

Even though Malaysia has strict immigration rules that prohibit illegal entry into the country including severe punishment for anyone found guilty of doing so, exceptions were granted on humanitarian grounds. It is also important to note that by allowing these refugees to stay, the state is not playing an active role in protecting them or their rights. Instead, the UNHCR (since 1975) and other NGOs, including religious-based organisations, have played a crucial role along with the Malaysian government to ensure protection of refugee rights. Malaysia successfully handled a major refugee crisis almost 30 years ago in what was known as the international Comprehensive Plan of Action (CPA) for Indochinese Refugees. An exodus of Vietnamese refugees to Malaysia in the 1970s and 1980s led to the drafting of the CPA in Kuala Lumpur in March
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1989, and its subsequent adoption at the international conference in Geneva in June of the same year (Coutland, 2004).

The CPA was set up to not only stop the flow of boat people from Vietnam, Cambodia, and Laos but also provided a framework for refugee status determination for asylum seekers from these countries and their voluntary repatriation and resettlement to third countries. Consensus was achieved between the countries of origin, host countries of the first asylum, including Malaysia, and third countries. Under this agreement, Malaysia accepted around 250,000 boat people from Indo China who were settled at the Pulau Bidong refugee camp in Terengganu. Malaysia provided temporary protection to these refugees at that time because of coordination with third countries and countries of origin, while those sheltered at refugee camps in Malaysia were processed by UNHCR to determine their refugee status. Once they were proven to be entitled to the refugee status, third countries such as Australia, the United States, and the European States resettled them. The international consensus among different countries and the leadership of the UNHCR were key factors in this successful example of what was termed burden-sharing in solving major refugee issues (Assalam, 2015).

This study suggests that Malaysia officially recognises the presence of refugees within its territory by regulating the group and facilitating enjoyment of their rights. By not recognising the rights of refugees, such as their right to education, many of these refugees may become illiterate and indulge in other social problems. Education has always been considered a key factor to guarantee social stability of a community; it is also vital to stop violating human rights of refugees. By deporting refugees, Malaysia is contributing to human trafficking and smuggling, since traffickers are known to take advantage of refugee deportations. Since its economy relies so much on migrant workers, the country should allow working age refugees to join the local workforce after adequate screening. This will make it easier for the government to weed out economic migrants. It is timely Malaysia devises a specific legal and institutional framework to deal with refugees in the country. The law should also require the establishment of an independent refugee screening mechanism which is subject to appeal and judicial review. It was recently reported that syndicates were selling falsified refugee identity cards. As a result, the UNHCR in Malaysia launched a tamper-proof identity card on 21st May 2016. Its representative in Malaysia, Richard Towel, believed that with enhanced security features, it will not only give refugees protection but also to ‘soften’ Malaysia’s approach to the refugees, namely enabling the latter to secure jobs and ensuring proper education for their children, which hopefully would lead to stability in their lives. Towel also had indirectly appealed to Malaysian authorities to accept refugees already in Malaysia, since they viewed Malaysia as their final destination rather than a transit point. As of April 2016, there were 154,140 refugees
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and asylum seekers registered with UNHCR in Malaysia. More than 90% of them were from Myanmar, while the rest were from Sri Lanka, Pakistan, Somalia, Syria, Iraq, Yemen, Palestine, and Iran (Rashvinjeet, 2016).

However, this appeal did not go well with Malaysian authorities. Deputy Home Minister, Nur Jazlan, criticised UNHCR for pressuring Malaysia to take greater responsibility arguing that Malaysia had accommodated the refugees based on UNHCR’s request, but only on the understanding that Malaysia was a transit country and not a final destination for refugees as UNHCR had tried to suggest. Jazlan further asserted that UNHCR’s statements ran contrary to the spirit of the Federal Constitution as well as the sensitivities of Malaysians (Tasnim, 2016).

CONCLUSION

Malaysia’s ability to address the refugee situation would be more fruitful if all the ASEAN member states extend their cooperation to deal with this humanitarian crisis. The association does have a precedent in effectively dealing with regional disasters, for instance, it played a leading role in the humanitarian response to Myanmar’s Cyclone Nargis in 2008. Nonetheless, recommendations contained in the report of ASEAN Parliamentarians for Human Rights should be adhered to, such as expanding the mandate of the AIHCR to include country visits, inquiries, complaints, and emergency protection mechanisms, and ensuring adequate independence and staffing support. This could help to improve the domestic plight of refugee problem, and the region’s overall limited capacity to address human rights. Nevertheless, it is hoped that the current step to issue the new refugee card in Malaysia will improve the situation.

The challenges lie not only in managing the increase in the number of refugees and other persons of concern who fall under its mandate but also because UNHCR’s duty of screening asylum seekers on behalf of or in lieu of a state’s machinery is tainted with issues of credibility and fairness. There are also problems when states completely ignore UNHCR’s work while letting the office carry out status determination of the refugees. Simultaneously, UNHCR has no outright control over state matters, which makes it effort less effective. Even with direct assistance from the UNHCR, refugees and asylum seekers find themselves with an uncertain legal status; identification papers are not recognised. Although UNHCR is allowed to operate in Malaysia to process applications for refugee status, the actual weight attached to UNHCR identity papers or documentation is highly questionable. In other words, even though the authorities accept the UNHCR’s presence, their powers are not recognised.

Malaysia has a good track record accommodating refugees but it remains unrealistic for Malaysia to host several thousand refugees without any legal stand. On the other hand, the country’s efforts have not received due recognition from the UNCHR, as it is not a signatory to the 1951 Convention on Refugees (Human
Rights Watch, 2004). Therefore, whether Malaysia keeps the status quo or not remains to be seen. Nevertheless, Malaysian authorities need to consider every aspect, most importantly, national interest, and conformity with domestic law before finalising a decision to grant these migrants a formal refugee status.

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An Analysis of Consensus Ad Idem: The Malaysian Contract Law and Shari’ah Perspective

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ABSTRACT
Consensus ad idem (meeting of the mind), is a common law doctrine that requires all parties to the contract to understand and accept the commitments and terms outlined in the agreement. Under the Contracts Act 1950 coercion, undue influence, fraud, misrepresentation and mistake vitiate consent. Equally, under the Shariah, consent or redha constitutes the primary element of a contract. A contract entered into without the consent of contracting parties is either void or can be invalidated; depending on the extent of which such consent is vitiated. This paper discusses factors that vitiate consent under the Contract Act 1950 and compare them with the Shari’ah principles. The objective of this article is to identify whether there is a divergence regarding the understanding of the concept of consensus ad-idem under the Malaysian law and the Shari’ah with the intention of identifying the degree of harmony between the two. Analysis was based on secondary data, namely contract law doctrines, statues and comparing different schools of thoughts in defining Shari’ah principles related to this issue.

Keywords: Consensus Ad idem, Contracts Act 1975, redha, shariah

INTRODUCTION
Consensus ad idem, is a concept that requires contracting parties to have a common intention to enter into binding commitments which are manifested through the expression of offer and acceptance (Baharum, 1999). It
is important that the contracting parties must agree on the same issues in the same manner that their consent is deemed to be undivided and absolute (Razali, 2010, p. 17). Similarly, under the Malaysian contract law, the presence of consensus ad-idem determines the validity of contractual obligations. Under the Contracts Act 1950 (section 14), if a contract is entered into under the influence of certain factors, i.e. coercion, undue influence, fraud, misrepresentation and mistake, the initial consent is deemed to be vitiated.

This article begins with an explanation of the doctrine of consensus ad-idem as understood in Malaysian law before it continues with a deliberation of the corresponding concept of redha under Shari’ah. The article then continues with a deeper analysis of the vitiating factors both under the Malaysian law and Shari’ah. It also compares the two different concepts under the Malaysian law and Shari’ah before summarising and concluding the paper.

THE DOCTRINE OF CONSENSUS AD-IDEM

Consensus ad-idem as a concept has been incorporated into s13 of the Contracts Act 1950, which defines ‘consent’ as when two or more persons agree upon the same thing in the same sense. Before such codification, the concept has been elucidated through judicial pronouncements. In Household Fire and Carriage Accident Insurance Co Ltd v. Grant (1879) 4 Ex D 216, Lord Justice Thesiger noted that ‘for a binding contract to exist, the minds of the parties should be brought together at one and the same moment.’ Similarly, in Carlill v. Carbolic Smoke Ball Company [1893] 1 QB 256, Bowen LJ said that an acceptance of an offer made ought to be notified to the person who makes the offer for the two minds to come together. The US Supreme Court in Baltimore & Ohio R. Co., v. United States 261 67 L. Ed. 816 (1923) correspondingly submitted that the founding basis of an agreement lies on a meeting of minds between the contracting parties.

From these judicial observations, the overwhelming conclusion is that without consensus ad-idem, a contract is deemed impaired and its validity prejudiced.

Consent under Shari’ah

The principle that an agreement must be based on mutual consent has been expressively stated in Surah An-nisa’ verse 29, which states that Allah prohibits the taking of property belonging to another person wrongfully, and even in a business based on a contract.

The consent of contracting parties may be expressed through some form of sighah such as words, signs, and actions and in writing. In general, Muslim jurists agree sighah must be manifested in a verbal form. In the absence of that, sighah in the form of clear signs understood by both parties is equally acceptable. Imam Al-Khatib Al-Syarbini opines the expression of sighah through signs made by a dumb person is equal to verbal sighah in times of emergency (Al-Syarbini, 2:17). However, according to the majority of jurists, sighah expressed by
Analysis of Consensus Ad Idem

signs, is considered invalid for contracting parties who are not mute. The Maliki jurists, however, recognise the expression of sighah through gestures, regardless of whether contracting parties are dumb or otherwise (Al-Mausuah, 1994, 30: 211).

With regards to sighah through action, both Hanafi and Hambali jurists accept its validity (Al-Mua’thah, Al-Taa’thi or Al-Murawadah; Al-Kasani, 5:134 & Fath Al-Qadir, 5: 177). A classic example is when a buyer gives money to the seller and in exchange, the seller hands over the goods. As trading money with goods is customarily made, especially for simple purchases, such a transaction is considered to be valid by ‘urf’ (Al-Zuhayli, 1885. 4: 99 & Al-Kibbi, 2002: 57). Shafie jurists however dissent by refusing to accept sighah through actions as consent here is concealed and not shown explicitly through words (Al-Syarbini, 2: 3 & Al-Syiraziyy, 1: 257).

The most explicit is an expression of sighah in writing, as reducing the contract into a piece of an agreement is encouraged in the Quran (Surah Al-Baqarah verse 282) that an agreement should be in writing. Expressing sighah in an online transaction has been provided for in the Shari’ah Standards of the Accounting and Auditing Organisation of Islamic Financial Institutions (AAOFI, 2010). Paragraph 5 of Shariah Standard No 38 provides that the “expression of offer and acceptance in online contracts can be in any form that indicated the consent of the two parties to conclude the contract”. Similarly, Bank Negara Malaysia Shariah Standards and Operational Requirements, in its Murabahah, Mudarabah, Musyarakah, Tawarruq and Istisna Standards (Bank Negara Malaysia [BNM], 2016), in paragraph 12.5 provides that “the murabahah contract shall be entered into through an offer and acceptance between the contracting parties”. Paragraph 12.6 further provides the offer and acceptance may be expressed by appropriate documentation or by any other methods accepted by customary business practice (urftijari) which do not contravene Shariah principles.

From the foregoing, it would appear that both civil and Shariah law requires the existence of consensus ad-idem in any given contract. The discussion below will elucidate factors that may vitiate consent in a contract and render them to be inoperative.

ANALYSIS OF FACTORS VITIATING CONSENT UNDER CONTRACT LAW AND SHARIAH

A contract that is entered into freely may be binding, but if it is found that the initial consent has been impaired by certain factors, such contract may be revocable. These factors weaken the free choice of the parties, and in such instances, it could be said that the freedom of the contracting parties has been prejudiced. Under Contracts Act 1950, several factors have been identified to damage consent, such as coercion, undue influence, fraud, misrepresentation and mistake. This paper will analyse each factor, followed by its elaboration from the Shariah and civil law perspectives to point out their similarities and differences.
Coercion

Section 15 of the Contracts Act 1950 provides that coercion can occur in two ways. First, a party to the contract commits or attempts to commit any act forbidden in the Penal Code. Second, the party is unlawfully detained or has threatened to detain the property of the other with the intention of pressuring the latter to enter into an agreement. The effect of a contract tainted by coercion is voidable (Section 19). Since coercion under Section 15 merely recognises the above two instances of persuading somebody by using force or threats, it is submitted that there are many other forms of arm-twisting strategies not covered. For example, one may resort to the use of physical force to pressure the other to agree. Such force can be considered as an assault and hence, a crime under Section 351 of the Penal Code if that party commits the conduct fully intending to cause injury or hurt. This mental element or mens rea is what distinguishes between a criminal assault and tortious assault (Cheong, 2013, p. 219). For the threats to impair consent, it would have to be accompanied with the required mens rea.

Further, cases such as Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd & Ors [1996] 4 MLJ 331; Chin Nam Bee Development Sdn. Bhd. v. Tai Kim Choo [1988] 2 MLJ 177; Perlis Plantations Bhd v. Mohammad Abdullah Ang [1988] 1 CLJ 670; and Mohd. Fariq Subramaniam v. Naza Motor Trading Sdn. Bhd. [1998] 6 MLJ 193, are examples which show the difficulty the courts face in defining compulsion or intimidation that does not involve physical threat or threat to property. A clear example is in the context of ‘economic duress’ where parties are compelled to make decisions due to some pressing financial situations as illustrated in Perlis Plantation and Mohd. Fariq. In both these cases, the courts downplayed financial pressure as so compelling that it impaired the consent of the parties. In economic pressures, the parties can easily walk out of the transaction if he/she wants to and find another offer that is less damaging and more lucrative monetarily (Ayus, 2009).

Shari’ah Principles. According to Mu’jam Lughah Al-Fuqaha’, ikrah can be defined as an act of forcing someone to do or abstain from doing something against his own free will (Qal’ajiyy, 1988: 85; Al-Nasafi, 2: 307; Article 948 of Majallah Al-ahkam Al-Adliyyah; Ali Haidar, 9: 10). More specifically, Mustafa Al-Zarqa defines ikrah as an intimidating someone through physical injury, or threat to do or abstain from doing something (Al-Zarqa’, 1998, p. 452).

Wahbah Al-Zuhayli holds the view that coercion happens when someone forces the other to do something against his free will, where such actions will not be performed in the absence of such coercion. Accordingly, Al-Sarakhsi asserts that the act of coercion impairs the free will of the contracting parties (Al-Zuhayli, 2003, p. 315). On that premise, an act of ikrah can be committed either through words or actions, whether the intention is to cause actual injury or anything that may lead to such harm.
In that respect, the scholars of Hanafi School further classify coercion into two types: total coercion (mulji’) and partial coercion (naqis). Total coercion occurs when an act of intimidation or threat causes death or severe bodily injury to its victim with the view of pressuring the other to agree to a particular undertaking. On the other hand, a partial coercion occurs when the threat is not life threatening or causing serious bodily injury. In such an instance, if the victim tolerates the suffering and still has the right to choose, then the contract is voidable (Al-Kasani, 9: 4479; Al-Samarqandiyy, 3: 273 & Al-Taftazaniyy, 2: 196). However, majority of Muslim scholars do not differentiate between total and partial coercion when both have the same effect, either leading to murder, amputation of limbs, imprisonment, beating, etc. According to Al-Tajwa Al-Iklil, the line between the two types of coercion is where the act causes injury either through assault, hurt and others (Al-Mawaq, 4: 45). The effect of a contract entered into through coercion is that such conduct vitiates the initial consent and the affected party has a right to affirm or avoid the contract (Al-Taftazanyy, 2: 196).

Undue Influence

Section 16 of the Contracts Act 1950 provides that undue influence occurs when one party who is said to be a dominant position, uses it to take an unfair advantage over the other by forcing him/her to enter into a contractual undertaking. The essence of ‘undue influence’ is the existence of the ‘dominant relationship’ which is further explained in Section 16(2) as:

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other;
(b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected because of age, illness, or mental or bodily distress;
(c) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

The effect of an agreement tainted by undue influence is spelt out in Section 20 of the Contracts Act 1950 to be voidable at the option of the party whose consent was so caused. In interpreting section 20, the Malaysian courts have been strict in insisting that all the elements under such section to exist for it to be operative. Where parties cannot prove the existence of the dominant relationship or unfair advantage the claim of undue influence will not be made up, such as the case of Polygram Records Sdn. Bhd. v. The Search [1994] 3 MLJ 127. Where parties are in a ‘fiduciary relationship’ the possibility of dominance is presumed. The term ‘fiduciary relationship’ refers to a bond where a party hold the
highest duty of care and trust to the other (Mohd, 2000). The typical example is the fiduciary relationship between a trustee and beneficiary. In such a situation, one person places complete confidence in the other with regards to the particular transaction or affairs. It is his legal, ethical and moral duty to undertake his responsibility in the best interest of the other and not to gain personal advantage over the other.

In a UK case, Barclays Bank plc v. O'Brien & Anor [1993] 4 All ER 417, Lord Browne-Wilkinson further divided fiduciary relationship further into two, actual and presumed undue influence. The decision of Barclays Bank plc was endorsed in Malaysia through Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 26. In this case, although an organiser of an association is not considered strictly as falling under a fiduciary relationship with members of the association, he/she could easily influence the others and may have taken advantage of the close relationship to attain personal gains. The relationship where one can assume absolute trust and confidence in the other has been delineated through case law in the UK and Malaysia. In Southern Bank Bhd v. Abdul Raof bin Rakinan [2000] 4 MLJ 71 though a husband and wife relationship is not typically classified as a fiduciary relationship, the court nevertheless accepted the possibility of dominance. Further, in Polygram Records Sdn. Bhd v. The Search [1994] 3 MLJ 127, a band manager and singers under his care were not considered to be falling within a relationship of ‘fiduciary’ that requires the highest duty of care.

The upshot of all these cases is that the Malaysian courts are cautious in arriving at a determination of ‘undue influence’ that could impair the validity of contractual transactions.

**Shari’ah Principles.** Sanhuri stresses the importance of two elements in a contract, i.e. freedom to choose (hak al-khiyar) and consent (redha) (Nabil, 1990, p. 108). The term ‘redha’ here implies the necessity to perform an act with the feeling of ease, purity and good faith. The majority of scholars describe redha as an intention to do something without any force or compulsion (Ibn Majah, 2: 737 & Mausu’ah, 30: 220).

According to Al-Zarqa’, undue influence is categorised as aib or something that may impair consent (redha) or freedom of choice (hak al-Khiyar) (Al-Zarqa’: 449). Al-Zuhayli posits that any defect in consent (uyubar-ridha) derived from unwillingness or incomplete intention to enter into a contract (Al-Zuhayli, 4: 212) and includes defects in will (uyubar-ridha) such as fraud (tagrir/tadlis), mistake (Ghalat), coercion (ikrah) and undue influence. On the other hand, some other jurists subsume the discussion of undue influence under the category of fraud or Al-Ghabn. The term Al-Ghabn refers to all situations where there is no disparity of power between the contracting parties. (Al-Asy’ari, 2015).

Article 97 of Majallah Al-Ahkam Al-Adliyyah further provides that any property that has been usurped through theft undue
influence or mistake must be returned to its original owner. The obligation to return the goods exists whether it is still in good shape or the in the possession of the influencer (Mejelle, 1967).

**Fraud and Misrepresentation**

Section 17 of the Contracts Act 1950 provides that the act of ‘fraud’ occurs when one party (or its agent) commits one of the following acts:

(a) The suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) The active concealment of a fact by one having knowledge or belief of the fact;

(c) A promise made without any intention of performing it;

(d) Any other act fitted to deceive; and

(e) Any such act or omission as the law specially declares to be fraudulent.

Section 17 in its Explanation explains further that the silence of a party from the disclosure of certain factual information does not render the act as an act of fraud. An obvious example of this is given in Illustration (a) where A sold an unsound horse in an auction. A does not disclose the fact that the horse is unsound and such is not considered in law as a fraud. An illustration of this principle can be seen in *Lau HeeTeah v. Hargill Engineering Sdn. Bhd. & Anor* [1980] 1 MLJ 185, where the owner of a vehicle rented it to another person without informing the buyer of two relevant information; i.e. of its manufacturing year and that it has been involved in an accident. The Federal Court in its judgement observes that in law, there is no active duty on the seller to inform all the information about the vehicle to the buyer. The seller by keeping quiet about any defects in his product is not considered as committing fraud under Section 17 unless he is obligated to reveal the truth about such product. Illustration (b) provides further light to this, where Buyer B is the son of Seller A. In this situation, the father and son relationship imposes a duty on Seller A to reveal every single fact about the goods, even defects, to buyer B.

An exception to the general rule is when the party whose consent was so caused had the means of discovering the truth with ordinary diligence (Exception to section 19) This exception imposes a duty on the buyer or the offeree to examine the goods by himself or ask questions to seek the truth and not to only depend on the information given by the seller. This concept is known at common law as caveat emptor and is popularly defined as ‘let the buyer beware’. The rule of caveat emptor contravenes the Shariah as the agreement is binding even though the seller is not telling the truth and thus, he or she escapes from any responsibility. In principle, it is the duty of the seller to reveal every single detail about the goods sold and not up to the buyer to check the quality of the goods before a purchase is made.

**Shari’ah Principles.** Wahbah Al-Zuhayli has discussed fraud and misrepresentation extensively under the topic “Ghabnma’a
Al-Taghrir”. ‘Ghabn’ literally means Al-Naqş (reduction) or the difference in sale and actual market price. Taghrir refers to the fraudulent act by one party either by words or through conduct with the intention to induce someone to enter into a contract (Al-Zarqa’: 463; Al-Zuhayli, 4: 221 & Al-Mausu’ah Al-Fiqhiyyah, 20: 148). Ghabn may be divided into two categories, namely ghabnyasiir (minor fraud) and ghabnfahisy (excessive fraud). A minor fraud occurs when the difference in price is not so excessive that it amounts to not more than 10% of its actual value. A minor fraud does not necessarily cause the contract to be void since the amount is negligible. However, the Hanafi scholars assert that in some instances, such as contracts entered into by a person nearing death (marad al-maut) or the transaction of properties of the orphans, despite the difference in price being minor, the transaction could be avoided to safeguard the interests of the deceased and the orphans.

Accordingly, ghahnfahish occurs when a transaction involves an unreasonably huge difference in price, or it involves different goods than what was initially agreed to by the parties. On this point, some indicators can be used such as (1) the difference in the sale price is more than one-half or 50%, (2) for livestock, the actual number of goods sold is more than 1/10th and (3) for immovable property, the difference of value constitute more than 1/5 from its market value (Al-Zuhayli, 4: 221 & Al-Mausu’ah Al-Fiqhiyyah, 31: 139).

Hanafi scholars are of the view that excessive fraud in a contract does not result in the invalidation of the contract unless the goods received was not up to the expectation of the buyer or the extent of the fraud was so vivid and clear. For example, when a developer of a house advertises the house as a two-storey building but it turns out to be only a single storey house. If such an event, the contract may be rescinded (Al-Durr Al-Mukhtar, 4: 166). Hambali scholars reiterate that excessive fraud in a contract render it to be voidable regardless of whether the fraud was clear or otherwise (Ibn Qudamah, 4: 212).

The Hanafi and Shafie scholars view excessive fraud affect the validity of the contract. Article 165 of Majallah Al-Ahkam Al-Adliyyah explains that an act of extreme fraud occurs when: (1) in the context of goods – if the fraud is more than one tenth; and (2) in the context of livestock – if the fraud is more than one-fifth or of a higher amount. Article 357 of Majallah Al-Ahkam Al-Adliyyah further highlights that if one party in a contract finds the other to have defrauded in an excessive manner, the victim may rescind the contract. The Maliki and Hambali scholars have the same opinion where a contract influenced by excessive fraud may be voidable especially in instances when the victim is less experienced in such transactions compared with the other party. (Khadduri & Liebesny, 2008, p. 193).

Hambali scholars further divide the act of excessive fraud into three:

(1) Talaqa Al-Rukban: when one blocks traders who are carrying goods to
be sold in the city in the middle of the journey in order to buy them at a lower price. This act is forbidden or haram and in such an instance, the seller is given the right to opt (khiyar) whether to affirm or avoid the contract based on the clear tenor of a hadith of Rasulullah (s.a.w) reported in Sahih Bukhari, which means to the effect: “You should not stop traders before they reach the market”. This view is also supported by scholars from the Shafie School (Ibn Qudamah 4: 212, Syarbini, 2: 36 & Muhazzab, 1: 292).

(2) Al-Najsyu: when A raises the price in an auction with no intention of buying but only to induce B to offer a higher price. According to a few Shafie and Hambali scholars, B is entitled to an option to rescind the contract (khiyar) if he was not aware that A’s an intention was only to deceive others (Ibn Abd Al-Bar Al-Qurthubi, 2: 739, Al-Mawardi, 5: 343, Al-Syabini, 2: 37 and Al-Hijawi 2: 91). On the other hand, some Shafie and Hanafi scholars perceive that such a person does not have the right to option (khiyar) and the contract remains valid (Ibn Qudamah 4: 212, Ibn Nujaim, 6: 107, Syarbini, 2: 37 & Muhazzab, 1: 291).

(3) Al-Mustarsil: where A is ignorant about the value of an asset or goods but buys it solely based on trust (Amanah) he places on B. After the purchase, A finds he had been defrauded. In this instance, A has the right to option (khiyar), and he is free to either affirm or rescind the contract (Ibn Qudamah 4: 212).

Mistake

The effect of a contract tainted by a mistaken assumption by parties has been explained by Lord Atkin in Bell v. Lever Bros Ltd [1932] AC 161 to ‘negate or in some cases to nullify consent’. However, the effect of bilateral mistake is void under section 21, but not voidable for unilateral mistake under section 23. On this point, Liquat is of the view that a mere unilateral mistake of fact by one party could not impair the validity of the transaction. The reason why the law treats unilateral mistake as being negligible is due to the principle of caveat emptor which has been developed in the common law and endorsed in the Contracts Act 1950 (Niazi, 1991, p. 106).

The difference between a unilateral and bilateral mistake highlights the importance of identifying how major the mistaken assumption is; either it is committed by both parties or only one party. In this regard, Sinnadurai (2004), asserts that the common law concepts derived from Cundy v. Lindsay (1878) 3 AC 459, HL and Lewis v. Averay [1972] 1 QB 198, CA to be applicable in Malaysia. In these cases, where a unilateral mistake is with regards to the identity of the person, this may be a major operative mistake while the mistake as to the attribute of a person may not be an operative one.
Shari’ah Principles. The Maliki scholars are of the view that a unilateral mistake may render the contract voidable (Al-Hattab, 1992). However, the majority of scholars’ view that even in the case of unilateral mistake, the contract is considered to be void and the mistaken parties may avoid the contract. If the mistaken party affirms the contract, then he loses the right to avoid the contract in the future. In the opinion of the Muslim jurists, consent derived in this manner is defective since if the victims know that they will be cheated or defrauded, they will surely not agree to sign the contract (Rayner, 1991, p. 178).

The Securities Commission Shariah Advisory Council (2007) in its resolution stated that ghalat takes place when the assumption made by a buyer about what he wants turns out to be otherwise, and this assumption is the reason why the buyer carried out the sale and purchase ‘aqd’. In such a transaction, ghalat can affect the aqd and causes it to be annulled if it pertains to the type and feature of the traded object (Securities Commission, 2007). Type refers to the genus of the goods while feature refers to the quality of the goods. The example given by the Securities Commission is in the context of type of traded goods, in this case if it gold or gold-plated and feature refers to whether the good is of a famous brand or a common one.

CONCLUSION

Comparing the factors that vitiates consent under the Contracts Act 1950 and the juristic opinions of the Shari’ah pointed to a substantial degree of harmony between them. However, the position relating to ‘caveat emptor’ could be revised to be fairer to the consumers. Buyers should not be allowed to get away from defective goods merely by keeping silent. Such a stand goes against the principle of justice in a commercial transaction. The emphasis on ‘mutual consent’ or redha must constitute the thesis of any commercial transaction. Its importance as the keepers of the free will of the contracting parties means that any activities that impair such mutual consent will prejudice the validity of the contract. Ultimately, the difference in the effect of such vitiating factors, either it is void or voidable may result in negligible consequence as long as the affecting parties are given the option to affirm or rescind the contract. At that instance, the parties are given a second chance to determine, with certainty, whether they indeed consented to the contractual undertaking or not, knowing the actual situation. It is indeed a true testimony of the concept of freedom of contracting parties, which is upheld by both the Contracts Act 1950 and the Shari’ah.

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A Comparison of Constitutional Adjudication Institutions in Malaysia and Indonesia

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ABSTRACT
The tyranny of majority against the minority is prevented or minimised by constitutional safeguards enforced primarily by the court. This is one of the reasons why Malaysia and Indonesia adopted the doctrine of constitutional supremacy when they achieved independence in 1957 and in 1945 respectively. This paper compares constitutional adjudication as one of the mechanisms of constitutional democracy in both countries. In spite of their geographical proximity and having similar cultural and historical heritages, the two countries have fundamentally different constitutions. Malaysia follows the common law model where superior courts adjudicate constitutional issues while Indonesia has adopted Kelsenian model by establishing a separate new court, namely the Constitutional Court. This is a qualitative research that examines the role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed light on constitutional democracy of the two countries, but also influences the process of democratic consolidation in the region.

Keywords: Adjudication, constitution court, democracy, Kelsen

INTRODUCTION
Malaysia and Indonesia adopted the doctrine of constitutional democracy when they attained independence in 1957 and in 1945 respectively. According to this doctrine, Parliament represents the will of the people but it is bound by the constitution as supreme law of the nation. In August 2003, Indonesia by amending its 1945 Constitution established the constitutional court. Its emergence was a result of political reform and judicial history of the country. In Malaysia, the superior courts are institutions...
which facilitate the citizen to bring constitutional adjudication to the courts. The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realising the concept of constitutional democracy.

METHOD
This is a qualitative research that focuses on the establishment, role and power of constitutional adjudications institutions in Indonesia and Malaysia. The development and experiences of these institutions will shed light on the workings of constitutional democracy in the two countries, and the process of democratic consolidation in the region.

RESULTS AND DISCUSSION
The Conceptual Ground of Constitutional Democracy and Constitutional Adjudication
Constitutional adjudication is much older and more deeply entrenched in the United States (US) than in Europe. Judicial review as a part of constitutional rights has been implemented continuously in the US since the Supreme Court’s landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803). Constitutional review in Europe is largely a post–World War II phenomenon (Gamper, 2009; Rosenfeld, 2004). Since the end of World War II, ‘a new constitutionalism’ has emerged and widely diffused in Europe. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional courts have been charged with ensuring the normative superiority of the constitution. These courts can be found in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978) and Belgium (1985) (Sweet, 2000).

Hans Kelsen shows the origins of judicial power to review legislation is from the constitution which is the supreme law of a country. He emphasises that supremacy is not real unless there is review. Without review, the constitution is not truly binding (Troper, 2003). The constitution is safeguarded by the court which necessitates judicial review when the need arises. The supremacy of the Constitution entails judicial supremacy. The courts determine the constitutional standards and examine whether the regimes can meet the standards (Tremblay, 2005). Judicial Review is justified for its role in correcting ‘malfunctions’ in democratic government that entrench the powerful and disregard minorities (Stone, 2010). Judicial review needs to be set in the context of mechanisms which seek to achieve broader political accountability (Woolf, Jowell, & Le Sueur, 2007).

Constitutional Democracy and Constitutional Adjudication in Malaysia
The doctrine of separation of powers involves a system of “check and balance”. Each branch of government is given specific powers of oversight (check) over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a
balance of power between the three arms of government and to prevent one branch of government from usurping power or taking over functions from the other branches of government. In *Loh Kooi Choon V Govt. of Malaysia* [1977], it is stated that:

“The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that ... no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government.”

Article 4(1) of the Malaysian Constitution proclaims the Constitution to be the “supreme law” of the Federation and that a law which is inconsistent with the Constitution “shall, to the extent of the inconsistency, be void”. Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary. The judiciary exercises the potent power of judicial review which is described as ‘the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice’. The court has the power to strike down the law, to overturn the executive act/decision, or order a public official to act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law of a free and democratic society.

**The Framework of Constitutional Adjudication in Malaysia: The Superior Courts and the Federal Court of Malaysia**

The system of the Government in Malaysia is closely modelled on Westminster Parliamentary system with its own peculiarities. Malaysia has a written Constitution that spells out the function of the three branches of the Government, namely the Executive, Legislative and Judiciary. Article 39 of the Federal Constitution vested the executive authority of the Federation in the YDPA (Yang di-Pertuan Agung) and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation to the Parliament while Article 121 deals with the judicial power of the federation. Judicial Review is an important tool for the judiciary’s exercise of check and balance on the Legislature and the Executive.

The judicial power of the Federation is contained in Part IX of the Constitution. The country, although federally constituted, has a single-structured judicial system consisting of two parts - the superior courts and the subordinate courts. In the hierarchy of courts, the subordinate courts comprise the Sessions Court and Magistrates Court while the superior courts comprise the High Court, Court of Appeal and the Federal Court. The Federal Court of Malaysia is the highest judicial authority and the final court of appeal in Malaysia.

The Federal Court, earlier known as the Supreme Court and renamed the Federal Court vide Act A885 effective from June 24, 1994, stands at the apex of this pyramid.
Before January 1, 1985, the Federal Court was the highest court in the country but its decisions were further appealable to the Privy Council in London. However, on January 1, 1978, Privy Council appeals in criminal and constitutional matters were abolished and on January 1, 1985, all other appeals i.e. civil appeals except those filed before that date, were abolished. The setting up of the Court of Appeal on June 24, 1994 after the Federal Constitution was amended vide Act A885 provides litigants one more opportunity to appeal. Alternatively, it can be said that the right of appeal to the Privy Council is restored, albeit in the form of the Federal Court.

In Malaysia there is no specialised Constitutional Court. Most constitutional cases begin at the High Court. In certain circumstances, constitutional cases are heard only by the Federal Court.\(^1\) The Section 20 of the Courts of the Judicature Act deals with reference of constitutional question by subordinate court to the High Court. Section 30 provides ‘Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court’. Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen. Section 84 of the Courts of the Judicature Act which deals with reference to constitutional question by High Court to the Federal Court states that ‘where in any proceedings in the

\(^1\) Section 20 of the Courts of the Judicature Act.

superior courts have the jurisdiction to hear constitutional cases. The decision of the Federal Court is the most important because it is the highest court in the land. Being the court at the apex of the hierarchy in the common law system of Malaysia the Federal Court plays a dual role - as the most authoritative interpreter of the Constitution and also as the highest appellate tribunal relating to all matters. Therefore, the Federal Court can be regarded as the constitutional court of the country. It also plays a pivotal role in the defence of fundamental liberties as provided in Part II of the Constitution.

The jurisdiction of the Federal Court is spelt out in Article 128. It has an exclusive jurisdiction in regard to any question whether law made by Parliament or by the Legislature of a State is invalid; the Legislature of the State has no power to make laws. It also has an overriding power related to disputes between States or between Federation and the State. It also has jurisdiction over the lower court. The Federal Court is also conferred the advisory jurisdiction under Article 130 of the Constitution under which the Yang di-Pertuan Agong may refer to the Federal Court any question as to the effect of any provision of the Constitution which has arisen or appear to him likely to arise. His Majesty has done so only once in The Government of Malaysia v. Government of the State of Kelantan [1968].

