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A LEGAL STUDY ON THE NECESSITY TO ENACT A LAW ON SURROGACY IN MALAYSIA, WITH REFERENCE TO INDIA AND RUSSIA

Nur Athirah binti Kamsol[1]*, Rina Yasmin binti Roslizan[2], Nur Fadhlina binti Md Salih[3] & Norliza binti Abdul Hamid[4]

[1,2,3,4]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*
Email: [1]nurathirahkamsol@gmail.com; [2]rinayasmin8@gmail.com; [3]2019810942@student.uitm.edu.my; [4]norlizahamid@uitm.edu.my

[*] *Corresponding Author*

ABSTRACT
The National Assisted Reproductive Technology (ART) Policy 2021 asserts the prohibition of surrogacy treatment to be practised in Malaysia due to legal issues surrounding the agreement. However, the prohibition hinders couples with fertility issues or difficulties in conceiving to start a family. Previous researchers primarily focused on the legal complexities surrounding each surrogate-related individual and the agreement without considering the possibility of the treatment being legally enforced. This study explores the legal complexities arising out of the surrogacy agreement and the possibility for the treatment to be permissible in Malaysia by enacting a comprehensive and regulated law to govern the rights and liabilities in the surrogacy agreement that relate to the surrogate mother, the intended parents, and the resulting child. The paper adopts a qualitative methodology which begins by analysing Malaysia's current legal standing on surrogacy agreements and the need for the law governing the treatment. It then discussed legal issues concerning surrogacy-related individuals with reference to existing Malaysian laws and the surrogacy law of India and Russia. Our findings show that the legal complexities in surrogacy agreements can be overcome by enacting a complete and comprehensive law addressing those legal issues. With the regulations in India and Russia as benchmarks, a thorough study enables this paper to recommend solutions regarding the issues affecting all the parties involved.

Keywords: *Assisted Reproductive Technology Policy, Surrogate mother, Intended Parents, Child*

Themes: Law, Science and Technology

INTRODUCTION

Surrogacy arrangement is one of the variations of Assisted Reproductive Technology (ART) and one of the "treatments" for infertile couples or alternatives to adoption. However, Clause 7.1.1 of the National ART Policy 2021 prohibited surrogacy in Malaysia due to legal implications that arose and to protect the rights and welfare of the resulting child. Nevertheless, the ban is imposed without considering the legal gaps and interests of couples seeking treatment. Herein, the paper aims to analyse the need to enact a law in Malaysia which specifically governs surrogacy with reference to the legislations in India and Russia. The paper will examine the current policy in Malaysia regarding surrogacy, the need to enact specific laws regulating surrogacy in Malaysia, how India and Russia dealt with the legal complexities arising from surrogacy based on the Surrogacy (Regulation) Act, 2021 (SR Act 2021) and Russian Federation Citizens' Health Protection Act 2011 (RFCHP Act 2011) and to examine and recommend how the legal complexities can be resolved in Malaysia.

LITERATURE REVIEW

Currently, in Malaysia, ART treatment is only governed by the National ART Policy 2021. However, the outright banning of surrogacy by the policy may close an opportunity which may even be the last resort for family-building for the intended parents who truly wish to have their biological child. As

such, the outright ban fails to address the existing legal gaps and problems relating to multiple parties: the surrogate mother, the intended parents, and the resulting children. Briefly, surrogate mothers encounter challenges regarding consent, the possible types of surrogacy agreements, legal agreements, and the protections available. As for the intended parents, the pertinent issues include marital status, the consent required to be recognised as the child's legal parents, and the potential for adoption. Children face problems regarding legitimacy, citizenship status, and inheritance rights. Furthermore, the outright prohibition is at odds with the country's medical tourism goals as it will only encourage Malaysians and foreigners to seek out other nations. Meanwhile, the benchmark countries, through their respective law, SR Act 2021 for India and RFCHP Act 2011 for Russia, have recognised the existence of these legal complexities and stipulated the rights and responsibilities together with restrictions for all parties involved.

METHODOLOGY

This paper adopts a qualitative approach under the doctrinal research category. The primary sources include various policies and statutes such as National ART Policy, the Distribution Act 1948, the RFCHP Act 2011, and the SR Act 2021. Besides, the secondary sources include books, journals, and online databases such as CLJLaw, HeinOnline, and LexisNexis.

FINDINGS AND DISCUSSION

Following the legal position in India and Russia, this paper found the possibility for the legal complexities that exist in Malaysia to be addressed. Among the findings discovered is that provisions in India's SR Act 2021 have resolved the vulnerability issue of surrogate mothers by imposing requirements for the surrogate mother to be insured and protected from forced abortion. Whereas in Russia, as per RFCHP Act 2011, a surrogacy agreement is treated as a special type of civil law contract relating to the surrogate's compensation. In light of the possibility of addressing the lacunae, this paper recommends that surrogacy arrangements should be legalised in Malaysia by enacting comprehensive legislation that governs the rights and obligations of all parties involved through adopting and adapting the legal stance in the benchmark countries to suit the local circumstances.

CONCLUSION AND RECOMMENDATIONS

The National ART Policy's ban on surrogacy treatment is inadequate in dealing with the current loopholes in Malaysia. Therefore, this paper suggests that the positions in both benchmark countries be adopted and adapted to meet the local circumstances:

Table 1: Recommendations about the Surrogate Mother, Intended Parents and Children.

SURROGATE MOTHER	Consent	Must acquire the surrogate's written and spousal consent (if any).
	Types of Surrogacies	Altruistic surrogacy.
	The Agreement	Special type of contract is distinct from the Contracts Act 1950.
	Protection for Surrogate Mothers	Right to enforce the surrogacy contract, insurance coverage and prohibition against forced abortion.
INTENDED PARENTS	Marital Status	Married couples with fertility problems.
	Agreement	The surrogate must sign the agreement to voluntarily give the parental rights and custody of the child to the intended parents. The intended parents can enforce the contract in court.
	Adoption	Child must be adopted by the intended parents.

CHILDREN	Legitimacy	Legitimate.
	Citizenship	Malaysian or follows the citizenship of the intended father.
	Inheritance	Enjoy all the rights of a natural child as per applicable law.

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AN ANALYSIS OF THE LEGAL IMPLICATIONS OF THE MYSEJAHTERA APPS ON PRIVACY: LESSONS LEARNT FROM NEW ZEALAND

Intan Azira Binti Hussin[1]*, Alia Anisa Binti Khairus Masnan[2], Nur Hafizah Binti Mohd Nazri[3] & Nur Sabrina Binti Azizullah[4], Hartini Saripan[5]

[1,2]*Faculty of Law, Universiti Teknologi MARA, Malaysia*

Email: [1]intanazira6@gmail.com, [2]aliaanisa241000@gmail.com, [3]dcfeeza@gmail.com, [4]sabrinaazizullah@gmail.com

[*]*Corresponding Author*

ABSTRACT

Contact tracing has become the key strategy in slowing down the transmission of coronavirus disease and reducing COVID-19-associated mortality. Given the scale of the pandemic, reliance on traditional contact tracing is deemed insufficient. This has driven the Malaysian government to develop and mandate citizens and premises to use the MySejahtera application. The application is proven effective for the Malaysian government in tracing and controlling the spread of COVID-19. However, the process of tracing and tracking in managing the spread of the pandemic has, in many ways, compromised personal information to third-party applications. Hence, by applying the doctrinal research methodology, the objective of this research is to critically investigate the legal implication of MySejahtera on privacy in Malaysia by comparing it with the position in New Zealand to benchmark the legal issues on privacy. The article also suggested recommendations to improve the MySejahtera guidelines and policies. Therefore, the legal implication of MySejahtera on privacy in Malaysia needs to be examined thoroughly, together with the policy used by New Zealand to ensure the data of the users are being used safely without any cyber security threats.

Keywords: *Contact Tracing and Privacy, Legitimate Surveillance, Privacy of Contact Tracing Apps*

Themes: Privacy Law, Cyber Law

INTRODUCTION

The Coronavirus Disease 2019 (COVID-19) has urged the Malaysian government to mandate the MySejahtera Application to be used by the government to plan for prompt and effective countermeasures (Yusof, 2020). However, due to the compulsory nature of the app, concerns over the security of personal information provided to the app have yet to be extensively addressed (Abuhammad, 2020). The need for a dynamic and precise movement tracing policy is therefore essential. Furthermore, if there is a leak of information in the MySejahtera app, users have a limited cause of action as there is little to no option for users to take legal action for any breach of information since the government has absolute discretion in the management of personal information (Mohsen, 2021). Moreover, there is no legal framework or guideline proposed by the government in its conduct of managing the MySejahtera app causing the government failed to gain the user's trust in confidently participating in the contact tracing process (Urbaczewski, 2020).

Hence, the MySejahtera apps must be critically compared with the position in New Zealand to benchmark the legal issues about privacy and data security. This is mainly due to the similarities both MySejahtera and NZ Covid Tracer have in their operation and the comprehensive legal framework governing contact tracing practices owned by New Zealand. `Eventually, from the comparison made, a lesson can be learned by the Malaysian government, and new recommendations can be made to improve the MySejahtera guidelines and policy on privacy and data security in Malaysia.

LITERATURE REVIEW

Multiple ethical issues regarding the employment of the MySejahtera were raised during the pandemic. First, the lack of information about the COVID-19 tracing contact application was one of the most agreeable points for more than 80% of contact tracing application users (Chan, 2021). The MySejahtera application has revealed a flaw in establishing a user-friendly, transparent policy. It must be noted that extensive, refined, and mandated guidelines that stress the steps to be followed after data gathering, data utilisation, and analysis are critical and should accompany any guidance to be deemed authoritative regarding COVID-19 virus data utilisation. However, due to the lack of this data transparency, users have a hard time believing the apps' mechanism and have a constant fear of them being tracked (Abuhammad, 2020).

Furthermore, the user's privacy and confidentiality were also significant concerns for the apps. The MySejahtera application has access to all pertinent data. As a result, because the loss of information privacy exposes users to numerous threats to confidentiality, an examination of the sensitivity of the data and the incapacity to control the data was necessary. While countries like New Zealand have comforted their citizens by completing a privacy impact assessment (PIA) on their apps to reduce the danger of infection to privacy, MySejahtera has not done so, leading users to have even more doubts about the app (Scassa, 2020).

Moreover, the amount of data collected from MySejahtera is enormous. The extraction of data from the user is said not to violate any privacy laws because it is being done for the general good of the public (O'Connor, 2021). People, however, have a right to know how their data is being used, despite the importance that MySejahtera provides, to ensure that there is a channel for them to bring forward if something goes wrong, particularly with data that can easily cause harm if the data is leaked (Urbaczweski, 2020). The NZ Covid Trace, meanwhile, has a proper guideline that establishes all the important data. Hence, transparency in MySejahtera is required to strengthen the policy and increase the public's confidence in the application, despite their differing perspectives (Tretiakov, 2021).

METHODOLOGY

The research adopted a qualitative method, combining the doctrinal with the empirical approach in collecting and analysing the data. The doctrinal approach is a method of analysing the legal doctrine of both primary and secondary data sources in the realm of data privacy in MySejahtera apps. In addition to the doctrinal method, this study employed the empirical approach by performing a semi-structured interview as a tool for gathering primary data to answer the research questions. Empirical data was then analysed to confirm and support the doctrinal data. The validity of the empirical data was validated and verified using the triangulation method by combining and analysing both empirical and doctrinal data.

FINDINGS AND DISCUSSION

Data privacy concerns have been numerously raised since the decision to develop contact tracing apps was announced by the Malaysian government. It is acknowledged that a balance must be considered between user data privacy and societal benefit (Gil, 2021). In this context, the right to privacy is not absolute. Although the collection and sharing of personal health information for contact tracing infringe on the individual right to privacy of those who are participating in the process, the government has the discretion to process and share sensitive personal information without the consent of the patient and solely based on suspicion of infection, according to the law. Hence, the challenge of striking a balance between public safety and personal privacy continues to be a massive concern in the digital era.

Due to that, the New Zealand government has adopted Privacy-by Design features into its contact tracing app. While registering for the app, users have the option to pick whatever information they wish to give about themselves. In other words, all of the information is completely voluntary. It should also be mentioned that any information provided to the app during registration will never be used for law enforcement reasons. Except when sharing information is judged required, the information will not be shared with another governmental entity unless sharing information is deemed necessary (White, 2021).

Furthermore, to show the application transparency and to create trust in users, the New Zealand government has taken steps to ensure that the NZ Covid Trace has been evaluated and complies with the Privacy Impact Assessment (PIA). Privacy Impact Assessment is an examination of how personally identifiable information is collected, used, shared, and maintained. In Malaysia, the MySejahtera application is exempt from any kind of Privacy Impact Assessment, causing there are no measures that can be taken if a risk arises. Due to that, many aspects of the implementation of contract-tracing apps have not been made clear to the citizens. It must be noted that transparency in MySejahtera is required to strengthen the policy and increase the confidence of the public in the application (Scassa, 2020).

CONCLUSION AND RECOMMENDATIONS

The study's findings show that the MySejahtera app has numerous issues with privacy and data security issue in Malaysia. Hence, there are a few lessons which could be learned from New Zealand in tackling this issue, such as the implementation of transparency via the Privacy Impact Assessment and the adoption of Privacy-by-Design. It must be noted that even if it is already too late for the Malaysian government to apply those tests because MySejahtera has been widely distributed among the public, they can still close the gaps associated with the apps by registering for the Privacy Impact Assessment and making it widely available to the public. Furthermore, the adoption of Privacy-by-Design features to the existing MySejahtera app is a great way to solve the current legal and ethical issues on the app.

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THE EXPLAINABLE ARTIFICIAL INTELLIGENCE FOR HEALTHCARE APPLICATIONS IN MALAYSIA

Nurus Sakinatul Fikriah Mohd Shith Putera[1]*, Hartini Saripan[2], Noraiza Abd Rahman[3],

Faculty of Law, Universiti Teknologi MARA, Malaysia

Email: [1]nurussakinatul@uitm.edu.my

**Corresponding author*

ABSTRACT

As Artificial intelligence ("AI") has become pervasive in many facets of life and society – often seen as a faster, more precise, and less labour-intensive alternative to human cognition – the extensive use of AI in healthcare has been a natural occurrence. The perks of AI can be readily noticed, from primary care to rare diseases, emergency medicine, biomedical research, and public health. More recently, AI has been making inroads into Malaysia, proven by several recent applications of the system in healthcare delivery. This trend is driven by perceptions about the reliability and advancement of technological solutions for improved quality of care and operational efficiency as part of democratizing healthcare. In light of this development, it is timely to consider whether introducing non-human elements into decision-making within the healthcare system may interfere with the medical profession's responsibilities in ensuring public health and preventing violations of various fundamental rights. The integration of AI has a range of potential applications in intelligent healthcare. However, there is a challenge in the black box operation of decisions made by AI models, which has resulted in a lack of accountability and trust in the decisions made. Adopting the doctrinal research methodology, this article investigates the current state of AI application in healthcare. It discusses the basis of which safeguards may be required to ensure continued confidence in a well-functioning healthcare system. It will also consider the role of the Explainable AI model in achieving accountability, transparency, result tracing, and model improvement in healthcare.

Keywords: *Artificial Intelligence in Healthcare, Explainable Artificial Intelligence in Healthcare, Algorithmic Decision Making*

INTRODUCTION

We are living in the age of intelligent machines. Artificial Intelligence (AI) has infiltrated our lives in previously unfathomable ways, performing tasks that humans could only accomplish with specialized expertise, costly training, or a government-issued licence. Healthcare has been seen as an early domain to be transformed by AI technology, alongside other significant fields such as transportation, energy, and the military (Coiera, 2018). Many specialised healthcare applications, including (but not limited to) medical diagnostics (Carfagno, 2019), patient monitoring, and learning healthcare systems (Bardey et al., 2022), are currently being developed or implemented using AI software platforms (Price, 2019). AI's contribution to the healthcare industry is revolutionary, but not without a price. Admittedly, AI offers a variety of potential augmentations in healthcare. However, there is a formidable concern about the black box operation of AI models, resulting in a lack of accountability and trust in the decisions made. In this context, developers recognize that the underlying workings of AI add a layer of complexity and obscurity regarding system behaviour. Once an AI algorithm has been trained, it might be challenging to comprehend why it produces a specific answer to a given set of data inputs. Moreover, the fact that AI algorithms can act in ways unforeseen by their developers raises concerns over AI's 'autonomy,' 'decision-making,' and 'responsibility'. When something goes wrong, as it inevitably does, it can be a daunting task to discover the behaviour that caused an event locked away inside a black box where discoverability is virtually impossible.

LITERATURE REVIEW

Seminal contributions have been made by scholars in dissecting theories of recovery for injuries resulting from the use of AI as early as 1981 in the infamous "Frankenstein Unbound: Towards A Legal Definition of Artificial Intelligence" when the author presented the legal categories of AI from a piece

of property to a fully-fledged legally responsible entity with its own right (Lehman-Wilzig, 1981). This legal categories in turn, produced a comparable liability principle for each category including product liability (Čerka et al., 2015), dangerous animal (Kingston, 2016), slavery, diminished capacity (Benhamou & Ferland, 2021), minor and agency (Vladeck, 2014). This has instigated further dialogue in exploring which theory of liability for AI has more merit than the other. Several theories have been proposed to resolve the liability agenda when intelligent machines are concerned, some focusing on the incompatibility of the traditional rules of liability (Sullivan & Schweikart, 2019), complicated layers of stakeholders (Mohd Shith Putera & Saripan, 2019), others on establishing a new framework of liability (Selbst, 2019). Traditional regulatory regimes, such as product licencing, research and development oversight, and tort liability, are particularly unworkable to meet the challenge of accountability and transparency posed by AI. Recently, a focus shift had since been directed to the role of Explainable AI (xAI) in the accountability conundrum. xAI refers to methods and techniques in the application of AI technology such that the results of the solution can be understood by human experts, thus satisfying the social right to explanation. Over the past number of years, various solutions in the domain of xAI have been proposed, many of which have been applied to the healthcare domain (Doran et al., 2018) (Adadi & Berrada, 2018) (Track et al., 2019) (Ogrezeanu et al., 2022). However, there is insufficient research being conducted on which explanations are not just desirable, but legally operative. The question of when and what kind of explanation might be required of AI systems has also been addressed by past literature in satisfying the requirement of law. In filling the gap, the research intends to also play a seminal role in discussing the nature and form of xAI I that are responsive to legal settings and audience.

METHODOLOGY

This research adopted the doctrinal research methodology to examine problems relating to accountability systematically and AI within the appropriate methodological framework. According to Chynoweth, it is concerned with the formulation of legal "doctrines" through the analysis of legal rules (Chynoweth, 2006). The method assisted the researcher in clarifying the deviation of traditional AI regulation methods, placing them in a logical and coherent structure and describing their relationship to other rules, such as, in this case, the Explainable AI (Hutchinson & Duncan, 2012). The instrumentalization of the textbooks, statutes, legislation, commentaries and other legal documents was conducted for that purpose. Ultimately, the data gathered were analyzed via qualitative approaches such as comparative analysis, interpretive analysis and jurisprudential analysis to achieve the research objectives.

FINDINGS AND DISCUSSION

Cognisance of the Explainable Artificial Intelligence in Law

The issue of interpretability of Al systems and transparency around how Al systems are making their decisions may further complicates its relationship with the legal realm and raises concerns with regards to the principle of rule of law (Surden, 2019). Greenstein notes that the use of AI in the context of legal decision-making would be disruptive as most of these systems are ‘black boxes’ because they incorporate extremely complex technology that is essentially beyond the cognitive capacities of humans and the law to inhibits transparency to a certain degree (Greenstein, 2021). The opaqueness of the AI system may even hinder any meaningful judicial review when used in the high stakes area of criminal justice which involved the matter of individual’s liberty (Citron, 2008). Scholars have raised concerns that Al systems engaged in decision-making should be explainable, interpretable, or at least transparent. Others have advocated that the systems themselves be required to produce automated explanations as to why they came to the decision that they did**.** Among the solutions to the black box problem is to design systems capable of explaining how the algorithms reach their conclusions or predictions, also known as "explainable Al" (xAI). One of the primary xAI objectives is to address the opacity of machine learning algorithms in various manners. DARPA (Defense Advanced Research Projects Agency) defines xAI as “AI systems that can explain their rationale to a human user, characterize their strengths and weaknesses, and convey an understanding of how they will behave in the future” (Leshem, 2022). Generally, they are categorized by scholars and computer scientists alike into two main types: exogenous and decompositive (Lim, 2020)

Exogenous v Decompositional xAI

Exogenous xAI approaches can be further divided into **model-centric explanations or subject-centric explanations** (Lim, 2020). Model-centric explanations focus on providing broad information on how an AI works without dealing with individual examples, such as providing information on how an AI was programmed, the parameters of the training data fed into it, and performance metrics such as its accuracy, precision and recall on test data (Lim, 2020). The xAI thus tries to provide the logic behind the model's decision process as a whole in the general case (Mostowy, 2020). A subject-centric approach, also referred to as local interpretability, in contrast, might provide the subject of a recommendation or decision with information about the characteristics of individuals who received similar decisions (Deeks, 2019). Another subject-centric approach involves the use of counterfactuals (Deeks, 2019). Here, people seeking to understand which factors may have most affected the algorithm's recommendation about them may, using that same algorithm, tweak the input factors to test how much a given factor mattered in the original recommendation. The exogenous approach however as highlighted by Deeks (Deeks, 2019) does not attempt to actually explain the inner workings of (that is, the reasoning of) the machine learning algorithm. Instead, it attempts to provide relevant information to the algorithm's user or subject about how the model works using extrinsic, orthogonal methods (Deeks, 2019). A second type of approach actually attempts to explain or replicate the model's reasoning, and sometimes is referred to as a "decompositional approach." Decompositive xAI approaches on the other hand attempt to explain the very operation of an AI itself, whether by bluntly exposing its source code or by constructing another model that seeks to reconstruct the correlation between inputs and outputs via repeated queries, and cast some illumination on the working of the original model in the process (Lim, 2020).

Agnostic v Intrinsic Approach

In addition to the exogenous and decompositional model, xAI could also be categorized in accordance to its strategy of providing explanation which can either intrinsic or agnostic (Mostowy, 2020). In an intrinsic approach, the Al model itself is designed to be interpretable, meaning that when it takes input and generates output, either the model itself can be easily examined as an explanation, or it generates some sort of explanation along with the output. In contrast, in an agnostic approach, a pre-existing Al model is treated like a black box that just generates its normal output without explanation; instead, an additional, simplified algorithm separate from the Al model helps to explain the AI's decision after it is made." This approach is more flexible in that it can be added to a pre-existing Al model, but a significant drawback is that because the approach relies on a simplified algorithm, not the target Al, for an explanation, the explanations generated may be less accurate. Thus, an intrinsic approach may be most desirable to aim for long-term, but given the deep neural networks already in use, agnostic approaches may be a more practical option that can be added onto the models already deployed.

CONCLUSION AND RECOMMENDATIONS

The black-box phenomenon of AI is the most concerning issue regarding the application of AI to the decision-making sphere, particularly in healthcare (Deeks, 2019). The inability to parse the reasons behind the algorithmic recommendations is detrimental to those affected by the predictions. As Mostowy puts it, the opacity of Al is a novel challenge to accountability and due process (Mostowy, 2020). In this context, this research contributes by introducing the nature and approaches of the Explainable AI in resolving the complex issue of accountability pertaining AI. However, more research is needed in exploring the common core structures of Explainable AI that are legally operative as well as the extend of explainability required by the law.

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TRACK 2 INTERNATIONAL LAW

COMPARATIVE STUDY BETWEEN THE OUTER SPACE LAW IN MALAYSIA AND THE UNITED ARAB EMIRATES

Trisha Celine Anak Steward[1]*, Muhammad Hadi Nafiz Bin Mohammad Din[2], Mohamad Fariz Bin Fadzilah[3], Fazrizatul Binti Fadzil[4], Emmanuel Juan Anak Robin[5] & Tunku Intan Mainura Tunku Makmar Nizamuddin[6]

[1,2,3,4,5,6]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1]2018263648@student.uitm.edu.my ; [2]2019811066@student.uitm.edu.my; [3]2019847834@student.uitm.edu.my ; [4]2019811042@student.uitm.edu.my; [5]2018439922@student.uitm.edu.my & [6]tunku_intan@uitm.edu.my

**Corresponding author*

ABSTRACT

This research aims to compare and analyse the space laws, space programs and space agencies of Malaysia and the United Arab Emirates (UAE). In this regard, it highlighted the difficulties and opportunities facing space research, examined the most recent developments in the field and identified strategies for dealing with them within the confines of statutory regulation. This research aspires to identify ways to strengthen Malaysia's space law by using the UAE as a model for its creation. Since doctrinal research is a theoretical study that primarily uses secondary data sources to seek answers, the methodology used for this study was a qualitative research approach that drew upon secondary data. In this regard, it looked at the treaties of space law, the legal system and the literature review on space law. It is concluded that Malaysia's space legislation is sufficient because there is an act in place to control our outer space activities, and that is the Malaysian Space Board Act 2022 [Act 834], which was recently published in the gazette on January 25, 2022, by the Malaysian government.

Keywords: *Space Law, Space Activities, Space Programs, Space Agencies, Space Law Act*

Theme: *International Law*

INTRODUCTION

The study analysed the existing legislation that governs space activities in Malaysia and compared such legislation with the United Arab Emirates (UAE). Both UAE and Malaysia have a long history of space exploration and the international space program. Due to responsibility and liability as a party to the Outer Space Treaty 1967 and Liability Convention 1972, Malaysia is recommended to enact national space legislation of specific Malaysian Space Law and Space Agency (Tunku Makmar Nizamuddin, 2018). Accordingly, Malaysia would also acquire legal certainty and transparency of legal rules which define illegal actions and possible penalties (Saari, 2014). This study aims to answer the question: to what extent can the existing national space legislation and space agency be implemented and executed in Malaysia, and can the current legal frame of UAE space legislation help as inspiration to develop Malaysia space legislation?

LITERATURE REVIEW

Space law refers to a set of legal principles that govern relations between nations, international organisations, and private individuals originating from the exploration and usage of space. It also refers to navigational laws that apply beyond the Earth's atmosphere. The Malaysian Space Board Act 2022 (“the Act”) defines "space" in Malaysian law as a void that begins at 100 kilometres above mean sea level and extends to 100 kilometres above mean sea level. The Act limits Malaysia's sovereignty to this exact distance (Gomez, 2022). Additionally, a space agency refers to the agency that was established to create policy and rules, as well as to coordinate, implement and oversee space activities aside from

playing a significant role in research development and space education. Furthermore, a space programme can be understood as a programme to inspire explorers from all walks of life to explore known and unknown frontiers aimed at achieving social and economic benefits that aid national development. For example, space programmes focus on satellite development and deployment for communications and Earth observation missions (Froehlich, 2018).

METHODOLOGY

Due to the COVID-19 pandemic situation, we used more secondary data than primary data as it was difficult to collect primary data such as conducting interviews. Gathered data from library materials which included textbooks, both published and unpublished academic documents such as journals, conference proceedings, dissertations, theses and reliable information gathered from an internet search. In this research, secondary data is used in the literature review and findings, which consists of data collected from numerous journals regarding legal frameworks in space legislation.

FINDINGS AND DISCUSSION

Legislation in Malaysia

In Malaysia, there is specific space legislation that was introduced in 2022 named as Malaysian Space Board Act 2022. The Act's goal is to establish a Malaysian Space Board to regulate certain space activities for safety, as well as to handle the registration of "space objects" and provide for certain space-related offences. As Malaysia embarks on attempts to govern the space industry, a new legal practice area – space law – is emerging. It will be fascinating to track the Act's progress through the Houses of Parliament, as well as the development of related fields when the Act becomes legislation in Malaysia as it was gazetted in 2022. The space law in Malaysia can be considered left behind by other countries, such as the United Arab Emirates. Since the specific space legislation of space law is still new in Malaysia, it is recommended that Malaysia has to enforce national space legislation because the existence of national space legislation indicates that it complies with the requirements imposed by international space law. The existence of a space agency in Malaysia will help the government to implement the National Space Policy and add value to the existing related national policy in Malaysia. Hence, the researchers were hoping that the space law in Malaysia could be enforced promptly as there was the rapid development of space law in other countries.

Legislation in UAE

In a recent gathering of the United Arab Emirates (UAE) government officials, the UAE Space Agency introduced new space legislation on February 24, 2020, to build a legislative and regulatory environment for the national space sector due to its growing space business sector and to supervise space operations in the UAE and to co-relate with international space laws and treaties. The main purpose of enacting new space legislation in the country is to establish a robust and sustainable UAE space sector while also adhering to international treaties, which is critical if the UAE wishes to grow its regional and international presence and leadership in space operations and exploration. The new legislation orders space exercises to encourage the development of a profitable and safe space area in the UAE, which aligns with the goal of their strategic initiative for the role. The purpose of enacting that law is to keep up with the rapid breakthroughs in space technology and to make appropriate and efficient use of all space resources. Hence, the space law in the United Arab Emirates (UAE) can be considered to be rather comprehensive and the first of its kind in its region.

DISCUSSION

The space agency and space legislation of both Malaysia and the United Arab Emirates has similarities and differences from one another. Regarding the similarities of the space agency, both nations share the same function, but there were differences when the space agency was established for different reasons, such as the UAESA being governed by the federal government while Malaysia's space agency was located under the control of the Ministry of Science, Technology & Innovation (MOSTI). The similarities and differences in space legislation may then be seen since Malaysia did not previously have any distinct space legislation laws. In contrast to UAE, has a law known as Federal Law No. (12) of 2019, Malaysia was initially exclusively ruled by Malaysia Space Board Bill 2020 ("the Bills") given to the parliament. However, the Malaysian Space Board Act 2022, which will be used to regulate space

and establish the Malaysian Space Board to oversee space-related activities, was recently formally gazetted on January 25, 2022 (Bernama, 2022). In short, the UAE Board of Directors will propose policies, strategies, and draft laws linked to the space sector. The Malaysian Space Board Act 2022 is tasked with advising the government on issues about the application of this statute.

CONCLUSION AND RECOMMENDATIONS

In conclusion, this research explores Malaysian space law's prospects and examines the legal framework of selected national outer space legislation to assist Malaysia in developing its national space legislation. It is advised that Malaysia implement its national space legislation because the existence of such legislation shows that it complies with the demands imposed by international space law and to identify an ideal legal framework not only for Malaysia but also for other states being comparable with the UAE. Despite its relatively new space programme, the UAE is rapidly establishing itself as one of the most serious and advanced in terms of space activities. The new space legislation that was introduced in 2022, named as Malaysian Space Board Act 2022, in the hope that it will serve as a guideline to rationalise the actual Malaysian Outerspace Act.

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TRACK 3 DISPUTE RESOLUTION

OMBUDSMAN IN HIGHER EDUCATION INSTITUTIONS: A COMPARISON BETWEEN MALAYSIA AND ENGLAND

Nurdiyana Farah Roslan1*, Nursyafiqah Shahabuddin[2], Muhammad Iman Norhizam[3] & Nur Ezan Rahmat[4]

[1,2,3] *Faculty of Law, Universiti Teknologi MARA, Malaysia.*
Email: [1]dyanaroslans@gmail.com; [2]syafiqahshahabuddin@gmail.com;
[3]imannorhizam@yahoo.com; [4]nurezan@uitm.edu.my

[*] *Corresponding author*

ABSTRACT
It is an emerging issue among Malaysian university students that their efforts to have their complaints heard only turn futile due to the absence of neither a good mechanism of dispute resolution in their universities nor a true ombudsman that can mitigate this. There had arisen occurrences where students had to resort to an improper way of voicing complaints, leading to negative repercussions. This paper aims to examine the suitability of introducing a separate and independent ombudsman specifically for higher education institutions by employing a qualitative research methodology involving doctrinal legal research and comparative analysis within the jurisdiction of England. Identifying the weaknesses in the current practice of dispute resolutions in higher education institutions will enable the policymakers to understand the importance of an ombudsman specialised only for higher education institutions to serve justice to aggrieved students and staff. Comparing the merits of our country and the practice of dispute resolutions in England can assist in shaping a practical framework for its establishment. Hopefully, the findings can help provide a more excellent mechanism to equip the students and higher education institutions (HEI) staff with a platform to assist them in dispute settlement.

Keywords: *Ombudsman, Students, Higher Education Institutions, Dispute Resolution, Establishment*

Themes: Dispute Resolution

INTRODUCTION
Forming an ombudsman specifically for dispute resolutions involving university students may largely contribute to sustainable development not only for the students and the university but for the prospects of the country, for it allows a better university experience for the students and, after that, produce good students. Therefore, an independent ombudsman, specifically to entertain university students' complaints, should be appropriately established. This study determines that it is wise to learn about the current policies and practises for resolving student complaints in Malaysia and other countries, such as England, to determine whether Malaysia should adopt them based on their efficacy. Besides, this research will pose recommendations if Malaysia aims to establish an independent ombudsman to hear students' complaints.

LITERATURE REVIEW
The current practice of student complaint procedure
According to the literature, there are noticeable loopholes in Malaysia's existing complaint procedure (Lim et al., 2016). This is as depicted in an incident where a Universiti Malaya student was met with negative repercussions over protesting during a graduation ceremony when it was due to his complaints being ignored, even when lodged to the Ministry. Presently, the handling policy to assist students' complaints in Malaysia is mostly decided by the university, so most universities have different procedures, so long as it complies with the guidelines set out in Educational Institutions (Discipline) Act 1976 (Act 174). For example, University Malaya has established an Integrity Unit that hears complaints concerning unlawful acts, misconduct and unethical behaviours by the university's machinery, including students. It is led by a Unit Head and assisted by two assistant registrars and an administrative assistant,

directly under the supervision of the Vice-Chancellor. Therefore, it is perceptible that the authority to adjudicate student complaints in the current practice in Malaysia is commonly vested in the administrative organisations and the Vice-Chancellor of the university (Omoola, 2019). Several universities in Malaysia have established their private ombudsman that operates within their institution, namely Universiti Sains Malaysia (USM) and Monash University. USM introduced their own ombudsman office that serves as a mechanism for the university's staff and students to have their grievances heard and redressed regarding the issues of workplace and academic conditions. As for Monash University, the University Student Ombudsman (USO) was introduced and applied to all of their campuses internationally, including Malaysia, as a primary complaint redressal system in the university.

The Higher Education Act of 2004 (HEA) in England permits the appointment of a neutral body to hear student grievances. The introduction of the Office of Independent Adjudicator for Higher Education (OIAHE) followed that. Unless and until the HEIs have issued a "completion of procedures" letter attesting that the student has used all available internal processes, the OIAHE will ordinarily decline its jurisdiction over a complaint. This indicates that the OIAHE is the last port of call for student complaints after they have used up all other internal complaint mechanisms within universities and still feel aggrieved (Behrens, 2017). The OIAHE acknowledges that there is a less expensive and time-consuming alternative within its jurisdiction. Additionally, although students who disagree with the OIAHE's decision may appeal to the courts, in practice, there were very few instances in which the students were not satisfied with the outcome of an ombudsman's decision (Horebeek, 2011).

METHODOLOGY

The researchers utilised doctrinal and comparative legal research methods in this research paper. For doctrinal methods, journal articles, statutes, and case laws on the higher education ombudsman related to handling student grievances in Malaysia and England were duly examined. As for comparative legal research, sources such as legislative texts, jurisprudence, and legal doctrines from Malaysia and England were observed.

FINDINGS AND DISCUSSION

The effectiveness of the current practices between Malaysia and England can be juxtaposed based on the three ombudsman values; independence, impartiality and the power of decision-making. To begin with, it is on the first value, independence. Most dispute resolution mechanisms in Malaysia are campus-based, meaning they are interconnected as the proceedings are done and decided within the university (Omoola, 2019). Although some Malaysian universities have introduced their university ombudsman, most of these university ombudsmen are also campus-based. Hence, it cannot be said that Malaysian universities uphold independence as there is still an interest of the university in the established ombudsman. In comparison, the independence of England's university ombudsman, known as the OIAHE, is evident as it is a body without any link to the universities. Due to its separate establishment with no inferior position, a hearing upon a student's complaint against the institution shall be arbitrated without conflict of interest.

The subsequent comparison is on impartiality. In Malaysia, the persons having the authority to discharge judgments in most universities in Malaysia are interconnected to the universities such as institutions and universities bound by Act 174, Section 5(1) of the Act provides that the person authorised to impose disciplinary sanctions is known as the Students' Affair Officer who is the university's staff appointed by the Ministers of Higher Education. The fact that the discipline authority is an employee may cause scepticism and doubt in his decision. Contrastingly, the manner of impartiality practised in England can be seen as counterproductive, where the services provided by OIAHE are funded through an annual subscription-based fee paid by the university members, which may also raise doubt. However, it is noteworthy that all powers conferred to the OIAHE are subject to the HEA 2004 and are obligated to follow all rules set out by the Act, as in Section 15(3) of the HEA 2004. Simultaneously, the Act provides its disciplinary procedures if a Member of the students' dispute resolution scheme defaults in paying the subscription fee. This will ensure that the OIAHE will not at all be affected by the non-payment of the subscription.

The power of decision-making is the third aspect of determining an effective dispute-resolution mechanism. It is recognised that every university in Malaysia can produce their judgment or decisions upon a conflict, and this was seen in a sexual harassment case involving a Universiti Malaya's lecturer

and student where the court case was dropped solely because the university had taken actions upon the case based on Section 5 of Act 174. This is not in line with the demands of natural justice, for a judge has to be free of any interest in the university. Compared with the practice in England, the power for decision furnished to the OIAHE includes independently examining and judging student complaints that are wider in scope and not only related to concerns of "academic judgement". It has been said in a court judgment of *R (Maxwell) v The Office of the Independent Adjudicator of Higher Education* [2011] EWCA Civ 1236 that the judicial power of the OIAHE is of similar extents to the courts of law and tribunals, such that it has the fact-finding functions and to make decisions where the general courts will not and have little expertise on, in the interests of the students.

CONCLUSION AND RECOMMENDATIONS

The preceding discussion enlightened that the existing dispute resolution mechanisms in Malaysia are insufficient to satisfy the valid values of an ombudsman, which are independent, impartial and effective, as they mostly stand below the higher authorities of the institution. This depicts a dire need for a specialised ombudsman to establish HEIs. Malaysia should emulate the practice of an effective HEI ombudsman, England's OIAHE, by observing the merits of the practice. It is to be borne in mind that the ombudsman's effectiveness for HEIs cannot be ascertained before it is initiated. It may be challenged by a lack of publications and awareness of the legal assistance, as well as the lack of legal literacy among students and doubt by the students to take further actions by consulting with other bodies due to the demanding formalities and procedures of their university's internal complaint mechanisms. Therefore, in the hope that more future research will work in sharpening its framework, an independent ombudsman for HEIs can achieve a triumphant end.

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TRIBUNAL AS A PLATFORM FOR DISPUTE SETTLEMENT IN MALAYSIA: A COMPARATIVE ANALYSIS WITH NEW ZEALAND AND SINGAPORE

Farah Yasmin Abd Radzak[1]*, Nur Azura Othman [2], Nur Farah Waheda Azmani[3,] Muhammad Farith Redza Zulkefli[4] & Nur Ezan Rahmat[5]

[1,2,3,4.5]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1]miminyasmin91@gmail.com ;[2] azura_aju@hotmail.com ; [3]2021282336@student.uitm.edu.my ; [4]farithredza10@gmail.com; [5]nurezan@uitm.edu.my

[*]*Corresponding author*

ABSTRACT

A tribunal, as part of the traditional judiciary system, is becoming an essential body to provide efficient, inexpensive and informal machinery in addressing the needs of consumers for fair justice treatment. The establishment of this body is indeed essential for attaining consumer protection, as the ordinary court system is generally perceived to be unable to satisfy customers' needs. The establishment of the Tribunal for Consumer Claims in 1999 is seen as a landmark in the development and recognition of alternative dispute resolution (ADR) apart from the conventional judiciary and regulatory system in Malaysia. Since then, the admission of the Tribunal in assisting the Malaysian court in protecting consumers' rights has grown with the installation of another two designated tribunals, namely the Tribunal of Homebuyer Claims in 2002 and the Strata Management Tribunal in 2013. The acceptance from the community, notably the consumers in Malaysia, of the establishment of this tribunal as an ADR from the long-lengthy litigation process is proven from the records that the Tribunal has received tremendous response from the consumers. Yet, there is still much room for improvement that needs to be made to the tribunals in preparing the body to face the new challenges by offering an informal, a faster and cheaper procedure to the consumers. This paper examines the importance of the three Tribunals in Malaysia, their strengths, weaknesses and challenges. This paper also comparatively analyses the tribunals in Malaysia with the tribunals in New Zealand and Singapore.

Keywords: *Alternative Dispute Resolution, Consumer, Homebuyer, Strata, Tribunal*
Themes: Law, Science and Technology, Dispute Resolution

INTRODUCTION

A Tribunal, in its simple definition, is described as "any person or institution with authority to judge, adjudicate on, or determine claims or disputes". The tribunal should be viewed as a body that hears and determines claims independently and just manner, as the aim of the tribunal is to give populations affected by the violations of their basic human rights recognition, visibility and voice. The establishment of a tribunal in Malaysia is seen as an ADR channel which provides a speedier and more affordable procedure of justice to people without the formality of the ordinary courts. However, there are still improvements that can be made for tribunals in Malaysia, especially with the limitation period, representation by lawyers and availability of online hearings. Therefore, a comparative analysis has been made with tribunals in New Zealand and Singapore to find and suggest improvements for tribunals in Malaysia.

LITERATURE REVIEW

The Tribunal for Consumer Claims (TCC) of Malaysia is a quasi-judicial body established under the Consumer Protection Act 1999, which acts as an alternative dispute mechanism for consumer complaints in the form of negotiation and hearing (Ismail et al.2019). The TCC proceedings will be heard in open court and no legal representation is allowed. (Ismail et al., 2019). Looking at the present position of the TCC, it is most likely that the TCC will continue to receive more complaints in the future and most

claims will likely be filed by urban and middle-class consumers who are more knowledgeable and critical of their rights (Amin., 2007). Although awards of the Tribunals are final and binding on both parties, the Tribunals have no power to enforce the award and the claimant needs to seek for a court order to enforce and execute the tribunals awards (Amin. 2007).

The first housing tribunal created in Malaysia was the Tribunal for Homebuyer's Claim (THC), applicable in Peninsular Malaysia, established under the Housing Development (Control and Licensing) Act 1966 (Sufian. 2012). The THC's jurisdiction is only limited to claims filed by the consumer against the housing developer and does not extend to other parties such as architect, engineer or contractor (Sufian. 2012). The Strata Management Tribunal (SMT) was established under the Strata Management Act 2013 and no limitation period applies to commence an action under the SMT. The SMT does not provide for provision for legal representation by an advocate and solicitor. The Strata Titles Board of Singapore, in contrast, allows representation by an advocate and solicitor (Mohamad, et al. 2015).

In New Zealand, the Disputes Tribunal is considered the most appropriate forum to hear and resolve consumer complaints which involve low value disputes. Legal representation in the Disputes Tribunal is not permitted (Sullivan. 2018).

METHODOLOGY

This research employs the traditional doctrinal method, which analyses the primary and secondary data including the statutes, case laws, journals and articles. The relevant statutes incorporating the tribunals in Malaysia are referred to namely the Consumer Protection Act 1999, Housing Development (Control and Licensing) Act 1966 and Strata Management Act 2013. Comparative legal analysis with the position in New Zealand and Singapore were used by referring to the relevant statutes and decided cases from both countries.

FINDINGS AND DISCUSSION

Based on a legal analysis of the consumer tribunals in Malaysia with tribunals in New Zealand and Singapore, it can be seen that New Zealand's tribunal provides for a longer limitation period for consumers to file and initiate its claims. New Zealand's tribunal provides for a 6 years period compared to 3 years period in Malaysia and two years period in Singapore. Besides, as compared to Singapore, Malaysia and New Zealand tribunals do not provide avenues for both parties to go for other ADR such as consultation or mediation before the hearing in the tribunal.

In terms of the awards given, these three jurisdictions provide slightly similar awards, which can only be enforced by way of judgement in the court. Although a tribunal is procedurally less formal than a court, there are instances where representation by an advocate and solicitor is allowed in Singapore and New Zealand. As the world is moving towards a paperless and online system, hearing of disputes by the tribunal in New Zealand via online platforms is possible while the availability of online hearing is not yet possible in Malaysia and Singapore.

CONCLUSION AND RECOMMENDATIONS

The establishment of consumer tribunals in Malaysia may be considered an important landmark for the development of consumer protection law in Malaysia. Nevertheless, in providing an affordable, speedier and simpler avenue to consumers in Malaysia, the tribunal's performance and jurisdiction should continue to be assessed to ensure the effectiveness and efficiency of the tribunal as one of the consumer protection agencies. This can be achieved by adopting the strengths of the tribunal in advanced countries such as New Zealand and Singapore. Alternative avenues in the form of consultation and negotiation for dispute settlement before the trial process, as implemented in Singapore, can be introduced to ensure a favourable result for both parties. Furthermore, the Malaysian tribunal should be given the power to enforce the award and non-compliance with the award shall be regarded as contempt of court. In addition, the Malaysian tribunal should consider allowing representation by lawyers, legal officers or consumer organisations to assist the parties in presenting their case with clarity. Besides, it is suggested that the limitation period of the claim of 3 years should be reviewed as the cases involving consumers are

becoming more complicated. Finally, the usage of technology in the administration and hearing process in all tribunals similar to New Zealand must be implemented for a speedier and more efficient process.

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THE ESTABLISHMENT OF FINANCIAL DISPUTES RESOLUTION INSTITUTION IN MALAYSIA: A COMPARATIVE ANALYSIS WITH INDONESIA

Muhamad Ikhwan Mohd Zain[1]*, Nur Ezan Rahmat[2] & Ibtisam Ilyana Ilias[3]

[1,2,3]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*
Email: [1]mikhwanzain157@gmail.com; [2]nurezan@uitm.edu.my; [3]ilyanailias@uitm.edu.my

[*]*Corresponding author*

ABSTRACT
The proportion of financial dispute cases keeps growing along with the volume of financial transactions. Besides court, the financial disputes may be resolved through the several institutions under the ADR mechanism to uphold consumer protection. Since Malaysia and Indonesia are among the more financially developed countries in ASEAN, this study explores the current establishment and relevant institutions for financial dispute resolution in both countries. By using doctrinal legal research and content analysis, the study found that combining multiple institutional avenues and creating a single dispute resolution body may be practised for a better financial dispute institution in Malaysia and Indonesia. More importantly, the research provides mechanisms and solutions to enhance consumer protection and uphold financial alternative dispute resolution. In the end, the relevant authorities should make some improvements to establish the comprehensive institution as a complementary forum to the court system in resolving financial disputes in both countries.