High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
Review of Primary Legislation/Check on the Legislature in Malaysia. Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the “supreme law” of the Federation and that a law which is inconsistent with the Constitution “shall, to the extent of the inconsistency, be void”. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. The court in Malaysia can declare invalid legislation enacted by the Federal Parliament or the legislature of a State. The Federal Court in Ah Thian v. Govt. of Malaysia [1976] had explained the legal position in detail. Under the Constitution, a written law may be invalid on the following grounds:

1. in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
2. in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
3. in the case of State written law, because it is inconsistent with Federal law, article 75.2

The Court's power to declare any law invalid on the second and third grounds is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual. But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution. The procedure and power to declare law made by the legislature invalid based on ultra vires are stated in art. 4(3) and (4) which need to be read together with article 128(1).

The procedure and power to declare law made by the legislature invalid based on ultra vires are stated in art. 4(3) and (4) which need to be read together with article 128(1). 3

Order 53 must be invoked when the defendant or one of the defendants in the action is the government or a public authority. It has been said that the purpose of Order 53 is “to provide certain protections to the public body or authority when their public act or decision is being challenged”. The current Order 53 came

Review of Action and Decision/Check on the Executive in Malaysia. The Courts are the only recourse for the individual against any state abuse or misuse of power. Administrative law and judicial review are indivisible aspects of the concept of rule of law. Its importance lies in maintaining the balance between state rights and rights of the individual. In this context, Lord Hewart described the rule of law as ‘the predominance of law, as opposed to mere arbitrariness, in determining or disposing of the rights of individuals’ (Hewart, 1929).

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged under statute to perform public acts and duties. This jurisdiction evolved in common law and was exercised by the issue of the prerogative writs of mandamus, certiorari and prohibitions. They are now regulated by statute namely Paragraph 1 of the Schedule to the Courts of Judicature Act, 1964 and procedurally by rules of Court that is Order 53 of the Rules of the High Court, 1980.
The court cannot when exercising its judicial review jurisdiction, subject to the legislative provisions to the contrary, substitute or replace the decision of the public authority with its own. In the context of judicial review of administrative actions in Malaysia, the appellate courts have cautioned against unjustified judicial interference with administrative decisions if this is done with a view of substituting those decisions with some others which the courts may feel fairer or more reasonable on merits. After a finding that a particular decision cannot stand in law, the court will then remit the matter to the authority for reconsideration. The court in the exercise of its judicial review jurisdiction is not to substitute its decision for that of the authority. However, there is one qualification: the non-decision substitution feature of judicial review is subject to contrary legislative intention.

**Constitutional Adjudication in Indonesia**

The discussion below is on constitutional adjudication in Indonesia. The role of Supreme Court is also discussed to highlight the different authorities of both the Constitutional Court and the Supreme Court in terms of judicial review.

The Supreme Court. The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also re-examine cases if new evidence emerges. The Supreme Court has oversight over the high courts (Pengadilan Tinggi) of which there are about 20 throughout Indonesia and district courts (Pengadilan Negeri) of which there are around 250 with additional district courts being created from time to time. As of mid of 2011, there were a total of 804 courts of various kinds in Indonesia (Pompe, 2005). About 50 justices sit in the Supreme Court while other high and lower courts across Indonesia employ around 7000 judges.

The Supreme Court is the final court of appeal following appeals from the district courts to the high courts (Indrayana, 2008). Constitutional matters, however, fall within the jurisdiction of the Constitutional Court of Indonesia, established in 2003.

Regarding the judicial review, the Supreme Court shall have authority to review subsidiary laws such as Government Regulation, Presidential Regulation and Provincial Regulation and Regency/Municipality Regulation.

4 These are See Art 7 (1) of Law No. 12 of 2011 on Legislation Making. In this article, it is stated the hierarchy of legislation in Indonesia, as follows: (a) 1945 Constitution (UUD 1945); (b) Decree of People’s Consultative Assembly (TAP MPR); (c) Laws/Government Regulation in Lieu-Law (Undang-Undang/Peraturan Pemerintah Pengganti Undang-
‘the judicial review’ exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court are known specifically as the ‘constitutional review’.

The Constitutional Court. The Constitutional Court of Republic of Indonesia is a new state organ in Indonesia. The Third Amendment of the 1945 Constitution gave birth to this Court (Anonymous, 2010). The Constitutional Court is independent and equal to the Supreme Court. It was established as the guardian of the Constitution as well as the sole interpreter of the constitution. The role of the Constitutional Court is to ensure checks and balances in the constitutional system. This mechanism may also overcome the gap between lack of sense of justice in society and the practice of authoritarian regime and state abuse of power.

Only the Constitutional Court has the authority to settle any disputes on constitutional cases, which relate to consistency of implementation of constitutional norms. The power vested in the Constitutional Court to decide on the constitutional cases is derived from the Constitution (Anonymous, 2010). Article 24 paragraph (2) of the 1945 Constitution states that judicial power shall be implemented by a Supreme Court and its subordinate judicatures, in the general judicature, the religious judicature, the military judicature, the state administration judicature, and by a Constitutional Court. Article 24C, which consists of 6 paragraphs, stipulates that the Constitutional Court shall have the authority to hear cases at the first and final levels, the decision of which shall be final, in conducting judicial review on laws against the Constitution, in deciding disputes concerning the authorities of state institutions whose authorities provided by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the result of general elections. The Court shall also be required to pass decisions on the opinion of the House of Representatives concerning alleged violations committed by the President and/or the Vice President in accordance with the Constitution.

The Constitutional Court consists of nine constitutional court justices as stipulated by the President, comprising three justices each proposed by the Supreme Court, House of Representatives and the President. The Chief Justice and the Vice Justice of the Constitutional Court shall be elected from among and by constitutional court justices. Constitutional court justices must possess integrity and flawless personality, must be fair, a good statesman with a mastery of the constitution and state organisation and shall not concurrently serve as state officials. Their appointment and dismissal, the procedural law and other provisions...
concerning the Constitutional Court are regulated by law.

Judicial Process of the Constitutional Court. Judicial process is a mechanism to ensure substantive justice. Judicial process needs a series of procedure for the people to access justice. The procedures of the Constitutional Court have salient characteristic which are different from other courts. The main characteristic of the court procedures lies in the legal bases of the court procedure used in the Constitution: the 1945 Constitution. Even though there are some acts and regulation of the Constitutional Court as the legal bases of the procedure, they can be used as long as they do not contradict the 1945 Constitution. This is because the role of the Constitutional Court is essentially to decide on constitutional cases.

The Constitutional Court hears cases filed by the petitioners. There are three kinds of hearings in the Constitutional Court, namely panel hearing, consultative meeting of justices (RPH), and plenary hearing (Anonymous, 2010). Panel hearing is a meeting attended by 3 (three) constitutional court justices assigned to hold a hearing for preliminary examination. This hearing is held to examine the legal standing of the petitioner and the substance of the petition. Constitutional court justices may give advice for revision of the petition. Consultative Meeting of Justices (RPH) is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. In this meeting, the case is discussed in detail and the decision of the Constitutional Court is made. This meeting must be attended by at least seven constitutional court justices. During the RPH, the Registrar takes notes and records every subject matter of discussion and the conclusion. A plenary hearing is held by the panel of the constitutional court justices with minimum attendance of 7 (seven) constitutional court justices. This hearing is open for the public with the agenda to hear examination and pronouncement of the decision. Hearing examination includes listening to the petitioner’s statement, expert’s statement, witness’ statement, and statements of the related parties, as well as examining the evidence.

Constitutional Adjudication: A Comparison between Malaysia and Indonesia

From the foregoing, there are similarities and differences in constitutional adjudication between both countries. Similarity in the constitutional adjudication of both countries is part of realising the goal of rule of law and ensuring democracy (Asshiddiqie, 2009). First, the authority and organs of the state are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state for ensuring dignity to its citizens. The existence of the constitutional adjudication is also a part of fundamental rights of citizens. Second, exercising judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries
act as a check and balance mechanism of the state’s main organs. This mechanism also prevents the trend of abuse of political powers. From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case (Brewer-(Carias, Bolivar, & Bur, 1989). Thus, the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts to honour the spirit of the constitution as the highest law.

The Constitutional adjudication of both countries also have differences. First, both countries follow different model of constitutional adjudication. Malaysia follows the common law model where superior courts function as organs of the constitutional adjudication, while Indonesia follows the Kelsenian models. This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review. Although in case of Malaysia, judicial review is limited to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See further Allan R. Brewer-Carias, Judicial Review in Comparative Law, Cambridge University Press, 1989, at 89.

6 Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the “American” model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See Victor Ferreres Comella, “The European Model of Constitutional Review of Legislation: Toward Decentralisation?”, 2004, Volume 2, issues 3, the International Journal of Constitutional Law, 461.
authority to adjudicate constitutional issues in the course of deciding legal cases and controversies (Comella, 2004). Unlike the American model that has a diffuse system, the Continental model is a concentrated system of judicial review. The concentrated system of judicial review is characterised by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organised outside the ordinary judicial hierarchy (Brewer-Carias et al., 1989). Secondly, consequential of the models, Malaysia has an appeal mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralised model, has no appeal mechanism because the Constitutional Court’s decision is final.

CONCLUSION

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realising the goal of the rule of law and democracy. The constitutional adjudication in both countries acts as check and balance mechanism of the main state organs. However, both countries follow different model of constitutional adjudication. Malaysia follows the common law model where the superior courts function as an organ of the constitutional adjudication, while Indonesia adopted the Kelsenian models by establishing a new court, namely the Constitutional Court. The courts ensure a dignified life for the citizens of a country, and undertake judicial review to guarantee justice and fairness.

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A Comparison of Constitutional Adjudication Institutions


Malaysian Court of Judicature Act.


Claims of Intangible Interest as Matrimonial Property at Shari’ah Courts: A Special Reference to Kelantan, Terengganu, and Malacca

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ABSTRACT

Most of the cases related to claims of matrimonial property or harta sepencarian are confined to existing personal property which existed or acquired during the marriage prior to the divorce, such as buildings, land, vehicles. However, many modern families are venturing into business either as a principal means of generating income or as an additional measure to generate income. This has resulted in interest in intangible interests such as shares and investments in business (in addition to tangible ones). With the changes in proprietary interest, it is perceived that the scope of claims on matrimonial property shall also be revolutionised to include claims of future earning and intangible interests. This paper analyses cases related to matrimonial property claims in Shari’ah courts in Kelantan, Terengganu and Malacca. The objective is to highlight scope of claims and approaches of the Shari’ah courts in dealing with matrimonial property claims related to intangible interest, such as business interest and future earnings. The research was based on doctrinal and statutory analysis.

Keyword: Intangible interest, Malaysia, matrimonial property, shariah

INTRODUCTION

In most cases on matrimonial property, the disputed claims are on the rights of the parties to certain properties or assets. Under the Malaysian law, the court shall have power to order the division of any assets acquired by the divorcing parties during their marriage including those attained by
the sole efforts of one party prior to the marriage. Reference to personal property is usually not contentious as the court would apply the general rule/method in dividing or concluding the matrimonial property. The conventional approach of the courts in Malaysia, both the Civil courts and the Shari’ah courts, in determining and distributing the matrimonial property is the “contribution” test (Ghadas & Ibrahim, 2012). Nevertheless, when it comes to distribution of future interest such as rights in business, business assets, shares, investment, continuous and future human capital’s earnings, legal issues crop up, such as the *locus standi* of the divorced parties to take legal action on the future interest and the proportion/division of the assets as a matrimonial property, and rights to future interest/benefits of the business assets/profits. This issue is vital since traditional claims of spouses on personal property or assets of the other have ‘expanded’ to include claims in business assets or interest, which are owned by the other parties. Therefore, this paper analyses the scope and approaches adopted by the Shari’ah courts in Kelantan, Terengganu, and Malacca in dealing with claims of *harta sepencarian* related to an intangible interest such as business interest and future earnings.

**DEFINITION OF MATRIMONIAL PROPERTY IN SHARI’AH COURT**

Matrimonial property refers to any property acquired during the marriage whether by joint efforts or by sole effort of the parties. The term *harta sepencarian* (matrimonial property) has long been recognized under Malay customary law and has now been given statutory recognition in the Federal Territories Act and its equivalent state enactments (Buang, 1988.) Most of the relevant statutes define *harta sepencarian* as “property jointly acquired by husband and wife, whether directly or indirectly, during the subsistence of their marriage in accordance with the conditions stipulated by Shariah principles”.

The definition of *harta sepencarian* has also been highlighted in decided cases including the case of *Hujah Lijah binti Jamal v. Fatimah binti Mad Diah* [1930] 16 MLJ 63, Briggs as:

“property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The acquisition referred to may be extended to cover enhancement of value by reason of cultivation or development.”

The above definition indicates that the basis of *harta sepencarian* is contribution by both parties during the marriage whether directly or indirectly. The scope of contribution itself has been addressed in a number of cases where the judge emphasises that contribution is not only confined to both their efforts in acquiring the property, but extends further to cover their contribution whether formal or informal (refer to *Piah binti Said v. Che Lah* 1983, 3 JH 220), and whether it is made in monetary terms or effort to acquire the property (Ibrahim, 1997).
From the above definitions it is clear that *harta sepencarian* is based on “recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvements done to it (in cases where it was acquired by the sole effort of one spouse). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property. Thus, once it is proven that a property was acquired (during coverture) or that the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption.”

The Muslim jurists appear to derive the same principle in Islamic jurisprudence on the basis that a wife who has no obligation to perform all the household duties including looking after the children is entitled to compensation for any work she performs during the marriage, if she so desires. In view of this, any housework done by a wife is recognised in Islam as productive work where she is therefore entitled to remuneration for the services rendered (Mustafa, 1996). Thus, the Malay custom of the division of the *harta sepencarian* in divorce, applied throughout Malaysia, has been accepted and judicially recognised and is now codified in the Islamic Family Law statute, which is applicable in the states of Malaysia. Hence, if formerly the claim on *harta sepencarian* usually takes the form of land, matrimonial houses and animals used to work the land, it has developed so that the scope of the claim has been extended to include moveable and immovable property like household goods and furnishing, in line with the life style and the purchasing power of society (Kamariah, 1999). It might also include joint bank accounts, compensation paid for land acquired by the government as well as shares registered in the name of either spouse (see Rokiah bte Haji Abdul Jalil v. Mohammad Idris bin Shamsuddin (1410) JH 111; [1989] 3 MLJ ix, Kamariah v. Mansjur (1968) 6 JH 301). This contention is also supported by other authors by highlighting that matrimonial property are no longer in the form of traditional properties such as agricultural land, kampong houses and livestock but have changed into more complex, modern and higher value items such as business shares, stock market shares, houses worth millions of Malaysian ringgit and other movable and immovable properties (Raihanah, Patricia, & Wirdati, 2010).

**LEGAL PROVISIONS ON MATRIMONIAL PROPERTY**

Under the Islamic Family Law Enactment (Kelantan) 2002, section 122 provides the power of Court to order division of *harta sepencarian* as below:

1. The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.
2. In exercising the power conferred...
by subsection (1), the Court shall have regard to-

(a) the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;

(b) any debts owing by either party that were contracted for their joint benefit;

(c) the need of the minor children of the marriage, if any, and, subject to those considerations, the Court shall incline towards equality of division.

(3) The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole efforts of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3), the Court shall have regard to-

(a) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;

(b) the need of the minor children of the marriage, if any, and, subject to those consideration, the Court may divide the assets or the proceeds of sale in such proportions as the Court deems reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage by one party include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

Similar legal provisions are also found in the Administration of Islamic Family Law Enactment (State of Terengganu) 1985 by virtues of section 57 and Islamic Family Law (State of Malacca) Enactment 2002 by virtue of section 122.

**INTANGIBLE INTEREST AS MATRIMONIAL PROPERTY**

Intangible property generally refers to something which a person has ownership of but not the substance like statutory creations such as copyrights, trademarks and choses in action in addition to bonds, shares/stock, long term contracts, rights in lease agreements which represent future value but have no intrinsic value on their own.

Possession of intangible property gives the owner a set of legally enforceable rights over reproduction of personal property, for example, a copyright owner can control the reproduction of the work forming the copyright. However, the intangible property forms a set of rights separate from the tangible property that carries the rights. For example, the owner of a copyright can
control the printing of books containing the content, but the book itself is personal property which can be bought and sold without concern over the rights of the copyright holder.

Generally, claims related to matrimonial property concern personal property of the divorced parties. Such claims do not normally give rise to contentious issues as the court often apply the conventional approach in defining and dividing the matrimonial property which are premised upon just, equitable and fair distribution approach (Ibrahim, 2008). However, issues on how to treat interest that accrue to the spouses in future or prospectively would crop up. How would the court decide accrued interest from intangible property owned by the divorced parties in claims of matrimonial property? What is the distribution formula? Can the conventional “contribution test” be applied in claims on interest in intangible property like matrimonial property?

The concept of future interest is commonly used in law of trust especially in relation to interest in land. Such application is observed to be gradually extended to other areas of law like family law especially in relation to interests in personal property (Tan, 2011) including business entities operating during matrimonial relationship. The basis for recognising future interest as a divisible matrimonial property is fundamentally based on the fact that both spouses contribute seamlessly to the advancement of the welfare of the family with or without demarcation of roles (Ibrahim & Ghadas, 2014). According to Lim (2003), the couple will usually acquire physical and capital assets together such as buying cars, renovating their house, investing in business ventures, among others. More often than not, individual enters into a marriage with certain skills, talents, education and training which they have acquired prior to their marriage, and which enhanced during their marriage either financially or non-financially (Ibrahim & Ghadas, 2014). Those personal attributes and skills may contribute to future income, known as “human capital”, in which the other party may have an intangible interest in it. Although the Syariah Court does not directly discuss about the claims of intangible interest because there have been no cases as yet claiming on future interest, the contribution made by the wife while the husband is pursuing his degree has been highlighted by the court in determining the wife’s share of harta sepencarian in the case of Hamidah bt Abdullah v Mohd Johanis bin Busu (Jurnal Hukum, p181). This shows that although the degree acquired during the marriage is not expressly recognised as matrimonial property, the court indirectly takes note of the contribution made by the wife while the husband is pursuing his degree in the university which has led to increase in the earnings of the husband.

OBSERVATION
This study examined unreported cases of the Syariah Court of Kota Bharu Kelantan, Terengganu and Melaka to analyse intangible interests in these claims such as
human capital or future business interest as *harta sepencarian*. It was discovered that matters relating to intangible interest has not been claimed by the parties either upon a divorce or upon the death of the deceased. Most of the cases dealt with personal assets including landed property, shares in the Amanah Saham Bumiputera and other banks like Bank Rakyat, savings account as well as vehicles or cars. It is interesting to note that there is only one case in Terengganu claiming intangible interest over the property of the deceased as *harta sepencarian* and subject to division upon his death. The plaintiff apart from claiming from the deceased few lots of land and vehicles as *harta sepencarian*, also claimed profit from the deceased’s company and profit accruing from the fishing boat as *harta sepencarian*. The Court granted the application declaring all the property as *harta sepencarian*. It ordered that one third of the property be given to the plaintiff while the remainder would be divided according to *faraid*.

**CONCLUSION**

The study found only very few cases dealt by the Shari’ah court on claims of intangible interest as matrimonial property. However, it is interesting to see that there are claims already being brought to the Shari’ah court related to intangible interest. It is not surprising to see that the conventional approach in determining and dividing matrimonial property was used by the court in the claims, although the value of the intangible interest cannot be ascertained.

Therefore, the approach of conventional courts in determining future earning of human capital as matrimonial property might be useful in claims on intangible interest as matrimonial property.

Interest in human capital generally refers to an individual’s expected future earnings and considered as an asset that promises a return on investments such as education, training, and work experience. It is an investment of time and money in self-development to enhance skills and abilities, which are a source and form of wealth. Human capital consists of intangible such as skills, knowledge, and ability acquired through education, training or experience, which may be manifested in a degree, a license, by reputation, or a resume (Weitzman, 1974). The author also highlights that a modern conception of marital property might well be broadened to include the ‘earning power’ of the marital partners. The recognition of earning power as marital property would legitimately compensate a non-income earning spouse for contributing to the other’s education, employability and job success (Weitzman, 1992).

Weitzman further noted that people today invest more in human capital and career instead of in land or a family farm leading to *inter alia* enhanced earning capacities which are often the major assets acquired during the marriage. By this, the law must be prepared to expand the definition of property and recognise them as part of dividable matrimonial assets (Weitzman, 1992). The inclusion of human
capital as matrimonial assets is clearly and consistently recognised in New York. However, in other parts of the United States, courts have overwhelmingly rejected the claim that human capital is matrimonial property. The most common rationale offered to deny the claim of property in these cases is that degrees, licenses, and earning power are not property in the usual sense of that term (See Graham v. Graham, 1978, 574, P.2d 75)

The English court of Appeal in the case of Wachtel v. Wachtel [1973] 1 All ER 829, include in its definition of “family assets” divisible on dissolution not only assets “of capital nature”, such as the matrimonial home and the furniture in it, but also assets “of a revenue-producing nature, such as the earning power of husband and wife”. This shows that the English courts recognise earning potential as a family asset which Lord Denning proposed that the wife should receive, as a “starting point”, one-third of the capital assets of the family and one-third of the spouses’ joint earnings.

Thus, this study suggests a thorough and further research to identify the appropriate principles and legal approach which the Shari’ah courts should adopt in dealing with claims on intangible interests as matrimonial property.

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Children as Weapon of War: Child Soldiers – An Overview

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ABSTRACT
Involvement of children in armed conflicts as child soldiers have prompted worldwide condemnation by humanitarian advocates and child rights activists alike. It is seen as an international humanitarian and human rights crises. It occurs in various parts of the globe, extending from Asia to the United States. It is a common misconception that only non-state armed groups or rebel groups deploy child soldiers. Many governments have also been recruiting under-18 years old into national armed forces. Different reasons have been cited for children’s involvement in the armed conflicts. The truth remains that these child soldiers in armed and hostile situations have gone through tough times which have left a deep impact on them emotionally and psychologically. International instruments which support efforts to stop using children as soldiers do exist, the question is their effectiveness. This paper presents an initial study on the issue of child soldier via doctrinal analysis of provisions of international treaties and relevant government policies. It attempts to provide a general overview on the issue of children as child soldiers, the reasons for such occurrence and reviews the various international legal treatises that regulate the use of child soldiers.

Keywords: Armed conflict, child rights, child soldiers, humanitarian crisis, legal treatises

INTRODUCTION
Online and offline media has posted hundreds of disturbing images of children bearing arms and other military weapons in Liberia, El Salvador and Sri Lanka, which in turn had raised global awareness on the use of children in armed conflicts. These images depict the children in army uniform and in normal day clothing. It creates an irony of
the child’s life as Amnesty International rightly suggests, they are old enough to kill and be killed but too young to vote.

There is no recent authoritative statistics on the number of children who are involved in armed conflict, either as soldiers, survivors or victims. The United Nations Children’s Fund [UNICEF] estimated that in 2005, almost 250,000 children served as child soldiers around the globe (UNICEF, 2010). Though this was a slight decrease from figures found in the 2004 Human Rights Watch Report, it is possible the number of child soldiers active in current armed conflict worldwide is about 300,000 and remains constant at all times (Becker, 2004). According to Child Soldiers Global Report (2008) this cannot be taken as the correct global figure as the proper data on child soldiers are unknown for a number of reasons, such as lack of proper birth records or falsification of them in certain countries, and inadequate mechanism to verify the age of new recruits. As such, no one can precisely determine the exact number of child soldiers, as these groups tend to conceal the involvement of children in their ranks (Fox, 2005; Kessler, 2016; Tiefenbrun, 2007; Webster, 2007).

Who is a child soldier? The Paris Principles on the Involvement of Children in Armed Conflict (2007) defines a child soldier as:

“A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes.”

The description by UNICEF includes any person under the age of 18 who becomes a member of “a regular or irregular armed group in any capacity” and who take part in combatant and non-combatant actions. A combatant action would involve the carrying of arms and being an active participant in a war-like situation for example as human mine detectors, whereas a non-combatant situation is where a child is employed as cooks, messengers, porters.
and other domestic tasks; this includes girls recruited for sexual purposes and forced marriages (Children Associated with Armed Groups, UNICEF). This definition includes activities, which are military related, any sort of preparation for ‘military preparedness training’ and other activities in support capacity - both direct and indirect participation in an armed conflict.

Child soldiers who are on active service encounter consequences equivalent to an adult soldier – possibility of being injured or maimed, captured or death itself. They are punished with imprisonment for desertion or upon capture. In fact, Maslen argues that their delicate age makes them more susceptible to sickness and malnutrition brought about by hardships of military life (Maslen, 1998). Their physical limitations compared with an adult become more apparent in military life resulting in their disproportionate misery and suffering. The fact that they receive little training or none at all before they are sent to the front line exposes them to dangers.

Root Causes for the Use of Child Soldiers

In tackling the issue of child soldiers, we need to first ascertain the causes for the drastic increase in child soldiering. Collmer (2004) suggested two factors: the changing nature of warfare, and the increase and availability of weapons. According to Berry (2001), when a state’s legitimacy or power is under threat, it can lead to manifestation of intrastate wars rather than interstate conflicts.

Wars fought before World War II can be categorised as “traditional” or “conventional” wars. These wars were fought between nation states where there were clear and distinguished ‘role’ between combatants and civilians. Troops were mobilised by a central state to march into another state for political
and territorial motives, targeting the armies of the opponents rather than just anybody crossing their path. The devastation and destruction inflicted on the life of civilians undoubtedly remains the same but children during these times were recognised as civilians who deserve special attention and protection along with women and the elderly (Collmer, 2004).

By the end of the 20th century and post-Cold War period, the nature of warfare went through a tremendous shift. New types of wars are now being fought. These contemporary wars are not confined only to some parts of continents but were widespread such as in Bosnia-Herzegovina, Chechnya, El Salvador, and Columbia. These ‘new wars’ as classified by the scholars are different from ‘traditional’ wars by their very nature. It blurs any distinctions between traditional concepts of wars and organised crimes which manifest in an organised and systematic use of violence and massive violations of human rights. Initiated always, in most cases, as an act of rebellion against a colonial or totalitarian state it can be termed as ‘anti-regime’ or ‘autonomous movements and secessionist wars. Among reasons cited for this new type of organised violence are the inequalities inherent in the economic and social structures that have resulted in rampant poverty among certain groups in a state. These new wars are further heightened if the armed forces in such states are divided in their loyalty and some join opposition rebel groups, resulting in a growth in organised crimes, paramilitary groups, and the availability of weapons and mercenaries (Collmer, 2004; Hughes, 2000; Webster, 2007). Collmer (2004) points out that these new types of wars present an ‘asymmetric structure of conflict’ between a ‘variety of non-state-actors’ and the law enforcement arm of the state. These actors, a mixture of fighters, with weak military capabilities employ techniques commonly used in guerrilla warfare to inflict massive violence and avoid direct confrontation with national armies. They also tend to retreat to their territorial sanctuaries to regroup and reinforce their forces resulting in prolonged warfare such as in Afghanistan, Sudan and Ethiopia.

How do these prolonged new wars relate to child soldiers? The new wars are not carried out in specific battlefields as in the traditional war but rather erupt in the middle of the city and disrupt a civilian daily life, without any warning. Creating a dangerous environment for children, these long and mass conflicts have separated children from parents or made them orphaned, fending for themselves. Faced between starvation or death and life in the militia or national armed forces, many children choose the latter as being the safer alternative. The child is promised protection in exchange for his commitment and loyalty to the group.

The long duration of these conflicts like that as evidenced in Sudan which had been in conflict since 1956, has resulted in thousands of casualties and shortages in adult manpower. Children are recruited to fill these gaps enabling these conflicts to perpetuate. The financial limitations of the actors in these wars is and the demand for
cheap fighters has led to an increase in child soldiers as they are perceived as the cheapest and expendable source of labour making them the ultimate target. Children who have been living in these war-torn zones all their life lack educational facilities that can equip them with other life skills besides soldiering or military training.

The second factor that contributes to the increase of child soldiers in the battle field is the availability and accessibility to small weapons and arms. In the era of advanced technology, weapons can be procured easily through illegal networks of international organised crimes. Collmer (2004) claims that the small weapons range from “simple handguns to armour-piercing bazookas” are relatively cheap. They are not new weapons but rather used goods that have saturated the global market, courtesy of post-Cold War period. Reports are circulating in these conflict areas, for example, that weapons used in Lebanese civil wars have found their way to Croatia. These weapons, which are light and easy to use, can be easily managed by these young children.

The Machel Report (1996) observed that even a small boy of 10 would have the strength to assemble and use an AK-47. The new wars make full use of these small arms rather than large scale military weapons as they require less logistical arrangement and are financially sustainable. The abundance of small weapons and their user-friendliness have facilitated and contributed to the growing number of child soldiers, as many are able to utilise them.

**Classification of Recruitments**

Recruitment of child soldier can be either voluntary (enlistment) or by forced (conscription). Recruitment includes accepting volunteers into armed forces but does not cover children studying in military schools. According to the United Nations Palermo Protocol (2001) voluntary and consensual enlistment of a child in any armed forces will preclude him or her from being protected as a victim of child trafficking under the trafficking statutes. Enlistment denotes a more acceptable act of recruitment in the sense it requires the child to agree to it rather than being forced. It also embraces the concept of voluntary enlistment by the government national army of children under the age of 18 years.

The Global Report on Child Soldiers (2008) compiled by the Coalition Group reported a decrease in number of countries enlisting children under-18 to front line combat. Even so, 14 countries still recruit children into auxiliary forces linked to their national armies or into local-level civilian defence groups established to support counter-insurgency operations, and militias and armed forces acting as proxies for government forces.

Children also have been trained as spies and other intelligence gathering purposes. The international community through the work of many NGOs and human rights activists have been advocating the ban on under-18 children from recruitment in any way into any armed forces, government and non-government alike. Some countries such as UK, US and Pakistan argue that
children as young as 16 should be allowed to volunteer as part of the national armed forces even though they are not allowed to be in the front line. The debate still rages as each country has its own reasons, economic, political, and social for such a stand.

Tiefenbrun (2007) argues the voluntary enlistment of a child in an armed force is doubtful as there is always an element of coercion, subtle or otherwise. She argues that the environment in which a child lives, plays an important part in ascertaining whether such decision is made on pure voluntary basis. Factors such as parental and family background, peer pressures, lack of intellectual capacity and maturity, lack of education, illiteracy and misinformation can influence a child to make a choice of which he/she is not well informed of neither fully understand.

The word conscription of child soldier connotes a bad image of children being forced into such a situation. Africa has been cited as ‘hot-spot’ for forced and abusive recruitments of young children into warfare, nonetheless the problem is actually a global one. Interviews with ex-child soldiers of Rwanda, Sierra Leone, Liberia and the Lord Resistance Army of Uganda testify to this, together with reported incidents in Kosovo, Sri Lanka and Myanmar. Tales of forced recruitment into armed forces include abduction and intimidation of young children or their immediate family members in case of refusals. Others are forced out of desperation, a survival tactic – join or be killed. Children, who try to escape but failed, are severely punished or even killed as a warning to others.

Factors Propelling Children Joining the Armed Forces

There are reports of children as young as 8 years old being recruited as child soldiers. The common age for recruitment is from the age of 10 and until adolescence. Human Rights Watch estimated one third of child soldiers in Uganda, El Salvador, and Ethiopia are girls (Human Rights Watch, 2015). Children are a target for physical, psychological, and social reasons.

Most of the reported occurrences of a child’s participation in armed forces are involuntary, usually either through force, kidnapping, abduction, coercion, deceit or intimidation. Nonetheless, there are also instances where children joined these forces on their own free will, technically.

These refer to situations where the children have to support themselves and their families. When there is scarcity of meal and work, the prospect of being given a small sum of salary and food is compelling enough for a child to be part of the armed group. This will at least ensure his family is not going to starve. Orphans, street children, and children separated from family members are also likely candidates. The desperation to live and survive makes them choose one evil over another.

Psychological reasons can be as compelling as physical needs. Children who have been subjected to violence and torture, living in uncertainty and fear desire to be in
control of situation rather than stay helpless. By joining a side and holding a weapon, being proactive instead of just waiting to be the next victim, it offers a feeling of greater safety to these young people. This is true in the case of youths joining rebel forces in El Salvador in the 1970s-1980s after being subjected to torture by government army. Being in the army also allows a young child to exert power and control to those in authority who have mistreated him/her. Revenge also motivates the child to inflict pain upon those who had done the same on his/her family member, and this is especially true in cases where government troops carry out rampant looting and massacre in their attempt to crush rebel forces. This would result in a young child with limited education and understanding of the reasons for such mistreatment, to support the rebel group.

Social structures may make a child feel that he/she is doing something worthwhile by joining the armed group. It brings honour and nobility not only to them but also to their family and community. Taking arms in protection of one own religion, ethnicity, and social groups signify loyalty and dedication to one’s cause. Such is the case of the Afghan war against the Russian, and the Palestinian youth attacking Israeli soldiers. In the Teso region of Uganda, young fighters take arms due to the destruction of their livestock and join the army to regain wealth and resources so that they could restore their social standing and start their own family.

Every child’s story and reason for joining the armed groups differ widely from one another all over the globe as the nature of armed conflicts. Their culture, family history, economic and social structures are different which influence their decision to join the armed groups. However, one common thread for their engagement with the armed groups is the breakdown of their community and hence their lack of protection. A failed state without a fully functioning central government and imbalance of power and wealth within the territory which lead to armed groups taking an opportunity to recruit these children and destroy their life.

**International Laws Regulating Child Soldiers**

Human rights (directed to the States) and humanitarian laws (applied to both state and non-state actors in certain circumstances) are the two main branches of international law governing the issue of child soldiers. The international legal framework for the protection of children is not condensed in one specific treaty but rather constituted in many specific and general treatises in all spheres of international humanitarian law. The law and practices of each state also plays a vital role in regulating protection of children at international level. Though the various treatises on general human right and humanitarian law explicitly talks about the rights and protection to be afforded to a child, no reference is made to the category of a child soldier (Convention on the Rights of the Child 1989). The two just do not go together. Provisions in the international regulations are for children who are victims
of war – those who are captured, not those who fought as soldiers.

As early as the 1970s, the international community has recognised the need to tackle this issue through the vaguely worded provision of the Additional Protocols to the Geneva Conventions of 1949. From then on, child rights supporters have worked tirelessly to prohibit recruiting children as members of any armed forces in whatever capacity they might be. The success of a group of NGOs, the Coalition to Stop the Use of Child Soldiers (predecessor to Child Soldiers International) in putting pressure on the international community to agree to a minimum age ban in recruitment of child soldiers can be considered as another winning milestone in efforts to eradicate this problem. This article will highlight a few of those treatises in regulating the issue of child soldiers, namely the Geneva Convention of 1949 and Additional Protocols, the Convention on the Rights of Children 1989, the International Labour Organisation Convention No. 182 and the Rome Statute of International Criminal Court 1998.

**The Geneva Convention and Additional Protocols**

The Geneva Conventions of 1949 and their Additional Protocols form the basis of international humanitarian law. The Conventions are now considered as customary international law regulating states relations in times of international armed conflicts. Geneva Conventions 1, 2 and 3 are an improvement on selected conventions concerning the treatments to be afforded to casualties and prisoners of wars and captured military personnel. Geneva Conventions 4 on the Protection of Civilian Persons in Time of War recognises the minimum protection for children as non-combatant regardless of their age and their rights, maintenance and entitlements. However, no mention is made to the prospect of armed minors (Fox, 2005). Geneva Additional Protocols I (AP1) and II (AP2) are supplements to Geneva Conventions, dealing with international and non-international armed conflicts.