Keywords: *Financial Ombudsman, Financial Disputes, Alternative Dispute Resolution, Dispute Resolution Institution, Malaysia and Indonesia.*

INTRODUCTION

Financial disputes may be frustrating as it involves money and reputation. When financial consumers feel dissatisfied with the financial service providers (FSP), such as the banking and insurance sectors, they must use a relevant channel that may prioritise how to settle conflicts successfully. Other than litigation in court, many kinds of alternative dispute resolution (ADR) exist, depending on the nature of the disputes. ADR institution provides different types of mechanism, and Brown and Marriott (1999) enumerated the diverse ADR techniques practised globally with distinctive features, including arbitration, negotiation, mediation, tribunal and ombudsman.

Hence, there is an imperative need for alternative dispute resolution institutions that are efficient, affordable and less formal than conventional litigation (David & Francis, 2012). In exploring the details of the mechanism used to settle financial disputes, this study investigates the existing institution established in Malaysia to cater for the need for consumer protection in dealing with financial disputes. The Indonesian country's practice is also discussed, especially concerning the Indonesian financial disputes institution. In the end, some suggestions to improve the existing institution in both countries may be formulated.

Problem Statement

Besides the Securities Industry Dispute Resolution Center (SIDREC) and Tribunal for Consumer Claims (TCC), Malaysia has introduced an institution that deals explicitly with complaints and disputes related to finances, known as Ombudsman for Financial Services (OFS). However, some flaws affect its effectiveness in executing its primary function of resolving financial disputes. This study posits that OFS still does not meet the cardinal principle of sound ADR principles outlined by several international bodies. Specifically, the principles are accessibility, efficiency, and transparency.

Regarding accessibility, the jurisdiction of the law is relatively limited. As stated in the Third Schedule in Regulation 18 of the FOS Regulations 2015, OFS only accept cases involving financial disputes that fall within RM250,000. Besides, the location of the OFS institution also contributes to the lack of accessibility, whereby there has been only one office in Kuala Lumpur, resulting in difficult walk-in access. Next, in terms of the principle of efficiency, there is lacking in the administrative issue mainly

due to the limited human capital of OFS, which currently consists of only two Ombudsman officers, fifteen Case Managers and seven support staff to deal with thousands of cases. It is more dangerous when no standard measure for certification or qualification as an ombudsman officer exists. In terms of transparency, unlike the court, the OFS does not provide a fully accessible decision on successfully resolved cases. Also, the Securities Industry Dispute Resolution Center (SIDREC) is for financial consumers who may generally deal with capital market disputes involving capital market products, services, and institutions. However, the Central Bank of Malaysia suggested that the OFS consolidate with the SIDREC into one integrated dispute resolution mechanism (OFS, 2021). While both institutions are enacted under different financial regulators, it may create confusion for financial consumers with little understanding and exposure to the differences between the institution.

Meanwhile, from the perspective of Indonesia, several institutions currently exist to resolve financial disputes, including the judiciary, the Consumer Dispute Resolution Agency, the National Consumer Protection Agency, and the Alternative Institution for Dispute Resolution in the Financial Services Sector (Christiani & Kastowo, 2021) which have another six different institutions. It may create confusion for the consumers in lodging complaints to the right body. In this regard, Abubakar & Handayani (2021) urged for the establishment of a single alternative dispute resolution institution to deal with many kinds of disputes may improve the effectiveness of resolving financial disputes. Even though arbitration and mediation dispute resolution have gained popularity as an alternative to the court proceeding for the financial service industry, as stated by Petrovna et al. (2020), this study would like to emphasise the advantages of implementing the ombudsman services as an ADR body to deal with financial disputes especially in providing cheap redress mechanism in favour of financial consumers. In view of the above problems, further study is imperative in establishing an effective ADR institution to resolve financial disputes effectively in Malaysia and Indonesia.

Research Questions

1. What are the relevant established institutions for financial dispute resolution in Malaysia?
2. What are the current institutions established for financial dispute resolution in Indonesia?
3. How to improve the effectiveness of the OFS institution in becoming the preferred alternative for most financial consumers in Malaysia and Indonesia?

Research Objectives

1. To analyse the relevant established institution for financial dispute resolution in Malaysia.
2. To explore the current institution established for financial dispute resolution in Indonesia.
3. To propose the recommendation to improve the effectiveness of the OFS institution in becoming the preferred alternative for most financial consumers in Malaysia and Indonesia.

LITERATURE REVIEW

Conceptually, a financial dispute is a complaint against the FSP in some situations involving fraud cases of credit cards, online banking, and automated teller machines, to name a few, which make the financial consumers suffer losses and damages (Shen et al., 2016). Most of the time, the financial consumer lacks knowledge and awareness of the financial transaction, resulting in disputes. Here, ADR is viewed as a viable alternative to litigation for settling commercial issues since it is less expensive, more private, and less likely to result in ill will or hatred, as litigation often does (Ahmad et al., 2022). It is acknowledged that judicial function is still within the court ambit, but to deal with the challenges of the cost and time, there is necessary to adopt an ADR in Malaysia (Zubair, 2020). Generally, FSP has a clear perspective regarding the transaction, making the financial consumers always the victim and suffering the losses in the disputes. This is the importance of the relevant institution besides court proceeding need to be established for the resolution of the disputes, to uphold the financial consumers' rights and protection through the legal platform.

METHODOLOGY

This study employs library-based research regarding financial dispute resolution in Indonesia and Malaysia. The primary law materials are reviewed involving all statutes and regulations related to the financial disputes that existed in both countries. Supported by secondary legal materials, a comprehensive literature review of textbooks and journals about the judicial system and alternative

dispute resolution is conducted through the university library's online database and the existing organisational websites. Using online databases such as Scopus, Lexis Advance Law and Proquest, this study uses the keywords, among others, 'Ombudsman', 'Financial Dispute', Financial Ombudsman' and 'Alternative Dispute Resolution (ADR)' to find the relevant articles and papers discussing the topic. All the data are analysed by content analysis to establish categories and themes to create descriptions systematically arranged, subsequently drawn conclusions to answer the research problem.

FINDINGS AND DISCUSSION

It is interesting to note that Malaysia is one of the states in Southeast Asia which shares a border through eastern Malaysia with Indonesia (Kuular, 2021). Besides, Diniyya et al. (2021) highlighted that Indonesia and Malaysia are among the ASEAN countries with a higher number of financial technology companies, with a portion of 17% and 11%, respectively. This similarity in trend makes the selection of Malaysia and Indonesia for a comparative study to see the comparison between countries. Table 1 summarises the relevant elements and perspectives that both countries may evaluate.

Table 1: The financial dispute resolution institution in Malaysia and Indonesia.

Element	Malaysia	Indonesia
ADR Institution concerning financial disputes	1. Ombudsman for Financial Services (OFS) 2. Securities Industry Dispute Resolution Center (SIDREC) 3. Tribunal for Consumer Claim (TCC)	1. Consumer Dispute Resolution Agency 2. The National Consumer Protection Agency 3. The Alternative Institution for Dispute Resolution in the Financial Services Sector: a. Indonesian Insurance Mediation and Arbitration Agency (BMAI) b. Indonesian Capital Market Arbitration Agency (BAPMI) c. Pension Fund Mediation Agency (BMDP) d.Indonesian Banking Alternative Dispute Resolution Institute (LAPSPI) e.Arbitration and Mediation Agency for Indonesian Underwriting Companies (BAMPPI) f. Indonesian Mediation for Financing, Pawnshop, and Venture Agency (BMPPVI)
Regulatory body	Central Bank of Malaysia (CBM) Security Commission (SC)	Financial Services Authority(OJK)
Legislation	1. Financial Services Act 2013 2. Islamic Financial Services Act 2013 3.Financial Services (Financial Ombudsman Scheme) Regulations 2015 4. Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 5. Capital Markets and Services Act 2007 6. Capital Market and Services (Dispute Resolution) Regulations 2010.	1. Law No. 21 of 2008 2. Law Number 21 of 2011 (the Financial Services Authority) 3. Law Number 8 of 1999 (Consumer Protection) 4. Law Number 30 of 1999 (Arbitration and Alternative Dispute Settlement) 5. Financial Services Authority Regulation Number 1 of 2013 (Consumer Protection in the Financial Services Sector)

	7. Consumer Protection Act 1999	6. Financial Services Authority Regulation Number 1 of 2014 (Alternative Institutions for Settlement of Financial Services Disputes)

Sources: Central Bank of Malaysia websites, OFS websites, OJK websites, Abubakar & Handayani (2021), Christiani & Kastowo (2021)

In brief, Malaysia and Indonesia have put much effort into developing their financial dispute resolution institution. Combining the multiple existing institutional avenues into a single dispute resolution body may have some benefits. Among others, reducing confusion for consumers, increasing accessibility, increasing consistency and reducing administrative costs. Both countries have to look at many aspects, and there are rooms for them to learn from each other's experiences.

CONCLUSION AND RECOMMENDATIONS

The establishment of financial disputes institution in Malaysia and Indonesia may help strengthen financial consumer protection in both countries. For Malaysia, the establishment of OFS has much room for improvement to operate the institutions in becoming the preferred alternative for most financial consumers in Malaysia. In Indonesia, it is time to adopt a similar ombudsman scheme as other countries to improve the country's financial dispute resolution. The uniformity in creating a one-stop centre for financial dispute resolution and a streamlined dispute resolution mechanism beneficial for financial consumers and investors may be relevant to uphold fair and responsible dealings with financial consumers.

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TRACK 4 CONSTITUTIONAL LAW/HUMAN RIGHTS LAW/ETHICS LAW

A LEGAL ANALYSIS OF STATELESS CHILDREN AND THEIR RIGHTS TO EDUCATION IN MALAYSIA: A COMPARATIVE STUDY WITH THAILAND

Nadzarina Hani Rostam[1], Nur Husnina Ahmad[2], Nur Shahira Aliah Mohammad Murshid[3], Rania Nabiha Mohd Attas[4] Nur Ezan Rahmat[5] & Atifah Othman[6]

Faculty of Law, Universiti Teknologi MARA, Malaysia

[1]nadzarinahani99@gmail.com, [2]nurhusnyna@gmail.com, [3]work4syira@gmail.com [4]raniaattas99@gmail.com [5]nurezan@uitm.edu.my [6]atifahothman@uitm.edu.my

**Corresponding Author*

ABSTRACT

Statelessness has been a substantial issue around the globe, including in Malaysia, yet the right to education for the stateless is often overlooked. This study seeks to find ways to ensure stateless children can still possess educational rights regardless of their inability to acquire citizenship. This paper further analyses the laws and policies governing stateless children's rights to education in Malaysia and Thailand to propose amendments to Malaysian law. This research found that undocumented children in Malaysia are allowed to enrol in public schools under the Professional Circular 2009 and the Zero Reject Policy 2019. Nevertheless, such policies are still inadequate compared to the 2005 Cabinet Resolution Policy in Thailand. The apparent difference between the policy in Malaysia and Thailand is that stateless children in Thailand may still enrol in public schools regardless of their parents' lack of nationality, but those in Malaysia must prove that they have at least one Malaysian parent to enrol. Through doctrinal research on Malaysian, Thai and international laws, there are ways to assure stateless children's right to education and Malaysia is urged to endeavour in that direction.

Keywords: *Stateless Children, Rights to Education, Public School, Laws and Policies*

Themes: *Human Rights, Child Law*

INTRODUCTION

Stateless children are juveniles who are not recognised as citizens and lack the protections afforded to children of citizens. Despite the efforts from the Ministry of Education (MOE) that allow undocumented children to gain access to public schools, there are still restrictive conditions which cause most stateless children to still be deprived of their education rights. Malaysia's reservation on certain international conventions, which protects children's right to education, also affects the Government's effort to ensure education for stateless children. This study seeks to uncover and examine the current laws and policies governing stateless children and their education rights in Malaysia and Thailand. This study also aims to seek and propose recommendations to reform the current laws and policies in Malaysia.

LITERATURE REVIEW

Upon reviewing previous literature pieces, the most significant theme is the general overview of statelessness, where stateless children are people under 18 years old who do not belong to any nation. Various international policies are protecting stateless children's right to education, including Article 28 of the United Nations Convention on the Rights of the Child (CRC) and the UNESCO Convention against Discrimination in Education. However, these protections are unenforceable since Malaysia did not ratify the UNESCO convention and reserved Article 28(1) (Md Samad & Mohd Badrol, 2018). The Government made several efforts to help undocumented children gain education, but children without Malaysian parents are still deprived of such opportunity because of a prerequisite of having at least one Malaysian citizen parent. A policy was introduced in 2019 regarding undocumented children's admission to public schools, but there is a lack of exposure relating to this policy. In Malaysia, only citizens are compelled to attend primary schools (Md Samad & Mohd Badrol, 2018), whereas children born in Thailand, regardless of their citizenship, are compelled to nine years of primary education and given

twelve years of free, high-quality primary education (Park et al., 2009). This comparison should be further delved into to find possible policies that Malaysia can similarly adopt. This literature review reveals the sufficiency of current education policies for stateless children in Malaysia has yet to be covered. Hence, this study aims to close the existing literature gap on stateless children's right to education and suggest policies to allow stateless children's enrolment in public schools.

METHODOLOGY

This study includes doctrinal and non-doctrinal research where it focuses on the primary and secondary sources of law, i.e. legislation on the rights of education in Malaysia and Thailand, journals, articles, reports and international conventions, as well as incorporating research interviews with two respondents, i.e. a Non-Governmental Organisation (NGO) called *Buku Jalanan Chow Kit* and an academician who specialised in constitutional law and international law from Universiti Teknologi MARA (UiTM). This research is also a comparative study between the laws and policies in Malaysia and Thailand, where the laws in Thailand are proposed to be a benchmark.

FINDINGS AND DISCUSSION

Article 1 of the UNHCR's Convention Relating to the Status of Stateless Persons 1954 defines a stateless person as one who is not a national by any state's operation of law. The common cause of statelessness in Malaysia is when parents fail to register their marriage and the child's birth because they lack knowledge of its importance (Liew, 2019, p. 95). Statelessness results in frequent deprivation of fundamental rights, including the right to formal education (Milbrandt, 2011, p. 92). A 'child' in Malaysia is a person under the age of eighteen (Child Act 2001) who must be ensured with fundamental rights to safeguard themselves due to their lack of physical and mental maturity (Md Taib, 2012, p. 79).

As a preceding note, the protection in Article 12 of the Federal Constitution, Education Act 1967, and Child Act 2001 that pledge no child's education shall be discriminated against on any ground does not apply to non-Malaysian children. Hence, according to Dr Ikmal Hisham Md Tah in an interview on 15 January 2021, the rights of stateless children inevitably fall outside of the radar. Pursuant to Education for All (EFA) concept by UNESCO, Malaysia introduced the Professional Circular Letter No. 1/2009, which allows undocumented children with one Malaysian parent to enrol in public schools or government aid schools (SUHAKAM, 2018). In 2018, further development to the law was made through the Zero Reject Policy, which expediently ensures undocumented children's access to education (Abdul Rashid, 2018). After four months of implementation, 2635 stateless children have been enrolled on the system, which solidifies the notion that stateless children are eager to learn but rather are being deprived of access to education (Bernama, 2019). Nevertheless, in comparison to Thailand's 1999 EFA policy, stateless children in Malaysia are unable to enjoy access to free education through the Zero Reject Policy. In 2005, the Royal Thai Government Cabinet Resolution for Unregistered Persons led to the availability of rights to an education at all levels for children without legal status. Thailand's EFA policy allows stateless children entry at every education level, in both public and private institutions, with the issuance of academic credentials upon completion (The Thai National Commission for UNESCO, 2015). Contrary to Malaysia's Zero Reject policy, Thailand's policy eliminates arbitrary limitations that exclude the stateless. Under the Thai Policy, every child has equal access to education, regardless of nationality, which is a structure of law that should be modelled upon. The exclusion criterion set in admitting stateless children into public schools allows discrimination toward the stateless. One common criticism that can be observed is that Malaysia should not have limited the enrolment of stateless children to Malaysian parents only.

CONCLUSION AND RECOMMENDATIONS

Although statelessness is often associated with the issue of nationality, stateless children's lack of education is also alarming. The existing policies governing undocumented children's admission to public schools failed to help stateless children who are born to two stateless parents. Therefore, the Government must implement a broader framework to ensure the EFA policy is correctly practised. In doing so, this study has extracted policies adopted in Thailand as reliable yardsticks which allow undocumented children with non-citizen parents to enrol in public schools. This study also proposes Malaysia consider amending the wording in the Education Act 1967 and Federal Constitution similar to those of Thailand,

where rights to education are not limited to citizens. Although the issue of statelessness in Thailand is yet to resolve, stateless children's right to education is not neglected. This gives light on the idea of resolving their deprivation of education without needing to wait for the nationality issue to be ironed out first. As amending the legislation could seem to be extensive, Dr Ikmal Hisham Md Tah suggested more collaboration between the MOE and NGOs to assist stateless children, especially in rural areas. The representative from *Buku Jalanan Chowkit* also emphasised that NGOs do not expect the Government to spoon-feed these children, but the concept of 'Education for All' should be fulfilled to give them a chance to break through their norms by way of gaining an education.

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AN ANALYSIS OF EDUCATIONAL RIGHTS FOR CHILDREN WITH DISABILITIES IN MALAYSIA, THAILAND AND SINGAPORE

Muhammad Fikri Othman[1]*, Nur Ezan Rahmat[2], Norazlina Abdul Aziz[3] & Sasipin Sukbunpant[4]

[1]*Faculty of Law, Universiti Teknologi MARA Cawangan Sarawak, Malaysia.*
[2 3]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*
[4]*Department of Special Education, Chiangmai Rajabhat University, Thailand.*

Email: [1]muhammad300@uitm.edu.my; [2]nurezan@uitm.edu.my; [3]noraz397@uitm.edu.my; [4]ohsasipin@hotmail.com

[*]*Corresponding author*

ABSTRACT
According to UNESCO, education is a fundamental human right since it can prevent inequality and improve the quality of life of human beings, especially children with disabilities. Due to the importance of education, many human rights treaties and declarations provide educational rights to everyone. However, in some countries, the educational rights of children with disabilities are not protected effectively due to certain factors. This paper aims to analyse and compare the educational rights of children with disabilities in Malaysia, Thailand and Singapore. The researchers adopt library-based or doctrinal research methodology in this paper by examining legal statutes such as the Malaysian Federal Constitution, the Malaysian Persons with Disabilities Act 2008, the Malaysian Education Act 1996 and its regulations, the Thailand National Education Act 1999, the Thailand Compulsory Education Act 2002, the Thailand Empowerment of Persons with Disabilities Act 2007, the Thailand Education Provision for Persons with Disabilities 2008 and the Singaporean Compulsory Education Act 2019. Plus, journal articles and textbooks related to special education and children with disabilities in Malaysia, Thailand and Singapore are also being examined to understand the issue of the educational rights of children with disabilities. It is found that the educational rights of children with disabilities in Malaysia are not effectively protected due to the non-existence of specific laws relating to special education for children with disabilities. Hence, there is uncertainty about laws and a lack of human capital and facilities. To protect their educational rights effectively, the Malaysian government must formulate a legal framework for special education for children with disabilities.

Keywords: *Education, Special Education, Special Education Law, Educational Rights, Children with Disabilities,*

Themes: Human Rights

INTRODUCTION

Maciver et al. (2019) define children with disabilities as "children with developmental problems such as visual impairment, hearing impairment, autism spectrum conditions, behavioural disorders and learning difficulties". In Malaysia, they are considered the most vulnerable group since their family and society always neglect them because they are a burden (Tan et al., 2019). Children with disabilities must be educated to solve this problem since it will help them read, write and make decisions (Muhamad Nadhir et al., 2016). Besides, education is essential to ensure their future and bring confidence in their life (Bhardwaraj, 2016). There are many international human rights instruments and declarations that recognise the importance of education, such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Jomtien World Declaration on Education for All and the Dakar Framework for Action. In Malaysia, some laws are related to special education for children with disabilities, namely the Federal Constitution, the Persons with Disabilities Act 2008, and the Education Act 1996 and its regulations. Besides, a few policies were introduced to provide educational rights for children with disabilities in Malaysia, such as the National Policy and Action Plan of Persons with Disabilities and the Zero Reject Policy. However, due to the uncertainty of laws, and lack of human capital and facilities, their educational rights cannot be effectively protected. Currently, there is no specific law to govern special education for children with

disabilities in Malaysia, while the current laws that relate to special education are very general (Othman et al., 2022). This paper aims to analyse and compare the laws relating to special education for children with disabilities in Malaysia, Thailand and Singapore. In addition, the practice of the special education system in Malaysia, Thailand and Singapore are assessed to provide suggestions to the Malaysian government for the consideration to improve the protection of the educational rights of children with disabilities in Malaysia.

LITERATURE REVIEW

Othman et al. (2022), in their research, discussed the laws that are related to special education in Malaysia, which are Article 8 and Article 12 of the Federal Constitution, Section 28 of the Persons with Disabilities Act 2008, Section 40 and Section 41 of the Education Act 1996 and the Education (Special Education) Regulations 2013. Besides they also discussed the Special Education Programme in Malaysia; Special Education Schools, Special Education Integration Programme, and Inclusive Education Programme.

Hill and Sukbunpant (2013) discussed the laws which are governing the educational rights of children with disabilities in Thailand in their research; Section 10 of the National Education Act 1999, the Compulsory Education Act 2002, the Empowerment of Persons with Disabilities Act 2007, and the Education Provision for Persons with Disabilities 2008. In addition, they also discussed the education system for children with disabilities in Thailand, which are in special and regular schools.

In their research, Ang et al. (2021) discussed the laws governing special education for children with disabilities in Singapore: the Compulsory Education Act 2000 and the Compulsory Education Act (extended 2019). They also discussed the education system for children with special needs in Singapore, which are in mainstream and Special Education (SPED) schools.

METHODOLOGY

In this paper, the researchers adopt a doctrinal or library-based analysis. According to Kharel (2018), a doctrinal analysis or library-based is an "enquiry into legal concepts, values, principles and existing legal text such as statutes, case laws etc.". Therefore, the legal statutes, namely the Malaysian Federal Constitution, the Malaysian Persons with Disabilities Act 2008, the Malaysian Education Act 1996 and its regulations, the Thailand National Education Act 1999, the Thailand Compulsory Education Act 2002, the Thailand Empowerment of Persons with Disabilities Act 2007, the Thailand Education Provision for Persons with Disabilities 2008 and the Singaporean Compulsory Education Act 2019 have been examined by the researchers to complete this paper. Besides, to understand the issue relating to the educational rights of children with disabilities in Malaysia, Thailand and Singapore, the researchers perused certain journal articles and textbooks related to special education and children with disabilities.

FINDINGS AND DISCUSSION

Even though there are a few laws related to special education for children with disabilities in Malaysia, the educational rights of children still cannot be protected effectively. Article 8 of the Federal Constitution does not directly mention discrimination against disability, while Article 12 does not prohibit discrimination toward children with a disability under the Malaysian right to education (Baqutayan et al., 2016). Hence, the requirement under the Education (Special Education) Regulations, which require children with disabilities to undergo a three-month probationary period for schools enrolment, has been argued to violate their educational rights, is still enforceable and practised by the Ministry of Education (Othman & Rahmat, 2020).

Besides, Othman and Rahmat (2020) argued that the Persons with Disabilities Act 2008 lacks enforcement provisions and monitoring mechanisms and is non-remedial. Therefore, the critics regard the Act as a "toothless tiger". So, Section 28 of the Act, which provides educational rights for children with disabilities, is not effective and inefficient. Not to mention, Section 40 and Section 41 of the Education Act 1996 only state the power of the Minister to provide special schools, duration and curriculum on special education.

The educational rights of children with disabilities in Thailand are in a better position since children with disabilities have the right to access facilities, media services, and educational aid for their education and are entitled to free education as provided under the National Education Act 1999 (Vibulpatanavong, 2018). Furthermore, the government gives special education instructors additional remuneration as provided under the Education Provision for Persons with Disabilities. The government, under this Act, also provides subsidies and assistance to the educational institution that provides special education. The instructors will be subsidised to enhance their skills and knowledge in special education (Othman et al., 2022).

In Singapore, the educational rights of children with disabilities have been enhanced due to the amendments to the Compulsory Education Act 2019. Under this amendment, children with moderate to severe Special Educational Needs (SEN) must attend mainstream or Government Funded Special Education schools. Before the amendment of the Act, the parents are to decide whether to send or not their child (children with moderate to severe Special Educational Needs) to school.

CONCLUSION AND RECOMMENDATIONS

To conclude, the educational rights of children with disabilities in Malaysia are still not effectively protected by the law due to the non-existence of a specific Act to govern special education for children with disabilities. Unlike Thailand and Singapore, the educational rights of children with disabilities in both countries are well preserved and protected due to the enactment of the specific law on special education for children with disabilities. Hence, the Malaysian government must enact a specific law on special education for children with disabilities to protect their educational rights effectively.

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THE CONSTITUTIONALITY OF INDIVIDUALIZED ACCOMODATION AND THE ELIMINATION OF TRESHOLDS FOR PRESIDENTIAL CANDIDACY IN THE INDONESIA LAW SYSTEM

Ahmad Sabirin[1*], Febrian Duta Adhiyaksa[2] & Janna Shafira Widianti Apcar[3]

[1,2]*Faculty of Law, Universiti Trisakti, Indonesia.*
Email: [1]achmadshobirinfull@gmail.com; [2]febrian8989@gmail.com; [3]jannaapcar11@gmail.com
[*]*Corresponding author*

ABSTRACT
Currently, the election mechanism for presidential and vice-presidential candidates only accommodates nominations through political parties and also still uses the provisions of the Presidential Threshold. In truth, Indonesia is a democratic country that, while adhering to the idea of people's sovereignty, which ensures the rights of all its residents, should also accommodate the method of presidential nomination through individual or independent channels. The form of study used is juridical-normative research, which is conducted by doing searches on numerous laws and regulations. The findings of this study show that the use of the Presidential Threshold for candidates for President and Vice President, which is used as a prerequisite in the nomination of President and Vice President, indicates that democratic principles have not been properly implemented and are also not in line with the principles of the President's real presidential government system. The separation of the executive and legislative branches is a fundamental feature of the presidential system in Indonesia; the election of the President and Vice President should not be a precondition for reaching a quota in parliament.
Keywords: *Individual Candidate; Accommodation;Presidential Threshold; Indonesia Law*
Themes: Constitutional Law

INTRODUCTION

One of the most important elements in the nation is the governor. In Indonesia, the presidency is held by a president. The constitution of the state of the Republic of Indonesia of the year 1945 mandates that general elections be held for choosing the Governor of Indonesia (President and Vice President, also a member of the DPR, of the Regional Representative Council, and of the Regional People's Representative Council). General elections are a procedure in which occurs a peaceful transfer of power in accordance with the idea of the constitution (Karim, 1991). As a result, general elections play an important role in the Indonesian government. Reform has brought the agenda by promoting democracy in a constitutional life in Indonesia. Therefore, it is freedom of expression as the Indonesian people's revenge against the New Order government for carrying out an authoritarian movement and distorting freedom of expression (democracy). The rights of the people to participate in elections have been ignored because the People's Consultative Assembly (MPR) has power as the sovereignty of its people. Having this power allows the MPR to fully control the presidential election, giving the President total power. This is an example of an electoral system that appears solely as a formal agenda to carry out the mission of the 1945 Constitution. The public is outraged by this traumatic experience, and they demanded a change to a democratic, representative and aspirational presidential election system (Yamin, 1982).

LITERATURE REVIEW

According to Jimly Asshiddiqie, a country can claim to have people's sovereignty if its constitutional life has fully embraced and anchored democratic values (Asshiddiqie, 2005). People's sovereignty is positioned as the most important criterion for a country that wants to embrace a democratic system because people's sovereignty is the embodiment of a democratic society where people hold the greatest power (Manan, 1996). Indonesia is a country that adheres to the philosophy of sovereignty. This principle has been held by the Indonesian since the proclamation of independence and the formation of a state organisation. "…Freedom of the Indonesian was later introduced into a Constitution of The Republic of Indonesia which established in the state of the sovereign of the people…", as stated in paragraph IV of the preamble to the 1945 Constitution. Thailand (Thaib, 1999). As a result, democratic values are a non-negotiable "price set" under the Indonesian constitutional structure.

METHODOLOGY

The research method used in this study is a juridical-normative type of research, namely legal research conducted by conducting a search on various laws and regulations related to the issue of individual presidential nominations and the presidential nomination threshold by using library materials or secondary data as a starting point. Some regulations that we used are the 1945 Constitution of the Republic of Indonesia, Law Number 42 of 2008, Constitutional Court Decision No. 14/PUU-XI/2013, and the Presidential Threshold in Law Number 7 of 2017 concerning Elections.

FINDINGS AND DISCUSSION

People's Sovereignty and The Democratic Constitutional Law System in Indonesia

According to Mayo (1960), the ideals that must be fulfilled in the criteria of democracy are as follows: First, by solving all problems peacefully and by being institutionalised. Peaceful conflict resolution); second, by guaranteeing peaceful change in a society that lives in a changing society (peaceful change in a changing society); third, with an orderly succession of rulers; fourth, by limiting the use of violence to the bare minimum (minimum of coercion); fifth, with a reasonable acknowledgement and assumption that there are differences or diversity in the existing community environment by reflecting the diversity of community philosophies (minimum of coercion); and fifth. If we consider it in the context of the existing state, we may agree that sovereignty currently gives the greatest authority to control the government of the state to the people, and the people can decide for themselves how they should be governed (Manan, 1996). The issue of public sovereignty according to the Indonesian constitutional system, as stated in Article 1 paragraph (2) of the third amendment to the 1945 Constitution. Textually, the provisions of the article imply that the realisation of people's sovereignty can only occur if it is carried out in accordance with the mandatory requirements of the 1945 Constitution. People's sovereignty must be regulated and subject to constitutional limitations. As a result, the constitution has supremacy over the sovereignty of the people, and this section can be considered to include the notion of *constitutional democracy* (Mayo, 1960).

Accommodation of Candidates in Presidential Elections and Elimination of Thresholds for Presidential Candidacy

We hope that the existing election system does not deviate from the principles of democracy. Thus we can conclude that relating to the criteria and principles of democracy formulated by the experts above, which will become the common ground and the basis for making a system for nominating candidates for leaders and their representatives in the election system in force in Indonesia, among others: 1) By ensuring the right of citizens to participate in passive voting. Passive voting is the right of citizens to be elected to certain positions (Arfani, 1996). Ensure equal opportunities for all eligible citizens to run for. 3) Can accommodate diverse candidates to achieve an open system of political acceptance; 4) Increase the level of competition in elections. There are several reasons submitted to the Constitutional Court of the Republic of Indonesia against the Presidential Threshold in Law Number 7 of 2017 concerning Elections; These reasons include irregularities in determining the Presidential Threshold in force, especially the results of the 2014 legislative elections. Considering that the results of the current election are used to determine the procedure for nominating the President and vice president in 2014, it can be concluded that Indonesia is the only country in the world that stipulates a Presidential Threshold system based on previous election results. Furthermore, the actuality of the results of the 2014 election cannot be separated from the long and convoluted nomination process that starts from registration, continues with campaigning, and ends with the process of determining the winner of the election in various conditions and circumstances. Finally, the coercive character of the results of the 2014 elections, which were held consecutively, could hinder new political parties from submitting candidates for leader and deputy leader in the 2019 elections.

The relevance of the two-door route nomination system with the 4 sets above can be explained as follows: 1) With the availability of a two-door candidacy route, the passive rights of citizens are guaranteed, meaning that citizens who are not nominated by political parties can still use their rights independently; 2) With the availability of a two-door candidacy route, the state can provide equal opportunities for every citizen to nominate themselves as a candidate for President and Vice President; 3) Due to the availability of a two-door candidacy procedure, it will provide a wider selection of candidates, and the general election will be more competitive.

Adopting the two-door candidacy system, the result will create a democratic election environment. Since it will provide a wider selection of applicants, the system will provide more competitive competition (Pasha, 1988). This method will certainly make individuals most picky in choosing candidates. Determination of the Presidential Threshold for those who support the regulation of the 20 per cent threshold as a means of preserving and strengthening the current presidential system. The current mechanism that can provide solutions for political parties that can still participate in the next election cycle is one of the most important factors (Huda, 2006). Although there are still shortcomings in the implementation of the Presidential Threshold, the attitude of the representatives of the parliament in revising the regulation remains unchanged. In fact, in a presidential government system, the principle of holding presidential and Vice President elections does not require a quota of seats in parliament (Widaningsih, 2014). This explains why the presidential threshold requirements for the nomination of pairs of presidential and Vice President candidates are not in accordance with government principles. The separation of executive and legislative institutions (the executive is not dependent on the legislative) is a fundamental basis of the presidential government system (Hanan, 2016).

CONCLUSION AND RECOMMENDATIONS

Indonesia needs to implement a two-doors nomination system, which presents two types of doors as a nomination route so that democratic principles in elections can be implemented properly. Political parties are the first door, and independent (individual) channels are the second door. The first door is reserved for candidates supported by the political party that is running for the election. Meanwhile, the second door is for non-party candidates who want to run for themselves. This shows that the principles of democracy have not been implemented properly and are also not in line with the actual principles of the presidential system of government adopted by Indonesia because the presidential system of government does not require a quota of seats in parliament to hold presidential elections and the Vice President. This explains that the presidential threshold requirement for the nomination of pairs of presidential and Vice President candidates is not in accordance with the principles of the government system. For this reason, it is necessary to immediately implement and realise a two-door nomination system, namely through political parties and through an individual in the Presidential Election and also the Elimination of the Presidential Nomination Threshold to carry out democratic and fair elections in order to maintain peace and prosperity.

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FIFA'S DOUBLE STANDARDS TOWARDS IMPLEMENTATION OF ANTI-DISCRIMINATION PRINCIPLES IN FOOTBALL

[1]Lilis,[2]Ikhwanul Muslim*, [3]Bayu Prasetyo

Faculty Of Law, Universitas Muhammadiyah Kalimantan Timur, Indonesia
Email: [1]Lilislilis2804@gmail.com,[2]im671@umkt.ac.id,[3]bp996@umkt.ac.id

**Corresponding author*

ABSTRACT
Federation International de Football Association (FIFA) is an international governing body of association football that establishes sets of regulations to be adhered to by all association members. The sets of regulations classified as FIFA Statutes consist of numerous principles regarding sportsmanship that has to be complied in football as well as football playing rules. One principle included in that statutes is anti-discrimination towards particular countries, individuals or races, skin colors, ethnics, national or social origins, genders, disabilities, languages, religions, political views, and other issues. Nevertheless, the anti-discrimination principles somehow were not implemented well by the international football association. This paper mainly addressed to provide analysis on how FIFA implement anti-discrimination principles as an effort to enforce FIFA Statutes in the world of football. This study employed library research, in which FIFA Statutes became the main research subject. Based on the findings of this study, researcher figured out that FIFA as the one who established and complied football regulations have applied double standards in enforcement of anti-discrimination principles.

Keywords: *Statutes, Anti-Discrimination, Football*

Topic: Human Rights

INTRODUCTION
FIFA is an international governing body of association football establishing a number of principles, including anti-discrimination in any circumstances towards particular countries, individuals, races, skin colors, ethnics, national or social origins, genders, disabilities, political views, and many other issues. This principle is included in FIFS Statutes which consist of sets of regulations that have to be complied by all association members. The principle is a real form of FIFA's commitment as they fight for any kinds of discrimination that often occurs in world of football. In fact, among all efforts done by FIFA to get rid off any kinds of discrimination, however, FIFA is somehow inconsistent to implement the principle.

LITERATURE REVIEW
Some studies had been conducted to investigate efforts on implementing anti-discrimination principle in the world of football, and one of those studies was conducted by Riyanti et al. (2022) that had been published in e-Jurnal Hubungan Internasional Undip Volume 8 Number 2 about roles of advocacy networks in football against racism in Europe (Fare) towards the construction of anti-race discrimination discourse in European football industry. The finding of the study revealed that there have been numerous efforts conducted by many parties including FIFA itself to fight for discrimination acts in the world of football. Nevertheless, the study did not elaborate deeply on how FIFA had not been consistent to commit for implementing the anti-discrimination principle. Therefore, the present study aimed to conduct further analysis on the inconsistency.

METHODOLOGY
This study employed library research, in which the implementation of FIFA Statutes regarding anti-discrimination principles became the main subject. Since this type of research was juridical normative, the approach used in this study was a statute approach as well as other norms related to anti-discrimination principles.

FINDINGS AND DISCUSSION

1. Principles of Anti-discrimination

   The Universal Declaration of Human Rights states that all human beings are born independent and have equal dignity and rights. Every human being has been given senses and consciences that can be used to establish the spirit of brotherhood among individuals. Regarding the importance of human equality considered as universal values which are believed to be true, the principles of anti-discrimination have become logic consequences to be implemented in all aspects of human life. All independent nations are surely respectful of this principle, in which almost all countries in the world have included the principles into a basic legal instrument or its constitution. Consequently, it has become a fact that any kinds of discrimination in all over the world considered as immoral crimes that need to be fought together, including in the world of football. The Declaration of Human Rights is a global reference document regarding respect for human dignity, freedom and equality. This declaration then inspired the birth of various international agreements. So, in this case, FIFA embraces its responsibility to respect human rights throughout its operations and relationships. Through its competitions and activities to regulate and develop football, FIFA creates jobs and investments in infrastructure, promotes the values of equality and justice and strengthens social bonds between people and countries. This substantial impact carries with it considerable responsibility. FIFA recognizes its obligation to uphold the inherent dignity and equal rights of everyone affected by its activities. This responsibility is enshrined in article 3 of the FIFA Statute, which reads as follows: "FIFA is committed to respecting all internationally recognized human rights and will endeavor to promote the protection of these rights." The FIFA Human Rights Policy outlines the commitments of this legislation and outlines FIFA's approach to its implementation in accordance with the United Nations Guiding Principles on Business and Human Rights.

   In the past years, FIFA underwent an intense reform process triggered by increased awareness of the human rights risks surrounding its global events. The FIFA Human Rights Policy outlines the commitments of this legislation and outlines FIFA's approach to its implementation in accordance with the United Nations Guiding Principles on Business and Human Rights. In 2018, FIFA released a statement about human rights defenders and media representatives who need bidders and host FIFA tournaments to enforce their commitment to respect and help protect the rights of human rights defenders and the media representative.

2. FIFA Statutes and Regulations

   The FIFA Statutes and the accompanying regulations governing their implementation form the Constitution of football's international governing body. They provide the basic laws for world football, on which countless rules are set for competitions, transfers, doping issues and a host of other concerns. There are consequences that may occur when these sets of regulations are infringed by natural and legal persons. It is stated in FIFA Statute section VIII on Disciplinary Action article 56. The strengthening and specification of FIFA's human rights commitment, including anchoring human rights in the organizational strategy 'FIFA 2.0' and the development and approval of FIFA's Human Rights Policy; – The embedding of respect for human rights within the organization through clarifying and defining roles and responsibilities, increasing capacity among FIFA staff and enhancing cross departmental collaboration; FIFA is committed to continuing its efforts to implement its human rights responsibilities. As such, it looks forward to continued engagement with its various external stakeholders on that journey. FIFA's human rights approach is anchored in the UNGPs. It covers the responsibilities under the UNGPs to commit to respect human rights and to embed this commitment in the organizational structures and culture, to conduct ongoing and in-depth human rights due diligence, and to provide for or cooperate in remediation. Furthermore, the approach takes into account the responsibility to engage closely with external stakeholders and puts emphasis on FIFA's role in helping to protect the freedoms of human rights defenders and media representatives covering FIFA's events and activities.

3. Zero Tolerance Approach on Discrimination Acts

   As an international football association, FIFA implement zero tolerance approach towards discrimination acts. Numerous efforts in forms of regulations and penalties have been proposed by FIFA to stop any kinds of discrimination acts that possibly occur in football industry. One effort done by FIFA to fight against discrimination acts was to implement a new step in handling

discrimination acts and racism by providing penalties for football team such as relegating the club from league once they are proved to be involved in discrimination incidents (Subagyo, 2022). One real action of the effort had been felt by a Colombian international, Edwin Cardona, who was suspended by FIFA for five international matches. The incident occurred when Edwin Cardona, caught on camera, showed a confrontative gesture by making slanted eyes as a humiliation towards a South Korean player (Wicaksono, 2017). In addition, FIFA have clearly shown their support on equality and human rights on LGBT community by promoting the use of captain's rainbow armbands in some leagues and competition under FIFA. Racism in association football is most studied in the European Union and Russia, although racism incidents have been reported abroad. In response to racist incidents at association football matches, in May 2013, FIFA, the international body of association football, announced new measures to tackle racism in sports.

From the 20th century until 1991, South Africa had segregation policies and segregated football leagues in which the South Africans designated "black" race were not allowed to play in the Football Association of South Africa. During the mid-1950s attempts by mainly South African blacks to integrate the sport were stifled by FASA. In 1961 the FASA was suspended by the International Federation of Association Football for not complying with desegregation policies. In 1963 the ban was briefly lifted until it was reinstated in 1964 and remained in place for 28 years. In 1973 the South African games were held, and attempts by the South African government to keep the games segregated and the teams racially determined and confined led to the International Federation of Association Football pulling its support from the event. They were drawn in due to the promise of it being a multiracial event, but upon discovering that the teams were racially determined and the sports events themselves had segregated attendance, FIFA backed out. The South African Football Association (SAFA) was formed in December 1991 right before the end of Apartheid in South Africa and has no racial requirements for play and entry.

In Indonesia, there is a football organization, namely PSSI or the All-Indonesian Football Association, in this case, this organization began to discuss the rules around the issue of racism. From the results of the 2013 Indonesian Super League evaluation, PSSI saw that there were no rules governing racist issues in football matches, especially in Indonesia. In this case, it is difficult for Indonesia to identify the existence of racism because there is still no clear definition of racism, especially if the racism problem involves a group of club supporters who crowded the stadium because not a few insults come from the stands, so that one form of PSSI's efforts to overcome The occurrence of racism in every football match is to issue a policy that is asking the referee to make a report after leading the match, as it is known that the obligation to make a report is only carried out by match supervision, but in this rule, the referee can also provide a report to overcome racism problems that happened.

4. FIFA's Double Standards

   Currently, FIFA have become a center of attention by football fans due to their unfair attitude which was considered as double standards when suspending a country. The protest wave was triggered by FIFA's decision on giving decisive suspension to Russia, in which the suspension requires Russia to take part in all international competitions until an undetermined time (Arifin, 2022). The conflict began when the President of Russia, Vladimir Putin, commanded their troops to launch an attack on Ukraine. In fact, the invasion has continued until now. As a result of that unilateral action, FIFA decisively suspended the Russian National Team. The decision from FIFA and UEFA has brought back the debate about the involvement or dissemination of political messages in football. Previously, FIFA through their regulations forbade any chants or political messages during a football match (Dailymail, 2018). However, in that case, FIFA even allowed solidarity actions on Ukraine in almost all elite matches in Europe. This is in contrast to the events that befell Palestine or other religiously motivated oppressions such as what happened to Uighur Muslims in China (CNN Indonesia, 2022). Any forms of support for Palestine or other Muslim communities that was carried out in the world of football would actually bring suspension from FIFA on the pretext of not carrying a political message in the football environment.

CONCLUSION AND RECOMMENDATIONS

According to the analysis conducted by the writer, FIFA's efforts in implementing anti-discrimination principles still adhere to the context of double standards. In fact, FIFA, which is supposed to be the

guardian in enforcing the anti-discrimination principles, actually behaves inconsistently by giving suspensions to those who want to voice peace and justice for the oppression that has occurred. In the end, FIFA is expected to truly become a pioneer in voicing resistance to oppression through football, which is the most popular sport in the world, regardless of national or ethnicity origins.

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LEGAL PROTECTIONS FOR VICTIMS OF SEXUAL VIOLENCE IN EDUCATIONAL INSTITUTIONS: A LEGAL PERSPECTIVE IN INDONESIA

Aljidan Rizky Ramadhan[1], Ikhwanul Muslim*[2] & Bayu Prasetyo[3]

[1,2,,3]Faculty of Law, Universitas Muhammadiyah Kalimantan Timur, Indonesia..
Email:[1]aljidanramadhan@gmail.com;[2]im671@umkt.ac.id; [3]bp996@umkt.ac.id

[*]Corresponding author

ABSTRACT
Everyone can become a victim of sexual violence, regardless of circumstance, place, or time. This is inevitable as long as there is a power dynamic between individuals in the community. Indeed, sexual violence is a criminal act that is influenced by the powerless control of the perpetrator over the victim. In order to give these victims a sense of justice and safety, victims of sexual violence are constantly ignored by all parties, especially law enforcement. With numerous variations in the perpetrators' methods of operation, this crime can be easily encountered even in a learning environment. A few of the existing laws and regulations that address sexual violence in Indonesia include the criminal code, the law on the elimination of sexual violence, and the regulation of the minister of education that will specifically protect victims of sexual violence within educational institutions. This article aims to provide an overview of the various legal protections available to victims of sexual violence in educational institutions in Indonesia, namely such as student body harassment, rape and verbal sexual crimes. This paper employs normative juridical legal research with primary, secondary, and tertiary sources such as laws and regulations, journals, and books relevant to the subject at hand. Finally, this paper will provide an analysis of the results that show legal protections in Indonesia have fulfilled a sense of justice for victims of sexual violence in the educational environment.

Keywords: *Victims of Sexual Violence, Legal Protections, Educational Institutions*

Themes: Constitutional Law/Human Rights

INTRODUCTION

Sexual harassment is any act of degrading, insulting, harassing, or attacking a person's body, and reproductive function, due to inequality in power relations and gender, which results in or can result in psychological and/or physical suffering including those that interfere with a person's reproductive health. and lost the opportunity to carry out education safely and optimally. One of the factors causing acts of sexual harassment in the educational environment is because the perpetrators feel they have power. Perpetrators also feel entitled to act arbitrarily on students. Various countries have enacted legislation to eliminate sexism and gender discrimination in the education field. This is due to the fact that many students are sexually harassed while attending schools. As a result, the quality of mental, physical, and academic outcomes may suffer (Reitanza, 2018). Meanwhile, negative effects of sexual abuse include depression, post-traumatic stress disorder (PTSD), shyness, and alcohol use that interferes with learning process at school. The Indonesian Minister of Education, Culture, Research, and Technology (PERMENDIKBUD) has issued a regulation outlining the prevention and handling of sexual violence in the higher education environment, which is detailed in PERMENDIKBUD Law No. 30 of 2021 (Karami et al., 2021). Furthermore, Indonesia passed Law No. 12 of 2022 regarding the crime of sexual violence as a form of protection from violence and the right to be free from torture or treatment that degrades the degree of human dignity as guaranteed in the Republic of Indonesia's 1945 constitution (Huda, 2021).