The AP1 is more extensive in nature, consisting of 102 articles, and was formally adopted on 8 June 1977. It relates to the Protection of Victims of International Armed Conflicts, reaffirming and improving the protection provided to the victims. Of particular relevance is Article 77 of AP1, which went further than Geneva Conventions 4 by prohibiting recruitment of minors into national armed forces if they are less than 15 years of age and should not take a direct part in hostilities. Regardless of that, if those below the age of 15 do take part in such hostilities and they are captured, they are to be provided protection in accordance with Articles 77 (1), (4) and (5) of AP1 (Breen, 2007; Fox, 2005).

The AP2 consists only of 28 articles and is more limited in application. It clarifies the protection of victims in non-international armed conflicts. It encompasses all conflicts between well-organised and well-armed forces in state, meaning civil wars. Article 4(3) (c) stipulates clearly that no children under 15 years of age can be recruited in armed forces or groups nor take part in
hostilities. The provision in Article 4(3) (d) further reiterates the provisions in Article 77 of AP1. Though it seems as if AP2 laid down a stronger measure towards child protection in armed conflict, prohibiting all forms of direct and indirect participation of under 15-years old child, its application is restrictive to non-international armed conflict that fits the specific criteria. It has been argued that Article 77 has actually classified minors into two separate groups of under-18 and under-15, where only the latter are directly prohibited from directly involving themselves in any armed conflict. The phrase “feasible measures” used in Art 77 (1) limits the capability of the state - meaning the state or non-state can refrain from doing so if they are unable to carry out any measures. The word direct participation limited the applicability of the restriction earlier indicated (Breen, 2007; Fox, 2005).

**Convention on the Rights of Children (CRC) 1989**

This is the first significant international instrument that specifically protects the human rights of children and has been universally ratified to date by almost every country albeit with certain reservations on the terms. The CRC as a human rights document has limited application, whereby it is directed towards the States in an armed conflict excluding non-state armed groups. Article 38 of the CRC relates directly to the issue of children in armed conflict wherein it specifically prohibits an individual under-15 years of age from taking direct part in hostility. The state is to take all ‘feasible measures’ to ensure such compliance. This Article merely echoes the stand taken in AP 1 and AP2 and fails to address the same issue like in the previous protocols. Voluntary recruitment, indirect participation, and feasible manner – are the vague phrases that remain unsettled and subjected to too many interpretations (Berry, 2001).

Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict is currently the most specific international legal treaty that prohibits the employment of child soldiers. It is ratified by 120 states in 2007 and consisted of 13 articles. It raised the previous age limit of children’s involvement in hostilities from 15 years as set by the CRC and the Geneva Conventions 1949 and Additional Protocols of 1977 to 18 years. This includes extending the age bar on child soldier from 14 years to 18 years for compulsory recruitment and direct participation in conflict and raising the minimum age limit for voluntary recruitment to above 15 years (Global Report, 2008). It gives birth to the ‘straight-18’ policy whereby all methods of recruitment in all armed forces and all methods of participation of armed conflict are disallowed until an individual attains the age of 18 (Sheppard, 2000).

**International Labour Organisation Convention No. 182**

In 1999, the International Labour Organisation (ILO) adopted a Convention on Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182). Article
3 of the Convention categorises four types of child labour that no government shall tolerate - which includes among others pornography, prostitution, and child soldiering. It thus prohibits the forced and compulsory recruitment of children but not voluntary recruitment of children under-18 into armed conflicts. Breen (2007) opines this Convention constitutes an elevation of current legal awareness on standards of human rights and may help states deal with the problem of recruitment of child soldiers by way of abduction, coercion or forced recruitment.

**Rome Statute of International Criminal Court 1998**

On July 2002, the Statute of International Criminal Court entered into force. It establishes a permanent court wherein persons charged with committing war crimes, crimes against humanity and genocide are tried. This legal development is important as it now makes the individuals responsible for recruiting minors in armed conflict to be accountable for their act. It makes the acts of conscription, enlistment, or use of children under age of 15 in hostilities either by the national armed forces or by non-state group as a war crime. Article 8(2)(b)(xxvi) of the Statute constitutes such acts as violation of a customary international law norm and open to criminal sanctions. Article 26 of Rome Statute states that an adult recruiting an underage child to be in armed forces can face criminal sanctions but the Courts jurisdiction does not extend to persons under age of 18 at the time of alleged commission of such crime. Thus, any child soldiers between the ages of 15 to 18 years are considered as victims though they have committed acts of atrocities during wartime. The debate remains as to whether these groups of child soldier should be allowed to escape from their criminal acts unpunished.

Prior to 2000, the international legal framework set the standard age for legal recruitment of children in combat at 15 while CRC defines a child as any person under 18 to be entitled to special protection. The effort put forward by NGOs, especially the hard work of Coalition to Stop the Use of Child Soldiers, led to promulgation of important treaties that strengthened international legal norms regarding the use of child soldiers. All these are concerted endeavours to improve the life of children throughout the world.

**Malaysian National Service Programme**

The Malaysian National Service Training Program or *Latihan Khidmat Negara* was initiated in 2002 and implemented in 2004. This three-month programme was aimed at promoting patriotism and bonding among young generation Malaysians. The module includes basic military training. Failure to attend the National Service Training Programme may result in either fine or imprisonment or both on the defaulter. Similar punishments might be inflicted to any person who persuade another not to attend, abetting or causing another not to attend any National Training Service programmes (National Service Training Act 2003). Therefore, it is pertinent to ask if the...
National Service Training Program is a type of armed forces training or for educational purposes only.

The Latihan Khidmat Negara was gazetted under the National Service Training Act 2003. According to Section 3 (a) of this Act, the Yang di-Pertuan Agong may require, through proclamation, that any person who is between the age of 16 and 35 years to attend and participate in this programme. All Malaysian youths who are within this age category will be selected randomly to join the programme. Some of them may be considered as a child and hence, minor due to their age at the time of recruitment. The Malaysian Age of Majority Act 1971 considers a person to be an adult when he has attained 18 years of age. In practicality, only youths above the age of 16 are enlisted. Nonetheless, the youths joining the National Service Training Programme is still a minor if he or she is to attend it at the age of 17.

The training consists of four modules: Physical, Nation Building, Character Building, and Community Service. All of these modules are implemented separately during the three-month period and supervised by National Service Department to ensure the effectiveness of the programme. In the Physical Module, all trainees will be exposed to several extreme outdoor activities such as marching, combating which might include hand to hand and weapon usage, obstacle course, and survival training. Character Building Module emphasises on encouraging good values and self-confidence, leadership and self-evaluation by participation in group and teamwork between the participants and their supervisors to develop good character among Malaysian youths. Nation Building Module is more class-room based, which attempts to create awareness among the younger generation on the importance of national security and defence. It also highlights the citizen’s responsibility to the nation, and loyalty towards the government. Lastly, in Community Service Module, trainees will be exposed to community awareness programmes by involving themselves in project which takes place within their communities. It is the government’s hope that, through this module, trainees will appreciate the diversity of the nation.

The modules cannot be seen as attempts to recruit or enlist child soldiers into government armed forces. This is because though the participants learn basics military training and combat tactics as well as usage of military of weapons in the Physical Module, they are not for actual combat training. Furthermore, the main objective of this programme is to develop good values among teenagers and create awareness on the importance of protecting national security. The program does not emphasise only on military combats and physical training but rather a wholesome programme combining spiritual awareness and community services.

CONCLUSION

Putting an end to the practice of child soldiers requires not only the existence of strong legal standards but also consistent international cooperation, regional and
national initiatives. Penal sanctions on recruiters of child soldiers as in the case Sierra Leone portrays the seriousness of the international community to address this problem. It is recommended that the national as well as the international court system can further develop a systematic procedure for investigation and prosecution, in order to crack down on the usage of children as weapons of war. Funding and supporting demobilisation and rehabilitation of ex-child soldiers are also crucial to ensure that they will be able to lead a normal life and not revert to a life of violence. By providing educational opportunity and marketable life skills learning and assistance, the future of these young soldiers would be brighter. The captured ex-child soldier should not be treated as a criminal but rather be offered with psychological, socioeconomic, and educational opportunities for rehabilitation. The UN Security Council should impose sanctions on countries which facilitate the infiltration of illegal weapons used in small wars. This again requires not only negotiations but also criminal and economic sanction to be truly effective. It is unfortunately true that success will only be achieved by continued monitoring and advocacy, practical assistance for demobilisation and rehabilitation, and effective use of political and military leverage by international actors and uncompromising commitment by national, local and international authorities to hold the perpetrators accountable (Breen, 2007). To drive a point home, the most effective solution as succinctly stated by Machel (1996) in her UN Report in eradicating this phenomenon is by preventing the outbreak of armed conflicts.

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The Duty of Good Faith in Common Law: A New View on Contemporary Contract Law

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ABSTRACT
The concept of good faith encompasses the notion that all parties to a contract owe a duty to each other beyond those expressly provided by the terms of the contract. Good faith is a popular concept in civil law countries whereby good faith is clearly included in the civil law codes. However, good faith is gaining recognition in common law countries as well. Common law judges and scholars are divided concerning the desirability of qualifying the concept of good faith into Contract law. The objective of this paper is to analyse common law judges and scholars’ perspectives on the application and interpretation of good faith. The paper is mainly a library-based research which uses a qualitative approach to analyse data. The findings show good faith had lately influenced common law, therefore, there is a higher chance for good faith to be a recognised and accepted as one of the legal principles of common law.

Keywords: Common law, contract law, good faith

INTRODUCTION
Good faith is a ubiquitous but poorly understood concept in contract law. There are many different interpretations of the meaning of good faith, some of which are contradictory and confusing. The concept of good faith encompasses the theme that all parties to the contract owe a duty to each other beyond those expressly provided by the terms of the contract. In this context, it is expected that the contracting parties take into account other parties’ interests when exercising their contractual rights. This is because the law of contract is viewed as a bargain that is made between the contracting parties, with the intention to make the
contract binding. For this reason, the court will try whenever possible to uphold bargains of contract through the duty of good faith to ensure the contract is executed fairly by the contracting parties.

The concept of good faith, which has its roots in civil law, has lately influenced common law. Because civil law has its origins in Roman law, this has directly influenced the continental system of law (David & Gary, 2006). Thus, the civil law legal system has been widely adopted in Europe, Latin America, Asia, Africa and the Middle East. The common law system however, originates from the English legal system. There is a fundamental difference between civil law and common law legal systems. Civil law is based on codification, where its legal rules are predominantly written.

The role of the judge in the civil law system is limited to the interpretation and application of the law based on the civil law code. In common law, the legal rules are developed by judges through decisions of the court or based on the doctrine of a binding precedent. Both common law and civil law adopt two different legal systems. However, in the law of contract, there has been a tendency of common law lawyers to refer to the civil law (Nicholas, 1974). In civil law, the influence of Roman law can be traced to the law of obligation, particularly the law of contract. Therefore, there is a higher chance that good faith, which is rooted in civil law to have a big influence on common law lawyers pertaining to contract law.

This article elaborates the position of good faith in terms of its application through the use of Bona Fides in civil law, common law approaches to good faith and lastly, it outlines the varying perspectives of good faith in common law countries.

Civil Law Approaches to Good Faith: Bona Fides

Among the features of Roman law characteristic of the civil law system is bona fides. The concept of bona fides require that ‘one’s word must be kept’, and ‘one’s conduct should be in exact conformity with it [promise]’ (Turpin, 1965). Therefore, it is a kind of social and moral concept that regulates the relationship (Powel, 1956). The underlying theme of bona fides is to ensure justice and fairness is upheld regardless of the expressed intention of the parties to the contract.

Prior to bona fides, the concept of strict juris (formal contract) had already existed in Roman contract law. Strict juris is a concept whereby a judge is required to decide a contractual dispute according to the strict rules of the civil law (Hutchison, 1999). A right in the contract could only be applied when the right is expressly granted. Therefore, it is difficult to fulfil the requirement of strict juris when the right needs to be implied. However,
the requirement of *strict juris* seems of little value regarding the rights and duties concerning everyday dealings such as sale, letting and hiring, and especially those rights and duties which are not explicitly expressed but implied.

This concept caused problems when the plaintiff pleads breach of contract but is unable to assert a definite and express right in the contract. Therefore, there were problems with the use of *strict juris*. First, upon breach of a contract, according to *strict juris*, the issue must be defined in precise Latin words, sometimes invoking the Roman god (Hutchison, 1999). This situation was problematic to non-Roman citizens not well versed in Latin and who did not believe in the Roman gods. This made it difficult for non-Roman citizens to comply with the requirement that was set by the *strict juris*. Second, as early as the third century, with the expansion of business between Rome and other countries, there was a need for the court to provide adequate remedies for breach of contract. Therefore, in order to accommodate these two limitations, Roman law introduced the concept of *bona fides*.

There were procedural differences between the two concepts. In applying *bona fide*, the court has to consider other elements. For example, the circumstances of the case and parties’ intention, compared with when applying *strict juris* which relies on the right given (O’Connor, 1990). The praetor (Roman magistrate) would always reject a remedy if the person seeking it was not in good faith, without having to show any element of bad faith in the contract (Watkin, 1999).

The historical origin of *bona fides* within the Roman law has played a vital part in the acceptance of good faith within contemporary contract law in European civil codes. Most European civil codes contain a general good faith provision. In addition to that, some codes contain specific rules in which reference is made to the concept of good faith. *German Civil Code, Italian Civil Code, French Civil Code, Greek Civil Code, Swiss Civil Code* and the *Dutch Civil Code* all make reference to the concept of good faith. It is evident here that good faith has an important role in the civil law by its inclusion in the civil law codes which provides a strong position for the concept.

**Common Law Approaches to Good Faith**

Unlike civil law, there is no overriding general positive duty of good faith imposed on the parties to a contract either in negotiation or performance in common law. In *Walford v Miles*, Lord Ackner commented that a contractual clause containing an agreement to agree, or to negotiate in good faith, would not be enforceable, whereby the parties in the negotiation is entitled to pursue their own interest.2

This parallels the features of the common law itself, which is based on precedent. The development of good faith in common law stems from the English law through the Court of Chancery (Powell 1956). In the Court of Chancery, the first

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Chancellors were ecclesiastics well versed in the Canon law. The principle of good faith is inherent in Canon law (the law of the Church of England). Therefore, the Canon law has been significant in the development of common law. In Canon law, it is emphasised that every promise was binding on the conscience of the person who made it and that failure or refusal to keep it was a breach of that person’s duty to God (Powel, 1956). The jurisdiction of Common Law Courts over contracts was limited during the middle ages, and was no remedy for the breach of a simple contract. However, the Ecclesiastical courts were willing to enforce such contracts. For this reason, Common Law Courts issued writs of prohibition to prevent recourse to the Court of Chancery as a means to avoid conflict.

Due to the rapid development of international trade in the 13th century, a general remedy for breach of contract was needed. Even though there were many available statutes and petitions that were addressed to the King that called for contracts to be honoured, the statutes and petitions were insufficient to provide a remedy for breach of contract. In the 16th century, the Court of Chancery progressed and developed from a Court of Conscience to being a Court of Equity. This event led to the development of the concept of good faith. It also implies that the concept of good faith is separate from the concept of conscience (O’Connor, 1990). Thus, it would appear that the basic obligation of good faith arising from a promise or an agreement, which was enforced on grounds of conscience in the Court of Chancery became the basis of the general remedy for breach of contract in common law. In view of this, it is beyond dispute that the Court of Chancery was mainly responsible for the development of good faith in common law.

By the 18th century, under the influence of Lord Mansfield, it appeared that good faith might have emerged as a broad principle of significance in English contract law (Atiyah, 2005). Lord Mansfield emphasised the basic fairness and intentions of the parties as governing principles. In his famous decision in Carter v Boehm, Lord Mansfield held that good faith is the central principle in a contract which ‘good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.’

The position of English law with relation to the principle of good faith can be found in the landmark case of Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd, where Lord Bingham pointed out that in the Civil law, there is an overriding principle that parties in the contract should act in good faith. The principle of good faith is thus far more reaching than the simple requirement that parties should not deceive each other, the latter being a general duty “which any legal system must recognize”. Despite good faith being a well-recognised principle in civil law legal systems and also in many common law legal systems, English law takes a different position. 

law’s preference for pragmatic solutions means that no such overriding principle of good faith has been adopted. The fact that English law does not recognise a duty of good faith does not mean that the rule of contract law does not generally conform to the requirements of good faith. Instead, English law responds to perceived cases of unfairness by developing piecemeal solutions in which good faith is implied.

References to good faith are increasingly found in both common law and legislation. In the insurance context, good faith is a well-known concept. The duty of good faith in insurance law was introduced almost 250 years ago in *Carter v Boehm*[^7] in which Lord Mansfield commented that good faith is an important concept for disclosure.[^8] Later, the concept was codified in the *Insurance Contracts Act 1984* (Cth) by requiring the insurer and the insured to exercise utmost good faith in an insurance contract. Section 13 of the *Insurance Contracts Act 1984* (Cth) provide that ‘A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. Apart from insurance, good faith is also recognized in fiduciary, partnership and employment relationships where there is a ‘special kind of relationship’ established by the contract which carries an implied obligation of good faith via ‘mutual trust and confidence’. In this context, the special relationship requires trust and confidence that carries with it an expectation of utmost loyalty and good faith. The requirement of trust and mutual confidence was observed as ‘the life-blood of the concern’.[^9] This is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on. From the above discussion, the pervasiveness of the concept of good faith in common law and legislation indicates that good faith behaviour is the expected norm.

**View on Good Faith**

To this date, the common law judges and scholars are divided as to the desirability of qualifying the concept of good faith in common law. Some common law judges and scholars welcome the concept of good faith in contract because it helps to overcome gaps in the contract. In Australia, Good faith was first put onto the judicial agenda through obiter comments by Priestley in the landmark case of *Renard* in 1992. His Honour held that a contract would be effective if both parties exercise reasonableness, which equates the duty of good faith.[^10] However, common law judges and scholars disagree with the introduction or acceptance of the concept of good faith for fear that it will override the essence of the contract. One who disagreed was Bristow who claims that ‘defining the concept of what good faith actually encompasses is an exercise that frequently proves to be

[^6]: [2004] FCAFC 16 [84]
[^7]: (1766) 3 Burr 1905.
[^8]: (1766) 3 Burr 1905, 1910.
[^9]: Helmore v Smith (1886) 35 Ch D 436.
frustratingly circular’ (Bristow, 2000). The following discussion outlines the varying perspectives adopted in relation to the concept of good faith.

Views not in Favour of Good Faith in Common Law. The recognition of an implied duty of good faith has been seen as an unnecessary and undesirable judicial intervention, especially for commercial parties. English law takes the view that, in general, it is for the parties themselves to allocate risk through the terms of their contract, and it is not the role of the courts to do it for them. Thus, it gives freedom and autonomy to the commercial parties to the contract (Bristow, 2000). The court’s duty is to respect and enforce the parties’ intentions in the contract (Goff, 1984).

When parties bargain, there is an expectation of an outcome similar to the intention of the contract. Therefore, implying a requirement that the parties deal with each other in good faith may go against the parties’ intention and consequently make the contracting process no longer reflect their intention. Contract law must provide parties with certainty (Bigwood, 2006). However, good faith creates uncertainty because it has no definite meaning. Good faith is often associated with the concept of honesty, reasonableness, fairness and cooperation. These concepts are believed to be too subjective and uncertain. Therefore, the concept of good faith has been described as a ‘mystery’ with its meaning susceptible to ‘change’ which shows that there is a lack of clarity around the concept. Similarly, there is no general duty of good faith in the making of contracts in English law, in relation to performance as well as formation of contract (Atiyah, 2005). The underlying reason against the adoption of a general principle of good faith in English contract law is to apply a specific legal concept rather than to have a general principle to police unfairness. There are various specific legal concepts that clearly tackle issues of unfairness and injustice such as unconscionability, duty of cooperation, non-derogation from grant and fiduciary duty.

On the other hand, the common law has long been used to interpret parties’ intentions to achieve a variety of normative results, with the aim of ascertaining the actual intention of the parties by looking at the typical intentions or expectations of the parties to the type of contract in question (Zimmermann & Whittaker, 2003). In this context, it means that the interpretation of expressed contractual terms or the implication of terms where one of the parties is held to be responsible to the other for defects in the subject matter of the contract, whereby some information was not disclosed before the contract took place will lead to legal consequences.

Views in Favour of Good Faith in Common Law. There is a need to have good faith as a universal term to act as a gap-filling term in the absence of express terms of the contract. This means the duty of good faith is a gap-filling term which supplements terms of a contract to
The Duty of Good Faith in Common Law

prevent uncooperative or unfair conduct in the course of performing a contract or exercising contractual powers. To exemplify this, a principal who engages a contractor to excavate a construction site provides in the contract that he [the principal] may terminate it following any specified breach of the contract by the contractor. This should of course be subject to the contract being given opportunity to show cause to the satisfaction of the principal why the contract should not be terminated. However, when the contractor breaches the contract but presents a reasonably good cause not to be terminated, the principal nonetheless decides the contractor is unreliable merely based on rumours that he had overheard about the contractor. The principal terminates the contract on the ground that the contractor has not met his/her satisfaction. Based on cases like the above, good faith is pivotal to the contracting parties in achieving cooperation and fairness as well as in the prevention of unfairness when express terms are absent from the contract. Good faith is therefore treated as an implicit expectation of the parties. Burrows (1968) further explained the function of good faith is used ‘not only to condemn deception and lack of candour at the time a bargain is concluded, but also to require a forthcoming attitude, to condemn chicanery and sharp practice in the carrying out of contractual obligations’.

The legislature increasingly relies on good faith as a mechanism to achieve justice. There are more than 154 federal Acts that mention term good faith. In legislation, there are two types of expressions to the concept of good faith, which are a) express and b) oblique. Express means a statutory obligation to act in good faith and oblique means good faith is a factor that has to be taken into account. An example of express good faith is found in s 13 of Insurance Contracts Act 1984 (Cth). By virtue of the above, the requirement of good faith has been interpreted to mean that both parties, namely the insurer and the insured, must act with fairness and honesty, particularly when disclosing information to each other. An example of oblique good faith is found in s 22(1) of the Australian Consumer Law as prescribed in schedule 2 of Competition and Consumer Act 2010 (Cth). This section provides a list of factors, which the court may have to consider for the purpose of determining unconscionable conduct. One factor that needs to be taken into account is the good faith factor in clause (1) ‘To the extent to which the supplier and the customer acted in good faith.’

The concept of good faith is widely employed at international levels, where many international trade instruments incorporate it. In Nuclear Tests Case (Australia v France), the International Court of Justice claimed that ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith’. In international sales law, good faith is used to promote uniformity as illustrated by Article 7(1) of the United Nations Convention on Contracts for the Sale of Goods.

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11 [2004] FCAFC 16 [84].

12 [1993] 7 ANZ Insurance Case 61-197 [78, 258].

for International Sale of Goods\textsuperscript{14}, known as the Vienna Sales Convention (CISG). Good faith is also mentioned in the Principles of International Commercial Contracts (hereinafter UNIDROIT Principles 2004 in Article 1.7\textsuperscript{15}, whereby good faith is the expected behaviours of the parties in the international commercial contracts. Indeed, the duty of good faith is also found in a number of articles of the UNIDROIT Principles 2004 which constitute a direct or indirect application of the principle of good faith and fair dealing in all phases of the contract.\textsuperscript{16}

The Vienna Convention on the Law of Treaties guides interpretation of international treaties that include their formation and operation. Article 26 requires the performance of the treaties must be in good faith.\textsuperscript{17} This means good faith is the foundation to the rules of pact sunt servanda.\textsuperscript{18} It is always an implicit expectation that whenever states enter into a contract, they have willingly committed themselves to its terms to ensure the successfulness of a contract. The Commission on European Contract Law produced the Principles of European Contract Law with an aim to harmonise the law of contract in the international business community by taking into account the requirements of the European domestic trade. The general obligation of good faith was clearly mentioned in Article 1.201(General Obligations)\textsuperscript{19}. This is a clear indication that good faith is the basic principle which is required in the performance and enforcement of the contractual duties in the contract. Despite the differences in its purpose, these international trade instruments show that good faith plays an important role in international contracts.

\textsuperscript{14} Article 7(1) of the United Nations Convention on Contracts for International Sale of Goods (UNCITRAL) stated that:

\begin{quote}
In the interpretation of the Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade.
\end{quote}

\textsuperscript{15} Article 1.7 of the Principles of International Commercial Contracts (UNIDROIT Principles 2004) stated that:

\begin{quote}
In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade and prohibits the parties from limiting or excluding the duty in their contracts.
\end{quote}

\textsuperscript{16} See for instance arts 2.arts 2.4(2)(b), arts 2.15, arts 2.16, arts 2.18, arts 2.20, arts 3.5, arts 3.8, arts 3.10, arts 4.1 (2), arts 4.2(2), arts 4.6, arts 4.8, arts 5.2, arts 5.3, arts 6.1.3, arts 6.1.5, arts 6.1.16(2), arts 6.1.17(1), arts 6.2.3(3)(4), arts 7.1.2, arts 7.1.6, arts 7.1.7, arts 7.2.2.(b)(c), arts 7.4.8 and arts 7.4.13.

\textsuperscript{17} Article 26 of Vienna Convention on the Law of Treaties (VCLT) ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

\textsuperscript{18} pactasunt servanda means agreements are to be kept; treaties should be observed. According to customary international law of treaties, pactasunt servanda is the foundation of international law. Without such an acceptance, treaties would become worthless.

\textsuperscript{19} Article 1.201(General Obligations) of the Principles of European Contract Law (Principles) stated that:

\begin{quote}
’[e]ach party must act in accordance with good faith and fair dealing and the parties may not exclude or limit this duty’.
\end{quote}
CONCLUSION

It is interesting to discover that, despite good faith being rooted in Civil law countries by way of its inclusion in the civil law codes, good faith apparently has a huge influence in countries that practise the common law. There is an emerging interest in good faith in common law countries whereby many references to good faith in the common law and legislation have been made. Although the recognition of good faith in common law is mainly through piecemeal solutions, there is a strong a positive inclination towards recognising the concept. Therefore, it is not surprising that there remains imbalanced views among common law judges and scholars towards the concept of good faith. However, this article has shown that good faith is widely used in common law, therefore there is a good likelihood for good faith to be a recognised and accepted as one of the legal principle at common law.

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Public Interest Corporation: A New Business Platform for Social Entrepreneurship in Malaysia

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ABSTRACT

Social entrepreneurship is one of the mechanisms to tackle social or community’s economic issues and to achieve sustainable development of a country. In Southeast Asia, business entities are mostly private and there are few social and economic enterprises. Therefore, United Kingdom had enacted special laws to govern and to promote the development of social enterprises. These were introduced to address lack of laws to form - charitable social enterprises. In contrast with commercial legal framework, these laws were designed to facilitate social enterprises to prioritise social goals rather than private shareholders interest. The objective of this paper is to explore the possibility of introducing a new legal framework for social entrepreneurs in Malaysia. This legal framework could be used to carry out business activities and gain profit with a clear purpose that profits of the business shall be used for public interest. This paper analyses statutory laws and other legal doctrines to see how this law could be applied in Malaysia.

Keyword: Legal entity, public interest, social entrepreneurship, statutory laws

INTRODUCTION

Countries witnessing rapid economic growth also experience many social problem, such as unemployment, inequalities in terms of access to health care and social services (Catford, 1998), poverty, crime and social exclusion (Blackburn & Ram, 2006). Social entrepreneurship was introduced to combat these social problems. This paper hence, focuses on how social entrepreneurship in
Malaysia can help tackle social problems in the country.

This paper is divided into four parts. The introduction will discuss briefly the concept of social entrepreneurship. The second part explains the role of social entrepreneurship to combat social problem looking at experiences from various countries. This was followed by a brief discussion of Community Interest Company (CIC) in United Kingdom and social entrepreneurship in Malaysia. The final section proposes introducing Public Interest Corporation Act as a new legal framework to govern social entrepreneurial activities in Malaysia.

Social Entrepreneurship
According to Dees (1998), Alvord, Brown and Lett (2002), and Okpara and Halkias (2011), social entrepreneurship refers to practices that employ entrepreneurial activities to manage social problems. According to Paton (2003), social enterprise is a generic term encompassing many different types of organisations where people conduct businesses without monetary rewards. Defourny and Nyssens (2006) explained the concept of social enterprises as a democratically controlled organisation with explicit aim to benefit the community, and profit distributions to external investors are limited.

Social entrepreneurship has also been described as an innovative approach to solve social problems as well as an entrepreneurial action that serves a social objective (Austin, Stevenson, & Wei-Skillern, 2006; Peredo & Chrisman, 2006; Peredo & McLean, 2006) and a consequence of a pressure to tackle societal illnesses (Thompson, Alvy, & Lees, 2000).

Roles of Social Entrepreneurship
For a long time, social entrepreneurship has been recognised as playing an important role in economic sustainability, economy and community’s life (Christie & Honig, 2006; Dees, 1998; Harding, 2004). Studies show that some of the social entrepreneurship practices have succeeded in improving the social well-being of their communities (Alvord et al., 2002). In UK for example, social entrepreneurs have contributed immensely to transforming society. It was reported almost a million people have been employed by social enterprises, contributing more than 5% to UK’s GDP (Malaysian Social Enterprise Blue Print, 2015).

Social Entrepreneurship in Malaysia
In Malaysia, the concept of social entrepreneurship is commonly associated with voluntary based business activities by government agencies and non-governmental organisations (NGOs) to overcome social problem, especially related to poverty (Farok, 2011). Some of these organisations are registered and governed by various legislations, such as the Companies Act 1965, Trustees (Incorporation) Act 1952, and Society Act 1966.

In promoting development of social entrepreneurship, the Malaysian Government introduced several incentives to promote business activities, such as tax
exemption and initial funds for the operation (Malaysian Social Enterprise Blue Print, 2015).

Therefore, it can be said concept of social entrepreneurship in Malaysia is still new and exists in many forms and governed by various legal frameworks.

However, different legal framework may impede the development of such practices. Kelly (2009) suggested that social entrepreneurs need an appropriate business entity and legal framework to promote their development and sustainability. He further explained that an out-of-date law and inappropriate legal framework can become a major obstacle to transforming society.

**Doctrine of Separate Legal Entity as Fundamental element to Public Interest Corporation.** Therefore, a specific legislation to govern social entrepreneurship in Malaysia is vital.

However, as a legal branding for Malaysia social entrepreneurship, awarding corporate personality through the establishment of Public Interest Corporation is key. It will invoke the doctrine of separate legal entity.

The doctrine of separate legal entity was accepted as a basic principle in company law. It was found in the common law case of *Solomon vs Solomon* [1897] AC 22.

In this case, The House of Lords, had unanimously agreed and held the company is an independent entity, in which its rights and liabilities belong to itself.

In *Macaura v Northern Assurance Co* [1925] ALL ER 51.

“My Lords, this appeal relates to insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmills Ltd, of Skibbereen, co Cork. He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company’s assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company’s only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no “legal or equitable relation to” the timber at all. He had no “concern in” the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company’s assets, not by the fire”

The House of Lord’s decision in Macaura’s case was a clear position of doctrine of separate legal entity where the company was allowed to own the property and register it under its own name.
In Malaysia, the doctrine of separate legal entity has been accepted and applied under the Malaysian Company Law Act 1965. This statute has been repealed by Company Law Act 2017.

In the case of *Tan Lai v. Mohamed Bin Mahmud* [1982] MLJ Salleh Abas, held that the company’s legal persona is the result of statutory acts of the Registrar of Companies under section 16 of Companies Act 1965. Thus, as an entity with an identity, the company has a right to sue and being sued.

The court in Abdul *Aziz Bin Atan v. Ladang Rengo Malay Estate Sdn. Bhd.* [1985] MLJ case ruled that although there are changes in the membership, the corporate entity remains.

**Company Act 2017**

**Separate Legal Entity.**

20. A company incorporated under this Act is a body of corporate and shall –

(a) Have a legal personality separate from its members; and

Continue in existence until it is deregistered.

**Companies have unlimited capacity.**

21. (1) A company shall be capable of exercising all the functions of a body corporate and have the full capacity to carry on or undertake any business or activity including-

(a) To sue and be sued

(b) To acquire, own, hold and develop or dispose if any property and

(c) To do any act which it may do or to enter into transactions

Significantly, the doctrine of separate legal entity will confer benefits for the business as the doctrine will ensure low risks for the management through limited liability principle and promote sustainability of the organisation.

In Malaysia, the doctrine of separate legal entity has also been applied in Partnership through Limited Liability Partnership Act 2013, the latter is a hybrid business entity whereby the partnership will have corporate attributes in its business operation.

**Limited Liability Partnership Act 2012.**

3. Separate Legal Personality and capacity

(1) A limited liability partnership is a body corporate and shall have legal personality separate from that of its partners.

(2) A limited liability partnership shall have perpetual succession.

(3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

(4) A limited liability partnership shall have unlimited capacity and shall be capable of-

(a) suing and being sued;

(b) acquiring, owning, holding and developing or disposing of property; and

(c) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer
Hence, it’s obvious that the doctrine of separate legal entity is not restricted to companies only, but also to any other entities regardless of their characteristics. Therefore, a legal research should be conducted on this doctrine to justify its application. Through this legal doctrine Public Interest Corporation will have its own legal entity and attributes similar to other corporate bodies which would enable it to conduct business activities with least restrictions. Moreover, this legal doctrine would provide social entrepreneurs a bigger scope to conduct their business, minimise operating cost and maximise benefits to the community.

CONCLUSION

With the recent economic downturn, it is high time for Malaysian government to focus on social entrepreneurship as one of the measures to assist the public. By introducing Public Interest Corporation, the Government may spend less on the public spending but enable the community to create and sustain its own revenue generating entity. With the suggested legal doctrine, Public Interest Corporation could exist independently and perpetually. This new entity could strengthen the spirit of community as the managing a corporation demands teamwork and cooperation within the community and it is independent of the Government.

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Cross-Border Marriages: Socio-legal Knowledge among Muslims in Malaysia

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ABSTRACT

Cross-border marriage is a marriage without permission from the marriage registrar in each state and it is solemnised either in Malaysia or abroad. The purpose of this study is to examine and analyse the level of socio-legal knowledge among Muslims in Malaysia who solemnise the marriage either in Malaysia or abroad. A total of 400 respondents from four regions in Malaysia were recruited for this study. A questionnaire survey was the main data collection method and further supported by semi-structured interviews. Findings show the respondents were aware of the opportunity to register their marriage at the court but did not choose to do so. Therefore, the study proposes new stricter regulations and policies to control and curb cross-border marriages.

Keywords: Cross-border marriage, knowledge, Muslims, registration, strict regulation

INTRODUCTION

Islam is a complete and comprehensive religion covering each and every aspect of human life. In order to strengthen the family institution, Islam has provided guidelines and rules to ensure the welfare and harmony of a family. The Islamic law has detailed the rules and regulations regarding marriage to protect its sanctity. The Shariah law that is practised in Malaysia recognises a lawful marriage as abiding the pillars of marriage and complies with the requirements set out in the legal provisions enforced in each state. Marriage is one of the Sunnah of Prophet Muhammad (p.b.u.h), but it has been violated to accomplish one’s wishes and desires, such as to get married without the families’ permission or because...
the female is already pregnant out of wedlock. These ‘wishes and desires’ have led to new types of marriage contracts, such as eloping with future spouses or popularly known among Malaysians as *kahwin lari*. It may also be termed as cross-border marriage which is defined as a marriage without the consent of the authority such as the Islamic Religious Department in each state and the Syariah Court Judges (Noraini, 2011). Cross-border marriage has raised many issues and major problems for Malaysians mainly among the Muslims and Malays, particularly in matters related to marriage registration.

**METHODS**

This paper uses both the quantitative and qualitative approaches. A survey was conducted among 400 selected respondents in Northern, Central, East and South regions of Malaysia using a set of questionnaires. Semi-structured interviews were also conducted with the informants who have the knowledge and experience in cross-border marriage. Data was analysed using SPSS version 22.

**Literature Review**

**Islamic Law Perspective.** In Islam, cross-border marriage is not specifically mentioned. This raises certain issues regarding the guardian of the bride. Allah has mentioned that a widow is entitled to choose a man if she wants to get married upon the completion of her ‘iddah period. Allah says;

> If any of you die and leave widows behind, they shall wait concerning themselves for four months and ten days. When they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner. And Allah is well-acquainted with what you do (Al-Baqarah: 234).

There are a few hadith that discuss the issue of guardianship in marriage;

Sufyan reported on the basis of the same chain of transmitters (and the right words are): A woman who has been previously married (thayyib) has more right to her person than her guardian and the virgin father must ask her consent being her silence. At times he said: her silence is her affirmation (Imam Muslim, Sahih Muslim translated by Abdul Hamid, 1999).

‘A’ishah reported the Apostle of Allah (peace be upon him) as saying: The marriage of a woman who marries without the consent of her guardians is void. (He said these words three times). If there is cohabitation, she gets her dower for the intercourse her husband has had. If there is a dispute, the sultan is the guardian of one who has none (Sunan Abu Dawud translated by Ahmad Hasan, 1984).

**Malaysian Legal Perspective.** According to Section 19 of Islamic Family Law (Federal
Territories) Act 1984, no marriage shall be solemnised without the permission to marry—

(a) by the Registrar under Section 17 or by the Syariah Judge under Section 18, where the marriage involves a female resident in the Federal Territory; or
(b) by the proper authority of a State, where the marriage involves a female resident in that State.

From this section, we can conclude that any persons who get married without the permission of the marriage registrar will be charged and punished. The punishment is based on Section 40(2) of Islamic Family Law Act (Federal Territories) 1984 which allocates fine of not more than one thousand Ringgit Malaysia and imprisonment of not more than 6 months or both for the misconduct.

According to Section 31(1) of the Islamic Family Law (Federal Territories) Act 1984, any person who is a resident of the Federal Territory and who has contracted a valid marriage abroad according to Hukum Syarak and not being in a marriage registered under the Section 24, the person shall, within six months after the date of the marriage, appear before the nearest or most conveniently available Registrar of Muslim Marriages, Divorces, and Ruju’ abroad in order to register the marriage. The marriage, upon being registered, shall be deemed to be registered under this Act.

The 52nd Conference of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia held on 1st July, 2002, discussed issues pertaining cross-border marriage in Southern Thailand. The Committee decided that marriage outside of the country is valid provided that:

(a) the marriage fulfils the essential validity of a marriage,
(b) the distance is more than two marhalahs, there is no court decision preventing the woman from getting married on legal reason and,
(c) such a marriage is solemnised by a wali that has been vested by the law of the country.

Thus, Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia still considers such marriage as valid in Malaysia context, given the location exceeds two marhalahs and fulfils all conditions that have been prescribed by the laws and rulings. In identifying issues related to Cross-Border Marriages, a number of previous studies were used as reference by the researcher. However, this discussion will only focus on a few major works on this topic. To date, socio-legal studies regarding cross-border marriages are limited.

Noraini (2009) in her book, “Registration of Marriage in Malaysia: A Socio-legal Study of Runaway Marriages among Muslims”, dealt specifically on cross-border marriages by analysing the demographic profiles of those involved in cross-border marriages. However, data utilised in her research were only obtained
through the applicants’ files in court and religious offices.

Raihanah (2007) in her work, “Polygamy without the Shariah Court’s Permission in Malaysia: A Socio-Legal Perspective”, blamed the strict procedure in practising polygamy which has caused Muslim couples to commit cross-border marriage. By employing inferential statistical technique, the study attempted to prove polygamy as a predictor of cross-border marriage.

Cheng, Brenda and Rashidah (2012) claimed that foreigners, especially Indonesians, resort to marrying local Muslims in order to secure their economic positions and upgrade their social status. The authors interviewed Malaysians and Indonesians who were involved in such marriages. However, their study was not based on quantitative research. Thus, the current study fills this gap by using quantitative research method in analysing data.

**RESEARCH OBJECTIVE**

The specific aim of this research is to examine and analyse the differences between demographic information and respondents’ knowledge on cross-border marriages.

**RESULTS**

**Descriptive Analysis**

Table 1 shows the respondents’ knowledge on the registration process of cross-border marriages in court. Overall, 79.5% of the respondents acknowledged that marriages can be registered at the court. Specifically, more than three-quarters of the respondents (77.6%) knew that many Muslim married couples registered their marriages while 78.2% of them knew it is compulsory for all Muslims couples to register their marriages while 78.7% of them felt the court gives an appropriate judgement. In terms of perquisites, 79.9% of the respondents understood that the court gives appropriate benefits to all Muslim couples while the majority (80.8%) believed the court gives appropriate judgement to the children involved in such marriages and majority of the respondents (80.2%) deemed registering their marriage will make the family to happier. From Table 1, it is apparent that the court places much emphasis on the children’s welfare as well as their families and 79.5% of the respondents perceived Muslim couples who registered their marriage as adequately literate on the current law enforcement. Moreover, 78.1% of the respondents perceived Muslim couples who registered their marriage as abiding the law. In fact, the majority of the respondents (82.6%) knew that the authorities in Malaysia strongly encourage Muslim couples to register their marriages. From the religious context, 79.5% of the respondents perceived those who registered their marriage adhere to the precepts of their religion.

**Inferential Analysis**

Ten items in respondents’ knowledge were analysed using the independent
**Cross-border Marriages among Malaysian Muslims**

Table 1  
**Respondents’ knowledge on marriage registration at the court**

<table>
<thead>
<tr>
<th>No.</th>
<th>Knowledge towards marriage registration at the court</th>
<th>Level of Agreement</th>
<th>Mean*</th>
<th>SD</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>I know many Muslim married couples registered their marriage.</td>
<td>- 0.5 25.0 60.8 13.8</td>
<td>3.878</td>
<td>0.627</td>
<td>77.6</td>
</tr>
<tr>
<td>2</td>
<td>I know that it is compulsory to register marriage for all Muslim couples.</td>
<td>- 0.3 24.8 58.8 16.3</td>
<td>3.910</td>
<td>0.643</td>
<td>78.2</td>
</tr>
<tr>
<td>3</td>
<td>I know that the court gives appropriate judgement to all Muslim couples.</td>
<td>- 0.5 22.3 60.5 16.8</td>
<td>3.935</td>
<td>0.638</td>
<td>78.7</td>
</tr>
<tr>
<td>4</td>
<td>I know that the court gives appropriate benefit to all Muslim couples.</td>
<td>- 0.5 18.5 62.0 19.0</td>
<td>3.995</td>
<td>0.629</td>
<td>79.9</td>
</tr>
<tr>
<td>5</td>
<td>I know that the court gives appropriate judgement to the children involved.</td>
<td>- 1.0 17.0 59.3 22.8</td>
<td>4.038</td>
<td>0.661</td>
<td>80.8</td>
</tr>
<tr>
<td>6</td>
<td>I feel that by registering the marriage, the family will be happier.</td>
<td>- 0.5 21.3 55.0 23.3</td>
<td>4.010</td>
<td>0.683</td>
<td>80.2</td>
</tr>
<tr>
<td>7</td>
<td>I perceive that Muslim couples who registered their marriage know the law.</td>
<td>- 1.0 27.8 44.0 27.3</td>
<td>3.975</td>
<td>0.769</td>
<td>79.5</td>
</tr>
<tr>
<td></td>
<td>I perceive that Muslim couples who registered their marriage are those who abide by the law.</td>
<td>- 0.5 31.5 45.3 22.8</td>
<td>3.903</td>
<td>0.745</td>
<td>78.1</td>
</tr>
<tr>
<td>8</td>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage.</td>
<td>- 1.0 19.5 45.3 34.3</td>
<td>4.128</td>
<td>0.750</td>
<td>82.6</td>
</tr>
<tr>
<td></td>
<td>I perceive that those Muslim couples who registered their marriage are obedient to the religion.</td>
<td>- 0.8 24.5 51.5 23.3</td>
<td>3.973</td>
<td>0.713</td>
<td>79.5</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>3.974</td>
<td>0.478</td>
<td>79.5</td>
</tr>
</tbody>
</table>

The t-test is used to test the demographic information of the respondents. The purpose of the analysis is to differentiate between demographic information and respondents’ knowledge regarding the registration process of cross-border marriages at court. For the independent t-test, respondents’ knowledge of registration of cross-border marriage at court was tested according to gender (male-female), locality (rural-urban), and type of marriage (polygamy-monogamy) dichotomy.

**Independent T-Test for Respondents’ Knowledge of Registration of Cross-Border**

**Marriage at Court by Gender.** Table 2 shows the t-test results of respondents’ knowledge by gender, in which no significant differences were found in the items. Overall, there are no significant differences between male and female in terms of respondents’ attitudes towards marriage registration at court, given the result for male respondents was \( M=3.986, SD=0.488 \) and the female...
It was found that male respondents’ knowledge of registration process of the marriage at court was slightly higher Overall, the t statistic value was 0.538 at 398 degrees of freedom and p-value of .591.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Gender</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
<th>t</th>
<th>df</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>I know many Muslim married couples registered their marriage.</td>
<td>Male</td>
<td>220</td>
<td>3.886</td>
<td>0.634</td>
<td>0.312</td>
<td>398</td>
<td>.755</td>
</tr>
<tr>
<td>I know that it is compulsory to register marriage for all Muslim couples.</td>
<td>Female</td>
<td>180</td>
<td>3.867</td>
<td>0.619</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the court gives an appropriate judgement to all Muslim couples.</td>
<td>Male</td>
<td>220</td>
<td>3.909</td>
<td>0.642</td>
<td>-.031</td>
<td>398</td>
<td>.975</td>
</tr>
<tr>
<td>I know that the court gives an appropriate benefit to all Muslim couples.</td>
<td>Female</td>
<td>180</td>
<td>3.911</td>
<td>0.645</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the court gives an appropriate judgement to the children involved.</td>
<td>Male</td>
<td>220</td>
<td>3.923</td>
<td>0.640</td>
<td>-.425</td>
<td>398</td>
<td>.671</td>
</tr>
<tr>
<td>I know that the court gives an appropriate benefit to the children involved.</td>
<td>Female</td>
<td>180</td>
<td>3.950</td>
<td>0.637</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I feel that by registering the marriage, the family will be happier.</td>
<td>Male</td>
<td>220</td>
<td>4.041</td>
<td>0.685</td>
<td>1.001</td>
<td>398</td>
<td>.317</td>
</tr>
<tr>
<td>I perceive that Muslim couples who registered their marriage know the law.</td>
<td>Female</td>
<td>180</td>
<td>3.972</td>
<td>0.680</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I perceive that Muslim couples who registered their marriage are those who abide by the law.</td>
<td>Male</td>
<td>220</td>
<td>3.986</td>
<td>0.767</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage.</td>
<td>Female</td>
<td>180</td>
<td>3.961</td>
<td>0.722</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I perceive that those Muslim couples who registered their marriage are obedient to the religion.</td>
<td>Male</td>
<td>220</td>
<td>3.932</td>
<td>0.734</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I perceive that those Muslim couples who registered their marriage are obedient to the religion.</td>
<td>Female</td>
<td>180</td>
<td>3.867</td>
<td>0.758</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overall knowledge of the respondents towards marriage registration at court</td>
<td>Male</td>
<td>220</td>
<td>3.986</td>
<td>0.488</td>
<td>0.538</td>
<td>398</td>
<td>.591</td>
</tr>
<tr>
<td>I know that the authorities in Malaysia strongly encourage Muslim couples to register their marriage.</td>
<td>Female</td>
<td>180</td>
<td>3.960</td>
<td>0.467</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Independent T-Test for Knowledge of Respondents on Registration of Marriage at Court by Locality. Data on the differences of respondents’ attitudes (Table 3) in terms of locality (rural and urban) was analysed. There 118 respondents from the rural areas. There were two significant items. The first item, respondents’ perception of the couples who registered their marriages as abiding the law, was found as significant at (t=2.144, p=.033), while the second item, which is the respondents’ perception of those Muslim couples who registered their marriage as obedient to the religion, was also found significant at (t=1.969, p=.050). In addition, the urban residences were found to be better informed.
Overall, the mean value for the rural and urban respondents was 3.953 and 3.983 respectively. Meanwhile, the standard deviation for rural group was 0.425 and for urban group 0.499. In this case, the t statistic was 0.564 at 398 degrees of freedom. The independent test p-value was 0.573, greater than 0.05. Thus, it shows that there is no statistically significant difference between the respondents in rural and urban areas in terms of their knowledge of marriage registration at court even though the mean value for urban area was higher.

### Independent t-Test for Knowledge of Respondents towards Registration of Marriage at Court by Type of Marriage.

Table 4 shows the results of the independent t-test on the respondents’ knowledge according to types of marriages, in which four items show statistically significant differences. First, the respondents know that the court provides appropriate judgement to all Muslim couples. (t=-3.214, p=0.001). For monogamous marriages, the mean is 3.832 and the standard deviation is 0.670 while the mean for polygamous marriage is 4.034.
Data shows knowledge of registration of cross-border marriage among respondents who practise monogamous marriage was less. Second, the respondents knew that the court gives appropriate benefit to all Muslim couples ($t=-2.042$, $p=.017$). The mean value for respondents in monogamous marriage was 3.918 and the standard deviation was 0.602. Meanwhile, the mean value for those in polygamous marriage was 4.069 and the standard deviation 0.647. From the figure, it can be concluded that the respondents who practise monogamous marriage had less knowledge in regards to benefits of registering cross-border marriage. Third, the respondents knew that the court gives appropriate judgement to the children involved in such marriage ($t=-2.489$, $p=.013$). The mean value for monogamous marriage was 3.954 and standard deviation 0.651, while the mean value for polygamous marriage was 4.118 and the standard deviation 0.663. Therefore, respondents who practise monogamous marriage were less knowledgeable in terms of their appropriate judgement to children involved in cross-border marriages. Fourth, respondents knew the authorities in Malaysia strongly encourage Muslim couples to register their marriage ($t=-2.142$, $p=0.033$). The mean value for monogamous marriage was 4.046 and the standard deviation 0.767. Comparatively, the mean value for polygamous marriage was 4.206 and the standard deviation 0.727, indicating respondents in monogamous marriage had less knowledge with regards to the encouragement by the Malaysian authorities for Muslim couples to register their marriage. Overall, there was a significant difference between the respondents in monogamous marriage ($M=3.921$, $SD=0.496$) and polygamous marriage ($M=4.025$, $SD=0.456$) in terms of their knowledge on marriage registration at court with $t$-statistic value at -2.175 and $p$ of .030 which is less than .05 acceptance threshold.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Type of Marriage</th>
<th>N</th>
<th>Mean</th>
<th>SD</th>
<th>t</th>
<th>df</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>I know many Muslim married couples registered their marriage.</td>
<td>Monogamy</td>
<td>196</td>
<td>3.827</td>
<td>0.616</td>
<td>-1.596</td>
<td>398</td>
<td>.111</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>204</td>
<td>3.927</td>
<td>0.635</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that it is compulsory to register marriage for all Muslim couples.</td>
<td>Monogamy</td>
<td>196</td>
<td>3.883</td>
<td>0.617</td>
<td>-0.834</td>
<td>398</td>
<td>.405</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>204</td>
<td>3.936</td>
<td>0.666</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the court gives an appropriate judgement to all Muslim couples.</td>
<td>Monogamy</td>
<td>196</td>
<td>3.832</td>
<td>0.670</td>
<td>-3.214</td>
<td>398</td>
<td>.001</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>204</td>
<td>4.034</td>
<td>0.590</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I know that the court gives an appropriate benefit to all Muslim couples.</td>
<td>Monogamy</td>
<td>196</td>
<td>3.918</td>
<td>0.602</td>
<td>-2.042</td>
<td>398</td>
<td>.017</td>
</tr>
<tr>
<td></td>
<td>Polygamy</td>
<td>204</td>
<td>4.069</td>
<td>0.647</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
DISCUSSION

With regards to differences between demographic information and the respondents’ knowledge on cross-border marriage registration, several differences can be noted. It was found that majority of the respondents had knowledge of marriage registration at the court. However, according to the independent t-test, respondents’ knowledge of this according to gender showed female respondents were less knowledgeable even though it was not statistically significant. When a male respondent from Johor was asked regarding his decision to opt for cross-border marriage, he answered:

....This marriage must be registered, if this marriage is unregistered, our life will be affected.... (Personal Communication with Informant No.1, on 23 October 2014, Songkhla)

The study also discovered statistically significant difference between the urban and rural residents in terms of their perception of Muslim couples who registered their marriage as those abiding by the law. Additionally, it was noted that respondents who practised polygamous marriage had more knowledge about the court providing appropriate judgement and benefits to all Muslim couples.

Therefore, this study recommends increased awareness on the importance of marriage registration, especially among the rural communities.
CONCLUSION

This study recommends the following to curb cross-border marriages as they affect the family institution:

(1) Government agency such as the Legal Aid Department and Religious Office must have a one-stop centre or branch in every district so the rural people can access it easily for information

(2) To promote the importance of marriage registration through mosques and seminar especially in rural area;

(3) The government should amend the laws regarding cross-border marriage;

(4) Legal education must start from the school.

In conclusion, legal factors play an important role in cross-border marriages. However, this study found the respondents’ knowledge also played an important role in cross-border marriages. Therefore, it is proposed more research is undertaken in order to prevent cross-border marriage as it affects future of the women and children involved.

REFERENCES


Iddah Maintenance: Concept, Issues and Methods of Enforcement

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21300 Kuala Terengganu, Terengganu, Malaysia

ABSTRACT
Al-Quran in surah At-Talaq verse 6 presents in a clear order that it is a mandatory obligation of the husbands to provide lodging, sustenance, and other things to their divorced wives during iddah period. However, husbands often neglect to bear this trust forcing the wives to file petition for their right. Nevertheless, cases have shown that very few women claimed maintenance after divorce for themselves. By neglecting their responsibility, it seems that the husbands are trying to waste the Syariah Court’s time and challenge its credibility. The objective of this paper is to examine the concept, issues and methods of enforcement of iddah maintenance in the State of Terengganu, Malaysia. It also suggests the way forward to enhance the capacity of Syariah court in dealing with the issue. The authors adopted qualitative research method to gather data and they found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, especially with regard to maintenance orders.

Keywords: Enforcement weakness, iddah maintenance, non compliance, responsibility, Syariah court

INTRODUCTION
The public nowadays are often faced with divorce cases happening all the time that it is now considered a normal occurrence. According to a research conducted in 2010 by the Department of Islamic Development Malaysia (JAKIM) there is an average of 3 divorces per hour for Muslim spouses in Malaysia, an average of 70 divorce cases per day, 2000 cases a month and 25,000 cases per year in the year 2011 (Utusan Malaysia, 2013).

Family disputes among Muslim couples would not end with the pronunciation of talaq or divorce as wives and children have the right to claim certain reliefs from the ex-husband. One of these reliefs is iddah
maintenance. In section 59(1) of Islamic Family Law (Federal Territories) Act 1984, it is the jurisdiction of the Syariah Court to order a Muslim man to pay maintenance to his wife or his ex-wife (equivalent to section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985). In section 65(1) of the same Act provides that it is the right of a divorced wife to claim maintenance from her ex-husband during her period of iddah. Regardless of these important provisions, cases have shown that many of the ex-husbands are unwilling to pay maintenance based on several factors; among others being the husband’s new commitment (new wife or children), a long-standing problem between the husband and wife (or ex-wife) that the wife is not cooperating, the ex-husband passing on his responsibility to the new husband of his ex-wife, or because the ex-husband has no job and no source of income, and there are cases where the husbands know that a state syariah law is confined to that particular state and not enforceable outside it (Ariff, 2002).

Furthermore, some of ex-wives are also unwilling to claim maintenance because of the time and cost taken to get a relatively small amount of money; not bothering to lodge complaints against the ex-husbands; and lack of awareness of the legal provisions to enforce their financial rights (Azhari, 2005). The objective of this paper is to examine the concept, issues and methods of enforcement of iddah maintenance. The authors adopted qualitative research method to gather data by way of library research on reference such as al-Quran, Al-Hadith and text books, journal articles and manuscript materials or brochures available in Syariah Court, Syariah Judiciary Department Malaysia (JKSM), Social Welfare Department, Department of Family Development and Enforcement, Social Institute of Malaysia (ISM), JAKIM and IKIM. It was found that the weaknesses of the enforcement and execution of a court order can contribute to the non-compliance with court orders, therefore this paper suggests the way forward to enhance the capacity of Syariah court in dealing with the issue.

THE CONCEPT OF IDDAH MAINTENANCE

The word nafkah derived from an Arabic word ‘infaq’ which means giving something. Wahbah al Zuhayli (1989) defines nafkah as ‘someone provided something to meet the needs of people under his responsibility in the form of food, clothing, and shelter. It is also defined as ‘the spending for someone’s maintenance in the form of food, clothing and shelter, and the consequent price of water, fat, lamp and etc.’ (Al-Jaziri, 1969). The responsibility of husband in providing maintenance for the wife and children is evident in the Al-Quran surah An-Nisa’, verse 34 where Allah says: “Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth.” (An-Nisa’: 34).

The duty to provide iddah maintenance begins at the moment of pronunciation
of *talaq*. *Iddah* literally means number or counting (Al-Jaziri, 1969). It is the waiting period of a divorced woman before she can engage into another marital relationship (Abdullah, 2009). In Al-Baqarah verse 228, Allah has provided that for divorced women, the waiting period should be three menstrual cycles and in the same *surah* verse 234, the waiting period for women who are separated due to the death of the husband shall be four months and ten days. The Syafi’i School provides that the wife’s maintenance is a debt due by the husband and arrears are recoverable by the wife. In deciding the amount of maintenance to be given to the wife, there are certain considerations that need to be taken into account. Those considerations are the earning capacity of the husband and the financial needs of the wife. A wife’s right to maintenance may cease when the wife dies, the wife is disobedient (*nusyuz*) or remarries (Al-Jaziri, 1969).

### THE LAW ON IDDAH MAINTENANCE IN MALAYSIA

Section 58 of the Administration of Islamic Family Law (Terengganu) Enactment 1985 provides that the court shall order a man to pay maintenance to his former wife unless if the wife is determined to be nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband.

In the case of *Wan Alwi v. Syarifah Sapoyah* [1988] 6 HJ 259; the learned Kadhi of Sarawak when deciding the case in relation to the claim for maintenance during *iddah* stated that according to Islamic law a wife who has been divorced by her husband is entitled to maintenance if a wife is divorced by talaq raj’i or is divorced while the wife is pregnant and she does not commit any act which can be considered as nusyuz. In *Noor Bee v. Ahmad Shanusi* [1978] JH [1401H] 63; the learned Kadhi of Penang stated that the right of maintenance during *iddah* if not paid would become a debt due by the husband to his divorced wife. However, the right to residence if it is not claimed during the *iddah* period, the right shall elapse. In *Rahaniah v. Haji Ujang* [1983] 4 JR 270; the divorced wife made a claim for the payment of the *iddah* maintenance calculated at RM300 a month for the period of 3 months and 10 days, amounted to an overall amount of RM1000. The Qadhi made a reference to the al-Mughni al-Muhtaj that explicates: “it is incumbent to provide a woman who has been divorced by a revocable divorce, maintenance for her expenses and garments”. The Qadhi assessed the amount of maintenance that was payable at RM6 a day. Thus, the husband was ordered to pay RM600 for the *iddah* period of 100 days.

### MAINTENANCE ORDER AND ITS METHODS OF ENFORCEMENT

Enforcement for payment of money is a well-established method in Syariah procedural law. In Terengganu, the Syariah Court Civil Procedure (Terengganu) Enactment (SCCPTE) 2001 covers the procedure for maintenance order in family law cases. Based on Part XVIII Chapter 3 of the Syariah Court Civil Procedure Enactment, if a maintenance order is issued, the enforcement of the order can be done through various methods such as garnishing wages, property, or assets of the debtor. The court can also order the debtor to pay a fixed sum of money towards the maintenance obligation.
(Terengganu) Enactment 2001, the types of enforcement and execution used by the judgment creditor can be made using the following methods: (i) Enforcement Order; (ii) Seizure and Sale Order; (iii) Ownership Order; (iv) Transfer of Ownership Order; (v) Hiwalah (Garnishment or, Transference of Liabilities); (vi) Proceeding; (vii) Judgment of Debtor Summon; (viii) Committal Proceeding; and (ix) Attachment of salary. Among the most common being the following:

**Judgment Debtor Summons**

The judgment creditor who is entitled to enforce the judgment may require the judgment debtor who is liable under the judgment to appear in Court to be examined orally as to his capacity to pay or settle the judgment debt and to secure any property which may be used for such payment (Section 176 SCCPTE 2001). In theory, this mode of execution seems to suggest the best method in ensuring that the judgment debtor is able to comply with the court’s order effectively. According to the provision, an inquisitorial examination will be conducted by the court on the judgment debtor or other witnesses on *iqrar* to determine the financial standing of the judgment debtor through his salary, expenses and his physical appearance. This is also an effective way to review from time to time the judgment debtor’s financial capacity to pay the judgment debt (Mokhtar, 2006).

In practice however, most cases faces difficulties in serving summons and notice of appearance especially if the address of the judgment debtor is not known. If such event the judgment creditor may apply for a judgment notice requesting the judgment debtor to appear in court to show cause as to why he should not be committed to prison for failure to comply with the summons (Section 179). When this order is also not obeyed, the court will resort to issuing a warrant of arrest as the last option to force appearance of judgment debtor in court (Section 178(2)), as most people will feel threatened by an order of imprisonment and would rather settle the debt owing. Despite its advantage, it is not always easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers to serve a warrant of arrest. Cases have often been struck out or dismissed by the court due to the problem of debtor’s whereabouts are not known and failure of judgment creditor to appear before the court without any particular reason.

**Attachment of Earnings and Other Periodic Payments**

Another type of enforcement of *iddah* maintenance is payment by way of attachment of earnings order, allocating money from the defendant’s wages to pay the debt. The enforcement of this method is provided in the (Married Women and Children (Enforcement of Maintenance) Act 1968. Where an attachment of earnings order is made, the defendant’s employer shall be required to make out of the earnings falling to be paid to the defendant payments in satisfaction of the order (Section 5 MWCEMA). After taking into account
the resources and needs of the defendant as well as the needs of persons under his responsibility the court will determine the reasonable amount to be attached. Section 7 of MWCEMA 1968 directs that the defendant and his employer are duty bound to comply with the order, failure to do so will cause the defendant or his employer to be liable to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand ringgit or both (Section 12 MWCEMA).

In cases where the defendant is self-employed, Section 13 MWCEMA provides the court to make an order for the payment of money directly to the court. In the event of non-compliance of the order, the court may call upon the defendant to show cause. Failing this, the court may proceed to the last resort, by issuing a warrant for the attachment and sale of the property belonging to the defendant. The SCCPT also provides on attachment of earnings order, one of which is to attach the income of the judgment debtor (Section 159 SCCPT). The enactment is however silent on the nature and enforcement of attachment.

Seizure and Sale

When a debtor refuses to pay his debts even though he is capable of doing so, the judge may order the debtor to sell his property and settle the debts (Section 159(1)(a) of the SCCPT). In executing seizure and sale, the judge may seize the debtor’s property and sell it. Aside from money and movable properties, other properties such as shares, stocks, debentures, and bonds can also be seized to execute the court’s order of seizure and sale (Section 160 SCCPT).

Hiwalah

Section 161(1) of the SCCPT defines property which can be the subject matter of hiwalahs to include debt due to the judgment debtor. The civil courts have decided that Employee Provident Fund (EPF) can be used for the claim of financial rights though it is acquired by the sole effort of one party. Thus, in deciding the proportion of the claim, the acquirer will get a greater portion (Lim Kuen Kuen v. Hiew Kim Fook & Anor [1994] 2 MLJ 693; Ching Seng Woah v. Lim Shook Lin [1997] 1 MLJ 109). Section 53A of the Employees Provident Fund 1991 provides that the Board may order the transfer of a sum of money from the account of a member of the Fund into the account of the receiver upon a court order that it is a matrimonial asset.

Committal order and Contempt of Court

Section 147 of the SCCPT provides that any person who is directed by any judgment of the court to comply with the order without demand and when there is a failure to comply, the person may be deemed to be a contempt of court. The law provides for a protection for the ex-wife to enforce maintenance order for the payment of money whereby section 229 empower the court to make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit (Form 46 of the Third Schedule).
THE WAY FORWARD
The Family Support Division (BSK) of the Syariah Judiciary Department Malaysia (JKSM) has adopted several measures to ensure the ex-husband complies with the maintenance order issued by the court. The BSK in collaboration with JKSM’s Information Technology Division, has established ‘E-Maintenance’ option whereby once a Syariah court order is issued, the order is automatically incorporated into BSK’s databank. The databank would give access to the officer in charge to follow up with the respective claimant and enquire as to whether the husband (or ex-husband) has made the payment. This mechanism is adopted not only to ensure only that the husband pays the maintenance, but also to prevent the maintenance accumulating into arrears, making it difficult for the husband to settle the amount. In addition, the BSK is now providing for trust fund to provide for interim maintenance based on the amount of maintenance decided by the Syariah Court. This interim payment is only available for six months but the BSK has the jurisdiction to extend the assistance based on approval by the Trust Fund Committee. This trust fund is deemed as debt owed by the husband (Ariff, 2002).

CONCLUSION
Regardless of how comprehensive an act/enactment may be, it cannot promise the efficient management of court cases, especially when there is delay in compliance of the court order. As in any other divorce cases, the major reason for delays in compliance with a court order comes from the judgment creditor or the judgment debtor itself (Ismail, 2011). The wordings of the provision suggest that the order obtained should be based on mutual agreement between the parties, however it still does not guarantee that the order will be complied with by the parties.

In judgment debtor proceedings another major reason for delays are problems in executing summons and warrant of arrest. The fact that it is not easy to get full cooperation from enforcement agencies such as the police and syariah enforcement officers, the judgment debtor disappearing and keeping their whereabouts a secret, and orders obtained ex parte, are reasons for the problem. Nevertheless, this type of proceedings offers great advantage if executed properly. For example, in conducting examination of judgment debtor, it is advisable that the judgment creditor can get information regarding the properties of the judgment debtor with the relevant authorities such as the Land Office, Securities Commission, banks, and Department of Road Transportation, where appropriate (Abdullah & Mohd Zin, 2012). Thus, each of the parties have their own roles in ensuring the success of the implementation and enforcement action of any order of the Syariah Court. Furthermore, the working of an effective mechanism cannot depend solely on the legal process, and must be accompanied with legislative and administrative cooperation. To conclude, the process of enforcement of iddah maintenance orders in the Syariah...
Court can be accelerated if all parties, especially the judgment debtor, cooperate and comply with the existing mechanisms.

REFERENCES


Social Benefits of the Equal Opportunity Rule in Takeovers and Mergers of Companies in Malaysia and United Kingdom

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ABSTRACT

The Equal Opportunity Rule (EOR) is the foundation of takeover laws in the United Kingdom and Malaysia. Under the rule, fairness in takeover is considered achieved through affording equal treatment to all shareholders of the target company in four aspects, namely rights to disinvestment, equal premium, information and decision making. The notion of equality favours shareholders and imposes higher burden on the acquirer. From qualitative studies of the rule and comparative analysis between Malaysia and the UK, it may be concluded that the ultimate benefit of the rule is to enable shareholders of a target company to make an informed decision on whether to remain as shareholders after being communicated on the potential changes to the target company and offered with a fair price to exit the company. As shareholders represent larger segment of the society, the rule that favours the majority will directly benefits the society and prevails. Hence, we maintain that the rule should be preserved in the Malaysian takeovers law because social benefit derived from it outweighs harms that it causes to acquirers and are necessary to protect shareholders of the target company from greater harms that takeover might causes in its absence.

Keywords: Equal opportunity, mandatory bid, shareholder’s protection, sharing rule, takeover

INTRODUCTION

A shift in corporate control via takeover presents real risk to a target company’s minority shareholders especially when an acquirer intends to change the company’s status quo. Thus, many jurisdictions regulate takeovers to protect minority shareholders’ interest while at the same time keeping takeovers no less attractive. Some
jurisdictions require an acquirer to undertake certain compulsory measures to ensure acquisition of corporate control is not at the expense of minority shareholders. Others require the target company’s management to act in the company’s best interest to get the best deal available in the market and create a competitive takeover environment. From these competing perspectives, 2 rules were developed namely the EOR which focuses on the acquirer’s responsibilities and the Market Rule (MR) which concentrates on director’s duties and competitiveness in takeover deals. In this paper, we intend to uncover the social benefits of the EOR via qualitative studies on its salient features in order to suggest whether it should remain as the guiding principle for Malaysian takeover laws. Since Malaysian law has many common features with the English law, comparative analysis is also made.

**THE EQUAL OPPORTUNITY RULE**

The EOR is triggered once a person together with persons acting in concert with him acquires shares that allows them to have “effective control” over a public company. The acquisition of shares in a private or public company which does not lead to effective control is not subject to the EOR but is transacted in accordance with the MR. The history of the EOR can be traced to the UK’s takeover regulatory regime specifically the City Code on Takeovers and Mergers (City Code) (Bruslerie, 2013; Schuster, 2010). It refers to a rule where the acquirer has an obligation during takeover proceedings to afford the same treatment to all shareholders of a same class in the target company. This rule imposes duties on an acquirer to give due consideration to shareholders (Balta, 2013).