LITERATURE REVIEW

A review of previous studies can be beneficial in determining what the authors will undertake in this study. Further, preliminary studies can be used to assess a researcher's position and identify previous

literature (Hejase, 2015). Deding Ishak conducted research on sexual harassment in educational institutions under the title "Sexual Harassment in Educational Institutions: A Policy Perspective." The research is expected to find a way to create policies on cases of violence and sexual harassment in educational institutions. As a result, the author has identified a gap in the writing where the author is lacking in knowledge regarding legal protection instruments for victims of sexual harassment. The author also does not include legal instruments that regulate sexual crimes

METHODOLOGY

The study utilises the qualitative method involving analysis on the primary and secondary data. The data used in this study was gathered from journals, books, or online articles with topics related to the research's themes, such as sexual harassment, sexual violence, violations in the field of education, etc.The analysis of data was done systematically using the designated themes and coding.

FINDINGS AND DISCUSSION

1. According to previous research findings, 19% of students have experienced sexual harassment committed by university staff in educational institutions in Indonesia. 75.9% of these victims of sexual abuse had experienced such harassment two to three times while in college. According to new student reports, the level of harassment reached 12.5%, while it could reach 24.9% for senior students. This implies that the rate of sexual harassment in college is increasing over time. It can also be seen that 28.6% of freshmen are sexually harassed by peers, while 35.7% of senior students are sexually harassed by peers. Sexual harassers on college staff or faculty are 78% men, 15% women, and 7% of the victim's gender is unknown. 84% of these incidents of harassment occur on college campuses. The perpetrators of this sexual harassment included up to 61% of faculty members, 27% of student employees, and 12% of staff. Meanwhile, 86% of sexual harassment cases committed by peers were committed by men. 11% of perpetrators are women, and 3% of perpetrators are unknown to the victim. As a matter of fact, there are legal instruments in Indonesia that govern the protection of victims of sexual violence, as stated in the PERMENDIKBUD Law No. 30 of 2021 and Law No. 12 of 2022 concerning The Crime of Sexual Violence (TPKS Law) (Mohamed, 2015).

2. Law No. 12 of 2022 concerning The Crime of Sexual Violence (TPKS Law)
   This law addresses the prevention of all types of sexual violence crimes, as well as the treatment, protection, and restoration of victims' rights, along with coordination between central and local governments. and international cooperation so that the Prevention and Treatment of Sexual Violence Victims can be effectively implemented. Furthermore, community involvement in the prevention and recovery of victims is regulated in order to achieve sexual violence-free environments. The legal basis of this law is Article 20, Article 21, and Article 28G paragraph (2) of the 1945 Constitution of the Republic of Indonesia (Republik Indonesia, 2021).

3. PERMENDIKBUD Law No 30 of 2021
   PERMENDIKBUD Law No 30 of 2021 on the Prevention and Handling of Sexual Violence (PPKS) is a regulation issued by the Minister of Education, Culture, Research, and Technology in response to the numerous cases of sexual violence that occur in universities in Indonesia. The regulation is aimed specifically at the academic community, particularly universities (Mahmudah & Fatimah, 2021). The Minister of Education and Culture issued the regulation because every citizen has the right to be protected from all forms of sexual harassment and the growing number of cases of sexual violence in universities, which is interfering with the implementation of the Tridharma of higher education and lowering the quality itself; and regulations or laws that guarantee in cases of sexual harassment in universities are required to prevent and deal with sexual harassment (Komisi Nasional Perempuan, 2020). The goal of issuing Minister of Education and Culture Number 30 of 2021 is to develop and implement initiatives to prevent and respond to sexual harassment on and off campus, as well as to be humane and dignified, collaborative, and violence-free among students, educators, education staff, and campus residents in universities. Cases of sexual harassment in Indonesia are still problematic and do not have strong legal certainty, especially in terms of evidence in court. Protection for victims of sexual harassment in Indonesia is currently still very minimal. Victims of sexual harassment are still difficult to prove when he was a victim of sexual violence. In addition,

the long judicial process often makes this case hampered and not followed up. of the legal structure. In Indonesia, both human resources (HR) and government agencies or institutions are still few who are trained to be able to understand victims. There are still many institutions that don't care about victims of sexual harassment , and not a few people even blame victims of sexual violence. legal culture that still applies a patriarchal culture. The complicated justice system often makes victims exhausted both psychologically and financially, which causes them to choose to withdraw their lawsuits.

CONCLUSION AND RECOMMENDATIONS

Referring to the text of the TPKS Law, there are nine types of sexual violence as stated in Article 4 Paragraph 1. The types of sexual violence consist of non-physical sexual harassment, physical sexual harassment, forced contraception, and forced sterilization. Then there are forced marriages, sexual torture, sexual exploitation, sexual slavery, and finally, electronic-based sexual violence. In addition to the nine types of sexual violence, there are 10 forms of sexual violence that are categorized as criminal acts. It is imperative that there be laws that specifically protect those who have been the victims of sexual violence because these individuals are sometimes neglected when it comes to legal protection. And it is also necessary to establish a task force within educational institutions as stated in PERMENDIKBUD Law No. 30 of 21 Article 23 (1) In implementing the Prevention and Handling of Sexual Violence, the Higher Education Leader forms a Task Force at the Higher Education level. (2) The Task Force as referred to in paragraph (1) is formed for the first time through a selection committee. Moreover, the crime of sexual violence is already governed and protected by general law in Indonesia. In higher education, the Minister of Education issued a regulation as a serious effort to reduce cases of sexual violence and as legal protection for victims of sexual violence in universities.

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STRENGTHENING FINANCIAL ACCOUNTABILITY AND TRANSPARENCY AMONGST LOCAL CHARITY ORGANISATIONS BY REFORMING THE SOCIETIES ACT 1966

Muhammad Nur Nasution bin Saleh[1], Tuan Husnaa Umairah binti Tuan Mohd Azran[2], Wan Miskiah binti Wan Mahmood[3], Nur'Afini binti Mohd Norizam[4] & Su'aida Safei[5]*

[1,2]*Faculty of Law, Universiti Teknologi MARA, Malaysia*

Email: [1]20128287108@student.uitm.edu.my; [2]2020952283@student.uitm.edu.my; [3]2020978493@student.uitm.edu.my; [4]2020978513@student.uitm.edu.my.

[*]*Corresponding author*

ABSTRACT

Local Charity Organizations (LCOs) are generally established for welfare purposes and are governed by the Societies Act 1966 (SA, 1966). The purposes of this research paper are: (1) to investigate the shortcomings of the SA 1966 in promoting accountability and transparency of the LCOs; (2) to examine Singapore's initiatives aimed to ensure the Singapore Charitable Organisations (SCOs) are more transparent and accountable and to study whether they can be implemented in Malaysia, and; (3) to propose improvements to the SA 1966 in order to promote financial responsibility and transparency among LCOs. Upon finding, it is suggested that the level of accountability and transparency amongst LCOs can be strengthened by: (1) imposing a harsher penalty to every LCO which fails to submit a duly audited financial report to the ROS; (2) setting a new standard for a more comprehensive financial report; (3) imposing a compulsory disclosure of information to the public through official websites; (4)regulating the management fees percentage that the LCOs can take, and; (5) establishing a single regulatory body to control and supervise LCOs exclusively. It is hoped that the suggestions would lead the LCOs to be more accountable and transparent and ultimately increase the public's trust in LCOs.

Keywords:
Local Charity Organisation, Societies Act 1966, Audit, Disclosure, Reform.

Themes*:* Ethics and Law

INTRODUCTION

This research begins with a background on transparency and accountability within LCOs. The problem statement explains the shortcomings of the current law regulating these two practices and the need to improve it. There are three research questions in this research, namely: (i) What are the weaknesses in the SA 1966 in strengthening financial accountability and transparency amongst the LCOs?; (ii) What is the approach taken by Singapore in ensuring the SCOs are practising a high level of transparency and accountability and can they be adopted in Malaysia?; and (iii) What are the proposed suggestions to reform the SA 1966 in order to strengthen financial accountability and transparency amongst LCOs?. On the other hand, the research objective is to answer all the research questions via doctrinal legal research, comparative study and qualitative research.

LITERATURE REVIEW

According to research conducted by Hisham, M.I. and Ramli, N.M. (2017), there is weak compliance amongst the LCOs towards the auditing requirement as provided in Section 26 of the S.A. 1966. Next, according to research conducted by Roslan, N. et al. (2017), the levels of financial and non-financial information revealed by Malaysian LCOs registered with ROS are rather low. In addition, research conducted by Hasnan S. et al. 2012 suggested that the Malaysian government should learn from the Singaporean government on initiatives that could be implemented to counter internal problems in LCOs,

such as fraud and mismanagement. Furthermore, Othman, R. & Ameer, R. (2014) submitted that LCOs should have proper audit and monitoring procedures in place to enhance the transparency and accountability level of each LCO**.**

METHODOLOGY

The doctrinal study, comparative study and qualitative research were conducted to investigate the SA 1966's shortcomings in three areas: (1) submission of legally audited financial reports to ROS; (2) public dissemination of information; and (3) management fees percentage of LCOs. This method was also conducted to study the initiatives that are implemented by the Singaporean government to regulate the SCOs and the possibility of adopting them in Malaysia.

FINDINGS AND DISCUSSION

No.	Finding	Discussion
1.	It is compulsory for every LCO to submit to the ROS a set of annual reports, as in Section 14(1)(d) of the SA 1966.	However, during an interview session with the ROS, it was mentioned that less than 50% of organisations (including LCOs) fail to submit their Annual Report to the ROS by 2021.
2.	It is compulsory for every LCO to audit their financial reports as in Section 26 of the SA 1966.	According to Jasri Kasim (the Director-General of the ROS), all LCOs registered under ROS are obligated to provide yearly statements, including audited financial reports.
3.	Section 14(1)(d) of the SA 1966 should be amended.	This provision should be amended to make it compulsory for every LCOs to produce several documents which are crucial to provide thorough information about the LCOs financial situation and performance.
4.	LCOs should disclose their financial information only when there is a request, as in Section 29 of the SA 1966.	Due to escalating problems surrounding LCOs, it was discovered that public trust would enhance if LCOs are being transparent by disclosing their financial and non-financial information to the public
5.	The management fee of LCOs is not specified by any provision in the SA 1966	The representative from ROS also affirmed that the percentage of management fee is an internal decision of each LCOs because it is not mandated in any rule or regulation.
6.	Singapore has implemented the Charities Act 1994 as a single regulatory framework that governs the operations of SCOs.	The Act also established a Commissioner of Charities (COC), who was given broad supervisory powers over SCOs, including discovering mismanagement and taking corrective or preventive action in connection with SCOs mismanagement.

CONCLUSION AND RECOMMENDATIONS

Recommendation 1: Future research must be done to investigate the suitable amount of penalty imposed on LCOS, which fails to submit its duly audited financial statement to the ROS.

Recommendation 2: It is recommended that future research must be conducted on the suitability of establishing a Charity Commission in Malaysia to supervise the practice of transparency and accountability among LCOs.

Recommendation 3: Further research must be conducted to investigate whether the financial reporting requirement laid down by the Income Tax Act 1967 (ITA 1967) could be incorporated into Section 14(d) of the SA 1967 because the requirement in the former is more comprehensive.

Recommendation 3: Section 26 should be amended to require all LCOs to disclose financial and non-financial information on their official websites.

Recommendation 5: Extensive research should be conducted on the suitable amount of LCOs management fees and how to regulate it.

Conclusion: This research met all aims and answered all questions. This research has solved the first research questions by assessing the SA 1966's inadequacies in strengthening financial responsibility and transparency among LCOs in Chapter 3. Chapter 4 answered the second research question by reviewing Singapore's approach to maintaining SCOs accountability and transparency. In Chapter 5, the second research objective and question were achieved by analysing whether Malaysia could adopt Singapore's method of regulating SCOs. Finally, chapter 5 proposes suggestions to improve SA 1966 to promote financial responsibility and transparency among LCOs, achieving the third research objective and question.

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THE OPTIMIZATION OF THE ROLE OF INDONESIA JUDICIAL COMMISSION LIAISON (KY): ALTERNATIVE SOLUTIONS TO DISCUSSION ESTABLISHMENT OF A JUDICIAL COMMISSION IN THE REGION

Ahmad Sabirin[1]*, Raafid Haidar herfian[2] & Sabila Ridwan[3]

[1,2,3]*Faculty of Law, Universiti Trisakti, Indonesia.*
Email: [1]achmadshobirinfull@gmail.com; [2] raafidhaidarh@gmail.com; [3]sabilarid1@gmail.com
Corresponding author

ABSTRACT
The establishment of the Judicial Commission Liaison ("KY Liaison") is expected to make a good contribution to the implementation of the supervisory function carried out by the Judicial Commission (KY) of the Republic of Indonesia (Central). However, the reality is that the formation and presence of KY Liaison in the regions has not been effective due to various problems. This research is focused on two main problems: 1). What are the problems faced by KY Liaison in the regions?; and 2). How to optimize KY Liaison in the regions to increase the effectiveness of judge supervision? This type of study is a normative juridical study using a statutory approach and a conceptual approach. The data sources used are secondary data sources which were analyzed using a literature study. The results of the study show that the problems of KY Liaison are related to the liaison nomenclature, the number of liaison memberships, facilities and infrastructure, and employment status. As a solution, in terms of nomenclature, it is important to change the connecting nomenclature. In the aspect of membership, it is necessary to add members so that they are ideally suited to the workload. Then related to facilities and infrastructure, adequate facilities and infrastructure must be provided for the implementation of the duties and functions of KY Liaison. If seen from the aspect of employee status, KY Liaison employees in the regions may not come from honorary employees.
Keywords: *Individual Candidate; Accommodation;Presidential Threshold; Indonesia Law*
Themes: Constitutional Law

INTRODUCTION

In further developments, the Constitutional Court's Decision No. 005/PUU-IV/2006 has also caused debate on the position of KY in the state structure. This is because, in its decision, the MK said that as a state institution, KY is not the executor of judicial power but only a supporting element or auxiliary organ in which KY only assists or supports the perpetrators of judicial power. Therefore, KY cannot be used as an organ that carries out the role of checks and balances (Minutes of KY, 2006, 23). On the other hand, the MK is also of the view that the position of the KY is also stipulated in the 1945 Constitution as an independent state commission whose composition, position and membership are regulated by a separate law. Thus this state commission is not under the influence of the MA or controlled by other branches of power. In this context, the relationship between KY and MA can be said to be independent but interrelated. Apart from the position of KY in the Indonesian constitutional structure, one of KY's powers is to supervise judges. Even in the context of optimizing supervisory powers, Law No. 22 of 2004 jo. Law No. 18 of 2011, the KY was given the authority to form liaisons in the regions as needed. One of the objectives of the establishment of the KY Liaison is aimed at providing convenience for the public in submitting reports, increasing the effectiveness of court monitoring, and institutional socialization in order to maintain and uphold the honour, dignity and behaviour of judges. Apart from the mandate of the Law, the presence of a KY Liaison is in accordance with the dynamics of the environment as well as an increase in the duties and functions of KY in requiring greater support from work partners. The establishment of a KY Liaison is also an effort to improve itself and improve the quality of services for justice seekers (Miriam, 2006).

LITERATURE REVIEW

Some Indonesian legal experts also have views on the rule of law. Sri Soemantri stated that there are at least four elements of a state of law (Sri Soemantri, 1992, 10), namely: a) The government in carrying out its duties and obligations must be based on laws or regulations; b) There is a guarantee of human rights (citizens); c) There is a division of power within the State; d) There is supervision from the judiciary (rechterlijke controle). Anyone who carries out a function determined by a legal order is an

organ (Raisul Muttaqien, 2006, 276). This means that the state organs are not always organic. Besides organic organs, more broadly, every position determined by law can also be called an organ as long as its functions are norm-creating and/or norm-applying. Thus, the KY was formed as a state institution that has a clear purpose based on existing norms and has a very important function in supervising the existing courts so that it can also monitor the integrity of judges who carry out their duties. Judges are a state organ according to this narrower understanding because they are elected or appointed to occupy their function because they carry out their function professionally and, therefore, receive regular wages and salaries, which are sourced from state finances. Important characteristics of state organs in this narrow sense are that (1) the state organ is elected or appointed to occupy certain positions or functions; (2) the function is carried out as the main profession or even legally exclusive; and (3) because of that function, they are entitled to receive salary compensation from the state" (Jimly Asshiddiqie, 2004, 32).

METHODOLOGY

This type of research is a type of juridical-normative research, namely legal research conducted by using library materials or secondary data as basic materials, by conducting searches on various laws and regulations related to KY and KY Liaison.

FINDINGS AND DISCUSSION

The Problem of the Existence of the Judicial Commission Liaison in the Regions

There are at least 6 (six) problems so far that have occurred in the regional KY Liaison. *First*, the KY Liaison institution. Broadly speaking, several problems related to institutions are as follows: a) Liaison institutions in the regions have not been well consolidated, so it is unclear whether these liaisons are permanent or temporary institutions; b) The current institutional design in its implementation encounters many obstacles and cannot work optimally. In order to improve the performance of the Liaison to support the performance of the KY, it is necessary to expand or add the main duties and functions of the KY Liaison. This means that the nomenclature of KY Liaison is not appropriate if it is based on the addition or expansion of the main tasks and functions.

Second, the number of KY Liaison memberships. As explained in Article 9 paragraph (1) of KY Regulation No. 1 of 2017, KY Liaison consists of 1 (one) coordinator and a maximum of 5 (five) assistants. The provisions in the article, literally it can be seen that the core organ of the KY Liaison is only 1 (one) person. As for the rest, his capacity is only as an assistant. This means it can also be read that only 1 (one) person has the authority to carry out the duties of KY Liaison. *Third*, very limited facilities and infrastructure. Facilities and infrastructure are important supporting parts in order to encourage the optimization of the implementation of the functions and duties of the institution. Therefore, his presence became a necessity (Azhari, 1995). Likewise, in order to encourage the role of KY Liaison to run well, of course, adequate facilities and infrastructure are needed. However, de facto, the facilities and infrastructure owned by KY Liaison are still very limited. *Fourth*, minimal budget because it is based on the budget of the central KY secretary general. Based on a review from MPI Consulting and the KY Liaison Development Team, the operational cost for each KY Liaison in the regions is only IDR 7,000,000.00 per year. The amount of the budget is very inadequate if we look at the tasks and coverage areas that must be carried out by the KY Liaison in several provinces. *Fifth*, minimal authority. In terms of technical implementation of duties, the KY Liaison does not have the authority to carry out executions, while the public and judges continue to ask for follow-up on their reports. This aspect is due to Article 5 of KY Regulation No. 1 of 2017, the authority of the KY Liaison only extends to the preparation of a report on the results of court monitoring to be forwarded to the central KY.

Optimizing the Role of the Judicial Commission Liaison in the Context of Increasing Judges' Supervision

The existence of the KY Liaison cannot be said to be optimal in the implementation of supervision of judges in the regions. For this matter, optimizing the role of KY Liaison in the regions becomes a necessity. Therefore, in order to make it happen, it is necessary to pay attention to several aspects of improving the KY Liaison, namely the nomenclature of the KY Liaison, the number of liaison memberships, facilities and infrastructure, budget, and staffing status (Muntoha, 2006).

First, Liaison nomenclature. In the Big Indonesian Dictionary (KBBI), the diction “liaison” is defined as a person who acts as an intermediary. From this meaning, it can be read that the “connector”

is not a person or entity that has full power over something it owns. For the problem, ideally the nomenclature used should be “representative”. The nomenclature of “representative” is appropriate for the following reasons: 1). According to the KBBI, the term “representative” is defined as a person or group who has the ability or obligation to speak and act on behalf of. Thus, if the KY Liaison is changed to a KY Representative, the agency (liaison) is a representative of the central KY in the regions who can act on behalf of the central KY. In addition, it can also be interpreted that the institution (liaison) also exercises the authority as possessed by the central KY. *Second,* the number of liaison memberships. As an institution that is projected to have the supervision of judges in the regions, it should be a concern in terms of membership. This is because the area coverage is also a consideration of the importance of the membership of the KY Liaison to be ideal. Therefore, the current membership of the KY Liaison, which only amounts to one person, needs to be added (Dahlan, 2000). *Third,* facilities and infrastructure. In this aspect, at least, there must be an adequate office. Although it does not have to be a permanent office, office facilities can be provided by renting or borrowing infrastructure owned by the local government. *Fourth,* budget (Ridwan, 2016). With regard to the budget, it can be projected that a budget is balanced with the workload of the KY Liaison. Therefore, the solution to the budget must be based on the performance that has been charged to the KY Liaison in the regions. Fifth, employment status. The status of the employee must be changed to the KY Liaison in the regions. The status may not be honorary because the actual honorary status is not clear status. The unclear status clearly affects the level of public trust. Therefore, the membership status of KY Liaison and its supporting employees in the future must be clarified (Tahir, 1995).

CONCLUSION AND RECOMMENDATIONS

Based on the discussion above, it can be concluded that the problems of KY Liaison in the regions consist of 1). Liaison Nomenclature; 2). The number of liaison memberships; 3). Facilities and infrastructure; 4). Employment status. In order to make the KY Liaison effective in the future, it is important to improve these four aspects. In terms of nomenclature, it is important to make changes no longer using the word "liaison" but "representative". In terms of membership, it is necessary to add members to make it ideal according to the workload. Furthermore, related to facilities and infrastructure, adequate facilities and infrastructure must be provided for the implementation of the duties and functions of KY Liaison. Then in terms of employee status, KY Liaison employees in the regions may not come from honorary employees. All stakeholders, especially the Indonesian Judicial Commission, must encourage changes to KY Regulation Number 1 of 2017 so that its content can lead to strengthening the duties and functions of KY Liaison in the regions.

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TRACK 7 WOMEN AND CHILD LAW

REVISITING THE EMPLOYMENT RIGHTS OF WOMEN IN THE PRIVATE SECTOR

Dayang Safiah Nadhira Osman[1], Najwa Zainon Abidin[2], Siti Zulaiqa Nordin[3], Zahida Zahuri[4], Norazlina Abdul Aziz[5]* & Norsyazrah Zulkifli[6]

[1, 2, 3, 4, 5,]*Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia,* [6]*Department of Law, Universiti Teknologi MARA, Cawangan Dengkil, Selangor, Malaysia.*

Email: [1]*2019810758@student.uitm.edu.my;* [2]*2019810854@student.uitm.edu.my;* [3]*2019811086@student.uitm.edu.my;* [4] *2019884016@student.uitm.edu.my;* [5] *noraz397@uitm.edu.my;* [6] *syazrah@uitm.edu.my*

[*]*Corresponding author*

ABSTRACT

Inequality in workplaces is mainly attributed to discrimination against working women due to the lack of enhancement in women's employment rights. The Employment Act of 1955 accorded protection over the rights of women employees in general. The new amendment made in 2022 to the Employment Act 1955 resolved some of the issues of women's worker rights. However, the effectiveness of this Act has yet to be tested in addressing issues of inequality for women working in the private sector, such as the lack of breastfeeding rights in the workplace and an urgent need to relieve the maternity leave protection of its punishing conditions and limitations. Women working in the private sector are subjected to contractual agreements. The main objective of the study is to propose recommendations to elevate the employment rights of female workers in the private sector in Malaysia, specifically on the right to breastfeed and maternity leave protections. This study adopts a doctrinal legal research methodology that examines the Malaysian Employment legal framework in depth to discover the strengths and shortcomings of the framework. It will be appraised in the recommendation to suit Malaysia's current legal framework. This study finds a legal loophole in Malaysian Employment rights regarding the rights to breastfeed in the workplace, and the current maternity leave provisions need a ton of improvement. Ultimately, this study proposed some recommendations to reform Malaysian current employment law.