When it was first established in 1968, the City Code consisted of 10 General Principles (GP) the first of which stated, “All shareholders of the same class of a target company must be treated similarly by the offeror” while the eighth GP stated, “Rights of control must be exercised in good faith and the oppression of a minority is wholly unacceptable” (Johnston, 2007; Roberts & Wiseman 1990). These principles became the foundation of the EOR (Jennings, 2005) which resulted in the formation of various safeguards to the interest of shareholders during takeover proceedings. The City Code is the main instrument which governs takeovers in the UK since 1968. It was initially a standalone instrument without any force of law with objectives “to reflect the collective opinion of those professionally involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved” (The Takeover Panel). After almost 40 years operated as a soft law which depended on public censure as the main sanction against non-compliance (Johnston, 2007) and after being revised more than 5 times, the City Code finally had statutory basis in 2006 following the UK’s implementation of the EU Takeover Directive through Part 28 UK’s Companies Act 2006. The current 11th edition of the City Code is based on 6 GP (The Takeover Panel).
In Malaysia, takeover activities are mainly governed by Division 2 Part VI Capital Market and Services Act 2007 (CMSA), the Malaysian Code on Takeovers and Mergers 2016 (2016 Code) issued pursuant to S. 217 CMSA and the Rules on Takeovers, Mergers and Compulsory Acquisitions (TOM Rules 2016) issued pursuant to S. 377 CMSA. The current 2016 Code came into force in 15 August 2016. The Code is administered by the Securities Commission (SC) which was established by the Securities Commission Act 1993. After being revised 3 times through the 1998 Code, the 2010 Code and finally the 2016 Code, the latest Code “sets out the broad principles to be adhered to by all parties involved in any takeover or merger transaction” (Securities Commission) while detailed requirements are provided in the TOM Rules 2016. The original 1987 Code was substantially influenced by the English takeover law and regulatory framework (Mushera, 2013) which promotes the EOR. When the Australian Eggleston Principles (Mushera, 2010) were incorporated into the Malaysian takeover regime via S. 217(5) CMSA, the EOR from the 1987 Code remained preserved in the same section. In 2015, S. 217(5) CMSA was repealed but both the EOR and the Eggleston Principles were preserved in the 2016 Code. The EOR can be found in GP 1 of the 2016 Code which requires persons involved in takeover offer to provide equal treatment to all shareholders of an offeree of the same class in relation to a takeover offer and opportunities to participate in benefits accruing from the takeover offer, including in the premium payable for control. Such preservation is the main reason why Malaysian takeover laws have mandatory offer despite it adopts Australian takeover law objectives which do not apply mandatory offer.

SOCIAL BENEFITS OF THE EQUAL OPPORTUNITY RULE

The social benefits of the EOR lies in the definition of “opportunity” or “treatment” which the acquirer has to equally grant to all shareholders of a same class in the target company during takeover proceedings. It refers to at least 4 important rights of shareholders as follows:

Exit Right

When change of control is triggered when an acquirer gained shares in a company of specific percentage, the remaining

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1 Eggleston Principles:
1) The holders of shares in a company:
   a) know the identity of any person who proposes to acquire a substantial interest in the company;
   b) have a reasonable time to consider any proposal to acquire their shares; and
   c) are given enough information to allow them to consider the merits of any proposal to acquire their shares.
2) As far as practicable, all shareholders have a reasonable and equal opportunity to participate in any benefits accruing to shareholders through a proposal under which a person would acquire a substantial interest in the company.

2 Masel Principle: The acquisition of control over the shares in a company takes place in an efficient, competitive and informed market.
shareholders should be granted an equal right of disinvestment. This right is given to the remaining shareholders by an imposition against the acquirer requiring that a mandatory general offer to minority shareholders the bought out right upon fulfilment of certain preconditions be made.

**Mandatory Offer.** Mandatory offer or bid is a compulsory requirement imposed on an acquirer to make a general offer to purchase the remaining issued voting shares or rights of the company which are not yet his. Due to this specific meaning, we are of the view that it is inaccurate to equate Mandatory Offer with the EOR since it is only one of the “opportunities” that the acquirer is required to give the remaining shareholders during takeover proceedings. The philosophy behind mandatory offer is mainly to protect the interest of minority shareholders but at the same time while also allowing the acquirer an opportunity to secure 100% control over the company (Mushera, 2013). Unlike a voluntary offer in which the offeror is generally at liberty to determine the terms of the offer, the terms of a mandatory offer are dictated by law.

**Bought Out Right.** The bought out right refers to minority shareholders’ right which correspond to acquirer’s right of compulsory acquisition. Under UK and Malaysian law, an acquirer who had successfully secured interest in at least 90% of the target company’s voting shares or rights through takeover offer is given an option to compulsorily acquire the remaining 10% voting shares or rights so as to gain 100% control over the target company. On the contrary, the bought out right is given to minority shareholders to “force” the acquirer to purchase the remaining 10% voting shares or rights so that they may exit from the company if the acquirer did not exercise his compulsory acquisition right. The social benefits of equal exit right through mandatory offer or bought out right may be understood from the rationale that a shift of control changes the nature of investment of the existing shareholders via the following means (Jennings, 2005):

(a) the acquisition of control in a company without a dominant shareholder may lead to a major change in the organisation and management of the company. As per the status quo, the company’s affairs are managed by the incumbent management, with no one shareholder being able to employ pressure over the decision making process. When an acquirer gained control, he is capable of procuring that the company is manage in accordance with his wishes;

(b) the new controller may set up a different corporate agenda, which present the prospect that the company will be run to suit the acquirer’s objectives;

(c) there is probability that the company will be managed to the disadvantages of the minority shareholders both in terms of a reduced shares’ value and
fraud on the minority. The position of minority shareholders would be even worse if the acquirer’s intention is actually to “loot” the company by stripping it of any valuable assets; and

(d) the new controller may even decide to privatise the company which make the shares of the company illiquid. This make it difficult for the minority shareholders to liquidate their investment after the target company is privatised.

Such changes in the nature of investment may happen against the wishes of the minority shareholders, removing the choice factor of their original investment in the target company. In this regard, the exit right reinstates the minority shareholders’ choice so that they may decide whether to remain in the minority or leave the company. Further, in pre-empting prospective harm or injurious behaviour by the new controller the aim of the EOR in providing an exit is to prevent the minority from coming into existence on an acquisition of control without their will (Jennings, 2005).

Right to Premium

The second right arising from the EOR requires all shareholders of the same class in the target company to be entitled to an equal amount of premium paid by the acquirer in consideration of control. This is often referred to as the “Sharing Rule” i.e. any premium the acquirer pays to the blockholder also has to be offered to the remaining shareholders, forcing the blockholder to share “his” premium with his fellow shareholders (Schuster, 2010). Due to this specific meaning it is inaccurate to equate it with the EOR since it is only one component of the EOR. In Malaysia the right to equal premium is one of the objectives of the 2016 Code as stated in its GP 1.

Shares are typically acquired at premium during a takeover because control over the corporation is a valuable “commodity” and brings with it the power to harness the activities of the company (Jennings, 2005). Furthermore, the premium paid by the acquirer corresponds to the value that the acquirer believes the target company possesses or at least its future. Equal opportunity to premium protects the target company’s shareholders from the perspective that the potential harms which follows from a shift in control may give minority shareholders no choice but to leave. In such events, minority shareholders are at the mercy of the acquirer who can decide to sell their shares at the price determined by the acquirer or remain as minority and face the potential harms from the takeover.

In order to prevent the acquirer from having an upper hand in the deal, the law interferes takeover proceedings by not merely providing an exit opportunity but also regulates the terms through which the exit opportunity is exercised. Thus, it is incumbent upon an acquirer in a mandatory offer, compulsory acquisition, or bought out, to provide consideration equivalent to what he has paid for shares that he acquired
within certain period prior to the making of the mandatory offer, compulsory acquisition or bought out.

**Mandatory Offer.** In the UK, consideration for mandatory offer is governed under Rule 9.5(a) City Code and in Malaysia, the equivalent provision are GP 10 of the 2016 Code and Rule 6.03(a) TOM Rules 2016. Both jurisdictions require that a mandatory offer must not be less than the highest price paid or offered to be paid by either the acquirer or person acting with concert with him for any voting shares or right to which the offer relates within the period of 12 months in the UK or 6 months in Malaysia prior to the mandatory offer. In addition, such consideration shall be paid in cash or if it is not solely in cash, the acquirer shall provide an alternative consideration of solely a cash sum³.

**Compulsory Acquisition.** As discussed, both the UK and Malaysia provide means for an acquirer to gain 100% control over the target company via compulsory acquisition. Due to its sensitivity as it involves interference with the minority shareholders’ right to property, the compulsory acquisition right was inserted into the parent acts itself rather than merely in the takeover codes, which are subsidiary legislations. S. 979(2) read together with S. 981(2) UK Companies Act 2006 provides that in compulsory acquisition, upon the giving of notice to the holder of shares by the acquirer on his intention to compulsorily acquire those shares, the acquirer is “entitled and bound to acquire the shares to which the notice relates on the terms of the offer”. Hence, the acquirer is bound to provide consideration which is similar to the consideration offered in the previous takeover offer to which the compulsory acquisition relates. The Malaysian equivalent provisions on consideration for compulsory acquisition of shares are S. 222(1) read together with S. 222(3) CMSA which in effect is similar to those in the UK.

**Bought Out.** The legal requirement on consideration for bought out in the UK and Malaysia is similar to that of compulsory acquisition. Pursuant to S. 983 read together with S. 985(2) UK Companies Act 2006 for the UK and S. 223(1) CMSA for Malaysia, the consideration in bought out must be the similar as per the previous takeover offer to which the bought out relates. Nevertheless, the parties are allowed to mutually agree on other considerations.

**Right to Information**

Most writers discussed the EOR from the perspective of the exit right and the right to premium only. However, in our view, the rule is also relevant to the right to obtain information on a takeover offer. Disclosure of information is essential to enable shareholders to make proper assessment on whether to accept an offer (Mushera, Azza, Sharon, & Azhana, 2013) while inadequate information might lead to shareholders accepting an offer at a price

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³ Rule 9.5(a) City Code and Rule 6.04(1) TOM Rules 2016.
substantially below the actual price of the shares as happened in the UK in 1950s that triggers hostile takeovers. In this respect, the EOR applies by ensuring each and every shareholder of the target company receives information relating to the takeover so that they can make their own evaluation and decision.

The second GP of the City Code requires the offeree shareholders being given sufficient time and information to enable them to consider the takeover offer and arrive at a properly informed decision. Similarly, GP 5 of the 2016 Code requires all parties in a takeover or merger to make full and prompt disclosure of all relevant information while GP 6 of the 2016 Code requires the shareholders and the board of directors of an offeree and the market for the shares that are the subject of a takeover offer be provided with relevant and sufficient information, including the identity of the acquirer or offeror, to enable them to reach an informed decision on the takeover offer. Further, GP 8 of the 2016 Code prohibits an offeror, the board of directors of an offeror, the board of directors of an offeree and their respective advisers from making selective disclosure to the shareholders in the course of a take-over or merger transaction.

The law imposes several obligations on acquirer and directors of the target company in ensuring that none of the target company’s shareholders are deprived of the right to make comprehensive assessment on an offer. An acquirer is required to make an announcement on the offer that it proposes and ensure that the information supplied to the target company’s shareholders in the offer document is sufficient to allow them to make informed decision.

**Announcement.** Rule 2.2 City Code lists several circumstances in which announcement concerning a takeover offer should be made. The announcement is subject to conditions under Rule 2.7 City Code that the acquirer should announce the intention to make an offer only after careful and responsible consideration and when the offeror has every reason to believe that it can implement the offer. In Malaysia concerning this matter are enumerated in Rule 9 TOM Rules 2016.

**Offer Document.** The law dictates the contents of a takeover offer document. The obligation to insert specific information in the takeover offer in the UK is found in Rule 24 City Code. Among the information required is information on the acquirer, the terms of the offer, all conditions to which the offer is subject, the acquirer’s intentions with regard to the future business and assets of the target company and the continued employment of the employees and management of the target company and of its subsidiaries. In Malaysia, the offeror is required under GP 6 of the 2016 Code to disclose to the shareholders and the board of directors of an offeree and the market on the shares that are the subject of a takeover offer, relevant and sufficient information to enable them to reach an informed decision on the takeover offer. Further, Rule 11.02 TOM Rules 2016 read...
together with Schedule 1 TOM Rules 2016 sets information on the offeror, the offeror’s intention on the continuation of the business of the target company, the major changes that it would introduce, the maintaining of the listing status of the target company, the invoking of compulsory acquisition provision and the acquirer’s intentions with regard to the future business and assets of the target company.

**Director’s Comments.** The duty to provide information is not only imposed on the acquirer but also on the directors of the target company. In the UK, Rule 25 City Code states that the board of the target company must, within 14 days of the publication of the offer document, send a circular to shareholders of the target which shall set out, among others, the opinion of the board on the offer and the board’s reasons for forming its opinion. In Malaysia, pursuant to Rule 11.03 TOM Rules 2016, the board of directors of the target company shall issue its comments, opinion and information on the takeover offer, including any other forms of consideration offered by the offeror, in a form of a circular to every target company’s shareholders within 10 days from the date that the offer document was dispatched to the target company’s shareholders. The circular shall also contain all information that the target company’s shareholders and their advisers would reasonably require and expect to find for the purpose of making an informed assessment on the merits of accepting or rejecting the take-over offer.

**Independent Advice Circular.** Apart for issuing its own comments on the reasonableness of the takeover offer, the board of directors of the target is also required to appoint an independent advisor to evaluate and provide comments on the soundness of a takeover offer. This serves as check and balance on the role of the board and prevents abuse of position and conspiracy with the acquirer to recommend an unreasonable offer for the board’s advantage. In the UK, Rule 3.1 City Code states that the board of the target company must obtain competent independent advice as to whether the financial terms of any offer are fair and reasonable and the substance of such advice must be made known to its shareholders. The Malaysian equivalent of the latter are GP 4 of the 2016 Code and Rule 3.06 TOM Rules 2016. The contents of the independent advice circular have to be consented by the SC prior to its issuance to the shareholders.

**Disclosure of Information by Directors of Target Company to Offeror.** It is interesting to note that in Malaysia regarding access to information that although the EOR is actually meant to protect minority shareholders’ interest in takeover, the 2016 Code somehow has a unique feature which is not available in the UK where it extends the equal right to information to offerors. This unique feature is found in Rule 10.04 TOM Rules 2016 which indirectly benefits shareholders in creating competitive environment that helps shareholders to get the best offer for their shares.
Right to Decide on a Takeover Offer

All the above three rights lead to the final goal, the fourth right of ensuring shareholders of a target company are afforded with the right to be the actual decision makers on a takeover offer after having been given an opportunity to consider all relevant information. This can be found in the second GP of the City Code which requires the offeree shareholders be given sufficient time and information to enable them to make an informed decision. In Malaysia, GP 11 of the 2016 Code states, the board of directors of an offeree shall act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on a takeover offer. Further, GP 2 of the 2016 Code prohibit any form of oppression or disadvantage of shareholders by the treatment and conduct of the acquirer or of the board of directors of the offeree.

The exit right gives the shareholders the opportunity of divestment whereas the right to equal premium ensures that money did not become the shareholders’ sole consideration in evaluating their investment in the target company. In addition, the right to information ensures the board of directors does not filter information on a takeover offer and decide on shareholders’ behalf. The combination of these rights entitles shareholders to make a conscious decision on their prospective investment in the target company following takeover proceedings. Without such rights, offeree shareholders’ right to be the actual decision maker is deprived. For instance, if there is no right to equal premium, they will be financially forced to accept whatever price offered by the acquirer hence money will become the sole determining factor in deciding whether or not to accept an offer.

CONCLUSION

Based on the above discussion, it may be concluded that the social benefits of the EOR is in the form of various protections of shareholders’ interests during takeover proceedings. Such influence can be seen at least in 4 primary aspects namely rights to disinvest, equal premium, information and make decision on a takeover offer. Ultimately, the rule is to allow shareholders of a target company to make an informed decision on whether or not to remain as shareholders in the target company. We have to admit that there is no man-made rule without flaws. Without undermining the criticisms made against the EOR, there is a need to recognise that the EOR had, for more than 50 years governed takeover arena in the UK and Malaysia and successfully protected the interest of shareholders, especially the minority shareholders from the potential harms and oppression present in the shifting of corporate control. Although the EOR seems to favour shareholders in the offeree company compared to the acquirer, we believe that such is necessary because an acquirer always has an upper hand in term of economic capability as compared to shareholders especially individual shareholders in the offeree company. As

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4 See Balta, 2013; Schuster, 2010; Jennings, 2005; Mushera et al., 2013.
shareholders represent a larger segment of the society compared to acquirers, the rule that favours the majority will directly benefit society should prevail. Hence, we believe the application of such rules should be preserved in Malaysian law.

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The Doctrine of Basic Structure of the Malaysian Constitution: A Study of Framework

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ABSTRACT
The Federal Constitution of Malaysia (the Constitution) is a living and vibrant document that may have to be amended in order to keep up with contemporary social, economic and political needs of the country. This proposed amendment may destroy its basic structure. The paper seeks to evaluate the doctrine of basic structure which has originally been developed by courts in India. The study is based on doctrinal research and a comparative analysis on the development of the doctrine of basic structure in Indian jurisprudence. It was found that in Malaysia since the Executive controls two thirds or more of the seats in the Dewan Rakyat any part of the Constitution can be amended even if destroys the basic structure of the Constitution.

Keywords: Basic structure, constitutional amendment, India, Malaysian Constitution

INTRODUCTION
As of September 2015, there have been 57 amendments to the Constitution of Malaysia since its enactment in 1957. Hamzah (2009) observed that certain provisions in the constitution may not be practical or relevant due to changes in social, political and economic conditions, hence there are need for amendment to certain provisions by the legislative. The Reid Commission framed it in such a way that an amendment would not be too difficult to the extent of frustrating the need for amendment, but at the same time, not too easy that it would end up weakening our constitutional safeguards. However, Lee (1978) observed that a constitution which is extremely easy to amend may turn out to be worse than having no constitution at all. He observed that some of the more fundamental amendments to the Malaysian Constitution had led to “a
truncation of safeguards which had been considered by the Reid Commission as vital for the growth of a viable democratic nation” (Lee, 1978, p. 369). The provision to amend the Constitution falls under Article 159. In Malaysia by virtue of Article 159 and Article 161E (for East Malaysia) Parliament is empowered to amend the Constitution. These Articles set out the formal or procedural requirements for amendment. Certain parts can be amended by a simple majority while others – for example, in the case of East Malaysia – require a two-thirds majority.

The Doctrine of Basic Structure

India. On the premise of Kesavananda Bharati v. State of Kerala (1973) the Supreme Court of India outlined the basic structure doctrine of the Indian Constitution. It ruled that all provisions of the constitution, including fundamental rights can be amended. However, Parliament cannot alter the basic structure of the constitution like secularism, democracy, federalism, separation of powers. Often called the “Basic Structure Doctrine”, this decision is widely regarded as an important part of Indian history. Later, the Supreme Court in Maneka Gandhi v. Union of India (1978) extended the doctrine’s importance as superior as to any parliamentary legislation. According to the verdict, no Act of parliament can be considered a law if it violated the basic structure of the constitution. This landmark guarantee of fundamental rights was regarded as a unique example of judicial independence in preserving the sanctity of fundamental rights. The fundamental rights can only be altered by a constitutional amendment; hence their inclusion is as a check not only on the executive branch, but also on the Parliament and state legislatures. The imposition of a state of emergency may lead to a temporary suspension of the rights conferred by Article 19 (including freedoms of speech, assembly and movement, etc.) to preserve national security and public order. The President can, by order, suspend the right to constitutional remedies as well.

As a whole, the court recognised that that basic structure includes supremacy of the Constitution, rule of law, judicial review, effective access to justice, democracy, federalism, and secularism. While in State of Bihar v. Bal Mukund Sah and Ors. (2000), the Supreme Court observed that the concepts of “separation of powers between the legislature, executive and judiciary” as well as “the fundamental concept of independent judiciary have been now elevated to the level of basic structure of the Constitution and are the very heart of the Constitutional scheme”. It also includes free, fair and periodic elections (Kihoto Hollohan v. Zachilloo, 1993). The doctrine of basic structure is vague in the sense that there is no clear-cut list given by the judiciary that such provisions of the constitution form the basic structure, rather, it has been left open before the judiciary to decide the same on the case to case basis. In India, Seervai (2008) has lamented that a precise formulation of the basic features would be a task of greatest difficulty and would add to the uncertainty of interpreting
Table 1

Features of Basic Structure according to judges in India

<table>
<thead>
<tr>
<th>Judge</th>
<th>Features of Basic structure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Justice Sikri Kesavananda Bharati v. State of Kerala, 1973</td>
<td>• supremacy of the constitution • republican and democratic form of government • secular character of the constitution • separation of powers between the legislature executive and the judiciary • federal character of the constitution</td>
</tr>
<tr>
<td>Justice Shelat and Justice Grover</td>
<td>• mandate to build a welfare state contained in the Directive Principles of State Policy • unity and integrity of the nation • the sovereignty of the country</td>
</tr>
<tr>
<td>Justice Hegde and Justice Mukherjee</td>
<td>• sovereignty of India • democratic character of the polity • unity of the country • essential features of the individual freedoms secured to the citizens • mandate to build a welfare state</td>
</tr>
<tr>
<td>Justice Reddy</td>
<td>• sovereign democratic republic • parliamentary democracy • three organs of the State</td>
</tr>
<tr>
<td>Justice Thomas</td>
<td>• power of judicial review</td>
</tr>
<tr>
<td>Justice Chandrachud</td>
<td>• unamendable sovereign democratic republic status • equality of status and opportunity of an individual • secularism and freedom of conscience and religion • government of laws and not of men i.e. the rule of law</td>
</tr>
<tr>
<td>Chief Justice Ray</td>
<td>• the constituent power of Parliament was above the constitution itself and therefore not bound by the principle of separation of powers. Parliament could therefore exclude laws relating election disputes from judicial review. He opined, strangely, that democracy was a basic feature but not free and fair elections</td>
</tr>
<tr>
<td>Justice Mathew</td>
<td>• that democracy was an essential feature and that election disputes must be decided on the basis of law and facts by the judiciary</td>
</tr>
<tr>
<td>Justice Beg</td>
<td>• that supremacy of the constitution • separation of powers</td>
</tr>
<tr>
<td>Justice Sharma, Justice Venkatachalliah, Justice Verma, Justice Reddy, Justice Jayachandra and Justice Agrawal</td>
<td>• free, fair and periodic election</td>
</tr>
</tbody>
</table>

The Doctrine of Basic Structure

the scope of Article 368. In the case of M. Nagraj v. Union of India (2006) the Court has tried to formulate a general test to decide if an amendment is against the basic structure of the constitution. The Court held that in order to apply the principle of basic structure, twin tests have to be satisfied, namely, the ‘width test’ and the ‘test of identity’. The Court referred to the judgment in Kesavananda Bharati
v. State of Kerala (1973) which clarified that not an amendment of a particular Article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or one that changes the identity of the Constitution is impermissible. Again, in the case of R. Coelho v. State of Tamil Nadu (2007), the Court held in respect of the amendments of the fundamental rights not a change in the particular Article but the change in the essence of the right must be the test for the change in the identity. It was further held by the Court that if the triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right test” but also the “rights test” has to apply. The Court also observed that ‘rights test’ and the ‘essence of right’ test both forms part of the application of the doctrine of basic structure. Finally, the “impact test” can be used to determine whether any law destroys the basic structure. If the impact of such a law has an effect on any of the rights guaranteed under Part III of the Indian Constitution, then by applying this test, the answer will be in affirmative that such law is in violation of the basic structure.

Malaysia. The question then arises whether any part of the Constitution may be amended as provided by Article 159. The Federal Court held that Parliament may, completely remove the whole of Part II of the Constitution (the fundamental rights guarantees) provided it meets the procedural requirements set out in Article 159 (Loh Kooi Choon v. Government of Malaysia, 1977 and Phang Chin Hock v. Public Prosecutor, 1980). In short, the Article allows the Executive which controls two thirds or more of the seats in the Dewan Rakyat to amend any part of the Constitution even if the amendment cuts cross or even destroys the basic structure of the Constitution (Sri Ram, 2010). It seems that both decisions failed to protect and preserve the integrity of the Constitution. However, an opposing view which says that not only must an Act amending the Constitution comply with the procedure prescribed by Article 159, it also must not violate the fundamental rights provisions in Part II (Sri Ram, 2010). Accordingly, there are certain features of the Constitution that form part of its basic structure such that an Act amending the Constitution is invalid if it is inconsistent with the basic structure. Article 4(1) which declares the Constitution to be the supreme law and states that any law passed after Merdeka Day which is “inconsistent with this Constitution” shall be void to the extent of the inconsistency. They argued that the phrase “this Constitution” must include its basic structure. The fundamental rights provisions form part of the basic structure of the Constitution as does the concept of a Constitutional Monarchy (Sri Ram, 2010).

The Federal Court in the case of Sivarasa Rasiah v. Badan Peguam Malaysia (2010) departed from the earlier cases and held that the basic structure doctrine is part of our law and that the fundamental rights provisions form part of the basic structure. Further, that even if an Act amending the Constitution
complies with the procedural requirements of Article 159, it may nevertheless be struck down if it violates the basic structure. What forms part of the basic structure is something that must be decided on a case by case basis. It was suggested by the counsel in Phang Chin Hock v. PP (1980) that the basic structures of the Malaysian Constitution would consists of: (a) supremacy of the Constitution; (b) constitutional monarchy; (c) that the religion of the Federation shall be Islam and that other religions may be practised in harmony; (d) separation of the powers of the three branches of Government; and (e) the federal character of the Constitution. However, the Federal Court highlighted a distinction between the Malaysian Constitution and Indian Constitution whereby the former does not have a Preamble, a Directive Principles and was not made by a constituent assembly. The court declined to make a conclusion whether there is an implied limitation on the power of Parliament in not destroying the basis structure of the Constitution amendments (p. 73).

**FINDING**

The writers are of the view that the doctrine of separation of powers, the rule of law and an independent judiciary must form a part of the basic structure of the constitution. The question is whether this has been recognised by the country’s courts as part and parcel of our Constitution.

The Federal Court in PP v. Kok Wah Kuan (2007) said that Malaysia does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. The extent of the applicability of the doctrine depends on the provisions of the Constitution. The Federal Court pointed out that:

> A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. At the same time, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, although it may be inconsistent with the doctrine. The doctrine of the separation of powers is not a provision of the Malaysian Constitution, even; it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. It does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore null. (p. 355)

Thus, the doctrine of strict separation of powers as propounded by the French philosopher Montesquieu has no application in Malaysia. However, it can be argued that the foundation of the entire constitutional structure of Malaysia resides in the separation of powers set out in Articles 39, 44 and 121 of the Federal Constitution of Malaysia. These Articles deal with
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executive, legislative and judicial powers respectively. Although the existing provision on judicial power has been amended to make it less certain, one can safely say that the Constitution still subscribes to the idea of separation of powers and hence, the judicial power to review legislative and executive actions. In our opinion, the doctrine of separation of power is definite and absolute. Judicial review is another proof that there is actually separation of powers in a Westminster democracy like ours. It lays within judicial review, although it does not subscribe to a “pure” separation of powers, a Westminster-model constitution can and does in fact incorporate the separation of power (see New South Wales v. Commonwealth, 1915; AG for Australia v. the Queen, 1957; Liyanage v. the Queen, 1967; Hinds v. the Queen, 1977).

Meanwhile, the rule of law, in its most basic form, is the principle that no one is above the law. It should be noted that the doctrine is derived from Article 4(1) of the Federal Constitution which obviously establishing the Constitution as a basis of the rule of law. Further, Article 128 confers power on the Federal Court to determine the constitutionality of federal and state laws. And Article 162(6) lays down that any court or tribunal applying the provisions of any existing law may apply it with such modification as may be necessary to bring into accord with the provisions of the Constitution. The implication of these Articles is that in Malaysia all persons and authorities including the Parliament are subject to the provisions of the Constitution, in so far as their powers are to be found in the Constitution. In this context Harding (1996) observes that the Malaysian Constitution clearly embodies, expressly in many of its provisions, the principles outlined by Dicey. While, the equality provision is found in Article 8(1) which states that all persons are equal before the law and entitled to the equal protection of the law. The legal meaning of Article 8 is that no one is above the law, thus everyone is equal in the eyes of the law.

In short, Article 8(1) is a codification of Dicey’s rule of law. Article 8(1) emphasises that this is a country where government is according to the rule of law. In other words, there must be fairness of State action of any sort, legislative, executive or judicial. Therefore, the doctrine of rule of law, which forms part of the common law, demands minimum standards of substantive and procedural fairness (Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd, (2003).

With regards to judicial independence, Harding (2012) contended that the Constitution secure judicial independence in several ways through express provisions of the appointment, security of tenure, and removal of judges. Abusing or insulting a judge may amount to contempt. This is reflected in Article 126 of the Constitution. Judicial immunity is a part of judicial independence. The purpose of judicial immunity is to enable judges, counsel and witnesses to speak and act fearlessly in the interest of justice and to condemn inequity in appropriate language without fear of being sued or prosecuted. In the performance of their judicial functions all judges are
immune from the law of torts and crime. Every judge of the superior and inferior courts is entitled to protection from liability for anything said or done while acting judicially. The law on judicial immunity can be seen in the following instances: firstly the conduct of a judge cannot be discussed in Parliament and State Legislative Assembly as stated in Article 127. Secondly, there is passing reference to immunities in Article 122AB(1) for Judicial Commissioners but no explicit protection for other judges; a number of other laws confer absolute privilege on judicial proceedings such as the ones under English common law which is applicable in Malaysia; the Defamation Act 1957 in section 11(1) confers absolute privilege on reports of judicial proceedings including pleadings, judgments, sentences or findings. This is so if the reports are fair, accurate and contemporaneous and the proceedings were publicly heard before a lawful court. All comments on judicial proceedings are privileged if fair and in good faith; and lastly, under section 6(3) of the Government Proceedings Act 1956 there is absolute immunity in torts for all acts performed in a judicial capacity (Ab Rahman, 2016). There is no exhaustive or exclusive definition of basic structure given by the judiciary. Judicial approach has been on case by case basis to define what is included in the doctrine of basic structure in Malaysia. Malaysian courts have yet to develop the basic structure test like their Indian counterparts.

CONCLUSION

The applicability of the basic structure doctrine is contentious both in terms of its adaptability and enforcement in jurisdictions outside India. This doctrine due to its undefined nature continues to be unclear in its perception and application. Factors such as differences in political and constitutional history pose a hindrance towards the doctrine becoming a universal watchdog of the legislature. The Indian basic structure doctrine was presented in Malaysia in several cases, and at an early stage the Malaysian Federal Court rejected the Indian basic structure doctrine, granting Parliament an unlimited power to amend the Constitution. In Loh Kooi Choon v. Government of Malaysia (1977), Justice Raja Azlan contended, with direct reference to Kesavananda Bharati v. State of Kerala (1973), that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended. In Phang Chin Hock v. PP (1980), again with direct reference to Kesavananda Bharati v. State of Kerala (1973), the Federal Court held that the basic structure doctrine does not apply in Malaysia due to differences between the Indian and Malaysian Constitutions – mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution of 1957 has no preamble. However, based on Sivarasa Rasiah v. Badan Peguam Malaysia (2010) it was concluded that the doctrine of basic structure of the constitution is no longer rejected and treated as an unfamiliar concept in our constitutional law. As briefly pointed
out by Justice Hishamudin in *Sivarasa Rasiah v. Badan Peguam Malaysia* (2010) the fundamental liberties as enshrined in Part II of the Federal Constitution ranging from Article 5 to Article 13 of the Federal Constitution are now being recognised as a part of the basic structure of the Federal Constitution.

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Determining Fundamental Breach in International Sale of Goods: Taming the Unruly Horse?

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ABSTRACT

The remedy of ‘avoidance’ under CISG is not available for every breach of contract, except for a fundamental one. Many commentators are of the view that the meaning of “fundamental breach” is vague and uncertain. The present paper analyses the dual elements of ‘fundamental breach’ on the basis of interpretative tools of the Convention, legislative history and an in-depth survey of judicial decisions from various countries. The paper finds that it is too drastic to say that the meaning of fundamental breach is vague but on the contrary the meaning can be refined through judicial interpretation. The paper concludes that though it will take time for case law to completely cover most situations of fundamental breach, it is clear at this stage that a number of basic principles for the determination of fundamental breach are well settled and established.

Keywords: CISG, foreseeability, fundamental breach, remedy of avoidance, substantial detriment

INTRODUCTION

In view of the often harsh consequences of unilateral declaration of termination of contract, the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 provides for rather far-reaching and strict requirements for the remedy of avoidance. A party may resort to the remedy of avoidance only if the other party has committed a “fundamental breach. A simple or non-fundamental breach of contract does not entitle the aggrieved party to avoid the contract. It is the uniform conclusion of courts (Bundesgerichtshof, Germany, 1996, CLOUT Case No. 171) and doctrine (Honnold, 1999, p. 314) that “avoidance under the CISG is a remedy of last resort, or an ultima ratio remedy, which should not be granted easily.”

The main objective of this paper is to investigate the claim that the true meaning of fundamental breach under CISG is vague
THE CONCEPT OF FUNDAMENTAL BREACH

In the CISG, “avoidance” is not available for every breach. A party may avoid the contract only when the other party commits a “fundamental breach.” Why is it limited so? The reason lies in the underlying objective of CISG to maintain as much as possible the successful performance of the contract and also the fact that avoidance may create unnecessary and unproductive costs (Pauly, 2000). Some commentators are of the view that the definition of fundamental breach in article 25 is vague (Graffi, 2003b). Will (1987) predicted that “as a fruit of world-wide compromise, the definition of fundamental breach may not always be easy to apply both for the parties and the judges, and foreseeably may give rise to divergent interpretation and continuous controversy”. Zeller (2007), however, disagrees with this criticism. Ferrari (2006) holds the view that “it is possible to define the concept of fundamental breach on the basis of the elements by which it is characterized.” As rightly put by Ferrari (2006), the elements of fundamental breach can be interpreted by courts and tribunals of the Contracting States by applying the interpretative tools provided in the Convention.

CISG INTERPRETATIVE TOOLS

There are two types of interpretative tools under CISG: interpretation of CISG provisions (article 7) and interpretation of the contract (article 8). In respect of the rules concerning the Convention’s interpretation, there are three primary rules of interpretation enshrined in article 7, namely: (i) the “international character” of the CISG; (ii) the promotion of “uniformity in application”; and (iii) the observance of “good faith in international trade.”

Rules on contract interpretation enshrined in article 8 are of utmost importance for the determination of “fundamental breach.” This is due to the fact that before such a determination can be made, it is necessary for courts and tribunals to ensure whether there is a substantial deprivation of what the injured party is entitled to expect under the contract (Zeller, 2007). Article 8 puts forward two sets of criteria: subjective and objective. According to the subjective interpretation, “statements made by, and other conduct of, a party are to be interpreted according to his intent, where the other party knew or could not have been unaware what that intent was” [article 8(1)]. The objective interpretation is that if the parties have a different understanding of the meaning of the contract, the language of the contract has to be interpreted “according to the understanding that a reasonable person of the same kind as the other party would
have had in the same circumstances” [article 8(2)]. In so doing, due consideration is to be given to all “relevant circumstances of the case, including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties” [article 8(3)].

INTERPRETING FUNDAMENTAL BREACH IN LIGHT OF LEGISLATIVE HISTORY

Article 25 defines ‘fundamental breach’ with two component elements, namely, substantial detriment and unforeseeability. Legislative history is one important way of ascertaining the meaning of fundamental breach in the light of these two component elements.

The First Element: Substantial Detriment

For a breach to be “fundamental,” the breach must cause a “detriment that substantially deprives the non-breaching party of its reasonable expectations under the contract” (CISG, article 25). This detriment concept developed out of the perceived weaknesses of the Uniform Law on the International Sale of Goods (ULIS), which in particular relies entirely on foreseeability test alone. The substantial detriment test remedies those weaknesses.

According to the legislative history of CISG, “[t]he determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party” (Commentary on draft CISG). Huber and Mullis (2007) clearly refer to the ‘legitimate interests of the promisee,’ who is a merchant. This ‘contractual expectation’ is key on the basis of which courts and tribunals will determine whether there is any substantial detriment (injury) to the non-breaching party to the extent that it amounts to a fundamental breach.

The Second Element: Foreseeability

The ‘foreseeability’ element of article 25 includes two tests. According to the legislative history of the CISG, the first test, a subjective one, merely requires whether the party in breach actually foresees the detriment that will cause the non-breaching party (Bianca & Bonell, 1987). The second test, an objective one, requires the breaching party to show that “a reasonable person of the same kind in the same circumstances would not have foreseen the detriment to the non-breaching party.” Since parties to international sales contracts are presumed to be merchants [CISG article 2(a)], a “reasonable person” may be construed as a reasonable merchant. The phrase “of the same kind” refers to a merchant in the same business as the party in breach (Bianca & Bonell, 1987).

DETERMINING FUNDAMENTAL BREACH IN CASE LAW

Perusing through the case law on article 25 of CISG, the following are the findings.
Case law is categorised into three groups: (1) non-performance of a basic contractual obligation; (2) late performance; and (3) non-conformity of the goods.

Non-Performance: A Complete Failure to Perform a Basic Contractual Obligation

A complete failure to perform a basic contractual obligation is a typical case of a fundamental breach. This may be “non-delivery” in the case of a seller and “non-payment of the price” in the case of a buyer. The total non-delivery on the part of the seller is without doubt the most serious and fundamental breach and the buyer has every right to avoid the contract. In case law, however, such a clear-cut situation is a rarity and there is a decided case, which illustrates a very late and still a partial delivery of the goods. In Foliopack v. Daniplast (CLOUT case No. 90, Italy Court of First Instance Parma, 1989), the Italian Court found that considering the statements made by and conduct of the parties, it was the obligation on the part of the seller to deliver the goods in a week. It was held that “the delay by the seller in delivering the goods, together with the fact that two months after the conclusion of the contract, the seller had delivered only one third of the goods sold, amounted to a fundamental breach.”

On the other hand, a simple case of partial non-delivery is not a fundamental breach. In Shoes case (CLOUT case No. 275, Germany, 1997), an Italian manufacturer sold shoes to a German buyer but failed to deliver the agreed quantity. The manufacturer demanded partial payment and the buyer wanted to avoid the contract. The German Appellate Court held that “partial delivery did not lead to a fundamental breach of contract. Non-delivery on the agreed date of performance will amount to a fundamental breach only if the buyer has a special interest in delivery on time by which the seller can foresee that the buyer would prefer non-delivery instead of late performance (for example, in the case of seasonal merchandise).”

Late Performance: Late Delivery or Late Payment

The general rule is that late performance by itself is not a fundamental breach of contract, unless the time is of the essence by virtue of the terms of the contract or the relevant circumstances of the case. In the context of late delivery in Italdecor v. Yiu’s Industrie (1998), Milan Appellate Court, Italy, decided that, “According to article 33 of CISG, the seller must deliver the goods on the date fixed in the contract. In the pending case, taking into account clarifications between the parties in the days following the agreement, there is no doubt that the agreed time of delivery was a fundamental term and that the contract turned on the availability of the goods just before buyer’s end of the year sales. However, the seller let the fixed time pass without any excuse; this behaviour is unjustifiable.”

Again, in Diversitel v. Glacier (CLOUT case No. 859, Canada, 2003), the buyer, a Canadian company doing business in
research and development of satellite and terrestrial communications entered into a contract with the seller, an American company. The buyer required delivery of insulation to meet the terms of a pre-existing contract with the Canadian Department of National Defence (DND). As a term of its contract with the seller, the buyer set out a specific schedule of delivery of the insulation by the defendant. The seller failed to deliver on time. The Supreme Court of Ontario found that, “the parties had made time of the essence in the contract by their conduct and communications, and held that the seller’s failure to perform in time was thus a fundamental breach”.

Non-Conformity of the Goods

As we have seen above, total non-performance of the contract is a clear-cut case of a fundamental breach. Nevertheless, the overwhelming majority of cases on CISG are those of non-conformity. The buyer can avoid the contract if defective goods are delivered and if non-conformity can be considered as a fundamental breach of contract under the CISG [article 49(1) (a)]. The question that can be raised here is under what circumstances delivery of non-conforming goods constitutes a fundamental breach.

A difficult question is how to determine the ‘substantial deprivation of contractual expectation’. According to Schlechtriem and Schwenger (2010), a buyer, who can make use of the goods (even if it is not the use which is intended at the time of the conclusion of the contract), ought to retain the goods and claim instead a price reduction or damages or both. It is a fact that when goods have been shipped across national frontiers, the cost of sending them back to the seller definitely will be too expensive and cumbersome. At the same time, it will be too harsh on a buyer to be told that he will have to keep the goods and, at some considerable cost and with unreliable prospects of recovering damages, sue a distant and uncooperative seller (Bridge, 2010). The question is how to strike a balance and at what point serious become very serious.

A careful analysis of the case law indicates that non-conformity in relation to quality is merely a non-fundamental breach unless it can be shown that the buyer – “without unreasonable inconvenience - can use the goods or resell them even at a discount.”

In the Meat case (CLOUT case No. 248, Switzerland, 1998), the German sellers delivered frozen meat by ship to Egypt and Jordan for a Swiss buyer. The buyer claimed lack of conformity of the goods. The Supreme Court of Switzerland found that “the difference in quality between that as had been agreed and that as was delivered was not significant enough to give the buyer the right to declare the contract avoided even though experts estimated that the decrease in value of the goods, which was too fat and too wet, amounted to 25.5%”. The Court held that “since the buyer had had such alternatives as to otherwise process the goods or to sell them, ithad no right to declare the contract avoided. The buyer
could merely avail itself of a reduction in price of 25.5%".

The above analysis of case law demonstrates the following principles in determining a fundamental breach:

(a) As reaffirmed by the Swiss Federal Supreme Court in ‘Packing Machine’ case: “[T]he term fundamental breach is to be interpreted narrowly. If it is doubtful, it should generally be assumed that no fundamental breach is existent”.

(b) The requirement of ‘contractual expectation’ must be ascertained through objective standards, while mere subjective expectations are immaterial (Packaging machine case).

(c) In most cases, courts rely on interpretative tools in article 8 of CISG, taking into account not only the contract itself but all relevant circumstances of the case in order to decide on the severity of the deprivation of contractual expectation of the injured party (Packaging machine case Foliopack v. Daniplast; Garden flowers case).

(d) In the case of non-conformity, it must be a substantially serious one, which cannot be remedied within reasonable time and by reasonable efforts to the effect that the goods are practically useless, unmerchantable, or cannot be appropriately resold” (Packaging machine case; Meat case).

CONCLUSION

Article 25 of CISG defines fundamental breach; nonetheless, there are commentators who maintain that the notion of fundamental breach expressed in article 25 is uncertain and rather controversial. The present paper argues that although the components of the definition of fundamental breach (e.g., ‘substantial detriment’ and ‘contractual expectations’) appear to be a bit strange for many people, it is not fair to conclude that they are vague and uncertain. There are a growing number of judicial decisions (not less than 56 decisions) on the application of fundamental breach. These decisions have in one way or another contributed to the development of consistent judicial interpretation of the concept, leading towards the unification of laws governing international sale of goods, which is the stated objective of CISG.

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Determining Fundamental Breach


Children’s Right to Education: Financial Neglect after Divorce in Muslim Marriage in Malaysia

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ABSTRACT
Divorce among Muslims married couples in Malaysia occurs every 15 minutes. The rate of divorce in among Muslims couples is twice of that of non-Muslims couples. Children are the most affected individuals from this separation not only in terms of social and emotional aspects but also financially. This paper adopted a qualitative approach by way of analysing the laws, international conventions and related cases to discuss the concept of right to education. Furthermore, it attempts to discuss the financial implications of divorce on children’s right to education particularly when the father fails or unable to pay the maintenance to the children. Though the right to education is guaranteed in Malaysia and the government had abolished school fees, the cost of education is still high. Therefore, the enforcement of judgment order by the court needs to be improved in order to protect the best interest of children i.e. for their right in respect of education.

Keywords: Children, neglect on maintenance, right to education, separated parents

INTRODUCTION
Malaysian Islamic Development Department (JAKIM) in 2009 reported that divorce among Muslim couples occurs every 15 minutes. In 2010, the statistics from JAKIM suggested an increased number of divorces which was 28,000 cases compared to 13,000 cases in 2001. This is an alarming issue in Muslim family institutions nowadays and problems relating to divorce is relatively increasing particularly which involve former wives and children. Many of these problems associate with the lack of responsibility of former husband/father towards children of previous marriages especially in providing care, either emotionally or most importantly, financially. Children who are caught up in the conflict surrounding the divorce or
separation of their parents are categorized as vulnerable children in need of special protection. Thus, their rights have to be given a high priority. This paper seeks to discuss the impact of neglect on children’s right to education in Malaysia.

THE RIGHT TO EDUCATION IN MALAYSIA

Education is seen to be important element for the development of a child. The Malaysian Child Act 2001 recognizes that every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status. In addition to that, Article 3 of the Convention on Right of Child 1989 (CRC) provides that the best interests of the child shall be a primary consideration in all actions affecting children. The international community now recognizes the importance of education for the economic, social, and physical well-being of children, their family members, and society at large. Article 26 of the Universal Declaration of Human Rights states that the right to education should be available to everyone and that primary education should be made free and compulsory. The provision provides that everyone has the right to education, which should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. A similar provision can also be found in Article 28 of the CRC, which Malaysia has acceded to in 1995, where it states that state parties shall recognized the right of a child to education by making education accessible to children. In Malaysia, Article 12 of Malaysian Federal Constitution provides for the right in respect to education to all citizens in Malaysia whereby the provision guarantees that no citizen shall be discriminated on the ground of religion, race, descent or place of birth in the admission to public schools or in the payment of fees. It is then codified in the Education Act 1996 which provides that the government may publish in the Gazette to prescribe for primary education to be a compulsory education. In 2003, Malaysian government had gazette for compulsory primary education in the Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003, dated 27th November 2002. Thus, from the legislations, all citizens of Malaysia must send their children to school for the compulsory elementary education, ranging from age 7 to 12 years old. The Education Act 1996 also provides for criminal liability for parents who fail to send their children to school, though this provision is never utilized. As far as secondary and tertiary education is concerned, the Education Act 1996 makes these two levels of education as recommendable and optional. Though these two levels are recommended but higher education is seen to be the most important level of education as it would give opportunity for children to create a better future. This level is the most cost-consuming level of education especially when the children enroll in private institutions.
Without proper financial aid from the parents, the children would face great challenges to embark themselves in education and would opt for labour hood at the early age (Che Mohd Salleh, Muhammad, Mohd, & Nik Mahmood, 2016). In 2012, the Malaysian government had announced the abolishment of school fees in both elementary and secondary public schools with the aim of providing access to quality and affordable education to every child irrespective of their socio-economic background (Kementerian Pendidikan Malaysia, 2012). This announcement is perceived as a good development in Malaysia, following the recommendation of UDHR and CRC that promotes free and compulsory education, at least at the elementary level. Assessing that the cost of education in Malaysia is not simply by looking at the school fees, these announcements relieve less than half of financial problems faced by the parents. Other costs such as school uniforms, extra reading materials, pocket money for meals, transport fare are among other indirect costs that parents should bear when sending the children to schools. Thus, a financially constraint single parent may find this a heavy burden especially when their children are more than two, all at once are in schooling age.

EDUCATIONAL NEGLECT DUE TO FINANCIAL CONSTRAINTS

Failure to meet the basic needs of a child is considered as neglect (Watson, 2005). The definition of neglect in previous literature which focused on physical neglect has far extended to other multiple categories such as supervisory neglect, abandonment and desertion, medical neglect as well as educational neglect. Thus, failure to provide a child for his or her basic development needs is constructed as a social neglect and failure to enrol in school constitute as an educational neglect (Kelly, Barr, & Weatherby, 2005). Moran (2009) defines educational neglect as failure to provide a stimulating environment in education as well as failing to comply with the state requirements regarding school attendance. Educational neglect also occurs when parents fail to prepare children to school or fail to assist children in completing educational tasks (Wiehe, 1996). Educational neglect generally applies to children who are under parental control. Thus, situation involving older children comes under the meaning of truancy rather that educational neglect which can lead to underachievement in acquiring necessary basic skills, dropping out of school or having continually disruptive behaviour (Perry, Colwell, & Schick, 2002). Family structure has an important implication for children’s ability to enrol and persist in school providing financial, cultural, and social resources where needed. The physical absence of one of the adults may be described as a structural deficiency in family social capital. Most importantly, if the absent adult is the sole breadwinner of the family, the family is seen as not only structurally and socially deficient but also financially lacking (Alivandi Vafa & Ismail, 2009). Parke (2003) reported that single parent families had a higher poverty rate...
than the intact families and this causes a high risk for negative educational outcomes for children in single-parent families is due to living with a significantly reduced household income. The decline in income following divorce account for the risk for children dropping out of high school and places the children to grow up in a financially constraint environment. Thus, the children from single parent families are likely to achieve lower levels of education as compared to children from an intact family. Economic crises are a standing situation with most of single parent’s families. It becomes difficult to meet the basic needs of children such as food, clothing, school fees, and maintaining the previous standard of living. Single mothers, especially who had never worked before the separation need to become the primary wage earner and are forced to shoulder huge financial responsibilities (Kotwal & Prabhakar, 2009). Child’s education attainment is viewed as a commodity desired by the household and financial resources would allow parents to purchase goods and services important for the child’s development. As a direct consequence of divorce, the economic status tends to decline and the limited family income may affect child educational attainment by reducing financial support for further schooling. Divorce is closely associated with the changes of family’s socioeconomic status and exposes children to potential disadvantages in respect of education (Liu, 2008). Children of separated parents are at a risk of growing up in low income households, performing less well in school and gaining fewer educational qualifications and leaving school at early age because the family cannot afford to send the children to school especially when there are many younger siblings present (Mooney, Oliver, & Smith, 2009). The ability of parental income to pay for education and the number of schooling children that they have to support may jeopardize the right of the older siblings in being educated. Hassan and Rasiah (2011) reported that schooling cost is a very heavy burden on parents even taking into account the subsidies received from the government. The household and family incomes do affect children’s schooling performance due to constraints in financial resources as low income parents often have difficulty in participating in their children’s education. The children from separated families are disadvantaged with respect to education and socioeconomic outcomes in childhood and adulthood compared to children of intact families as they are more likely to drop out from school especially in secondary level due to mostly, financial reasons. The report from Child Rights Coalition Malaysia (2012) shows that children from poor families (including those from families of separated parents) would drop out from schools especially at secondary level in order to help the family and younger siblings. For them, education is no longer an important element in life as the sustainability of the family is priority. Drop-out children would then suffer in the future when they enter adulthood where qualifications are needed in order to change their economic
status. Parental income affects children’s educational attainment by affecting the quality of primary and secondary schooling, thereby affecting student’s achievement and their expectation for post-secondary schooling. If parents think that they cannot afford to send their children to college they may discourage these aspirations (Mayer, 2002). Due to separation of parents, children may exhibit depression, behavioural and learning difficulties. Single mothers who are forced to work in order to finance the family would unintentionally neglect the children. Neglect can negatively affect a child’s cognitive capacity, language development and academic performance. Neglected children are more prone to encounter different problems in their future life when their problems left unnoticed and would demonstrate a notable decline in academic (DePanfilis, 2006). Divorce may also subject children to emotional distress that may negatively affect their educational attainment. The children of single parent household have access to lower levels of economic and social resources necessary for human capital development. This impacts on the child’s educational attainment through reduced financial resources for further and better schooling and through possible early entrance into the labour force (Xie, 2010).

CONCLUSION

Divorce among married couples could potentially harm the basic needs of children, especially when it involves something that requires financial aid. In Islamic Family Law in Malaysia, former wives may claim for ancillary reliefs which would include children’s maintenance especially when the wives obtain custodial order for the children. These claims however are not easy. It is a long cost-consuming process which requires much patience and money from the claimants. The procedure becomes harder if the former husband refuses to cooperate and take responsibility. The impact would be on children who are forced to enter labour force before they enter adulthood. Protecting the best interests of these children would be rather difficult when they have entered into ‘adulthood’ at the early age. Therefore, a proper enforcement of ancillary claims in the Syariah Court in Malaysia is needed in order for the children to be protected.

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ABSTRACT
It can be said that the source of the modern concept of human rights came from the United Nations. Looking at its charter one can see that the main purpose of the institution is to prevent wars on a global scale but at the same time the charter lays down various explicit and implicit inferences with regards to accepted standards of human rights. This charter came into being before the Universal Declaration of Human Rights and it has the effect of international law rather than the mere declaratory effect. This article will trace the creation of the charter, its references to human rights standards, the jurisprudential argument with regards to the obligatory nature of the charter, the impediments both causal and argumentative and the transcendence of a ‘uniform’ standard of human rights and erosion of local perspectives of human rights.

Keywords: Domestic human rights, human rights, universal human rights, UN Charter

INTRODUCTION
Explicit and Implicit References to Human Rights in The United Nations Charter
The United Nations is an international organization that was formed as a collective effort to regulate and conduct inter-national affairs, to prevent occurrence of war between nations and at the same time respecting the notion of fundamental human rights. It was only after Second World War that nations began to ponder positively on the issue of human rights. The ratification of the Charter by member states and the formation of the United Nations should be seen as the desire of nations that the organization becomes the international protector of human rights due to the tragic experience of the world wars (Buergenthal, 2000).

Throughout the Charter there are eleven provisions in the Charter that refers to human rights, explicitly and implicitly.
Explicit/Express Reference to Human Rights in the United Nations Charter

There are nine direct or explicit references on human rights in the United Nations Charter. They are as follows:

1. Second Paragraph of the Preamble;
2. Article 1(3);
3. Article 13(1)(b);
4. Article 55(c);
5. Article 56;
6. Article 62(2);
7. Article 68; and
8. Article 76(c).

The second paragraph of the preamble of the Charter provides that the peoples of the United Nations have determined to reaffirm their “…. faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women….” It is accepted that a preamble is an introductory and explanatory statement in a document that explains the document’s purpose and underlying philosophy. Thus, the said preamble of the Charter gave purpose and philosophy on human rights by first recognizing it.

Article 1(3) of the Charter deals with one of the purposes of the United Nations, in the context of human rights it provides that the purpose of the United Nations is “to achieve international co-operation…. in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion….” From this article two important points can be made. First that the article establishes the concept of universality of human rights by stating that human rights and fundamental freedoms are for all and secondly, that the rights and freedoms should be enjoyed by all without any form of discrimination.

Article 13(1)(b) deals with functions and powers of the United Nations General Assembly (UNGA). It provides that the UNGA “….shall initiate studies and make recommendations for the purpose of…. assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” This article gives obligation and imposes duty on the UNGA to initiate studies and make recommendations on matters of promotion of human rights. In the same time this article resonates with the wordings and spirit of Article 1(3) by expressly stating the concept of universality of human rights and non-discrimination.

Article 55(c) then provides “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote….universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Then Article 56 states that “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” These two articles need to read together in order to understand that they
provide member states with an undertaking to promote and observe human rights either by working together with the United Nations or separately.

Another explicit reference to human rights can also be seen under the prescribed functions and powers of the Economic and Social Council (ECOSOC). In Article 62(2) of the Charter, ECOSOC has been given the power to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” For the purpose of realization of this power the Charter further provides ECOSOC with the authority to set up commissions for the promotion of human rights. This can be seen in Article 68 which states that ECOSOC shall “….set up commissions….for the promotion of human rights”.

The last explicit reference on human rights in the United Nations Charter can be seen in Article 76(c). The article provides that “the basic objectives of the trusteeship system….shall be….to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world…."

From these explicit references to human rights in the Charter, three United Nations Organs have been given the specific obligation of promoting and encouraging respect for human rights and for fundamental freedoms.

Implicit/Implied Reference to Human Rights in the United Nations Charter

There are two indirect or implicit references with regard to human rights in the Charter. They are as follows:

(1) Article 8;
(2) Article 10; and
(3) Article 14.

Article 8 provides that the United Nations “…. shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality…” This principle of non-discrimination as to sex is specific for the purpose of participation in the United Nations in its “principal and subsidiary organs”.

Article 10 states that the UNGA “….may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United nations or to the Security Council or to both on any such questions or matters”. This allows the UNGA to discuss any questions or any matters that include human rights and fundamental freedoms, which theme recurs again and again explicitly in the Charter, thus making it obvious that they are within the scope of the present Charter. This power of the UNGA is however curtailed by Article 12 which restricts UNGA to discuss any matters if the situation is under the exercise of the United Nations Security Council.
Article 14 provides that subject to the provisions under Article 12, the UNGA “….may recommend measures for…. situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”. Purposes and Principles of the United Nation can be found in Article 1 of the Charter. For the purpose of discussion under the human rights theme, the specific relevant article under the said article would be Article 1(3). When Article 14 is read together with Article 1(3) of the Charter, it is clear and evident that the UNGA is given the power to recommend measure to solve situations that occur caused by violations of universal human rights and discrimination.

Thus, it can be said that there are eleven instances in the United Nations Charter that make reference to human rights and fundamental liberties. Though the proposal, by interested countries and non-governmental organizations, to include the International Bill of Rights was rejected, their continued effort however was not in vain. It was in a way a success in the sense that even in the era where the major powers were quite resistant to the idea of universal human rights and fundamental freedoms, all members of the United Nations including the major powers had put their strong promise and commitment on promoting human rights and fundamental freedoms. This allowed the Universal Declaration of Human Rights to be formed in 1948 and later the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966, including its optional protocols which are referred to collectively in the International Bill of Rights.

The Significance of the United Nations Charter on the State Of Human Rights

It can be concluded that the Charter contains provisions that refer to human rights. These provisions alone show that human rights were considered by the members of the United Nations, during the adoption of the Charter, as an important theme that needs international recognition and affirmation. Below the significance of the Charter on the state of human rights will be discussed.

There are six areas of the United Nations Charter on human rights are as follows:

1. Human rights constitute a theme that recurs again and again throughout the Charter and is singular in its predominance.


3. The United Nations Charter is the first international instrument in which nations agreed to work closely on the international level for the promotion of human rights.


5. The United Nations Charter has the status of multi-lateral treaty and it imposes obligations on the member nations.
states which are binding under international law.

(6) The United Nations Charter allows the propagation and education on the concept of universal human rights.

It can be concluded that there are eleven provisions, both explicit and implicit, that refers to human rights in the United Nations Charter. The various recurrences of provisions that touch on human rights show that the theme was deemed important at the point when the Charter was adopted. Both explicit and implicit reference on the matter recurs again and again throughout the Charter. Oppenheim and Lauterpacht (1955) stated that “The idea of the recognition and protection of human rights is woven like a golden thread throughout the entire Charter as one of the principal objectives of the United Nations Organization”.

The provisions discussed above shows that human rights and fundamental freedoms are dominant themes in the United Nations Charter. Reading the Charter, one cannot escape from making a conclusion that human rights dominate the instrument. It was stated that “the core concept of the United Nations when the Charter was drafted was…. for the maintenance of international peace and security…. alongside this, the Organization would promote development and the universal realization of human rights” (Ramcharan, 2004).

Secondly, the United Nations Charter has internationalized the concept of human rights. Prior to adoption of the Charter in 1945 human rights were considered as a domestic and municipal issue. Based on the concept of law and sovereignty, each state has its own version of human rights depending on the state’s political ideology, religion and culture. Under this domestic version of human rights, no foreign state or any international organization may interfere. The adoption of the Charter marked the agreement of members of the United Nations to accept the internationalised view of human rights as stated by Buergenthal (2000) that with the signing of the Charter member states “….could no longer claim human rights as such were essentially domestic in character”. Though the question of what are human rights was not defined in the Charter but later in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Though the internationalized universal idea of human rights was positively accepted, there are however criticisms on the concept. Some critics advocated that universal human rights now adhered to were based on the western notion which can be traced back to the United States Bill of Rights and the French Declaration of the Rights of Man. Steiner, Alston and Goodman (2008) stated the relativist point of view is that it is not prudent to impose an exogenous concept of human rights on states which have their own endogenous concept of human rights. They also commented that “to a relativist, these instruments (human rights instruments) and their pretentions to universality may
suggest primarily the arrogance or cultural imperialism of the West…” (Steiner et al., 2008).

The third significance of the Charter on the state of human rights is that the Charter is the first international instrument where nations agreed to work closely on international level for human rights promotion. This is evident in Article 1(3) of the Charter that encourages international co-operation in the promotion of human rights. It is also evident in other provisions which are Articles 55(c) and 56. These three provisions can be seen as the ‘obligations’ of member states on the promotion of human rights. These provisions are among the most frequently invoked provisions of the Charter when dealing with inter-state ‘obligations’ on human rights.

As mentioned above, though human rights was internationalised by the Charter, it was not defined. The obligation imposed on member states to work with the United Nations allowed the organisation to embark on the mission to define human rights. According to Buergenthal (2000), the above provisions provided the United Nations “….with the requisite legal authority to undertake a massive effort to define and codify these rights”. It was through this collective effort by member states that human rights was given the definition and accepted understanding by the Universal Declaration of Human Rights 1948.

The fourth significance of the Charter with regards to human rights is its broad provisions on gender non-discrimination. The issue of gender discrimination has existed prior to the Charter and continues even after its international recognition in the Charter. The Charter has allowed efforts to eradicate gender discrimination.

One of the most important efforts in eliminating gender discrimination is the mechanism known as the ‘gender mainstreaming’. The term ‘gender mainstreaming’ was made popular on the world centre stage on the Fourth World Conference on Women in Beijing in 1995 (Charlesworth, 2005). Gender mainstreaming mechanism was taken up by the ECOSOC in 1997. The principles are:

1. Issues across all areas of activity should be denied in such a manner that gender differences can be diagnosed—that is, an assumption of gender-neutrality should not be made.
2. Responsibility for translating gender mainstreaming into practice is system-wide and rests at the highest levels. Accountability for outcomes needs to be monitored constantly.
3. Gender mainstreaming also requires that every effort be made to broaden women’s participation at all levels of decision-making.
4. Gender mainstreaming must be institutionalized through concrete steps, mechanisms and processes in all parts of the United Nations system.
5. Gender mainstreaming does not replace the need for targeted, women-specific policies and
programs or positive legislation, nor does it substitute for gender units or focal points.

(6) Clear political will and the allocation of adequate and, if need be, additional human and financial resources for gender mainstreaming from all available funding sources are important for the successful translation of the concept into practice.

On paper, the principles on gender mainstreaming set forth by ECOSOC may appear promising but for the time being they fall short in term of implementation and success. It was argued that despite the gender mainstreaming mechanism, women’s participation in decision making in the United Nations itself is somewhat glacial and not in line with Article 8 of the Charter (Lombardo, 2005). Not only in the United Nations can gender disparity also be seen all over the world either in the public or private sector. Feminists may say that this is against human rights but in reality, the question that needs to be asked is does gender equality as mentioned in the Charter means total equality between men and women without taking into consideration points of merit and circumstance? On this issue Islam provides an alternative view. In Islam, women are given equal rights with men, tough equal they are however not identical as the Quran prescribed that both man and woman are equal but man have advantage over them. The “advantage” has nothing to do with man’s superiority over woman, but rather, speaks of the different social roles that males and females fulfill based upon their individual natures. Though Islam seems to provide the answer, it is most unlikely that the so-called universal human rights proponents are going to adhere or at least take them into consideration. Here, as argued by Lombardo (2005), the universality of human rights as described in Charter can be argued on the basis that it is universal in the eyes of the West but not taking into consideration other non-western religion and cultural views.

The fifth significance of the Charter on human rights is that the Charter gives the effect of multi-lateral treaty that imposes obligation on member states. As a multi-lateral treaty that signed by the member states, it imposes obligations on them that are binding under international law. This is evident with reference to The Vienna Convention on the Law of Treaties, article 2(1)(a), defines a treaty as “an international agreement concluded between States in written form and governed by international law....”. Furthermore in Madellin v. Texas the United States Supreme Court mentioned in the positive on the binding effect of the Charter on member states. However, The Charter though binding on member states under general international law is however limited by domestic law. Kirgis (1997) mentioned that treaties, including the United Nations Charter, are binding instruments under international law, subject to limited grounds much like those in domestic contract law for invalidating or terminating those.
In the context of human rights, the obligation imposed upon member states by the United Nations Charter is in Article 56 and read together with Article 55(c). As discussed above, the articles require member states to promote “universal respect for, and observance of . . .” human rights. The aforementioned article only obliges member states to promote respect and observance of human rights but not domestic application of universal human rights. To rely on the Charter for state’s obligation on human rights is not enough. The Charter only binds member states so that future work and effort on human rights is possible. This was remedied by subsequent international treaties that addressed the matter. The sixth significance is that the Charter provides an opportunity for propagation and education on universal human rights. This opportunity is provided in Articles 55(c) and 56 of the Charter. The organization and member states have positively taken this opportunity by signing and ratifying various international instruments on human rights. Taking into consideration the Charter and the instruments on human rights together they, as mentioned by Bilder (1969), “. . . define the content of human rights concepts and establish clearer standards of governmental conduct. They educate both officials and the general public in these norms . . .”. Thus, the Charter clearly sets forth the foundation on which the universal human rights and fundamental freedoms can be promoted through education and this is shown by the establishment of the United Nations Education, Cultural and Scientific Organization (UNESCO) on 16th November 1945. UNESCO as a specialized agency under the United Nations was established with promotion of human rights as one of its core purposes.

**Obligation of the Member States under the United Nations Charter**

In the discussion above, it can be concluded that the Charter gave significance on the state of human rights. One of it is the concept of internationalization of human rights that allows departure from the old understanding of domestic or municipal human rights to universal human rights. Though the understanding of member states on this matter have changed significantly in the past five decades, the issue that needs to be addressed is whether this understanding is practiced by states by their own volition or by the obligation imposed upon them by the Charter.

To determine whether such positive obligation exists we need to see the expressions used in the Charter. There is no doubt that there are provisions that refer to this matter but they are about purposes and principles of the United Nations and the functions and powers of bodies or organs under the United Nations. The exception can be found in Article 56, the undertaking clause. The provision provides that the undertaking itself only requires member states to promote and observe human rights without any discrimination and does not have a strong obligatory impact. Thus, rather than obligatory, the provisions sound advisory and supervisory.
Kelsen’s View

According to Kelsen (1950), the Charter does not impose obligation on member states on matter of human rights. He stated that “the language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects” (p. 29). He further stated that “the fact that the Charter, as a treaty, refers to matter is in itself not a sufficient reason for the assumption that the Charter imposes obligations with respect to this matter upon the contracting parties” (p. 29). Kelson’s tone on this matter shows that he was of the opinion that the Charter does not impose obligations. He further argued that human rights are well within a state domestic jurisdiction because Article 2(7) of the Charter forbids intervention of United Nations on such matters with the exception that the situation fits “….threats to the peace, breach of the peace….” as provided in Article 39 of the Charter.

There are several reasons why this occurred. First, the Charter does not provide a standard definition of human rights making imposition of obligation impossible. Second, a provision that clearly imposes obligation would never be accepted by the signatories during the adoption of the Charter. And third, it was perhaps the drafter’s intention that the provision was worded in that manner so that it can be the foundation of international cooperation on human rights. Thus, it can be said that true to the Kelsonian jurisprudential argument of the pure theory of law, the Charter though inspiring does not impose obligations upon the member states since it lacks the binding norm.

Looking at the Charter from Kelson’s perspective, the Charter is viewed not as an authoritative document of human rights but merely as a collective agreement between the contracting states to work together seeking a common ground of understanding on human rights. Nevertheless, this however should not be seen as a failure of the Charter, and should be seen in a way that the Charter was actually a success story with regards to the fight for human rights because it provided the foundation upon which human rights are defined, codified and strengthened.

Obligatory/Binding Nature of the Charter

It can be argued that the Charter does impose legal obligations on human rights on the ground that provisions on such matter recur throughout the Charter thus signifying its predominance. The Article that mentioned “…. the United Nations shall promote…. observance of, human rights…..” when read together with Article 56, obliges member states to actively participate on human rights. This participation can either be jointly together with the United Nations or separately.

The obligatory nature of the Charter can be seen in two of the earliest UN General Assembly resolutions. In the Resolution of 44(1) of 1946, the general assembly was of the opinion that the “…treatment of Indians in South Africa should be in conformity with the international obligations under
the agreements concluded between the two governments and the relevant provisions of the Charter”. In Resolution of 103(1) of 1946, the General Assembly declares that “….it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations…”.

There are also many other court decisions that seem to support this view such as the case of Oyama et al., v. California, which revolves around the issue of racial discrimination caused by a law coupled together with negative sentiment of the Americans towards peoples of Japanese origin. This case did not have a huge impact on the abolishment of discriminatory laws in the United States although the concept of human rights under the United Nations Charter was quoted and recognized. This is evident in the words of Justice Murphy that “…this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion”. The same positive tone of the courts with regard to racial discrimination as against human rights can also be seen in the Canadian case of Re Noble and Wolf. The positive treatment on the obligatory nature of the Charter had allowed states to argue at the international level on the violation of human rights issues. For example, Articles 1, 55 and 56 were mentioned in the Hostages Case. In this case the United States urged the International Court of Justice to condemn Iran’s seizure of United States’ hostages during the 1979 Iranian Revolution as a violation of fundamental human rights recognized by the International community. The United States citing the above three articles, contended that, “the existence of such fundamental rights for all human beings….with the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected in the Charter of the United Nations”.

The latter discussion that argued that human rights impose obligations on member States does sound appealing. As appealing as it may sound, in reality, States maintain their own human rights affairs which is strengthened by the doctrine of Sovereignty of State. It can be said that the number of States that truly adhere to universal standards of human rights are small or perhaps negligible. Even strong and vocal proponents of human rights like the United States and her allies violate human rights at home and abroad since it is a widely known fact that in these countries there is discrimination based on colour, religion, and culture.
States also seem to rely on the two approaches discussed above when arguing on this matter depending upon their particular interests at the point in time. This can be seen in the case of the treatment of Indians in the South African Union. The Union argued that the Charter did not provide a definition of human rights thus making the Charter impossible to impose obligations on member states. Meanwhile Indian representatives argued that the mistreatment of Indians constitute a violation of human rights as provided in the Charter.

Objections to Implementation

In the discussion above, some have argued that the Charter does not establish obligatory nature of human rights provisions. It is believed that one of the reason such obligatory nature cannot be established is the impediment in Article 2(7) of the Charter.

Human rights though internationalized, remain still very much under domestic state jurisdiction. Each state has the right to apply its own set of human rights either by adopting in total the internationally prescribed standards of rights or by their own *sui generis* standards perhaps based on the relativist view, albeit respecting the universal notion of human rights. This will create a situation where the observance of human rights differs from State to State. These differences in the approach on how States perceive human rights gives rise to situations where one State may believe that the other is not practicing human rights.

For example, Malaysia practices affirmative action that gives privileges to *bumiputeras* (persons of a Malay race and natives of Malaysia) as per the Malaysian Federal Constitution. On this matter Shad Faruqi mentioned that many economic, social and educational programmes in Malaysia are structured along ethnic lines (Faruqi, 2008). Some defend it on the basis that it is a much-needed affirmative action to balance the imbalances in the country and some may say that Malaysia violates human rights by practising discrimination via discriminatory laws. On this matter the question that should be asked is that, is it possible for foreign States, via the international arena, to impose positive obligations on Malaysia to observe universal human rights?