Keywords: *Employment Law, Working Women, Maternity Rights*

Themes: *Employment Law*

INTRODUCTION

The Malaysians' employment rights in the private sector are mainly governed under the Employment Act 1955, which recognises women's employment rights, specifically under Part VIII and Part IX. The act provides selective employment rights for women and maternity protection, respectively. The average percentage of female labour force participation rates for developed countries is set to be above 60%, which unfortunately means Malaysia is still below the standard to this date. In addition, there is still an absence of a few more prominent women's employment rights, such as breastfeeding and menstrual leave, when compared to a global lens (Fallon, 2017). In contrast with the female employees working in the public sector who are showered with numerous job benefits, the same cannot be said for the majority of female workers in the private sector. In the absence of a dedicated legal regime, the rights of women, especially in the private sector, may vary from one to another. The employment laws in the public sector are not only governed by a set of laws under the purview of the Public Service Commission but also by several circulars, which makes the labour law governing this sector to be more concise and detailed (Chia, 2021). For example, the Malaysian government sector provides childcare services for civil servants, while this service cannot be seen to be provided across the board by some corporate sectors (Murad, 2021). This is one of the indicators that women employees in the public sector enjoy more rights and interest in contrast to the private sector's female workers, which is very concerning.

LITERATURE REVIEW

Countless studies have pointed out the substance of elevating women's employment rights both locally and internationally. As asserted by Basri (2021), rights to employment are social and economic rights of everyone as a means for livelihood, which falls under the basic principle of human rights. The economic field workers' rights are basic civil rights (Lofaso, 2017). A multitude of studies has acknowledged numerous perceptions towards women's rights. Kashirkina and Morozov adhere to the concept that women's rights are also rights included in the general catalogue of human rights (Kashirkina, 2020). Several studies have sufficiently explained the history of women's employment rights in Malaysia. According to Gallway and Hagan, around the year 2000, working-class Malay women have not always had the same opportunity as middle-class Malay women, losing political sway over their labour rights (Crinis, 2008). Furthermore, Mat Arif (2019) posited, as per the Malaysian 2020 Budget, private sector employees will be able to take 90 days of maternity leave rather than 60 days beginning in 2021 to adhere to the international standard. Various studies which were locally conducted emphasised the breastfeeding rights of working women in Malaysia. Hashim, S. et al. (2019), who conducted research in 2020, asserted that women who work as healthcare providers at Universiti Sains Malaysia Hospital have the hardship of providing successful exclusive breastfeeding during the first six months of their children's life. Researchers conducted several studies to understand the need for the right to breastfeed in the workplace. Also, Hassan(2012) analysed legal sources which cover these rights and found that the Employment Act of 1955 does not provide any rights to breastfeed; thus, it creates legal lacunae concerning women's rights (Hassan, 2012). Gaps in the literature were that most of them had not specifically discussed the right to breastfeed on its own but had an addition of other factors affecting the practice of breastfeeding by working mothers. The studies of the literature had not been specified for rights in the workplace but more focused on working mothers. It was also conducted in specific areas, small and not wholly in Malaysia.

METHODOLOGY

This study employed doctrinal legal research to examine the weaknesses within the local legislation in regard to the employment rights of female workers within the private sector. Therefore, both primary and secondary sources of law were examined. The latter is important to highlight the current development in the legal area. Both sources have been accessed not only from the library but also from online database resources such as Lexis Legal Research for Academics, CLJLaw, HeinOnline, and Sciencedirect, as well as websites of relevant institutions and nongovernmental organisations. Data were analysed using content and thematic analysis with specific coding and theme.

FINDINGS AND DISCUSSION

The Constitutional Perspective

The right to breastfeed and maternity leave is closely related to health, and there are no express provisions on the right to health in Malaysia's Federal Constitution. This indicates that Malaysian citizens have no constitutional provisions to claim their right to health care (Mokhtar, 2021). Nevertheless, Article 5(1) of the Federal Constitution provides the right to life and personal liberty where every individual is protected from any unlawful physical damage, as well as torture and other cruel, inhuman, or humiliating treatment or punishment. The right to life, which is covered by the other portion of Article 5(1), has a significantly broader scope and impact based on the interpretation of judicial decisions. In *Tan Teck Seng vs Suruhanjaya Perkhidmatan Pendidikan & Another [1996] 1 MLJ 261*, the court referred to the judgement in *Munn v Illinois [1877]94 US 113* in determining the meaning of the right to life.

Legal view on employment rights of women in Malaysia

The vital statute regulating all labour relations is the Employment Act. The Act was first established in 1955 before Independence Day and has been revised four times respectively in 1981, 1994, 1999 and 2021. The Employment Act of 1955 governs all matters pertaining to employment, such as contracts of service, wages, rest and work hours, holidays, leaves, termination, and layoff benefits. There are specific provisions enacted under the statute for pregnancy and maternity protection. Whereas, on maternity leave in the private sector, the provided leave is for a period not less than 60 consecutive days for every female employee under Part IX of the Employment Act 1955. In 2022, it was amended to a maternity leave of

not less than 98 consecutive days. However, the limitation stays where only a maximum of five deliveries for female workers in the public sector were privileged to acquire the leave. For public sector employees, an extension of unpaid leave of up to three months is provided.

CONCLUSION AND RECOMMENDATIONS

In summary, it is pertinent for Malaysia to consider implementing the rights for breastfeeding and strengthening the provisions already existing within the Employment Act, such as the ones on maternity leave and maternity allowances. This will ensure that Malaysia is not behind other countries and the global changes in the women's rights landscape; it will also protect the interest of Malaysia's own female workers in workplace conditions to amplify the rate of participation in the labour force and guarantee their attachment to their respective workforce long-term.

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TRACK 8 FAMILY LAW

A DISTRIBUTION OF EPF FUNDS AS A MATRIMONIAL PROPERTY IN CIVIL COURT

Ravindran Nadarajan[1]*, Hamizah Abd Rahman[2], Tengku Adida binti Tengku Zainal Mulok[3], Mohamad Syauqi Bin Mohamad Arifin[4], Che Natheera Binti Syed Abdul Aziz[5]

[1]*Postgraduate student at Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM), Malaysia*
[2,3]*Lecturer at Faculty of Law, UiTM Cawangan Kelantan, Malaysia*
[4]*Lecturer at Faculty of Information Management, UiTM Cawangan Kelantan, Malaysia*
[5]*Lecturer at Business and Finance, UTAR, Kampar, Perak.*

Email: 1ravindrann@utar.edu.my; 2hamizahabdrahman@uitm.edu.my; 3adida359@uitm.edu.my 4mohdsyauqi@gmail.com;

**Corresponding author*

ABSTRACT
Under section 76 of the Law Reform (Marriage and Divorce) Act 1976, the courts have classified the matrimonial assets distributed upon divorce on the claim related to the existing assets acquired during the course of a marriage, such as matrimonial home, buildings, land, etc. Nevertheless, the limited source of existing property acquired during the course of marriage failed to meet the needs of financially constrained divorcees. Therefore, one spouse's Employees Provident Fund (EPF) is considered for matrimonial asset and distributed to another spouse. On this basis, most of the spouse has contributed either directly or indirectly towards raising the welfare of the family; thus, upon divorce, the most non-acquired spouse is left behind with nothing. Therefore, it is fair to include these EPFs in the distribution of matrimonial assets upon a divorce. This paper intends to look into judicial decision approaches applied related to the subject matters. This also discusses the legal principle the Malaysian civil court could apply when it comes to claims on EPF funds to be distributed as matrimonial assets. The research methodology adopted in this paper is judicial and doctrinal analysis. Undoubtedly, this would prevent the disadvantages of economic disparity between spouses upon divorce by taking into consideration other assets, such as EPF, to be distributed as matrimonial assets.

Keywords: *Matrimonial Assets, EPF, Future assets, Spousal rights, Economic disparity,*

Themes: Family Law

INTRODUCTION

The Employees Provident Fund (commonly known as the "EPF") is a social security fund established under the EPF Act 1991 to provide retirement benefits to employees working in the private sector in Malaysia. There is an amount of money paid to the EPF as a contribution based on the monthly salary of an employee. The monthly contributions will be credited to the employee's EPF account. The EPF contributions of an employee are made up of the employee's and employer's share. The Employees Provident Fund (Amendment) Act 2007 amended the Employees Provident Fund Act 1991 (EPF Act 1991) by inserting a new part VA after part V which came into force on 1 July 2008 (PU(B) 264/08) which allows the court to order the EPF funds as matrimonial property. Therefore, Part VA is clearly defined that Section 53A of the EPF Act 1991 has given the power to the court to order EPF funds as matrimonial property and subject to distribution to non-acquired EPF spouses.

LITERATURE REVIEW

There are few works of literature review on the distribution of EPF as matrimonial property related to LRA. However, there are few types of research done on the concept of Sharīʿah laws on these subject matters with different laws applied. According to Ibrahim and Hak (2007), when a divorce occurred, the issue of matrimonial properties was irrelevant, as whatever was acquired by the husband would remain

his sole right. According to Ibrahim (2008) said that the court should also consider the couple's financial ability, especially when it involves the matrimonial assets acquired jointly by both parties but only registered under either party's name. However, the rights of the Chinese and Indian women to matrimonial property in Malaya and, subsequently, Malaysia have been recognised by the law beginning with the Married Women Ordinance 1957 and followed by the LRA. Besides that, other issues raised in a book entitled Family Law in Malaysia by Pillai (2009) were related to the monies kept in the EPF, properties obtained after the divorce and the issue of being a trustee of the properties for minors at the time the distribution of the properties is being made. According to Hak (2007), there is no conflict between the LRA 1976 and Sharīʿah in the division of matrimonial property as the provisions of both laws are the same except in matters concerning the Employee Provident Fund (EPF) and insurance. This is because the EPF has a distribution for non-muslim for matrimonial property as compared to Muslims. Therefore, this analysis is carried out to define the relevance of EPF assets for distribution as matrimonial property.

METHODOLOGY

This paper intends to look into judicial decision approaches applied related to the subject matters. This also discusses the legal principle that the Malaysian civil court could apply when it comes to claims on EPF funds to be distributed as matrimonial assets. The research methodology adopted in this paper is judicial and doctrinal analysis.

FINDINGS AND DISCUSSION

The relevant provision related to the distribution of matrimonial property is referred to under section 76 of the Law Reform (Marriage and Divorce) Act 1976. Thus, the said provision does not mention that the future assets should be distributed as matrimonial property, which includes EPF. Therefore, the Employees Provident Fund (Amendment) Act 2007 was amended to include section 53A of the Employees Provident Fund (EPF) Act 1991 to give right on the claim of their spouse EPF to be distributed as matrimonial property. Section 53A of EPF Act 1991 precisely emphasised the proceeding of the transfer of credit from the account of an EPF member of the Fund into the account of the receiver named in the order by the court as distribution of matrimonial property. Though, as per section 53A of EPF Act 1991, the position of an EPF's contributor spouse money is being questioned as to the matters of the matrimonial property where none EPF's contributor spouse is entitled to claim for a share of their spouse's EPF money. The main justification for the EPF monies claim is to solve the disparity or disadvantage conditions between spouses, and upon divorce, the financial contribution based on these specific assets can be generated as income support to the former wife and children. This opens up a possibility for non-contributor spouses to claim a share of their contributor spouse's EPF money on certain occurs when there is scarification made by the spouse's wife on the job. For example, wives who surrendered their job or career just for the reason of taking care of children and the welfare of the family often ended up making no income at all and therefore made no monetary contribution towards the acquisition of matrimonial property. This caused the former wife to suffer from the financial sustenance of their life. Therefore there is a need for a claim on the share of the husband's EPF.

The wife had entered into the marriage with the intention of growing old with the husband, and on his retirement, they would both enjoy the benefit from the monies set aside in EPF contributions. Therefore, with the breakdown of the marriage, the husband should not be allowed to benefit solely from the EPF. A wife who has to give up her job or career in consideration of marriage life often gives up not only her income but also the chance to continue to build up her EPF funds. In this scenario, the EPF contributions by the husband and wife are entitled as matrimonial assets when acquired during the marriage. Suppose either spouse can prove to the court that they lost their saving on EPF as a result of losing their job for the sake of taking care of the family. This would allow the court to grant the spouse who lost their job and lost saving to EPF is entitled to EPF's money from their spouse. There are few cases justified on the right of the other spouse to claim on the EPF as matrimonial property.

In early years, the court clearly stated the EPF is a matrimonial asset even on its nature, where these types of assets it is acquired by the sole effort of one party to the marriage, which allows for the distribution of matrimonial property at the discretion of the court, as can see the ruling

in the case *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693. On the facts, the applicant and respondent were married in 1970 but separated in 1988. The applicant filed a divorce petition in October 1992, and the respondent retired in April 1993 at 55. The applicant requested that 50% of the EPF and gratuity payments due to the respondent be placed in a fixed deposit. The court held that the respondent was ordered to deposit half of his EPF and gratuity payments with his solicitors to be kept in a client's account as a fixed deposit until disposal of the applicant's application for ancillary relief pursuant to the divorce petition. In the case above, the court allowed an injunction to preserve half the husband's EPF money until the disposal of the wife's application for ancillary relief. Section 76(4) of the LRA does require that the party who acquired the assets solely shall receive a greater proportion of the assets.

Furthermore, the EPF is one of those unique assets which cannot be acquired by the joint efforts of both parties to a marriage. Thus, the EPF funds are an accumulation of contributions, being deductions from income earned by one person who alone contributed to such accumulation. Even though the law may regard EPF funds as a matrimonial asset intended for the mutual benefit or mutual enjoyment of spouses, nevertheless, the discretion is given to the court to make a decision. Therefore, the court further defined EPF funds as matrimonial property pursuant to section 76(4) of the Law of Reform (Marriage and Divorce) Act 1976, which has a statutory requirement of giving a greater proportion in favour of the party who acquired the matrimonial asset, the proportion of EPF monies awarded to the non-acquirer should be less than the remaining share retained by the acquirer. In most cases, this would translate to awarding less than a half share of the EPF monies to the non-acquirer. The Court of Appeal has upheld an award of a one-third share of EPF money in *Ching Seng Woah v Lim Shook Lin* [1997] 1 CLJ 375, [1997] 1 MLJ 109, CA. On the facts, the appellant, the husband, married the respondent, the wife, in 1976, blessed with two daughters. The wife prayed for her husband's EPF money. The court held that one-third of the husband's EPF as of 31 December 1993 (RM260,627.06) be paid to the wife as and when it is paid to the husband according to law. This decision is based on the wife's indirect and direct contribution towards their marriage.

The recent LRA amendment does not specify the future assets to be distributed as matrimonial property. However, this amended section 76 of the LRA upholds the principles set by the Court of Appeal in the case of Yap Yen Piow, which became the authority for the principle that EPF funds could be distributed as matrimonial property, as long doing so justified needs based on the contested facts, in order to provide just and equitable distribution. On the development of the facts, the Court of Appeal upheld the order made by the High Court that the petitioner's husband was to pay the respondent-wife half of the former's EPF account and reduce it to a quarter on a just and equitable basis. The EPF that was sustained was subject to the sum being reduced from 50 to 25 per cent to the sum of RM124,506.30 in the appellant's EPF account.

CONCLUSION

From the analysis of the case stated, it is clearly stated that the court decided on their discretion that the EPF acquired by one spouse during the marriage by interpreting the meaning under section 76 of Law of Reform (Marriage and Divorce) Act 1976, where another spouse would have right to claim as matrimonial property. This is a development in the process of distributing matrimonial property under section 76 of LRA because the provision itself is silent on which types of assets should be distributed. The fairness justice will be held on the need of the case regardless of the issues, whether the EPF money is a solely individual contribution, where the other spouse does not have enjoyment on the said funds. The court will order otherwise to provide fair and equitable distribution in order to protect the innocent spouse being affected by the enforcement of the law.

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NUPTIAL AGREEMENT: SHOULD I OR SHOULD NOT I

Noorjuliana Alab Din[1], Suhaida Mohd Sobri[2], Azlina Abdul Hamid[3]* & Nur Ezan Rahmat[4]

[1,2,4]*Faculty of Law, Universiti Teknologi MARA (UiTM), Malaysia.*
[3]*Intellectual Property Corporation of Malaysia (MyIPO).*

Email: [1]2017618508@student.uitm.edu.my; [2]2017514019@student.uitm.edu.my;
[3]azlina2009818984@gmail.com; [4]nurezan@uitm.edu.my

[*]*Corresponding author*

ABSTRACT
The nuptial agreement includes prenuptial or postnuptial agreements, which are contracts made between couples for marriage which seek to predetermine financial liabilities and responsibilities towards each other in the event of divorce or death. Such agreements are still in the grey area under the current Malaysian legal system as their validity is still subject to the court's discretion. It means parties to a marriage are initially free to agree on the terms of the contract, whereas in the event of disputes, the court retains its power in interpreting and giving effect to the terms of the contract. Nevertheless, the agreements are highly persuasive to the court in arriving at the judgment should there be any dispute between the parties, so long as the agreements are not contrary to any provision in the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976). Thus, this paper aims to identify the importance and benefits of nuptial agreements for a marriage, examine the position of nuptial agreements in the LRA 1976 and compare the Malaysian position with those in Singapore and Switzerland. The research employs qualitative research methodology, while doctrinal research focuses on library research methods.

Keywords: *Nuptial Agreement, Non-Muslims, Marriage, Divorce, Financial Liabilities*

Themes: Family Law

INTRODUCTION

Nuptial agreements refer to prenuptial agreements (also known as ante-nuptial agreements) and postnuptial agreements (also known as post-marital agreements). Those agreements are regarded as contracts and were entered after the couple, particularly men and women. The parties mutually agree on all the conditions that must be met in case of a divorce or upon death. The terms of the agreements vary considerably, but they typically address marriage matters such as property division, wife and child support, child custody, and on occasion, debt division. This article discusses the position of nuptial agreements in Malaysia's current legal status, compared with its position and the court's acceptance in Singapore and Switzerland.

LITERATURE REVIEW

Generally, this concept is not new, even though it sounds unpleasant to establish any agreement on divorce upon entering a marriage. Nuptial agreements are widely recognized and enforced in many countries as they are regarded as practical tools for protecting relevant rights in marriage and the event of divorce or death. Harikumar (2020) mentioned that prenuptial agreements are the evolution of the marriage institution; analogous to the notion of insurance, they exist to avoid confusion and ambiguity in the event of the marriage's dissolution. Such agreements are interpreted using common law contracts governed by paper in tandem with equity based on specific facts or circumstances. Stephanie (2021) stated that the law recognizes the ability of individuals to enter into contracts relating to a party's economic relationship, as nowadays, marriage has become more of an economically based partnership, and the courts believe that, by establishing a contract, they will be able to align with public policy that favours long-term marriages. As mentioned by Sharon (2021), The Canadian Supreme Court aptly expressed the current concept of marital property by suggesting that marriage is seen as "not merely a union, but also a "joint venture" or a socio-economic partnership." She also implied that, rather than being pushed into the default marital property regime provided by state law, couples could select how their property is distributed since the contract law has overtaken it as the governing principle. Natasha (2021) shared that any contract is against public policy if it harms the public interest, breaches a public statute, or threatens public welfare or safety. As marriage is a "permanent" public institution that

encourages couples to live together and prevents divorce; hence marriage contracts are generally lawful unless they encourage divorce or separation. Postnuptial agreements are legal as long as they do not encourage divorce or separation but encourage personal dispute resolution without separation or divorce.

METHODOLOGY

This article employs qualitative research methodology where the doctrinal research focuses on relevant legislations, cases, journal articles and other relevant sources from selected and trusted scholars. Further, this research makes a comparative study with selected jurisdictions on the issue of nuptial agreements to stimulate a better understanding of the importance of how the laws are developed and worked in those countries on nuptial agreements.

FINDINGS AND DISCUSSION

A. THE POSITION OF NUPTIAL AGREEMENTS IN MALAYSIA

In the current situation, Malaysian courts have not had many opportunities to consider nuptial agreements as there is no specific provision under LRA 1976 to cover such agreements. The only available provision is Section 56 of LRA 1976 empowers a party to divorce proceedings to refer the court to any agreement or arrangement made prior to the marriage. The purpose is for the court to express an opinion on the reasonableness of the agreement or arrangement and to issue such directions in the matter as the judge deems appropriate. Nevertheless, this provision does not mention the form of agreement that the court will approve. As decided in *Lim Thian Kiat v Teresa Haesook Lim*, James Foong J, in his judgment, mentioned that prenuptial agreement is subject to the court's discretion to consider. It indirectly reflected that the courts might consider the nuptial agreements under Section 56 of LRA 1976 as long as the agreements are not contrary to anything under the LRA 1976. In general, no provision in Malaysian law prevents someone from signing any agreement before or after entering a marriage. Similarly, the court is not required to enforce those divorce agreements.

B. THE POSITION OF NUPTIAL AGREEMENTS IN SINGAPORE

Similar to Malaysia previously, the enforceability and validity of the agreements will be subject to the discretionary power provided by the courts in determining whether and to what extent the agreements are enforceable. Nevertheless, this approach started to lose its binding effect when the Singapore Court of Appeal in *Kwong Sin Hwa v Lau Lee Yen* emphasized that an agreement made between spouses, or between intended spouses to regulate marital relations is not inherently wrong or against public policy, as it does not mean that, the couple negate the marriage and their legal obligations in the marriage. The acceptance of nuptial agreements seems to be in line with the amendment made in 1996 with the insertion of Section 50(1) of the Women's Charter, which provides the Family Court to give into consideration the possibility of a harmonious resolution of the matter and may refer the parties for mediation. As the law itself encourages settlement in any family proceedings through mediation, indirectly the law must also respect and uphold the parties' autonomy if they intend to establish any private agreements, including nuptial agreements.

C. THE POSITION OF NUPTIAL AGREEMENTS IN SWITZERLAND

As Switzerland practices a civil law legal system, it considers the distribution of assets and family maintenance as separate issues and, thus, are governed by different rules. The property regime rules govern the former through marital agreements. At the same time, the latter is generally included in separate written agreements, known as anticipated divorce agreements or divorce conventions. Swiss law generally allows spouses-to-be to conclude any marital agreement before or after the wedding. The law treats the marital agreements as a special kind of contract, in which the spouses-to-be may choose to set aside or modify their marital agreements, even after the divorce request has been made, so long as it is within the limits of the law to fit their best interests. Any marital agreement containing provisions regarding the chosen matrimonial property regime, which does not provide for the other effects of a divorce, will qualify as a marital agreement and is not subject to judicial review by the court for fairness, i.e., binding over the court, without ratification. Nevertheless, any agreement which intends to lead to a divorce and is dealt with differently from a marriage agreement will be subject to judicial review. It gives a vital sign that Switzerland recognizes the existence of nuptial agreements.

CONCLUSION AND RECOMMENDATIONS

In conclusion, even though many people associate nuptial agreements with the possibility of a breakup, in practical terms, nuptial agreements are excellent ideas for several reasons, including reducing the possibility of unforeseen financial claims and planning ahead for events like death. It is necessary to have a proper level of awareness combined with appropriate information. It is a fact that a nuptial agreement is only helpful if the marriage ends in divorce; it is not a guarantee that the marriage will come to an end. It is merely a precaution in case something goes wrong. Muslims sometimes view nuptial agreements as unusual as Syariah Law does not entail the concept of nuptial agreements. Nevertheless, it does not mean it is prohibited under the Syariah Law. Thus, it is fascinating to see the research on nuptial agreements extended to the Muslim community, i.e. how to establish valid and enforceable nuptial agreements for Muslim couples according to Malaysian Syariah Law and accepted by the Syariah Courts.