As discussed previously, Articles 56 and 55(c) contain the provision where positive obligation in human rights can be derived. They require member states to promote and observe human rights based on the pledge given by the states. In the event that a state breaches that pledge by violating human rights within its own territory a state is said to have breached the Charter itself. The only remedy available in such matters is international law yet the United Nations by virtue of Article 2(7) has no authority or jurisdiction to intervene.

Article 2(7) states that, “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters
for settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

The article indicates that the United Nations cannot intervene in any matter under state jurisdiction. The question is what does it mean by ‘intervene’? Authors such as Lauterpacht and Oppenheim seem to define interventions as the dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things. Gilmour (1967) mentioned that ‘intervention’ means either “dictatorial interference” or “interference pure and simple”. By referring to the drafting history of the Charter he was of the opinion that intervene means “interference pure and simple” and the drafters have no intention to limit that word to “dictatorial interference”. This shows that at the time when the Charter was adopted member states agreed on the supremacy of state sovereignty thus making any interference in the domestic affairs of a state illegal.

Furthermore, in the Nicaragua case, the International Court of Justice established the fact that the term intervention in the Charter does not mean dictatorial-interference. Any dictatorial-interference by one State on another is deemed as a violation of international law. In this case it was held that the United States had violated international law by intervening in Nicaragua’s state of affairs by supporting guerrilla rebels and mining Nicaraguan harbours contrary to the provision of Art 2(4) of the Charter.

**CONCLUSION**

It can be said that since human rights theme recurs throughout the Charter it has attained transcendence from a matter of State domestic jurisdiction to a higher plane of international law. This transcendence will slowly erode domestic human rights which have been moulded by unique domestic factors such as culture and religion. Domestic courts are seen to slowly adopt and adept to the international norm of human rights one case at a time. Though the UN version of human rights is not expressly imposed upon member states, it will slowly creep into domestic laws and judgments of the courts, and eventually there is a probability that the same standard of human rights will be applied by all states to result in a uniform new world order.

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The Protection of Small and Medium Enterprises in Yogyakarta: The Challenges of ASEAN Economic Community

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ABSTRACT
The ASEAN Economic Community (AEC) is one of the pillars of the ASEAN Community. AEC goal is regional economic integration by 2015. AEC envisages the following key characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. Yogyakarta is a city in Indonesia where many citizens are involved in small and medium-sized enterprises (SMEs). Based on the data obtained from the Department of Trade, Industry and Cooperatives Bureau of Yogyakarta, in 2015 there were 230,047 SMEs. The fierce competition from the single market will have an impact on the survival of the SMEs. The Indonesian government ratified the ICESCR into ICESCR Ratification Act 2005. The government has a binding obligation to take various measures “to respect”, “to protect” and “to fulfil” human rights towards SMEs in Yogyakarta.

Keywords: AEC 2015, economic, social and cultural rights, SMEs, Yogyakarta

INTRODUCTION
The ASEAN Economic Community (AEC) was implemented at the end of 2015. The AEC is one of the pillars of the ASEAN Community were set out in the Bali Concord II. ASEAN hopes to establish a single market end of 2015 (Syukriah, 2013). The ASEAN Economic Community shall be the goal of regional economic integration by 2015. AEC envisages the following key characteristics: (a) a single market and production base; (b) a highly competitive economic region; (c) a region of equitable economic development; and (d) a region fully integrated into the global economy (ASEAN AEC, 2015).

The first AEC characteristic seeks to create a single market and production
base through free flow of goods, services, investment, skilled labour and freer flow of capital. The second characteristic helps to create a business-friendly and innovation-supporting regional environment through the adoption of common frameworks, standards and mutual co-operation across many areas, such as in agriculture and financial services, and in competition policy, intellectual property rights, and consumer protection. It also supports improvements in transport connectivity and other infrastructure networks. The third characteristic seeks to achieve equitable economic development through creative initiatives that encourage small and medium enterprises to participate in regional and global value chains and focused efforts to build the capacity of newer ASEAN Member States to ensure their effective integration into the economic community. The fourth characteristic envisages ASEAN’s full integration into the global economy pursued through a coherent approach towards external economic relations, and with enhanced participation in global supply networks (ASEAN 2016).

Indonesia’s readiness to face the ASEAN Economic Community 2015 can be seen from the aspect of economic growth, the national export growth and Gross Domestic Product (GDP). The readiness of Indonesia can be viewed from the aspect of economic growth. Based on the economic growth report that was launched by the International Monetary Fund (IMF) in 2012, it appears that in the last 10 years of economic growth, Indonesia is very stable in the range of 5.5% ±1 per cent with an average growth of 6.11% from 2007 to 2012 (Abdu Rofiq, 2014).

Yogyakarta is a city in Indonesia where many citizens are involved in small and medium enterprises (SMEs). From the data obtained from the Industry and Commerce Bureau of Yogyakarta, in 2015 there were 230,047 SMEs. With the increasingly fierce competition as a result of the single market of the ASEAN Economic Community will very likely have an impact on the survival of these SMEs, cause will many imported products that will flood the domestic market.

Small and medium enterprises play a vital role in the development and economic growth. Actually, since small and medium enterprises is the main provider of goods and services it's has a low-income (Tambunan, 2012). So, the protection of Economic, Social, and Cultural (ESC) rights of small medium-sized enterprises is very needed towards free market in ASEAN Economic Community in Yogyakarta.

The Economic, social, and cultural rights are vague, inherently of a positive nature which required positive measures for their implementation, and resource dependent becomes the departure point in discussing the justiciability of these rights in this article (Malcolm, 2009). Although international law recognizes ESC rights as genuine rights, a lively and contentious debate over the ideological and technical nature of these rights is still ongoing (Mapulanga, 2002). The debate about the justiciability of ESC rights has become an issue since the development of human rights.
This study will assess the protection of small and medium enterprises in Yogyakarta towards ASEAN Economic Community 2015 in the perspective of economic, social and cultural rights. This study will focus on the role of Yogyakarta government to protect ESC rights of small and medium enterprises in Yogyakarta.

METHODS
This research is a legal and socio-legal research of the international law and Indonesian law which are related to economic, social and cultural rights. This research would use statute approach (Ibrahim, 2006) because it discusses regulations such as the Universal Declaration of Human Rights and other conventions relating to the issue of ESC rights which applicable to the protection of small and medium enterprises based on economic, social and cultural rights, for instance International Covenant on Economic, Social and Cultural Rights and its Protocol.

Small and Medium Enterprises in Yogyakarta towards AEC 2015
SMEs can be defined in many different ways. In Indonesia, there are many different definitions of SMEs based on the institution (Hubeis, 2009):

(a) The Central Statistics Agency (BPS): SME is a company or industry that has between 5 and 19 employees.

(b) Bank Indonesia (BI): SME is a company or industry which is characterised by: (a) having a capital of less than IDR. 20 million; (b) for one round from his business only needs IDR.5 million; (c) has maximum assets of IDR. 600 million, excluding land and buildings; and (d) annual turnover of ≤ IDR.1 billion.

(c) Cooperatives and Small and Medium Enterprises Ministry (Small Enterprises Act 1995): SMEs are small scale and are usually focused on traditional economic activities with a net income IDR.50 million - IDR.200 million (excluding land and buildings) and an annual turnover of ≤ IDR.1 billion. According to the SME Act 2008, SMEs have a net income between IDR.50 million – IDR.500 million and annual net sales of IDR.300 million – IDR.2.5 billion.

(d) Presidential Decree No.16/1994: SME is a company that has a net income of up to IDR. 400 million.

(e) Ministry of Industry and Commerce:
(a) the Company had assets up to IDR.600 million, excluding land and buildings (Department of Industry before merger); and (b) the Company has a working capital less than IDR.25 million (Department of Commerce before merger).

In general, small businesses have characteristics, such as: a self-management, self-funded, local marketing area, small company assets, and a limited number of employees. SMEs are the implementation of the principle of solidarity, democratic
economy, independence, balance, progress, sustainability and efficiency of justice, as well as national economic unity. It is also called the informal sector as it is not highly sophisticated. The production volume is very small and the SMEs do not have a formal business license (Mubyarto, 2002). The importance of growth and development of SMEs must be considered, especially in the framework of ASEAN economic integration (Tiurmaida, 2014).

The SMEs are also an integral part of economic development and growth of the ASEAN Member countries because of the number of SMEs and their employees exceed those of other types of companies. The SMEs also directly impact on the advancement of ASEAN framework on equitable economic development (AFEED) Program. This is evident from the fact SMEs account for more than 96% of all companies and 50%-85% of domestic industry (Lemhannas, 2013).

SMEs only need a small capital and many SME founders say they set up their own company because they do not like working as labourers in factories which has too many rules and regulations. This is evidenced by the growing number of SMEs (Syukriah, 2016).

Data for this study was obtained from the Cooperation and Small Medium Enterprises Bureau of Yogyakarta and Industry and Commerce Bureau of Yogyakarta.

The number of SMEs in Yogyakarta is growing exponentially. However, the development of SMEs in Yogyakarta is hampered by two main barriers, namely:

1. the internal factor, SMEs are weak in terms of capital, management capabilities, production, marketing and human resources; and
2. External factors: the issues arising from competition. For example, the lack of government supports to protect SMEs in term of legislation to facing the AEC 2015.

Economic, Social and Cultural Rights and ICESCR

The ICESCR states that ESC rights are guaranteed to all without discrimination of any kind such as ‘race’, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive and discrimination is also forbidden on other grounds, including disability, sexual orientation or gender identity, marital or family status, or socio-economic status.

The terms that explain the economic, social and cultural rights related to ICESCR are:

(a) Economic rights in the ICESCR are the rights to work and to just and favourable conditions of work; the right of everyone to form trade unions, join a trade union of one’s own choice; and the right to strike.

(b) Social rights in the ICESCR are the rights to social security; protection and assistance of the family; the right of everyone to an adequate standard of living for them and their family, including food, clothing and housing, the continuous improvement of living conditions and the right to be free
from hunger; the right of everyone to the highest attainable standard of physical and mental health; and the right of everyone to education.

(c) Cultural rights in the ICESCR are the rights of everyone to take part in cultural life, to enjoy the benefits of scientific progress, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Amnesty International, 2016).

Obligations undertaken by states and consequently by the international community, under international human rights instruments shall be implemented in good faith (Article 26). However, many obstacles must be overcome in fulfilling this standard, including that of the relative neglect of economic, social and cultural rights. Another problem is the slow process in clarifying the contents of these rights and their corresponding obligations. However, by way of the “general comments” interpreting the relevant international instruments by

Table 1

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<td>IV</td>
<td>Detail per Region/City</td>
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Sources: Industry and Commerce Bureau of Yogyakarta 2016
the UN Committee on Economic, Social and Cultural Rights (Asbjorn, Catarina, & Allan, 2001).

State responsibility in this context is a statement of “commitment” and “goodwill”, which does not recognize “half-committed” or “commitment patchy” but “full commitment” to guarantee the non-discrimination principle, including ensuring the equality of men and women to enjoy ESC rights guaranteed in Article 3 of the Covenant.

The ratification of the Charter has consequences for the implementation of human rights and create a report relating to the adjustment of law, measures, policies and actions (Yosep, 2012). ICESCR commands state parties to protect their citizens from the violation of ESC rights, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights seeks to regulate State obligations (Article 6, Maastricht Guidelines on Violation of Economic).

Indonesia is bound by international law and to fulfill the Economic and social rights of Indonesians. As the member of United Nations (UN); Indonesia is required by UN Charter to implement a code of conduct in implementing human rights (Article 55 UN Charter). Article 103 of UN charter states: “In the event of a conflict between the obligations of the Members of the United Nation under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. ICESCR with its instruments is very important for ESC rights in each country that has ratified the Covenant.

ESC Rights of SMEs in Yogyakarta

The Yogyakarta Government tries to protect not only economic or social rights, but also the cultural rights. The government provides freedom to choose cultural life as long as it does not contradict the social norm in Yogyakarta. Through AEC it will be a bridge to cultural transformation in Yogyakarta the government introduced programs to strengthen local cultural identity to ensure its survival. Yogyakarta still does not promulgate the legislations to protect small and medium enterprises towards AEC 2015, especially on economic, social and cultural rights.

CONCLUSION

Although Yogyakarta has made strong efforts to protect the economic, social and cultural rights of SMEs legislation is still vulnerable. The ICESCR has an important role to protect SMEs in Yogyakarta and as such, the government should fulfil the ESC rights of SMEs. There is also a need for Yogyakarta to promulgate and enact Regional Regulation to regulate small and medium enterprises based on economic, social and cultural rights.
REFERENCES


CAIS@LAW: Accounting Information System for Small Law Firms in Malaysia

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ABSTRACT
In Malaysia, as of January 2016, nearly 90% of the legal firms comprise less than five partners (4818 firm out of 5405 firms registered). With small number of partners and lack of knowledge in accounting, it is perceived that a special accounting management system for the law firms would be very useful for the lawyers to operate their accounts and book keeping. At present, there are many software on legal firms account management system, for example, the MyCase’s web based legal practice management software and the QuickBooks legal accounting software. However, most of this international formulated software are expensive and might not be suitable to cater to the practice of local small law firms. Computerised Accounting Information System for law firms (CAIS@LAW), is specially developed to assist the small law firms in Malaysia. The report produced by CAIS@LAW is also sufficient for submission to professional bodies.

Keywords: Account management system, law firms, Malaysia

INTRODUCTION
Dyt and Halabi (2007) pointed out that the most obvious and startling distinction between successful and discontinued small businesses is in their approach towards the use of accounting information. Accounting Information System (AIS) is a primary source of information to help firms manage their business (Ismail & Mat Zin,
2009). Good AIS can help evaluate the performance of the firm (Heidari, Moradi, Ghahramanizady, & Heidary, 2012) and help owners grow and develop their firms (Halabi, Barret, & Dyt, 2010). AIS could also inform owners of the consequences of their firm’s operations and the effects of their past decision making (Wan Ismail & Ali, 2013). Previous research however had found that not all small firms produce accounting reports and that those who do so meet minimal reporting requirements (Davis, Dunn, & Boswell, 2009).

Developments in IT has changed the way of doing business. Accounting is one of the important business areas facing unprecedented challenges due to the rapid development of IT (Davis, Dunn, & Boswell, 2009). Many researchers agree that aspects of accounting practice have been changed fundamentally by advances in IT, including financial reporting, managerial accounting, auditing and taxation (e.g., Davis, Dunn, & Boswell, 2009; Ismail, 2009; Kharuddin, Asshari, & Nassir, 2010; Kouser, Rana, & Shahzad, 2011; Moorthy, Seetharaman, Gopalan, & San, 2010). In fact, accounting was the first area to be computerized (Davis, 1989). Accounting systems that were previously performed manually could now be performed with the help of computers (Salehi et al., 2010). Nowadays, there are range of off-the-shelves accounting software packages or Computerised Accounting Information System (CAIS), has been produced as cost-effective solutions for SMEs and can be easily used by those not trained accountancy (Halabi et al., 2010). However, the main challenge for law firms in using the general CAIS is their unique nature of business. In Malaysia, majority of legal firms can be categorized as SMEs and they have specific processed and rules regarding accounting records should be kept and recorded (Abd Ghadas et al., 2015). Moreover, the accounting information that they need also differs from other businesses where legal firms have to handle the Client Account separately from Office Accounts to ensure better accountability of the client monies. Hence the slow adoption of automation accounting in legal firms. This has urged the need for a Turnkey System for law firms. Turnkey System is a system written by vendors who specialize in a particular industry (Romney & Steinbart, 2012). This research proposes an idea to create an accounting turnkey system which is acceptable to attorney and SMEs law firms.

METHODS

CAIS@LAW is developed using Rapid Application Development (RAD) methodology. RAD integrates project management techniques, development techniques, users and tools to build quality application systems in a fixed time frame to deliver business value. It can eliminate time constraint problem in order to develop the system faster. RAD has four main processes and requires less time to complete compare to Waterfall Model approach. In general, RAD is a software development methodology, which involves iterative development and the construction of
prototypes. Prototype is an approach based on creating a demonstrable result as early as possible and refining that result. The refinement is based on feedback from the business, the eventual users of the system. Prototyping requires an open approach to development and it also requires an emphasis on relationship management and change management.

Figures 1 shows RAD process, where the result of each phase, often called an end product or deliverables, flows down into the next phase. This phase is a continuous phase where prototypes are rapidly developed until they fulfil the objectives of system requirements.

The first phase of the RAD is to understand the requirements of the system (analysis and quick design). It requires knowledgeable end-users to determine what the functions of the system should be. The process in this phase includes deciding what programming languages and database to use. PHP scripts and MySQL database are used as a development tool to develop a prototype. PHP is scripting language originally designed for producing dynamic web pages which has evolved to include a command line interface capability and can be used in standalone graphical applications. PHP is free software released under the PHP License and widely used. It also includes the interface design (what are the interfaces going to look like) and data design (what data will be required). During this phase, the software’s overall structure is defined. It is important understand the requirements of the system before proceeding to developing a prototype.

The second phase is a repetition of prototype development (development, demonstrate, design). It includes creating the physical design of the database and mainly focuses on translation of design into programming codes. A code to connect from programming language to MySQL Database Management System (DBMS) is created.

The third phase is testing the prototype to validate CAIS@LAW business processes. Normally programs are written as a series of individual modules and functionality. CAIS@LAW is tested by looking at the

![Figure 1. Rapid Application Development (RAD)](image)

Figure 1. Rapid Application Development (RAD)
functions available in the system. Later, the flow of the system is tested to ensure that interfaces between modules work (integration testing). Next, the analysis report of the system is compiled. The next process involves enhancement and errors correction of the prototype. This process is repeatedly done until the prototypes meet the research objectives. The last phase is deployment in the actual environment when all system functionalities and databases are validated.

**CAIS@LAW Architecture**

CAIS@LAW is an online web-based system. It can be run using any web browser such as Mozilla Firefox, Chrome or Internet Explore at any operating system platform such as Windows, Mac OS or UNIX.

CAIS@LAW is based on three-tier client-server architecture as shown in Figure 2. The first-tier is the presentation layer. The presentation layer provides the application’s user interface (UI). This involves the use of Graphical User Interface for smart client interaction, and Web based technologies for browser-based interaction. The presentation tier displays information related to bank account, client profile, developer profile, chart of account, client account and office account. It communicates with other tiers by outputting results to the browser/client tier and all other tiers in the network.

The middle layer is the business logic. The business logic tier is pulled out from the presentation tier and, as its own layer; it controls an application’s functionality by performing detailed processing. The main function in CAIS@LAW is client account and office account. The client account is cash book/cash account managed by law firm for the client’s case transaction. Meanwhile office account is account for law firm operation. The client account is not a part of a legal firm’s account but some amount from the client account will contribute to its income.

![Figure 2. CAIS@LAW architecture and framework](image-url)
The CAIS@LAW database provides database services in Tier 3 Database processing. The database consists of 11 main tables. There are Account Period, case, client, bank, Client Case, Chart Of Account, Chart Of Sub Account, Client Account Transaction, Developer, Client Contractor Transaction and company Expenses. Figure 3 shows the entity relationship diagram for CAIS@LAW.

**Figure 3. CAIS@LAW entity relationship diagram**

**CAIS@LAW Implementation**

System implementation is the action that must follow any preliminary thinking in order for anything to actually happen. It is the process of getting the system operating properly, including installation, configuration, running, testing and making any necessary changes. Figure 4 and Figure 5 show the login interface and the homepage of CAIS@LAW which sets up the menu of the system, respectively.

**Figure 4. CAIS@LAW login page**
Figure 5. Menu manager

Figure 6. Chart of account

Figure 6 shows the chart of the accounting system where the user needs to set a code for an account name and determine account name status either debit or credit. The account status is important where it will be used in client account.

The Client Account Transaction module is shown in Figure 7. This module consists of two functions. The first function is to add new client account transactions for a particular client based on client file number. The second function is to display all transactions for a particular client file number.

Figure 8 shows the report of client ledger according to respective case of each client. This data is retrieve from table client and client Account.

The Profit and Lost module is the business income for a company, where all
the records of the transactions are displayed based on its accounting period as shown in Figure 9. It shows the list of income from client cases and the expenses. The data was retrieved from office account table and client account table. Some of transactions in the client account are part of the company income.

**Figure 7.** Client account transactions

**Figure 8.** Client ledger

**Figure 9.** Profit and lost
CONCLUSION

CAIS@LAW provides effective ways for owners of small law firms to improve operations and accountability. Business owners can also create a competitive advantage by developing cost allocation processes in their management accounting function. Reports produced by CAIS@LAW also assist small law firms in reporting purposes. As regards to system requirements, CAIS@LAW is able to clout on existing hardware and network resources of the firm to safeguard existing IT investment. The main setback of this system is that it has to be upgraded if the firm’s work process changes requiring system upgrade.

As a conclusion, CAIS@LAW is suitable for small law firms in Malaysia to manage their account and to comply with the regulatory body’s requirements. It is a software that can be used by lawyers with limited accounting knowledge and designed to cater for transactions in small legal firms.

REFERENCES


MEC App: Enhancing Legal Knowledge via Smartphone

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ABSTRACT
Knowledge and advancement in technology are indispensable in today’s living. One of the most popular products is the smartphone. As smartphones continue to grow in popularity, it is important to look into how legal education and understanding could be enhanced via applications (apps) available in the smartphone. This paper discusses how smartphone application could enhance understanding of the Malaysia Federal Constitution among the public, academics and legal practitioners. The app, named MEC contains all provisions of the Constitution is invented to replace the print version whose bulk has long been a problem for students to bring it to the class. The app was developed using Rapid Application Development (RAD) methodology, a common method used in computer software and mobile apps development.

Keywords: Application, constitution law, smartphones

INTRODUCTION
According to Mothar, Hassan, Hassan and Osman (2013), the rise of smartphone is inevitable, but its main usage is centred on Integration and Social Interaction, i.e. calling and texting. Smartphones have the capability to function like a computer and even further such as it allows users to acquire information, play electronic games, stream videos, listen to radio, capture images, store data, browse Internet, read emails and make online payments. In Malaysia mobile learning is widely implemented at tertiary education level and is now approaching the Malaysian school education (Sa’don, Dahlan, & Ibrahim, 2014; Singh & Bakar, 2006).

Integrating technology with law is an innovation that could help many people to learn the laws using a mobile app. In today’s technology driven world, legal professionals need the ability to access legal information.
and documents while away from the office (Janoski-Haehlen, 2010). McKenna (2012) concluded that the intersection of three emerging technology trends – mobile technology, digital books and social media – is fundamental changing the day-to-day workflows of every legal professional. Thus, it is important to look into how legal education and understanding could be enhanced via the mobile applications (app) available in the smartphones.

One of the problems that law students face is carrying bulky books of legal acts, e.g. the Federal Constitution, to class or whenever they need it. Multiple versions of the act would make it even bigger problem as they have to buy newer version of it, should amendments are made in the law. Presently, there are a few legal apps associated with Malaysian laws available on mobile app stores, e.g. Apple App Store and Google Play Store. The more apps one has, the easier his or her life is, provided that the apps are of productivity apps.

This paper discusses a new invention of smartphone app which could enhance understanding of Malaysia Federal Constitution. The app, named as MEC contains all provisions of the Constitution and can be utilized for educational purposes free and benefit students, academics, researchers, legal practitioners, policy makers and the laymen.

The app has basic features such as Contents; Provisions; and Other Links, to access the Federal Constitution. The app also features Cases Summary; Professional Reviews; and Related Documents, with other functions: Search; Share; and Settings. However, these additional features are still under research and development, and await incorporation. Tentatively, users may subscribe to the additional features at a reasonable fee via In-App Purchase (IAP) function. The subscription allows users to access thousands of legal documents from paid online databases such as The Malayan Law Journal (MLJ) – LexisNexis Malaysia; The Current Law Journal (CLJ); eLaw; Common LII; et cetera.

**Malaysia Federal Constitution**

The Federal Constitution of Malaysia is the supreme law of Malaysia, which came into force in 1957. The Federation was initially called the Federation of Malaya (in Malay, Persekutuan Tanah Melayu) until the formation of Malaysia in 1963. The Constitution establishes the Federation as a constitutional monarchy having the Yang di-Pertuan Agong as the Head of State whose roles are largely ceremonial.\(^1\) It provides for the establishment and the organisation of three main branches of the government: the bicameral legislative branch called the Parliament, which consists of the House

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\(^1\) See Article 32(1) of the Constitution which provides that "There shall be a Supreme Head of the Federation, to be called the Yang di-Pertuan Agong..." and Article 40 which provides that in the exercise of his functions under the Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or an authorised minister except as otherwise provide in certain limited circumstances, such as the appointment of the Prime Minister and the withholding of consent to a request to dissolve Parliament.
of Representatives (in Malay, Dewan Rakyat) and the Senate (Dewan Negara); the executive branch led by the Prime Minister and his Cabinet Ministers; and the judicial branch headed by the Federal Court.  

The constitution came into force on 27 August 1957 but formal independence was only achieved on 31 August 1957. The constitution was then amended in 1963 to admit Sabah, Sarawak and Singapore as additional member states of the Federation and to make the agreed changes to the constitution that were set out in the Malaysia Agreement, which included changing the name of the Federation to “Malaysia”. A statement by the Malayan permanent representative to the 18th session of the 1283 meeting of the United Nations General Assembly stated that, “constitutionally, the Federation of Malaya, established in 1957 ... and Malaysia are one and the same international person. What has happened is that, by constitutional process, the Federation has been enlarged by the addition of three more States ... and that the name ‘Federation of Malaya’ has been changed to ‘Malaysia’”. Thus, the establishment of Malaysia did not create a new nation as such but was simply the addition of new member states to the Federation created by the 1957 constitution, with a change of name (Harding, 2012).

The Federal Constitution is the supreme law of Malaysia, whereby according to Article 4(1), any law passed after 31 August 1957 which is inconsistent with the Constitution shall be void. Article 162(6) also states that any court or tribunal applying the provision of any law in operation immediately before 31 August 1957 may apply it with such modifications as may be necessary to bring it into accord with the Constitution. Fundamental liberties in Malaysia are set out in Article 5 to Article 13 of the Constitution, inclusive of liberty of the person; slavery and forced labour prohibited; protection against retrospective criminal laws and repeated trials; equality; prohibition of banishment and freedom of movement; freedom of speech, assembly and association; freedom of religion; rights in respect of education; and rights to property.

METHOD AND APP DEVELOPMENT

MEC was developed using Rapid Application Development (RAD) methodology. RAD integrates project management technique, development technique, users and tools to build quality application systems in a fixed timeframe to deliver good business value. RAD is a software development methodology, which involves interactive development and the construction of prototypes. Prototype is an approach based on creating a demonstrable result as early as possible and refining that result. Refinement is based on feedback from eventual users of the system. Prototyping requires an open approach to development and it also requires an emphasis on relationship management and change management.

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2 For the establishment of the legislative branch see Part IV Chapter 4 – Federal Legislature, for the executive branch see Part IV Chapter 3 – The Executive and for the judicial branch see Part IX.
Figures 1 shows RAD processes, where the result of each phase, often called an end product or deliverables, flows to the following phase. This phase is a continuous phase where prototypes are rapidly developed until they fulfil the objectives of system requirements.

The first phase of the development process is to understand the requirements of system (analysis and quick design). It requires knowledgeable of end-users to determine the functions of the system should have. The process in this phase includes deciding programming languages and database need to be used. PHP scripts and MySQL database were chosen as tools to develop a prototype. PHP is a scripting language originally designed for producing dynamic web pages. It has evolved to include a command line interface capability and can be used in standalone graphical applications and is a free software released under the PHP License and widely used. It also includes the interface design (the end-user interface) and data design (type of data required). During these phases, the software overall structure is defined. It is important to understand the requirements of the system before proceeding to prototype development.

The second phase is a repetition of prototype development – development, demonstrate and design. It includes creating database physical design and mainly focuses on translation of design into programming codes. A code to connect from programming language to MySQL Database Management System (DBMS) is created. MEC was developed on a mobile app creation platform namely the Appy Pie. There are three basic steps in building the app: firstly, selection of a category of apps; secondly, designing the contents and customize accordingly; and finally, publishing the app on the web or installing it on smart devices. Nonetheless, publishing apps would need developers to subscribe to one of four plan options ranging from Free Plan, Sliver Plan, and Gold Plan to Platinum Plan. The end product is compatible on both Android and Apple iOS platforms.

The third phase is testing the prototype to validate the information delivery processes on the app. Programmes are

![Figure 1. Rapid Application Development (RAD) Processes](image-url)
written as a series of individual modules and functionality. The MEC app was tested using the functions available in the app. The flow of the system was tested to ensure that interface between modules work and the analysis report of the app system compiled. The next process involved an enhancement and error correction of the prototype. The final phase was deployment in actual environment when all system functionalities and databases design have been validated.

ARCHITECTURE AND FRAMEWORK

MEC is a hybrid mobile app – a combination between native app and web-based app – which works offline on smartphones, but some contents would need Internet connection. For instance, the content of the Federal Constitution, Cases Summary and Professional Reviews are accessible offline, while subscribed contents and authoritative judgments need the Internet connection.

The app was designed based on multi-tier client-server architecture. Figure 2 shows the MEC app architecture and framework.

MEC app is structured into three tiers. Smartphone users who own the app with the Internet connection are the client presented in Tier 1 Presentation. In Tier 2 Application processing and data management, a web server provides data management services and implementing the logic of application to provide the required functionality to end users. The web server generates online contents to the MEC through opening additional windows on browser installed in the smartphones. The app database provides database services in Tier 3 Database processing. Efficient middleware that supports database queries in SQL (Structured Query Language) is used to handle information retrieval from the database.

![Figure 2. MEC app architecture and framework](image-url)
IMPLEMENTATION

The app is built to be user-friendly and easy-to-access contents with simple interface and functions. This section displays all actions taken in the app implementation process to show it can operate properly. The process includes installation, configuration, running, testing and making any necessary changes according to users’ feedback. It is expected that the app can be downloaded from the app stores as soon as it is available online. For the time being, users could install the app on their smartphone through private link shared to them. After installation, users can configure the app according to their preference. Figure 3 to 6 show the screenshots of the app that has been installed in a smartphone.

Figure 3 shows the profile page or the homepage of the app once the app is opened. The page displays the description of the Federal Constitution of Malaysia. Figure 4 shows the auto-hide sidebar in the profile page that lists the menu of the app such as Contents; Part I to Part XV; Schedule 1 to Schedule 13; and Other Links. User can tap on each menu to go to the preferred part.

Figure 5 shows the arrangement of Articles of the Federal Constitution that reflects the contents of the app. Users can go through the contents to look for the articles. Figure 6 shows the full contents of the MEC App, ranging from Part I to Part XV and Schedule 1 to Schedule 13, which are the end product of the app.

The MEC app has been run and tested by users particularly law students and lecturers. The development team has gained positive feedback from users and testers at Research Week and Innovation Competition, Universiti Sultan Zainal Abidin in March 2016 and International Carnival on e-Learning, Universiti Teknologi Malaysia in September 2016. Both competitions received the app Bronze Medal for educational and innovative significance. Most respondents would download this app for educational purpose.
as it is user-friendly compared to e-books or PDF-format document. Some of the respondents also suggested the team build similar apps on other legal acts in the future such as land code, penal code et cetera.

The app has also been shortlisted as a finalist in Inclusive Innovation Competition by Yayasan Inovasi Malaysia in December 2016, and received constructive feedback from competition judges. Some of the comments concerned copyright issue and commercial value of the app.

CONCLUSION

Apps have helped people in their daily chores, for instance finding information, making decisions, completing tasks, et cetera. The more apps one has the easier his or her life is, provided that the apps are productivity apps. Integrating technology with law is an innovation that could help many people in learning and understanding the laws using a mobile app. The MEC app comes at the right time and at the right place since currently there is no mobile app on the Malaysian laws available in the Google Play Store or Apple App Store. The app offers the contents of the Malaysia Federal Constitution to anybody interested to learn it. With its latest features and functions, the authors believe that the app can make a change in society, not just for educational purposes, but also to encourage people to think further in legal terms and therefore creating a law-abiding society.

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Land Administration: Issues and Way Forward

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ABSTRACT
The National Land Code 1965 is the highest law in Peninsular Malaysia in respect to land administration. It is a codification of laws covering various important aspects of rights and powers over land. This paper will discuss the issue of squatters, temporary occupation of lands and corruption in land administration with respect to the rights of stakeholders. The research methodology involves case analysis to analyse the duly decided and reported cases which had led to amendments in the National Land Code 1965. The study reveals that there are evident flaws in the administration of land in the arising legal issues highlighted. This study will also highlight some of the proposed improvements to improve both land administration and land law to protect the rights of parties who have interests on lands.

Keywords: Issue of land administration, National Land Code 1965, weaknesses and recommendations

INTRODUCTION
The National Land Code 1965 (NLC) is the main law governing land matters in Peninsular Malaysia. It was first enacted in the ‘50s. NLC and based on the Land Code 1926 which was further updated and supplemented. The NLC currently in force is based on the Torrens system or Title Registration System. Torrens system is a title-based system in which registration guarantees the principle of indefeasibility of proprietary rights of land owners. This system was created to solve the problems of uncertainty, complexity and costs arising out of the previous system which was earlier introduced (Maidin et al., 2008).
ISSUES IN LAND ADMINISTRATION

Among the issues that arise due to weaknesses or loopholes in the laws relating to land administration in Malaysia are as follows:

Temporary Occupation Licence of Land (TOL)

Under the NLC, the disposal of government land is divided into two, namely the disposal by way of alienation and the second is disposal other than by alienation. Disposal of the first type is found in section 76 which empowers the State Authority (SA) to grant freehold titles or titles for specific timeframe, while for the second method of disposal, the SA can provide reserve over lands, grant temporary occupation license, permit the extraction of rock and allow the use of air space over government land and land reserves (Buang, 2010, p. 51). Disposal by way of temporary occupation falls under the second method.

TOL is a temporary license or permit granted by SA for specific purpose and time limit. It is in short, a form of approval to enter a land and work on it (Abia Kadouf, 2011). Therefore, the TOL lands remain as State lands and there is no guarantee that the land will be transferred to the licensee who enjoys the TOL. In the case of P & A Systech Sdn Bhd v. the State of Kedah Darul Aman (2015), although the court acknowledged the plaintiff had a good cause for action it was nevertheless dismissed since the filing of action was time-barred. In this case, the court found that the instruction issued to the Plaintiff was actually made at the State Exco Meeting which was conveyed to the Plaintiff through the Land Administrator. The Plaintiff therefore did not have the right to appeal against the instruction under section 418 of NLC since the instruction did not originate from the Director of Land Office or the Land Administrator himself. This case shows that there are limitations a TOL holder has in challenging the instruction issued by the SA.

The question whether TOL should continue to exist under NLC does not arise, the more important question is how to make it more effective and beneficial to the people.

Squatters

Under the NLC, occupying lands belonging to others and government lands is an offence. The latest 2016 amendment introduced higher penalty of RM500,000 and imprisonment of up to five years if squatters occupy government land (Buang, 2016).

The position of SA as the sole and absolute owner of all lands and section 48 of NLC which prohibits illegal land occupation has provoked a socio-economic problem because acquisition of state land by adverse possession has been statutorily precluded by the NLC. In Sidek & Ors v. Perak State Government (1982), it was held by the High Court that the appellants did not have cause to action against the respondents as they were squatters, and squatters have no right either in law or in equity.

In Mat bin Che Pa & 54 Yang Lain v. Felcra Berhad (2015), the plaintiff had no
cause for action as they failed to defend their interests as settlers and were considered as intruders without a valid land title.

**Corruption in Land Administration**

Statistics of arrests made by the Anti-Corruption Commission from 2015 until January 2016 as per Table 1 below shows the involvement of civil servants in corrupt activities.

Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil Servants¹</th>
<th>Public²</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>323</td>
<td>595</td>
<td>918</td>
</tr>
<tr>
<td>2012</td>
<td>288</td>
<td>413</td>
<td>701</td>
</tr>
<tr>
<td>2013</td>
<td>170</td>
<td>339</td>
<td>509</td>
</tr>
<tr>
<td>2014</td>
<td>224</td>
<td>328</td>
<td>552</td>
</tr>
<tr>
<td>2015</td>
<td>398</td>
<td>443</td>
<td>841</td>
</tr>
<tr>
<td>2016</td>
<td>471</td>
<td>468</td>
<td>939</td>
</tr>
</tbody>
</table>

Source: www.sprm.gov.my

Note: ¹Top Management, Professional and Supporting groups; ²Private persons or citizens, Council members and politicians

According to Zameri and Azmin (personal communication, 8 July 2011) there would be possibility for occurrence of corruption when such people who are involved used such opportunity to work together in order to fulfil their false aim to procure unjust enrichment due to their excessive rapaciousness. It obviously indicates that corruption basically occurs due to personal desires. Personal character may sometime become the pushing factor for a person to give or receive bribes. Bureaucracy is also said to be a factor that lead to corruption in land administration sector. The corruption case is rampant in the Land Office. Delays in the approving applications, casual procedures of control, as well as bribery, leads to the practice of paying bribes for faster service from the land office.

**RECOMMENDATIONS**

Disposal of land in Islam takes place through the concept of *ihya al-mawat* or exploring uncultivated land by Muslims. This means those who explore and cultivate a plot of uncultivated land would be entitled to its ownership. The suggestion for *ihya al-mawat* to be implemented through NLC is not new. Awang (1994) highlighted several amendments to apply the concept of the “Approved Application” (AA) through NLC and allow the individual who cultivates the land to own it according to the principle of *ihya al-mawat*. In order to implement the AA concept, section 76 needs to be amended to authorise the SA to allow occupation of State lands in line with
AA, to manage annual rents, and that the land must be developed or cultivated within three years and cannot be transferred. If the land is successfully developed or cultivated within the prescribed period, the title can be issued under the principle of *ihya al-mawat*. According to the latest *National Land Code (Amendment) Act 2016*, section 66 (2)(a) and (b) states that nothing in this section shall authorise the Land Administrator to issue TOL in respect any such river and up to fifty metres of the bank of any such river, and any such lake or spring and up to fifty metres from the edge of any such lake or spring.

The latest amendment involving TOL under the NLC has no indication for a proposal to introduce new statute such as Landlord and Tenant Act to solve problems arising from a tenant-landlord relationship. In the United Kingdom the *Landlord and Tenant Act 1985* had consolidated certain provisions pertinent to both the landlord and the tenant such as the disclosure of identity, interests, remedies for breach of contract, etc. Protection is also afforded to both parties statutorily and one cannot contract out of these statutory provisions. The said statute spells out all the rights, duties, obligations and remedies of the parties that can summarily be affected and avoiding, lengthy and convoluted court processes.

In terms of penalties in cases of corruption, section 13(1) of the *Prevention of Corruption Act 1960* enforced in Singapore, for example empowers the Court to order the recipient of a bribe to pay a fine equivalent to the amount of feed received by him other than a punishment in the form of fines and/or prison. This shows the recipient of bribe should not enjoy any benefits from the corruption itself. Therefore, severe punishment should be imposed on the offenders so that it would serve as lesson to the public.

**CONCLUSION**

NLC which is the supreme law on land administration in the Peninsular Malaysia covers many important aspects of land should be amended to ensure justice and to strengthen the law of the land in relation to its administration. Cases involving fraud, abuse of power and lack of law enforcement can indirectly affect the image and reputation of the State’s land administration. The matter should be given serious attention. In addition, the full commitment is necessary on the part of the enforcement to ensure the implementation of law is fully enforced. From a legal position amendments made to provisions of laws and regulations are necessary.

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International Religious Freedom Act 1998 and the Issues of Religious Freedom in Muslim Countries

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ABSTRACT
In the late 20th century the increasing international emphasis on the recognition of religious freedom had led the United States to draw the International Religious Freedom Act (1998) in October 1998. The Act aims to improve the ability of United States to advance religious freedom through its foreign policy. However, after almost 18 years since its establishment, it is important to highlight that IRFA’s report had focused on the issue in Muslim-majority countries. In fact, many Muslim countries were classified as “Countries Particular Concern” (CPC) that is violators of religious freedom. The objective of this article is to study critically the IRFA report with regard to Muslim countries. It contends that the US government had given too much focus to Muslim countries. Though the law has the potential to be a useful tool to protect religious freedom, the result of IRFA report in meddling in affairs of Muslim-majority states is the major flaw. The paper will also examine, at glance, on the concept of religious freedom within the framework of maqasid al-shariah (the objectives of Shariah law).

Keywords: International Religious Freedom Act (IRFA), religious freedom, religion and international relations

INTRODUCTION
International Religious Freedom Act (IRFA) implementation towards Muslim countries has been criticized and provides misunderstanding to the US government. Most of the studies were on Muslim countries seen as violators of religious freedom, i.e. Countries of Particular Concern (CPC). This study thus argues that IRFA does not adequately specify particular rights on religious freedom in Muslim countries.
IRFA: A General Background

In 1998, IRFA was passed unanimously by the US government and it requires the United States to extend the concern for religious freedom in its foreign relations (Danchin, 2002). The establishment of IRFA creates the Office of International Religious Freedom, a Commission and a special adviser on International Religious Freedom. The Office of International Religious Freedom within the State Department and is headed by an Ambassador at Large for International Religious Freedom who is appointed by President. The State Department’s duty is to highlight the status of religious freedom around the world, together with foreign officials and besides, to publish its International Religious Freedom Report annually.

The main part of IRFA is laid down in Subchapter III of the Act. Under the Act, the President has to respond to a violation and promote the right to freedom of religion. Actions taken are based on the annual report which released in September by State Department and findings of the Commission (Sadat, 2003). The Secretary of State is responsible to manage the countries termed as Countries of Particular Concern (CPC). The reports describe measures needed to address the issue and serves as a resource for diplomacy, policy, assistance, recommendations and other resource allocations and decision in determining countries that have engaged in “particular severe violations”. The US government will independently handle the countries that are in violation with the report used as a tool of US human rights policy (Farr, 2001).

The objective of the annual report is to advance US human right policy in promoting and protecting religious freedom. The annual report on the current status and development of religious freedom around the world has been recognized as “the most comprehensive account of religious ever compiled” (Smith, 2001). In addition, the IRFA report is one of the most widely read documents of American diplomacy and has become the gold standard on international religious freedom (Hertzke, 2008).

Generally, the main purpose of IRFA is “to condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental freedom of religion.” (International Religious Freedom Act Of 1998). The passage of IRFA might be argued with some justifications and criticisms, however it is unfair to evaluate the success or failure of US religious freedom policy from worldwide reported statistics (Farr, 2012).

IRFA had created an independent watchdog agency, known as US Commission on International Religious Freedom (USCIRF), to monitor IRFA’s implementation. The USCIRF consists of nine unpaid commissioners to oversee the implementation of the Act. USCIRF also produces their own report and it will serve as a basis for the US government’s cooperation with private groups to promote internationally recognized right to religious freedom.
Hence, the IRFA empowers a legal framework for the US government through the institution of the US State Department and the Commission on International Religious Freedom to examine the status of religious persecution in other countries. In addition, it will suggest proper punishment such as economic sanction to countries that repress religious freedom. However, there are some criticisms levelled against the US government over the IRFA, including disagreements on the question of the promotion of religious freedom internationally.

**Defining the Key Concept of Religious Freedom from International Perspective**

Generally, religious freedom has been embedded in various instruments of international law. One of the four major international documents that universalized the principle of religious freedom can be found in Universal Declaration of Human Rights. Under the declaration, it recognizes a broader spectrum of the definition of religious freedom. Article 18 reads:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

The right includes freedom of conscience and association, the right to own property, to publicly worship, publish, speak, petition government, and raise children according to family desires (Hertzke, 2012). The declaration asserts that any religious differences should be respected (Davis, 2002). The longstanding principle of religious freedom as a fundamental human right deeply affected in human’s life and as the persuasive evidence in religious freedom advocacy. Later documents such as the International Covenant on Civil and Political Right (ICCPR) of which Article 2(1) it states, "without distinction of any kind, such race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This provision prohibits religious discrimination and includes the right of parents to direct the religious education of their children.

The United Nations Declaration on the Elimination of All Forms of Intolerance and Of Discrimination Based on Religion and Belief is also one of the fundamental documents that protect religious freedom. Particularly, the right has been embedded in Art. 1 and 6 of the Declaration. In Article 1, it stipulates, “Everyone shall have the right to freedom of thought, conscience and religion.” This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching.”
Countries of Particular Concern (CPC)

Designation for Countries of Particular Concern (CPC) refers to those countries with severe violations of religious freedom. The annual report lists nine countries as CPC: Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan, Uzbekistan and Turkmenistan (US Department of State, 2014). When a country is designated as CPC by the Secretary of State, the President is responsible for instituting measures to improve the protection of religious freedom in the States concerned (Rieffer-Flanagan, 2014). The President, either he or she does not have complete discretion if it concerning CPC, “that have engaged particularly severe religious freedom violations”.

In September 2011, Suzan Johnson Cook, an Ambassador-at-large for International Religious Freedom, stated that CPC designations is a starting point for the US government to work constructively with foreign governments to improve religious freedom. Measures such as sanctions will be considered according to the circumstances. The results of IRFA is rather ambiguous. Farr (2013) states that, the designation “Countries of Particular Concern” list as ineffective. During Obama administration, it was reported that listed countries has not been issued annually since 2011. In the first place, the commission under Robert George had publicly expressed its concern regarding the issue but the Congress itself did not show moral support.

Under IRFA, countries remain designated as CPC until removed and any corresponding penalties will expire after two years. When the President determines that “the government of a foreign country has engaged in or tolerated particularly severe violations of religious freedom,” it is designated as a “Country of Particular Concern” (CPCs). The effectiveness of designation of CPC is not easy to measure, requiring thorough scrutiny. Therefore it is not surprising that the designation of CPC received criticisms by the opponent and rendering it as a major flaw of IRFA. Among other things, it is important to highlight the issue of CPC in order to see the implementation of the law.

Religious Freedom and the Contents of IRFA

By virtue of IRFA, the US has recognized four principles in promoting and monitoring international religious freedom. Firstly, freedom of religion is a fundamental human right and is a source of stability for all nations. Secondly, the US government and its agencies will assist any newly democratic country to implement freedom of religion. Thirdly, it will support any religious group as well as human rights NGOs in their mission to promote religious freedom. Fourthly, the U.S government and its agencies will identify and take a specific measure to punish any regime or country that severely violates freedom of religion and persecute their citizens or

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1 22 U.S.C. § (c)(1)(A) (providing that the President shall respond to violations of religious freedom by taking the “action or actions that most appropriately respond to the nature and severity of the violations of religious freedom.”)
others because of their religious belief (US Department of State, 2016).

The introduction of the Act became a new landmark in the foreign policy making and diplomatic practice of American government. The Act created a new dimension in US foreign relations and its engagement with other nations when it obliged the President’s office and Department of State to consider any claims on abuse of religious freedom. Moreover, it also created a set of requirements for which the US government can be held accountable by public interest groups concerned with religious rights. In addition, by virtue of the Act, the US started to consider any issues related to international religious freedom as its important concern of its foreign affairs.

Religious Freedom in Muslim Countries

Religious freedom in Muslim countries have high level of violation. Muslims are trying to revive and uphold Islamic law and it leads to challenges as an important aspect is the regulation of society according to Shariah law.

In the Muslim world, oppression of Christians and other non-Muslims are increasing every day in Saudi Arabia, Sudan, Pakistan and Egypt (Nickles, 1998). It is important to note that freedom of religion is a good thing. However, the freedom should not include matters of religion because religion is sacred and cannot be questioned and must be handled with sensitivity (Uddin, 2011). John Ambassador, US ambassador for religious freedom believed that there is no room for religious freedom in a country where Islam is the state religion. He further explains that in Muslim majority countries, the law will be based on Holy Koran and the Prophet’s Sunna while at the same time upholding constitution (Hanford, 2004). They believe Muslims are ruled by their own Islamic law which is based on Islamic sources. The perception of non-Muslims pertaining to Islam somehow distracted by baseless accusation. The media, the electronic sources sometimes posted the wrong perceptions on the true teaching of Islam.

Grim and Finke (2010) highlights violations on religious freedom in most Muslim-majority countries, creating the assumption that Muslim countries are “exceptionally repressive and their societies uniquely tolerant.” However, surprisingly the data provided in the book showed that almost sixty-two percent have high levels of persecution.

It was contended that Iran has one of the world’s worst records (Marshall, Gilbert, & Shea, 2013). Iran’s population consists of 99% of Muslims and its constitution states that Islam is the official religion. According to the latest International Religious Freedom report, Iran was re-designated as CPC country (US Department of State, 2014). In Saudi Arabia, religious freedom is not protected under the law. It has been designated as CPC since 2004 having engaged in or tolerated particularly severe violations of religious freedom. In Pakistan, 95% of the population consists of Muslims. The Criminal Code in Sudan criminalizes both the offence of apostasy and acts that
will lead to apostasy. In the case of Ms. Meriam Yahya Ibrahim Ishag in Sudan, received global condemnation when she was spared a death sentence for apostasy. She is a Sudanese woman and according to her family, her father is a Muslim and according to Sudan’s Islamic law, Meriam is a Muslim. She argued that she was brought up by a Christian family and never practiced Islam (BBC News, 2014). Initially the court passed the death penalty but international pressure led to it being overturned. (US Department of State, 2014). Misconception of the concept of religious freedom in Islam has led global community to condemn teachings of Islam.

On the other hand, many Muslims have lost confidence in the international system as a neutral problem solver after the experiences of the post-Cold War era and the persistence of the geopolitics of exclusion, double standards and intervention. The answer to the question on how best to promote and protect human rights and human dignity lies within the purview of internal domains. The choices made by the leaders and peoples of the Muslim world will play a key role in shaping the politics and the practice of human rights in their societies.

The IRFA’s report had focused on Muslim-majority countries. The result after the implementation of IRFA was suspicious. In addition, IRFA’s goal was suspicious because US only focuses on Muslim countries. Saudi Arabia is considered one of the most oppressive Islamic states (McCormick, 1998). Laila Maryati, who is the only commissioner of the nine-member US Commission on International Religious Freedom believes that the Act is biased against Islam.

Islamic View of Religious Freedom

In Islam, a human is God’s creature. The relation between human being and God is to be defined through human responsibilities. The Secular West depicted Islam as a religion that seems to clash with human rights. Westernized liberal advocates and Muslims have debated and exchanged their arguments on human rights and the sanctity of their religion (Ahmad, 2015).

Accordingly, human rights are given by God as the creator of human beings as creatures. It is not the result or the fruit of mind but determined in the Holy Quran. There are a lot of matters relating to human rights in Quran, there are almost 40 verses circulate the matters on compulsion and coercion.

The Quran is clear on the right to religious freedom and the Islamic concept of religious freedom is simple. The general rule in Surah al-Baqarah reads,

\[
\text{Let there be is no compulsion in religion. Truth has been made clear form error. Whoever reject false worship and believes in Allah has grasped the most trustworthy handhold that never breaks. And Allah hears and knows all things. (Al-Quran, 2:256)}
\]

According to the Quran, no one can be compelled to embrace Islam. Every Muslim
has the duty to prove Islam is sacred. Allah will reward the person who accepts Islam and if a person becomes an apostate, he or she will be punished by Allah.

Based on the perspective of Shariah law, a Muslim cannot change his or her religion. In contrast to Muslims, non-Muslims are free to follow and profess any religion they like. The Islamic concept of religious freedom is laid down in the first pillar of Islam “Declaration of Faith” (shahadah) (Khan, 2003). A Muslim is obliged to testify to the Unity of Allah and one’s commitment to the cause of Islam. Shahadah which means witness in Arabic is the most essential part of a Muslim whereby he declares, “There is no God but Allah and Muhammad is the Messenger of Allah.”

It is vital a Muslim to not only remain as a Muslim but to proclaim that he will always be a Muslim. Hence, the issue of religious freedom is not applicable to Muslims. Be that as it may, being a surrendered Muslim, a Muslim has a right to invite non-Muslims to Islam.

It is prohibited for a Muslim to force any non-Muslim to accept Islam because professing the religion is a matter of choice. Done forcefully and it will only harm others feeling and sensitivities. Islam respects other religions to be practiced as long as it guaranteed peacefulness among society throughout the world.

Shah (2005) highlights the example of freedom of religion in the Quran and the way of the Prophet Muhammad followed. When the Prophet Muhammad failed to convince delegates of non-Muslim tribes to accept Islam, Allah commanded him to tell them that, “to you be your religion, and to me my religion” (Al-Quran, 109:6). This explains that people have a choice whether to embrace or leave the religion and Allah has the reward and punishment for those who believe and those who do not.

Shariah law itself has put forward several mechanisms to protect Islam. In maqasid al-shariah they are regarded as al-wasaila al-maqasid (ways to achieve objectives). One of the mechanisms is capital punishment for those who convert out and denounce Islam. Muslim scholars have unanimously agreed the Prophet Muhammad said, “Who changes the religion, kill him”. However the punishment may be set aside if the culprit reverses back his decision to convert out of Islam.

CONCLUSION

This study concludes that it is obvious that US International Religious Freedom report had focused on Muslim-majority countries. However, the US government had denied the fact since the first report was released. Instead, they had blamed Muslims countries as repressive and the worst violators of religious freedom. The effort by US to improve religious freedom around the world is commendable. However, the clashes of Islamic law and international law showed that the result of IRFA report in meddling in the affairs of Muslim-majority countries is its major flaw. In addition, the designation of those Muslim countries as CPC was mainly based on bias and US national interest.
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Community Service Order as Alternative Punishment in Syariah Court: An Analysis

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ABSTRACT

Syariah courts in Malaysia have the jurisdiction to impose punishments up to 3 years imprisonment, 6 strokes and RM5000 fine or combination of any two or three of the punishments (Criminal Jurisdictions) Act (Amendment 1984). Referring to Syariah Criminal Offences Act, Syariah Court Judge has the discretion to impose punishment for first offender, youthful offender, woman offender and those who has previous conviction. The judge can consider light punishments as an alternative to the punishment provided for that particular offence. Hence, a judge can use his discretion to order for good behaviour or send the offender to rehabilitation centre/approved home. This paper seeks to examine the possibility of the Syariah Court to give an order of community service as an alternative punishment. This research is basically qualitative and analysis based on the discussions of the implementation of a community service order as practised by civil courts.

Keywords: Alternative punishment criminal offender, order for community service, Syariah court

INTRODUCTION

Under the criminal justice system those who are guilty of committing any offence will be punished. There are ranges of punishment or sentence: death penalty, judicial caning, imprisonments, fine, probation; where the offender is required to be supervised and regularly checked for a specific period and reparation or restitution; where the offender is required to take specified activities to repay either society or his victims for his
criminal activities (Abdul Rahim, Zainudin, Azira, Samuri, & Abdul Rahim, 2013).

Punishment is seen as retribution or revenge, deterrence or public education, incapacitation and rehabilitation. Therefore, punishment should be viewed as not only to punish the offender but also to reform the criminal into a better person.

Community service order is considered as an alternative punishment in most criminal justice system. It is the right time for the Syariah Court to consider introducing community service order as an alternative punishment in Malaysia.

DEFINITION OF COMMUNITY SERVICE ORDER

Community service order can be defined as a form of punishment requiring the offender to do certain duties without any reward in return (Walgrave & Geudens, 1996). This order also has been defined as a punishment meted out to offenders without involving imprisonment and is usually known as non-custodial or an alternative to imprisonment (Mc Laughlin & Munchie, 2006). It can be said that community service is only one form of alternative to prison sentences. According to the United Nation Standard Minimum Rules of non-custodial Measures (The Tokyo Rules) a number of non-custodial options can be imposed including verbal sanctions, such as admonition, reprimand and warning, conditional discharge, status penalties, economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; referral to an attendance centre; house arrest; and any other mode of non-institutional treatment (Abdul Rahim et al., 2013). Community service order is also defined as any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority (Criminal Procedure Code, section 293). Studies show community service orders benefit the offender and society since the offender is never separated from society (Maher & Dufour, 1987). The offender and society are both involved in performing activities which may encourage the offender to take responsibility and feel more aware of the needs of society (Silberman, 1986). The offender’s personality also improve substantially through acquisition of new skills.

COMMUNITY SERVICE ORDER IN MALAYSIA: CIVIL COURT

In Malaysia, community service order is still in its infancy stage. It was introduced in 2007 and only applied to young offenders aged between 18 and 21 years old as provided in section 293 (1)(e) of Criminal Procedure Code (Act 593). This section was amended so that an order of community service for a period not exceeding 240 hours, could be made to youthful offenders for the purpose of their rehabilitation. The enforcement of this order is under the care of the Minister responsible for Women, Family and Community (Sidhu, 2008).
It should be observed that community service order can only be imposed on a child offender between the ages of 18 to 21. A person below 18 will not be entitled to this type of punishment since there is no specific provision in the Child Act 2001 which gives the power to the Court to make community service order for child offenders. However, the court may use section 83 and section 91 of the Child Act to order community service as alternative punishment for child offender (Child Act section 83(2) (b) and section 91(1)(a)(b)(c)).

It has been observed that under Offenders Compulsory Attendance Act 1954 (Act 461) provides for compulsory work to be performed by the offender who had been convicted to be ordered to do compulsory in lieu or being so sentenced or committed: and for purposes connected therewith (Preamble of the Act). By virtue of this Act, compulsory attendance order is one of the additional punishments to imprisonment imposed by the court without affecting the life of offender in the society. This order comes under the Management and Administration of Prison Department.

COMMUNITY SERVICE ORDER: ISLAMIC LAW PERSPECTIVE

In Islamic criminal law, community service order can be considered as a type of ta’zir punishments. Ta’zir (plural :ta‘azir or ta‘zirat) is a crime punishable with penalties that are discretionary, i.e. it is left to the discretion of the judge to determine the suitable punishment to be imposed on the offender. The crimes of ta’zir are unlimited. It consists of transgressions where no specific and fixed punishment is prescribed, i.e. apart from hudud and qisas and diyah (‘Awdah, 2003). The Shariah gives the ruler or the court considerable discretion in the infliction of ta’zir punishments, which range in gravity from a warning to death, taking into account the seriousness of the offence, the circumstances of the criminal, his record, and other mitigating or aggravating factors. However, the authority of the judge is limited by Islamic law (Siddiqi, 1985:165).

The punishment of ta’zir imposed can be one of the following categories:

1. Basic / original punishment (al-‘uqubah al-asliyyah) - for crimes which have no fixed punishment, for example, in the case of bribery (rashwah), or riba, though both acts are considered as ma’siyah in the Qur’an and Hadith, there are no fixed punishments stated. Thus, ta’zir punishments are considered as the basic / original punishments for these types of crime.

2. Substitutional / alternative punishment (al-‘uqubah al-badaliyyah) - for the crimes of hadd or qisas which are remitted for certain reasons, for example, hustud crimes which lack one or more conditions of hadd such as stealing good whose value is less than nisab (i.e. a minimum value fixed by the shariah).
(3) Additional punishment (*al-‘uqubah al-idhafiyyah*) - means that *ta‘zir* punishment is imposed on the offender in addition to the basic punishment in the case of those crimes which deserve *hadd* or *qisas* punishment which are clearly mentioned in the Qur’an and Hadith of the Holy Prophet, for example, exile for one year is considered as a *ta‘zir* punishment which is additional to the basic one (i.e. flogging with one hundred lashes) in the case of fornication (as held by Abu Hanifah), or adding forty lashes to the basic forty lashes for the crime of drinking intoxicants (as held by al-Shafi‘i).

It can be inferred from the above; community service order can be imposed on an offender as an alternative punishment or even as additional punishment depending on the offence committed.

**THE OBJECTIVES OF *TA‘ZIR* PUNISHMENT**

*Ta‘zir* punishments have the objective of preventing the commission of further offences, both by the offender and by other members of society. The word *ta‘zir* literally means to prevent or to restrain. *Ta‘zir* punishments are also intended to rectify the offender and to reform him (al-Mawardi, 1973). In the following paragraph the objective of *ta‘zir* punishments is explained.

**Preventive and Deterrent (*al-Zajr*)**

Al-Zayla‘i, in his discussion on *Matn al-Kanz* states that the objective of *ta‘zir* punishments is to serve as a deterrent (*zajr*) (Al-Zayla‘i, 1313H). *Zajr* means to prevent the offender from the recommission of further offences and deter other members of society from initiating the offences, realizing that the punishment which has been inflicted on the offender is not only confined to him alone but may also be imposed on any other potential offender for a similar crime. In this regard Ibn al-Humam states in his discussion on *Fath al-Qadir* as follows:

_Punishment can serve as a preventive measure (mawni‘) before the occurrence of a crime, and serve as a deterrent (zawjir) after the occurrence of a crime. It means that the knowledge of the enforcement of the punishment could prevent any other potential criminal from carrying out his intention, or whenever a criminal is punished, it deters him from the recommission of further offence._

(Ibn Al-Humam, 1995)

Since religious disobediences (*ma‘asi*) punishable by *ta‘zir* can be either the commission of the prohibited acts or the omission of the obligatory acts, the meaning of *zajr* is, in the former, to prevent a person from committing such prohibited acts and, in the latter, to prevent him from omitting such obligatory acts. The offender will be punished until he obeys the required religious duty. It is interesting to note that
punishment in the latter case should be stricter and stronger since the objective of ta’zir punishment in such cases is to compel the offender to observe the obligatory acts. Thus, the punishment can be repeated so long as he omits the obligatory acts (Ibn Taymiyyah, 1992).

The deterrent aspect in Islamic Penal system is seen as the predominant justification for punishments. The jurists maintain that deterrent punishments promote the safety of society and the honour and interests of all. Deterrence is not pursued based on the speed with which the accused is tried and punished, and on the public manner of the infliction of the punishment (Lippman, McConville, & Yerushalmi, 1988).

Reformative (al-Islah wa al-Tahdhib)

Another objective of ta’zir punishment is to reform and to rehabilitate the offender. Mawardi (1973), in this regard, states that ta’zir is intended to discipline, reform, and prevent a person from the commission of the crime. It means that disciplinary and reformative punishment can lead the offender to stop from the commission of a crime, motivated by his religious awareness and self-consciousness, which results from his abhorrence of the crime and not from the fear of the punishment, to seek God’s pleasure since the crime is considered a ma’siyah. This religious awareness is, indeed, the best way to confront the crime at its root when a person believes that every one of his actions is recorded by God and cannot go unresponded in the Hereafter.

The concept of reformation of the offender is obtained from the principle of repentance or tawbah recognised in the Qur’an. The most noticeable example of this objective can be seen in the absence of any limitation on the period of punishment, and could last till the criminal’s repentance or until his death in the case of a dangerous criminal. Recourse has been had to imprisonment from a very early date. It is said that during the caliphate of ‘Umar ibn al-Khattab, a house was purchased in Medina to house prisoners. This practice was later followed by governors (Ibn Faraj, 1982). Imprisonment came to be used mainly for discipline and correction, both of which objectives, it was thought, would be achieved by self-reflection.

Retributive (al-Jaza’)

Since crime is a detested and undesired act which harms the sense of justice and rouses the wrath of society against the offender, punishment is the reaction of society towards the offender. Therefore, ta’zir punishment is the general retaliation of society in the interest of maintaining peace and social order. In the case of a ta’zir offence which infringes the right of individuals, the punishment provides satisfaction for the aggrieved parties by eliminating the ill feelings which they may bear towards offenders. Punishment prevents offenders from experiencing the consequences of the wrath their activities creates in society, thus allowing their rehabilitation (Al-Bahuti, 1982).
Expiation (al-Kaffarah)

The objectives of punishment in Islamic law do not only cover the benefits gained in this world but also that of the next world (Mehat, 1991). This objective of punishment is a unique feature of Islamic criminal law that cannot be found in any other criminal law systems. The punishment that is inflicted on an offender in this world is to clear his account with Allah. This is based on a hadith of the Prophet which says:

“Whoever commits a crime deserving of hadd and receives its punishment, this will be its expiation (of sin)” (Tirmizi, 1975)

From the hadith, it can be understood that an offender who has been punished in this world will not be punished again for the same offence in the hereafter. However, it must be borne in mind that the right to pardon sins of a man belongs solely to Allah. Allah knows the truth.

TYPES OF TA’ZIR PUNISHMENT

There is no specific punishment to be passed on an offender. Any punishment which can serve the purpose of punishment may be used. Ta’zir punishment can be inflicted upon the offender’s soul, body, property, and dignity. These penalties are based on the school of law used, morality and local custom. Types of ta’zir punishment can be of these following categories:

1. Corporal punishments (al-‘uqubahal-badaniyyah). These include capital punishment, i.e. the death penalty, flogging, and crucifixion.

2. The withdrawal of one’s freedom (al-‘uqubahal-muqayyadah li al-hurriyyah). This includes banishment, boycotting and imprisonment.

3. Financial punishments (al-‘uqubahal-maliyyah). These include fines, seizure of property, and the modification or demolition of property.

4. Verbal punishments (al-‘uqubahal-nafsiyyah). These include admonition, reprimand, and threat.

5. Other punishments. These include any punishment which can serve the purpose of ta’zir such as dismissal from office, and public disclosure.

From the above, it can be seen that there are various types of punishments which can be imposed as ta’zir punishments in Islamic criminal law as discussed by the jurists. It is agreed that jurists do dispute the legality of some of these punishments, particularly financial punishment and imprisonment. However, as they are all ta’zir punishments, they are left to the discretion of the ruler or the authority concerned to legislate ta’zir laws depending upon the suitability of their application according to place and time. Thus, Community Service Order can be considered a legal punishment to be imposed on an offender if the public interest necessitates it and it serves the objectives and conforms with Shariah principles.
CRIMINAL JURISDICTION OF THE SYARIAH COURT

It is undeniable that the criminal jurisdiction of Civil Courts especially that of the High Courts, is very wide and unlimited.¹ The High Courts can impose any punishment allowed by the law including the death penalty on any offender regardless of race or religion.

Concerning the Syariah Courts, the Federal Constitution of Malaysia provides that, other than in the Federal Territories, the constitution, organization and procedure of the Syariah Courts are State matters and its exclusive legislative and executive authority.²

Since Syariah Courts were established ¹ See: section 22 of the Courts of Judicature Act, 1960, which provides that the High Court shall have jurisdiction to try all offences committed (i) within its local jurisdiction;(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;(iv) by any person on the high seas where the offence is piracy by the law of nations; and offences under Chapter VI of the Penal Code [Act 574], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be (i) on the high seas on board any ship or on any aircraft registered in Malaysia;(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.² The Federal Constitution of Malaysia, Schedule 9, List II, item 1.

under the State laws (i.e. the State enactments), they provide for both civil and criminal jurisdiction of the Syariah Courts. State enactments are bound to specify criminal and civil jurisdiction as provided by the Federal Constitution in 9th Schedule, List II, State list.

For criminal jurisdiction, the enactments list a number of offences that can be tried in the Syariah Courts. Generally, the offences can be divided into six categories, namely, matrimonial offences, offences relating to sex, offences relating to the consumption of intoxicants, offences concerning the spiritual aspect of Muslim communal life, offences relating to the sanctity of religion, and miscellaneous offences (of a religious nature) apart from those categories mentioned.³

In criminal matters, the sentencing jurisdiction of Syariah Courts is limited by the Federal Constitution.⁴ Parliament also enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 (amendment) 1984,⁵ which limits the jurisdiction of the Syariah Courts to offences punishable with imprisonment for a term not exceeding

⁵ Act No.23 of 1965. Before its amendment in 1984, the Shariah courts had jurisdiction over offences punishable with imprisonment for no more than six months, or with a fine not exceeding one thousand ringgit, or any combination thereof.
three years, or with a fine not exceeding five thousand Malaysian ringgit, or with whipping not exceeding six strokes, or any combination thereof.\textsuperscript{6} Other types of punishment such as sending the offender to any rehabilitation centre or welfare home can be found in the Syariah Criminal Procedure Enactment/Act. It should be noted that the jurisdiction of the Syariah Courts is applied only to Muslims.

POSSIBILITY FOR THE SYARIAH COURT TO ORDER FOR COMMUNITY SERVICE

Community service as an alternative punishment is a medium to strengthen relationship between the offender and community. There is no clear provision in either Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) or Syariah Criminal Procedure (Federal Territories) Act (Act 560) regarding community service order. If Criminal Procedure Code provides for a community service order to a youthful offender the same could be done under section 128 of Syariah Criminal Procedure (Federal Territories) Act 1997, where Syariah Court judge can impose a community service order in addition to a bond for a good behaviour. This can be done by adding to the provision which gives the power to the court to order the Syariah offender to do community for a number of hours:

\begin{enumerate}
\item in addition, to an order for imprisonment, the court can request a youthful offender to perform community service of maximum 240 hours in aggregate. The type, nature, and time for such services being determined by the court;
\item phrase “community service” means any work, service or direction for the betterment of the community in general, and including, any works which involve payment to prison or municipality;
\item community service order under this para is the responsibility of the minister responsible for women, family and community.
\end{enumerate}

The same discretion should be given to a first offender as provided in section 129 of the Syariah Criminal Offences (Federal Territories) Act 1997 by providing the same power to the Syariah Court to make an order for community service within a stipulated period of time.

Community service order given by the Syariah can be carried out in any welfare home, or through activities in the community such as trash-collecting, painting building, housekeeping, serving meals and maintenance works.

In a case where the Syariah offender was given community service order as alternative/substitute to the punishment given by the trial court. However, the order for community service was not actually given by the court, it was ordered by the Sultan. In the case of Kartika Sari (2009), the accused was convicted for the offence of drinking liquor by the Syariah High Court of Pahang and sentenced to whipping and a

\begin{footnotesize}
\begin{itemize}
\item Shariah courts (Criminal Jurisdiction) Act 1965 (Amendment) 1984.
\end{itemize}
\end{footnotesize}
Community Service Order in Syariah Court

fine of RM5000. She did not appeal against the punishment and was ready to be whipped when the Sultan of Pahang commuted the caning sentence to 3 weeks community service at Tengku Fatimah Children Home, Alor Akar, and Pahang. The Religious Department of Pahang who was responsible for the execution of the order had given her a room at the Home where she than spent 3 weeks, and upon completion a report was send by the Principal to JAIP.

CONCLUSION
From the above discussion, it can be concluded that the criminal jurisdiction of Syariah Courts of Malaysia is limited. The punishment provided for in the Syariah Criminal Offences Enactment of the States seems to be less effective to serve its objectives, i.e. as deterrence and reformation.

It is high time for the authorities concerned to review the power of the Syariah Courts of Malaysia and their criminal jurisdiction. The types and quantum of punishments should also be reviewed. Other type of punishment such as community service should be included as a mode of sentencing a Syariah offender and a clear provision should be included in the relevant laws. The execution of the community service order should also be made clear to the all persons involved in the execution of the order by providing a Standard Operating Procedure on how community service should be implemented.

REFERENCES
Federal Constitution of Malaysia.


Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559).

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