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TRACK 10 ISLAMIC/SHARIAH/HALAL LAW

A LEGAL STUDY ON THE POSITION OF LATE PAYMENT CHARGES IN ISLAMIC BANKING IN MALAYSIA

Husna binti Ridzuan[1], Noor Azreen binti Ana[2], Nur Syakirah binti Nor Azam Shah[3] & Syuhaeda Aeni binti Mat Ali[4]*

[1, 2, 3, 4]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1]2021636514@student.uitm.edu.my; [2] 2021853376@student.uitm.edu.my; [3]2021876224@student.uitm.edu.my [4]syuha497@uitm.edu.my

[*]*Corresponding author*

ABSTRACT

The outbreak of Covid-19 began in March 2020 and is considered one of the ten deadliest pandemics in human history. Malaysia shut down almost all administration, socio-economic and economic sectors causing economic instability. Consequently, Islamic banking suffers the most common risk faced by all banking institutions: the default risk. The prohibition of *riba'* is the most fundamental factor differentiating between Islamic and conventional banking. This paper aims to examine the implementation of *ta'widh* and *gharamah* against the defaulters before and during the outbreak of Covid-19 with reference to the regulations that are now in effect and to identify any problems that have been encountered. Therefore, this paper sheds light on the position of late payment charges, including *riba'*, *ta'widh* and *gharamah*, in Malaysia's Islamic banking. This study employed a qualitative method through a library approach. As part of this process, the shariah-based justifications for *ta'widh* and *gharamah* are examined. Besides, it will also go into detail on how these late payment charges relate to the ideas of Shariah, *Maqasid* of Shariah, and *Maslahah* following the ruling of the fundamentals of Islamic law. According to the study, the existing *ta'widh* and *gharamah* procedures differ from the *riba* levied by conventional banks. Additionally, the implementation of *ta'widh* and *gharamah* by the Bank Negara complies with the *Maqasid* of Shariah. Finally, this study makes some public policy recommendations for using *Maqasid* of Shariah in Islamic banking.

Keywords: *Riba', Ta'widh, Gharamah, Maqasid Shariah, Late payment charges*

INTRODUCTION

The effect of COVID-19 pandemic has caused the financial sector to suffer tremendously. Since the outbreak of Covid-19, financial institution has been exposed to default risk where the number of defaulters is increasing daily. To mitigate this risk, Islamic banks have difficulty charging a penalty for late payment of what is due. This is due to differing opinions among shariah experts on whether imposing such a penalty would constitute *riba'* or not. Late payment charges in Islamic financial institutions in Malaysia are implemented in two ways, according to the Bank Negara Malaysia (BNM) Guidelines on Late Payment Charges for Islamic Banking Institutions, which are *ta'widh* and *gharamah*. This paper aims to discuss the position and the application of *ta'widh* and *gharamah* in the Islamic financial institution before and after the pandemic of Covid-19, and it is critical to guarantee that these mechanisms comply with *Shariah*, the ideas of *Shariah, Maqasid Shariah*, and *Maslahah*. It is essential to rule out all the possible solutions for the Islamic financial institution to reduce the risk of defaulters and assist the bank in recovering from any losses.

LITERATURE REVIEW

THE LEGAL PERSPECTIVE OF *TA'WIDH* AND *GHARAMAH*

The definition of *Al-Ta'wid* or *al-'iwad* is substitute or countervalue. The Fiqh Academy Journal defines *ta'widh* as "payment of financial compensation or countervalue, which is obligatory as a result of loss caused to others" (Nadiah, 2020). Ta'widh is an amount that Islamic banks incur to defaulters. Whereas *gharamah* is a penalty imposed on defaulters in addition to the *ta'widh* (Bank Negara Malaysia, 2011). Most contemporary Muslim scholars have unanimously agreed on the imposition of *ta'widh* and *gharamah* as the most suitable methods to be imposed against defaulters in Islamic financial institutions (Ezani et al., 2014). The pandemic of Covid-19 has not only been a health crisis but has become one of the most prominent economic stressors in modern history. The measures taken to control the spread of the Covid-19 virus have eventually strained the economy due to the lockdowns upon lockdowns imposed by the Government. The Malaysian Government, among others, has introduced moratoriums, easing the economic burden of the people who have loans from financial institutions. Before the pandemic, Islamic financial institutions primarily imposed *ta'widh* and *gharamah* as the applicable methods of financial remedies in dealing with late payments in Islamic Banking (Ezani et al., 2014) to mitigate and avoid the harms of financial losses due to defaulted and delayed payment (Mohammad Akram, 2014).

APPLICATION OF *TA'WIDH* AND *GHARAMAH* BEFORE & DURING COVID-19

During the pandemic of Covid-19, Bank Negara Malaysia announced measures in support of efforts by banking institutions to help individuals, small and medium enterprises and corporations to overcome the impact of the COVID-19 pandemic outbreak. The measures include a six-month deferment for all loan or financing repayments beginning from 1st April 2020. The deferment of the loan regarding this situation applies for six months. During this period, borrowers with loans or financing that meet the conditions do not have to make any repayment, and there will be no late payment charges. The interest will continue to accrue on the deferred loan repayments, and the borrowers will have to honour the deferred repayments in the future. The loan repayment resumes after the deferment period of six months ends. (Adam Aziz, 2020) The borrowers will not be charged with *ta'widh* and *gharamah* for default and delayed payment if they opt for the moratorium.

The imposition of *ta'widh* and *gharamah* is allowed because it is in accordance with the principle of *Maqasid al-Shariah*. According to *Syaykh Al-Zarqa*, the notion of repaying the financier for his loss caused by the debtor's default and delay in paying the loan within the prescribed time frame is an accepted premise in Islamic law. The imposition of *ta'widh* and *gharamah* also prevents any evils from occurring, and should any harm arise, and it is necessary to remove them. (Kitab Al-Aqdiyah Wa'l - Ahkam , Hadith 85). Citing the case of *CIMB Islamic Bank Bhd & LCL Corp Bhd & Ano***r** [2011] MLJU 1134, borrowers should be punished, whereas genuine debtors should be handled with compassion which in turn protects the interest of both sides and reflects the integral aspect of *Maqasid* al-Shariah. Therefore, *Maqasid* al-Shariah is very important as it provides social responsibility (Dusuki & Abdullah, 2007), assist in the assessment of the Islamic banking product (Laldin & Furqani, 2013), reforms the classic aspect of Islamic Banking (Hasan, 2016) to sustain the viability of Islamic bank (Ishak, 2019), and to promote transparency (Al-Ashur, 2001). However, the implementation of the moratorium during the pandemic does not seem to comply with the *Maqasid* al-Shariah, citing the example of a moratorium granted in the Ijarah financing facility due to several issues. Firstly, the issue of the customer's consent to participate in the moratorium. The announcement of the moratorium was made to the public, and the customers expected that they would be automatically granted the deferment of instalments which is against the Shariah rules of the Ijarah contract. This conflict can be avoided if customers were clearly informed that the moratorium package for ijarah financing is subject to their consent and approval. The second issue is the increase in instalments after the deferment period. According to Islamic banks, increasing the customer's instalment is necessary to cover the modification loss required in the new International Financial Reporting Standards (IFRS) 9 Guidelines. It is not meant to take advantage of customers during the Covid-19 rather; its purpose is to maintain the expected cash flow, which is supposed to be received by the Islamic banks.

METHODOLOGY

The research methodology used in this study is qualitative and doctrinal, including analytical and comparative approaches. Primary sources, such as statutes, regulations, and case laws, and secondary

sources, such as books, academic journals, and newspaper articles, were used to compile the study materials. A special reference is made to the Shariah Advisory Council Resolution to obtain information on the consensus of the Islamic Scholar in Malaysia regarding the position of *ta'widh* and *gharamah* and their application. Finally, the information and data that have been collected were used inductively and deductively to analyse the position of the late payment charge, specifically *ta'widh* and *gharamah* in Islamic banking in Malaysia.

FINDINGS AND DISCUSSION

Legal Measures in Response to Moratorium due to Pandemic COVID-19

The deferment of loan and Targeted Repayment Assistance initiated by the government is made in line with Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) Act 2020 (Covid-19 Act), which comes into force on 23 October 2020. This Act is meant to provide temporary measures to ease the impact of Covid-19 on various sectors and industries in Malaysia. Areas addressed by the Covid-19 Act include, among others, the inability to perform contracts and insolvency. Section 1(2) of the Covid-19 Act states that the Act will continue to remain in operation for two years from the date of its publication.

During the period of deferment of payment, late payment interest charges are prohibited. In a nutshell, the effect of deferment of payment is that the financing payment is deferred for the moratorium period, i.e. for six (6) months without any charges on late payment interests during the deferred period. In consequence, this reflects the aim of the *Maqasid* Syariah mentioned above, which is to protect the welfare of society by relieving the financial burden faced by borrowers due to the outbreak of the COVID-19 pandemic.

By taking part in the public offering of the moratorium package, Islamic banks undoubtedly made the right decision because it enables customers to manage their cash flow and meet extraordinary economic problems, which is further supported by al-Baqarah (2:280). However, another client group also benefits from the moratorium even though they are not financially impacted by the Covid-19 outbreak, necessitating a different assessment from the bank's point of view. Islam considers a wealthy debtor's deliberate delay of debt repayment immoral and unfair to the creditor. It has been determined that the claim that Islamic banks are "un-Islamic" when they impose further instalments after the moratorium has expired is unfounded. Helping those in need of financial assistance is an integral aspect of an Islamic bank's social responsibility. As a result, it is affirmative that Islamic banks have the authority to charge extra payments to clients not afflicted by the Covid-19 pandemic.

CONCLUSION AND RECOMMENDATIONS

The elimination of compounding profit is consistent with Shariah's principles since it lessens the burden on the negatively affected customers. The current application of *ta'widh*, *gharamah,* including the moratorium, differs from *riba*'. Furthermore, *ta'widh*, *gharamah*, and moratorium imposed by Bank Negara adhere to the shariah's *Maqasid*. It is suggested that *Maqasid al-Shariah* should not be used in Islamic banking simply to allow or prohibit something in real life. Instead, it should offer practical answers that allow *Fiqh Muamalat* to gradually integrate with Islamic banking operations without jeopardising Islamic principles. Since the reality is constantly changing, any *Maslahah* or *Maqasid al-Shariah*-based practice must be reassessed after a specific implementation period.

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CONTROVERSIES AND CHALLENGES OF ISLAMIC BANKING PRODUCTS: A COMPARATIVE ANALYSIS BETWEEN *BAY AL INAH* AND *TAWARRUQ*

Sharon anak Sawing[1], Fazlyn Yu binti Mohd Farid Yu[2], Siti Zulaikha binti Haron[3], Ahmad Nazri bin Ridzuan[4] & Syuhaeda Aeni Binti Mat Ali[5]

[1,2,3,4,5] *Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email:[1]2021850584@student.uitm.edu.my;
[2]2022322599@student.uitm.edu.my;[3]2021412504@student.uitm.edu.my,
[4]2022519297@student.uitm.edu.my,
[5]syuha497@uitm.edu.my

[*]*Corresponding author*

ABSTRACT

Many countries now have dual banking systems, where banks operate both conventional and alternative forms of banking. Despite the Islamic banking industry's rapid development in recent years, there are drawbacks. Malaysia's existing Islamic banking practices are criticised for resembling conventional banking. This paper aims to identify the controversies and challenges in *Bay Al Inah* and *Tawarruq*. A systematic literature review on the views of classical jurists, legal and theoretical framework and modern application of the products is studied. One of the issues with *Bay Al Inah* contracts is the sequence in which the banks' and customers' contracts are implemented. The research outcomes will aid in determining which product is better and recommendable for use in Malaysia. The advantages and disadvantages of these products are comparable because they share the same objective: to obtain immediate cash in consideration of the delay. However, there are some differences in the transactions of these products whereby *Bay Al Inah* involves two parties in each transaction, and *Tawarruq* involves three parties. Comparing these products reveals that *Tawarruq* is more shariah-compliant as the actual possession of the commodity has taken place before the second sale. The transaction model is clear because a third party is involved. Since the practice of *Bay Al Inah* raised Shariah issues, it is recommended that Islamic banks and their Shariah experts reevaluate the current Islamic Banking products and emphasise the practice of *Tawarruq* in the market as it fosters a better Islamic banking practice.

Keywords*: Islamic Banking, Bay Al Inah, Tawarruq, Shariah Compliance, Comparative Studies*

INTRODUCTION

Bay Al Inah is a term used to describe a sale based on the *Nasi'ah* transaction (delay). According to Schacht (1984), the debtor sells a thing to the creditor for cash that is due right away, and the debtor simultaneously buys the identical object for a higher price later. As a result, the transaction is a loan. The difference between the two prices represents the interest. On the other hand, Bank Negara Malaysia (BNM) (2018) defines that *Tawarruq* consists of two sale and purchase contracts. The first involves a seller selling an asset to a purchaser on a deferred basis. Following that, the first sale's purchaser will sell the same asset to a third party on a cash and spot basis. This is done to gain cash or liquidity at that given time, not using the purchased asset.

METHODOLOGY

This study's objective is to analyse the concepts of *Bay Al Inah* and *Tawarruq* and compare both. A qualitative approach would be suited to the study's objective. Secondary data was collected from previous research papers, reports, and conference papers included in the literature review and the data analysis in this study. The researchers used data-collecting tools from a library research approach. By analysing journal papers and reports, the current literature study explores how *Bay Al Inah* and *Tawarruq* operate as well as their benefits and drawbacks. The sources were thoroughly studied and compared by hand, and notes were taken to highlight key ideas and viewpoints relevant to the research objectives.

LITERATURE REVIEW

Classical jurists interpreted different rules for *Bay Al Inah* due to their differences in opinions and views regarding its forms. The Hanafis, Malikis and Hanbalis believed that the contract was unlawful. While according to al-Shafi'i, it was permissible. The jurists who ruled against *Bay Al Inah* justified their assessment with two explanations. Firstly, the prohibition is indicated in the fatwa of Companions (Athar) and hadith and secondly, the contract practice was seen merely as *Hilah* (legal stratagem) to legalise *Riba*.

Inah consists of two parties: the seller is the first party who buys the commodity at a certain price, and the buyer is the second party who pays a higher price and on deferred payment. On the other hand, the majority of Hanbali jurists consider *Tawarruq*, which comprises three parties and is only specifically addressed by them, to be lawful (Yuhanis, 2012) as it was not included in the *hilah* for *Riba*. Ibn Taymiyyah and Ibn Qayyim, two eminent scholars, disagreed with the majority of Hanbalis who approved of *Tawarruq* and subsequently disallowed it, calling it a *hilah* (ruse) similar to the Inah contract. Ibn Al Abidin, a prominent Hanafi scholar, later reaffirmed the permissibility of the *Tawarruq* contract; however, some jurists, such as Ibn Humam of the Hanafi School, still viewed lending money without interest as preferable (Khan, Faraz,2012). Though not explicitly mentioned in their treaties, Shafi'i jurists concur that it is permissible since contracts are kept separate for the two transactions, which are regarded as independent and separate from each other until a condition is stipulated in the contract for the second trading. *Tawarruq* was likewise viewed as permissible by the Maliki school of thought.

FINDINGS AND DISCUSSION

Classical jurists have discussed the controversy of *Bay Al Inah* since the early period of the formation of Islamic law. The Malikis, Hanafis, and Hanbalis declare that the contract is void, haram, and sinful, for such a transaction are *Riba* or smacks of *Riba* (shubahat). They argue that the form of the contracts of sale in Bay is nothing but a legal device or a legal fiction (*hilah*) to legalise what is intrinsically illegal by Shariah, as they classify Bay as, in essence, a loan with interest. Abu Hanifah claims that this contract is void (*bati*l) if it does not involve a third party who deals with the original seller or buyer (Jamaluddin, 2018). Despite the controversy, the Malaysian Shariah scholars allowed the contract to create various Islamic banking products in the country. The decision to legalise the *Bay Al Inah* demonstrates the pragmatic orientation adopted by Malaysian Shariah scholars in determining the compliance of Islamic banking products to the principle of Islamic law. As evident in the case of Bank Islam Malaysia Berhad (BIMB) Islamic Card (BIC) cards, they uphold the 'form over substance approach. However, this approach is increasingly seen as inappropriate for maintaining the industry's growth. It has failed to eradicate the element of *Riba* in the banking system. Thus, Islamic bankers and their Shariah experts are strongly advised to rethink their current approach when developing new Islamic banking products (Shaharudin,2012).

On the other hand, for *Tawarruq*, the Fiqh Academy criticises the structure of organised *Tawarruq* for lacking principles and the essence of legitimate trade activity. It entails simultaneous transactions between the bank (financier) and the *mustawriq* (client), which are carried out either implicitly or expressly in exchange for a financial obligation. This means that the financier (bank) executes both transactions (buying and selling the commodity), with paperwork added to artificially include or demonstrate the usage of brokers and other parties. Furthermore, some of the commodities used in *Tawarruq* transactions do not meet the specifications for those that have genuine uses, are of market value, and where (Al-Zuhayli, 1989) explains that a sale contract will be invalidated if the object of sale is of little or no value if these conditions are not met. However, it is crucial to note that these critiques are directed at the current *Tawarruq* implementation rather than the legality, legitimacy, or substance of the basic *Tawarruq* contract.

CONCLUSION AND RECOMMENDATIONS

Some Islamic scholars advocate using *Bay Al Inah* and *Tawarruq* in Islamic personal financing as the best way to prevent *Riba*. Although the goals of *Bay Al Inah* and *Tawarruq* are similar, the *Hilah* practises are not. Many *hilah* can be found in *Bay Al Inah* compared to *Tawarruq* due to how the transaction is done; it is like a buy and sells transaction, although the purpose is to lend money. Furthermore, BNM as a regulator should formulate policies to manage qualified and proper Shariah governance mechanisms for appropriate Shariah applications, better performance and quality Shariah

compliance. In Malaysia, *Tawarruq* is employed in almost every aspect of Islamic banking, including capital markets, investments, loans, and deposits. Malaysia abides with the Fatwa issued by the Shariah Advisory Council of BNM, which endorsed the practice of organised and reversed *Tawarruq*.

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TAKAFUL AS THE SOLUTION TO AVOID RIBA IN CONVENTIONAL INSURANCE

Nur Farah Waheda Binti Azmani[1], Wideeya Juliana Bt Mustapha[2], Maymun Nalubega-Rozanita Naziwa[3] & Syuhaeda Aeni Binti Mat Ali[4]*

[1,2,3,4]*Faculty of Law, University Teknologi MARA, Malaysia*

Email: [1]2021282336@student.uitm.edu.my; [2]2021409154@student.uitm.edu.my; [3]2022736641@student.uitm.edu.my; [4]syuha497@uitm.edu.my;

[*]*Corresponding author*

ABSTRACT

In 2021, the Malaysian Takaful industry recorded an increment of 664% in the issuance of new certificates despite the industry's challenging year due to COVID-19. 39,909 new certificates were issued, amounting to more than RM1,512 million, compared to only 5,223 new certificates issued in 2020. This remarkable growth shows that the Takaful industry has been well-accepted in Malaysia since the first Malaysian Takaful operator took place in 1984 to cater to the growing needs of Muslim consumers for a Shariah-compliant alternative to conventional insurance. The reason is that conventional insurance is prohibited in Islam as it consists of, among others, the element of interest (*riba*). This paper discusses the Islamic notion of Takaful as the solution to avoid *riba* in conventional insurance and how it has evolved in Malaysia. Using qualitative research analysis, this paper provides a structure for a detailed understanding of the concept of Takaful and distinguishes it from conventional insurance. A comparison with Saudi Arabia, Türkiye, and the United Kingdom is made to examine the competitiveness of the current Malaysian Takaful industry. This paper provides several recommendations to help the Malaysian Takaful industry become a competitive alternative to conventional insurance, such as fully utilise Takaful legislation, empowering the function of the Shariah Advisory Council (SAC) of the Central Bank of Malaysia, creating more initiatives to introduce takaful to the society, and takaful operators to do product advancement to offer a more commercially viable and competitive industry.

Keywords: *Takaful, Conventional Insurance, Riba, Mudharabah, Wakalah*

Themes: Islamic Banking

INTRODUCTION

In conventional insurance, the insured enters into a contract with the insurance company where the insured will pay the premium as protection towards an uncertain future loss that he may suffer. A group of Islamic scholars is against conventional insurance as it contains *riba*, among others. In Arabic, *riba* means excess, increase, addition, expansion or growth. Allah prohibits all kinds of *riba* in verses 275 to 276 of Surah Al-Baqarah. The Prophet Muhammad (peace be upon Him) also emphasized the prohibition of *riba* in his last sermon. *Riba* exists in conventional insurance in three situations. First is *riba al-fadhl*, which happens when two same things are exchanged unequally, whereby there is an excess in quantity. In conventional insurance, the insured pays money as a premium to the insurance company. If he suffers a loss, he will be compensated. However, the amount of his compensation is not the same as his premium, where he can be compensated more than what he has paid. Second is *riba al-nasiah* where there is a delay in time. In conventional insurance, the exchange between the premium paid and the compensation does not happen immediately or on the spot. This is an example of *riba*. The third situation is when the insurance company invests the premium paid by the insured in interest-bearing investment instruments such as non-Islamic deposits and conventional bonds.

Regarding Takaful, its legality is derived from the second verse of Surah Al-Maidah. It is a system based on *Tabarru'* (donation or charity) and *Ta'awun* (solidarity and mutual assistance). It revolves around the concept of mutual assistance, protection, indemnity and sharing liabilities among its

participants. Its significance lies within the ability of the participants to face risks as a group and enables them to bear the burden of loss in a lighter form. Therefore, via the Takaful scheme, a group of people facing the same struggle or harm willfully makes contributions in the form of a certain sum of money to a "common pool" or common fund, to which it can be used for the compensation of its participants who suffer a specified loss.

This paper has three objectives. The first is to identify why Takaful is a better solution to avoid riba in conventional insurance. The second is to compare the Takaful industry in Saudi Arabia, Türkiye and the United Kingdom. The third is to recognize the recommendations to enhance the Takaful industry in Malaysia.

LITERATURE REVIEW

Scholars have different views on conventional insurance. (Asyraf Wajdi Dusuki & Mohammad Mahbubi Ali, 2018) The first group of scholars allows conventional insurance as it has importance to the insured. The second group of scholars are against conventional insurance as it contains *gharar*, *maysir* and *riba*.

Riba exists in conventional insurance in three situations. First is *riba al-fadhl*, which happens when two same things are exchanged unequally, whereby there is an excess in quantity. In conventional insurance, the insured pays money as a premium to the insurance company. If he suffers a loss, he will be compensated. However, the amount of his compensation is not the same as his premium, where he can be compensated more than what he has paid. Second is *riba al-nasiah* where there is a delay in time. In conventional insurance, the exchange between the premium paid and the compensation does not happen immediately or on the spot. This is an example of *riba*. The third situation is when the insurance company invests the premium paid by the insured in interest-bearing investment instruments such as non-Islamic deposits and conventional bonds. (Hairul Suhaimi Nahar ,2015).

Takaful is a system based on the principles of *Tabarru'* (donation or charity). Conventional insurance contracts are commonly entered to maximize profit. At the same time, Takaful is regarded as a tool for risk management and distribution based on *Ta'awun* (solidarity and mutual assistance).Maysami, R.C, 2006).

According to the World Islamic Banking Competitiveness Report (2016), Türkiye is essential to the worldwide expansion of the Islamic financial services industry because of the Turkish government's significant support. However, the scholar opines that even though Takaful practices have a forty-year history in the global insurance market, takaful operations in Türkiye are a relatively new and underdeveloped sector. (Hakan, A. Emin A., 2021). Similarly, United Kingdom government has not positioned the Takaful industry as a top priority as it did with the Sukuk sector. On the contrary, the Takaful industry in Malaysia receive a boost and full support from the government of Malaysia (New Straits times, 2022)

METHODOLOGY

The research methodology used in this study is doctrinal and comparative approaches. This paper primarily contains data from available literature, case studies and document analysis. A qualitative approach is used for the study's objective. Secondary data was collected from previous research papers, reports. The researchers also utilise data collecting tools from a library research approach.

FINDINGS AND DISCUSSION

From our findings, the countries such as Saudi Arabia, Türkiye, and the United Kingdom use takaful as an Islamic finance product instead of using conventional insurance to avoid *riba*. Malaysia, which is considered to have one of the world's most sophisticated takaful ecosystems, has been used as a point of comparison to examine Turkiye's takaful industry. Furthermore, we have identified the differences

between Takaful and conventional insurance on several aspects. Among the primary differences between Takaful and conventional insurance are that Takaful is a combination of *Tabarru'* contract (donation) and agency or profit-sharing contract while the latter is an exchange contract (sale and purchase) between insurer and insured. Regarding payments, for Takaful, the participants must contribute to the scheme and mutually share the surplus. make "contributions" to the scheme and mutually guarantee each other under the scheme whilst policyholders in conventional insurance have a duty to pay a premium to other insurers. Regarding the funds and risks, for Takaful, the fund belongs to the participants. The Takaful operator only acts as the *mudharib* (manager of the fund) and risks are mutually agreed to be shared by the participants while for conventional insurance, the fund belongs to the insurer and risk is transferred from the policy holders to the insurer. Further, in terms of liability, a Takaful operator will provide a benevolent loan if there is a case of deficiency. The operator will not share the deficits of the funds while in conventional insurance the insurer has liability to pay the insurance benefits as contracted from its assets. It is also highlighted that for Takaful the funds invested are via Shariah compliant instruments approved by the Shariah Supervisory Board while there is no restriction to invest in Shariah compliant instruments for conventional insurance. Lastly, in regards to the remuneration from the investments, for Takaful the profit to be shared among the participants and operator. The agreed profit-sharing ratio should be applied consistently regardless of the performance of a Takaful investment while in conventional insurance, it is at the sole discretion of the insurer whether to pay or not to pay the bonus depending on the investment returns.

CONCLUSION AND RECOMMENDATIONS

In a nutshell, Takaful, contrary to conventional insurance, is the best alternative solution for both Muslims and non-Muslims alike when it comes to insurance as it is free from the element of *riba*. However, although the Takaful system strives to adopt and apply Islamic principles, it does not come without challenges especially, in modern times. Therefore, we should fully utilise Takaful law in Malaysia namely Islamic Financial Services Act 2013 (IFSA). In addition, we should create more initiatives to introduce takaful to society. Takaful penetration is directly influenced by awareness, which can be strengthened through adequate education. For instance, by conducting in-house training, technical support, industry-academia relationships, and certification for talent development. It is advisable for takaful operators to do product advancement to offer a more commercially viable and competitive industry notably Insure-Tech and mobile apps for micro-Takaful, and diversify their products to include trading Takaful and Re-Takaful. Introducing more micro-takaful is a method to promote takaful among the low-income group.

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TRACK 11 ENVIRONMENTAL POLICIES AND GOVERNANCE

OCEAN RENEWABLE ENERGY IN MALAYSIA: A REVIEW

Alia Anisa Binti Khairus Masnan[1]*, Fatin Adriana binti Mohd Nizam [2], Irdina Marini binti Ibrahim[3] & Intan Azira Binti Hussin[4]

[1,2]*Faculty of Law, Universiti Teknologi MARA, Malaysia*

Email: [1] aliaanisa241000@gmail.com, [2] 2019810662@student.uitm.edu.my, [3] 2019810948@student.uitm.edu.my, [4] intanazira6@gmail.com

[*] *Corresponding author*

ABSTRACT

Malaysia's oceans are endowed with a plethora of natural resources due to its long coastline. This indicates that Malaysia has great potential for using ocean energy. According to prior studies, it was found that ocean energy is capable of replacing fossil fuels due to its predictable nature compared to hydropower, solar photovoltaic (PV), and biomass. However, the current renewable energy initiatives in Malaysia have yet to embrace the utilisation of Ocean Renewable Energy (ORE). Therefore, the objective of this article is to provide a preview of the potential of ocean renewable energy in Malaysia. Applying the doctrinal research methodology, this article identifies suitable ORE site locations that could be used in Malaysia and examines the problems and difficulties with ORE in Malaysia. This study focuses on the challenges of ORE implementation in Malaysia, namely, the absence of information about ocean conditions and marine expertise, problems with societal adaptability, threats to marine life, and government expenditure.

Keywords: *Renewable energy, Ocean Renewable Energy (ORE), Marine Renewable Energy (MRE), Oceanic wave energy, Renewable energy policies*

Themes: Energy Law, Environmental Law

INTRODUCTION

Natural disasters, the greenhouse effect, and pollution are significant contributors to environmental destruction. CO2 is the largest contributor to greenhouse gases, accounting for 60% of total greenhouse gases. In mitigating these risks, renewables are vital. (Farabi, 2019) Recently, oceanic wave energy has received a significant amount of attention due to its prospective and predictable nature. The availability of oceanic wave energy is greater than that of all other renewable energy sources. Hence, this paper will further explore the potentials and opportunities of Ocean Renewable Energy (ORE), specifically, oceanic wave energy as a means to generate energy in Malaysia efficiently. (Rahman et al., 2022) Transitioning to a sustainable energy system is vital to limit the risk of excessive climate change. In the status quo, energy strategy usually lacks broad economic, environmental and social considerations. This result causes social inequality considering that not all social groups are equally positioned to benefit from policies focused on community initiatives. (Lacey-Barnacle, 2020) Thus, this paper will also holistically assess the efficacy of existing Malaysian renewable energy policies in hopes of regulating ORE. Comparison will be made with the European Union and International positions in regulating ORE.

LITERATURE REVIEW

To support the growth and development of the ocean energy sector, the European Commission issued the Blue Energy Communication in 2014, establishing a framework for the development and adoption of ocean energy technologies by 2020 and beyond. The EU Commission has also published a dedicated EU strategy on offshore renewable energy, COM(2020)74, which assesses its potential contribution and proposes ways forward to support the long-term sustainable development of ORE. (European Commission, 2020) Apart from the European Commission, ocean energy development has also been undertaken in the United Kingdom, China, and the United States. The UK became the first major economy to set a 2050 goal of reducing greenhouse gas emissions to zero per cent by passing the Net Zero target into legislation in 2019.

China released its 12th Five-Year Plan for Renewable Energy in 2012, which included the general development goal of the Ocean Energy industry in the National Five-Year Plan. (Ma, 2019) Whereas in the United States, the development of wave energy is centralised under the US Department of Energy. Thus, despite not having specific laws, states are adapting to having policies, development plans and guidelines to ensure activities and future developments are in accordance with each stakeholder's rights and liabilities. (National Science & Technology Council, 2018)

In the 12th Malaysia Plan 2021-2025, the government addressed its plan to increase renewable energy installed capacity. It should be noted here; however, there are no plans to include marine renewable energy and ocean renewable energy in tackling the issue of energy efficiency. In Malaysia, the Renewable Energy Act 2011 is the main and only legislation governing renewable energy efforts in Malaysia. However, the Act's operation on the implementation of Feed-In-Tariffs (FiT) for renewable energy generation has, over the years, shown a major loophole due to the absence of a renewable energy support mechanism. FiT is only effective in the development of small-scale renewable energy generation but fails to cater to projects with a greater spectrum of energy generation. (Ghazali et al., 2018) In 2009, a preliminary investigation found six areas in coastal Malaysia with a large tidal range: Sejingkat, Pelabuhan Klang, Pulau Langkawi, Tawau, Kukup, and Johor Bahru. These six locations account for 70% of annual power availability. This particular study has led to several recent studies done to assess the potential of power generation through a tidal range. In 2020, sixteen tidal locations along Malaysia's coast were evaluated to determine the potential for power generation via a tidal basin. In Peninsular Malaysia, the tidal range is discovered in Pelabuhan Klang, with a height of 3 metres, exceeding the minimum criteria for tidal barrage deployment. Sabah and Sarawak, on the other hand, have the highest tide range with a tidal height of more than 3 metres at Sejingkat. (Samo et al., 2020)

METHODOLOGY

The research adopted a doctrinal approach in collecting and analysing the data. The doctrinal approach is a method of analysing the legal doctrine of both primary and secondary data sources in the realm of renewable energy regulation, specifically, ocean renewable energy. Hence, the researchers examine primary sources, namely statutes and legal strategies adopted by nations globally in support of ocean renewable energy regulation, specifically, the EU's Blue Energy Communication, the EU Strategy on Offshore Renewable Energy COM(2020)74 and the EU's Renewable Energy Directive, the UK's Net Zero Target Policy and the US Renewable Energy Incentive. In addition, secondary data sources are also examined via internet databases. All of the information gathered is analysed and explored to answer the research questions and address the research objectives.

FINDINGS AND DISCUSSION

One of the glaring challenges in implementing ORE in Malaysia is Malaysia's lack of data on the status and condition of our oceans. The lack of data in developing a Geographical Information System (GIS) mapping of Malaysian seas based on the data from the Malaysian Meteorological Department has caused their projection into mapping and did not manage to accurately portray the true picture. (Yaakob & Kho, 2013) Another challenge faced is the lack of expertise and advanced technology for marine turbines, which hinders the development of marine energy generation. Additionally, there are also economic barriers to applying renewable energy, specifically the high cost of renewable energy and difficulty in obtaining bank loans. (Kai et al., 2021) Social adaptability is also a concern due to Marine Energy being relatively new in Malaysia. (Yaakob, 2012) Aside from the challenges, the predictable impacts that may occur as consequences of marine renewable energy are also something to be concerned about. One of the most discussed consequences is environmental consequences and their impact on marine life. One of the potential threats is that the wave energy device may become a threat to migrating fish. Installation of wave energy devices will include interference and barging into the ocean ecosystem in setting up the device. This may cause a disturbance that will impact the infauna and the epifauna that are not motile enough to leave the area. (Akar & Akdogan, 2016)

However, there are a few works of literature that view the impact of marine energy in a positive light and state that the positive outcome outweighs the negative consequences. Wave energy applications in offshore

islands would contribute positively to the tourism industry. Another positive impact of marine energy is on the environment, especially in reducing carbon emissions, and this measure has been embraced by many countries to combat climate change. The installation of marine energy-based technologies contributes to habitat enhancement. When an area becomes a marine energy farm, fishing and vessels will not be permitted in the area, thus attracting marine living populations to the protected area. (Fadaeenejad, 2014)

CONCLUSION AND RECOMMENDATIONS

Long-term planning, specifically Marine Spatial Planning (MSP), might benefit Malaysia in balancing the marine ecosystem and expanding the generation of MRE. MRE expansion is a crucial pillar in lowering fossil fuel use and greenhouse gas emissions. MSP optimises sector cooperation and management. (Ehler, 2021) Thus, when drafting a policy framework for the development of the Ocean Renewable Energy sector in the region, it is vital to consider unforeseen risks and effects. Therefore, a comprehensive review of successful countries' existing techniques and an effective regulatory framework will simplify the development and sustained deployment of maritime and renewable energy technology and boost investor confidence in the project's viability. (Ghazali, 2020)

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A LEGAL STUDY ON THE WATER CATCHMENT CONSERVATION IN MALAYSIA

Suhaili Ishak[1]*, Siti Sarah Sulaiman[2] & Noraziah Abu Bakar[3]

[1,2,3]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1] lilizaffri@gmail.com ; [2]siti_sarah@uitm.edu.my; [3]noraziah@uitm.edu.my

[*]*Corresponding author*

ABSTRACT

Water catchment areas in the natural environment accumulate water and have a significant important as they offer both access to potable water and an ecosystem for life. Thus, natural water catchment is pivotal in providing the 1% of worldwide freshwater supply. In Malaysia, the non-existence of water catchment law and de-gazettement of forest reserve had reduced the protection of the water catchment. Given the importance of water catchment to humanity, this study aims to find ways in conserve this priceless resource. The consolidated doctrinal, library-based research, and fieldwork will be employed including a legal analysis and judicial decisions concerning other jurisdictions such as New Zealand and Australia. Reference to other jurisdictions such as Resources Management (Amendment) Act 2020 from New Zealand and Water Act 1912 from New South Wales, Australia is hoped to facilitate the conservation of the water catchment. The findings of this study shows that no specific legal framework in ensuring water catchments conservation. Henceforth, a robust judicial framework is fundamentally important as to aligned with the provision of water security under the National Priority Area (NPA) as it ensures availability and sustainable management of water for all hence, meet Sustainable Development Goals 6.

Keywords: *Water, Conservation, Governance, Legal Framework, Environment*

INTRODUCTION

The right to water is defined as the right of everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses. The water catchment accumulating rainfall, surface runoff, vapor-transpiration, groundwater recharge, surface artificial storage and groundwater storage (Malaysia Water Vision Forward, 2001). Evidence shows that these catchments areas are facing with threats. Currently, there are 47 single-purpose and 16 multipurpose dams with a total storage capacity of 25 billion m3. Sadly, most of them at peril. Eventually, some of the water catchment area as in Selangor is converted into plantation which bare the topsoil. To safeguard this large storage of water, the Malaysian government is currently gazetting its 12 water catchment areas. Mohd Suhaily (2010) concluded that various issues such as legal and illegal logging which altered the runoff pattern that caused a soil erosion, sedimentation, downstream pollution and the unsustainable land conversion that caused by poor land use planning are among issues that affected our water catchments.

PROBLEM STATEMENT

In Malaysia, there are numerous legislations pertaining to protection of the environmental law but unfortunately there is no specific law regarding the conservation of the water catchment. According to (9th Malaysian Plan 2009), the number or size of the natural water catchments are on the decline due ineffective enforcement and weak legislative requirements for catchments and the water run-off. Adding to this is the weakness in policy and administration and the overlapping jurisdiction on water management at State and Federal levels between 14 states in Malaysia. At present, the State's water is additionally referenced in the Federal and Concurrent List of the Federal Constitution, as well as the drainage and water system are in the Concurrent List. Due to the sharing powers in terms of administering the water between the State and Federal levels, it provides the inequality of jurisdiction, therefore it gave a dreadful impact on the water catchment. The government only focused on the value of water assets other than supply and disregard the maintaining of water resources and increasing water quality. While gazetteing water catchment areas is critical to ensuring clean and sufficient water supply, de-gazettement of the water catchment forest is

another concern that demands particular attention. The Selangor State Park is a component of Peninsular Malaysia's Central Forest Spine and serves as the primary water catchment area for Selangor, Kuala Lumpur, and Putrajaya. This de-gazettement will undoubtedly have an impact on the water catchment in middle regions. Other countries, such as New Zealand, and Australia, have water catchment laws in place to ensure good water quality and quantity in the future.

RESEARCH OBJECTIVES

The objectives of the research are to identify whether legal frameworks exist in conserving water catchment in Malaysia and to explore the legal framework in conservation water catchment conservation in another jurisdiction as a benchmark for Malaysia. At the end of the research, several recommendations are proposed to improve the legal framework regarding the conservation of water catchment in Malaysia.

LITERATURE REVIEW

According to Sarah Ann Wheeler (2017), the increasing physical and economic scarcity of water due to increasing societal demands and climate changes will require worldwide water policy reform. One of the tools is through the regulatory framework. In Malaysia, we have many water-related legislation such as the National Forestry Act 1984, Environmental Quality Act 1974, Waters Act 1920, Town and Country Planning Act 1976 and our supreme law of the land, Federal Constitution. However, no single legislation or agency is entrusted with the overall responsibility for the planning and management of water catchment. Over the past decades, Malaysia was lacking a central agency entrusted with the overall responsibility of holistic planning and management of the overall aspects of water resources as perceived by K.E. Lee et. al (2018). Conferring to Intan Saimy (2013), Malaysia's environmental policy still falls behind other problem that is begging to be addressed, for example, the industrial development. Conflicts in water resources are resolved through inter-agency coordination and consultation. Furthermore, according to (Chan 2012), existing laws do not support Integrated Water Resource Management (IWRM) and Integrated River Basin Management (IRBM) eventually led to no success. Therefore, it can be observed that Malaysia has sector-based laws both at the Federal and state levels and lacks comprehensive laws. Rasyikah et.al. (2012) highlighted that Integrated Water Resources Management (IWRM) is a process which promotes a coordinated development and management of water; land and related resources that maximize the economic and social welfare of a country without compromising the sustainability of its environment. When IWRM and IRBM is still not well developed and showed any success (Chan, 2012), there is still a gap in the literature about the protection of water catchment area.

In other jurisdiction, the Resource Management Act 1991 of New Zealand is a pioneer legislation which provide the framework for environmental solution in New Zealand. As perceive by (Perkins 2001), the Resources Management Act is the radical restructuring of New Zealand's planning system but also give a significant amendment to the Local Government Act 1974. Memon (1995) stated that this act provides a new statutory framework for environmental planning and management in New Zealand. It replaces a plethora of environmental planning and management statutes including the town and country planning legislation. In 2020 it has been amended by Resource Management (Amendment) Act 2022 to reduce the complexity of RMA, increase certainty, restore public participation, and improve RMA process. As for Australia, in 2000, the state of New South Wales (NSW) replaced its Water Act 1912 with a modern water law regime enacted through the Water Management Act 2000 that incorporated several adaptive management tools designed to ensure the health of surface and groundwater systems. A major amendment to the Water Management Act 2000 in 2004 and the passage of Commonwealth legislation in the Water Act 2007, designed to provide inter jurisdictional integration of water management across the Murray-Darling Basin (MDB), have further strengthened the adaptive capacity of NSW's water regime. As emphasize by IUCN (1991), 'integration of environment and development effectively in the policies and practices of a country is essential to develop and implement integrated, enforceable, and effective laws and regulations through appropriate legal and regulatory policies, instruments, and enforcement mechanisms at the national, state, and local levels, and to enforce compliance with the laws, regulations and standards that are adopted.

METHODOLOGY

This study consolidated doctrinal, library-based, and field research. Data from online databases of Current Law Journal, LexisNexis, Scopus, and ResearchGate are employed in this library-based research. The primary sources of Malaysian laws and regulatory instruments will be evaluated, including the National Forestry Act 1984, the Land Conservation Act 1960, the Environmental Quality Act 1974, the Waters Act 1920(Revised 1989), the Town and Country Planning Act 1976, and our supreme law, the Federal Constitution.

FINDINGS AND DISCUSSION

This research showed that there is no specific legal framework in Malaysia to conserve the water catchment. The presence of other environmental law merely centering on penalty and the other environmental issue but silent on the water catchment conservation. As in the current amendment of the Environmental Quality (Amendment) Act 2022, the penalty has been increased to ten million Ringgit Malaysia, but there is no mention of the conservation water catchment area. Therefore, the Malaysian legal framework must provide a robust legal framework. The law's enforcement should be strictly regulated to limit problems that could affect the quantity and quality of clean water. In addition, the environment and water resource issues are the responsibility of the federal and state governments thus the powers and responsibilities are predicated on them. This overlapping jurisdiction, particularly in water catchment management, has resulted in insufficient components in law and regulations, which should be addressed to ensure consistency and to avoid ambiguity in the law and policies. As a recommendation, the law from other jurisdiction such as New Zealand's the Resources Management (Amendment) Act 2022 should be referred to for the sake of conserving water catchment area in Malaysia.

CONCLUSION AND RECOMMENDATIONS

The water catchment in Malaysia can be conserve and protected effectively by providing a robust and sound legal framework. It is imperative to protect water catchment since the consequences of not doing so can undermine the conditions of our water supply. In line with this intention, there is an urgent need to pass a specific legislation to conserve the water catchment, catchment infrastructure work, to regulate activities within or affecting the inner and outer catchment area.

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TRACK 13 COMMERCIAL/CONSUMER/LAW AND ECONOMICS

A LEGAL STUDY ON RESPONSIBLE LENDING PRACTICES IN BANKING INDUSTRY IN MALAYSIA

Alisa Ardini Fatnin Rosli[1], Fify Nirwanza Atira Zaihisham[2], Noor Farah Athirah Mushtareh[3], Wan Nor Ramizah Amani Wan Remali[4]*, Zahid Zulkifli[5], Ibtisam @ Ilyana Ilias [6] & Nurulhasni Shaari @ Mat Saman[7]

[1,2,3,4,5,6,] *Faculty of Law, Universiti Teknologi MARA, Malaysia.*
[7] *Centre of Foundation Studies, Universiti Teknologi MARA, Malaysia.*

Email: [1]alisaardini.1234@gmail.com; [2]fifynirwanza99@gmail.com; [3]farahathmirah21@gmail.com; [4]ramizahamani@gmail.com; [5]zahidzulkifli@gmail.com; [6]ilyanailias@uitm.edu.my; [7]nurul015@uitm.edu.my

[*]*Corresponding author*

ABSTRACT

The significant rise in bankruptcy rate and over-indebtedness in Malaysia raises questions as to the extent of compliance by banks with the Guidelines of Responsible Financing enforced by the Bank Negara Malaysia (BNM) as a regulator. In this research, the existing local legal framework of responsible lending and the law of selected jurisdiction regarding responsible lending practice are analysed, along with the application of the guidelines by the banking industry. In achieving the objectives of the research, both doctrinal and qualitative research methodologies are employed. A semi-structured interview was carried out via an online platform by interviewing financial officers from selected banks, where they were asked about their lending practice and compliance with the responsible lending guideline set up by BNM. Comparative research is also adopted by comparing responsible lending guidelines in Malaysia with the law introduced in South Africa. The findings show that compliance of the banking industry in Malaysia with the Guidelines of Responsible Financing relies solely on BNM as a regulator to take action as it is a regulatory instrument. Pertaining to the said findings, there is a need to enhance the existing responsible lending regime in Malaysia with a view to increasing the protection of financial consumers from being over-indebted by referring to the South African law on the implementation of proper legislation.

Keywords: *Bankruptcy, Over-indebtedness, Financial Consumer Protection, Responsible Financing, Consumer Credit*

Themes: Commercial/ Consumer/ Law and Economics

INTRODUCTION

The introduction of Guidelines of Responsible Financing (GRF) by Bank Negara Malaysia (BNM) aims to protect the interests of the applicants or the borrowers of loans to prevent them from falling into financial hardship due to excessive debt burden that may lead to foreclosures (Bank Negara Malaysia, 2016). The main focus of this research is on the compliance of banking institutions with the GRF set up by BNM following the over-indebtedness problems and high bankruptcy statistics recorded in Malaysia. There is no legislation governing responsible lending among banking institutions in Malaysia. Hence being a regulatory instrument, enforcement solely depends on the regulator. The rise in the number of bankrupts in Malaysia raises questions as to the extent of compliance by banks and enforcement by the regulator. Furthermore, under the existing regime, financial consumers who are victimised by the act of irresponsible lending have no avenue to initiate legal action against the bank and seek compensation. Hence, this research aims to examine the laws/policies/guidelines in regulating responsible lending in the banking industry in Malaysia, to examine the extent of responsible lending practised by the banking industry, to study the laws/policies/guidelines governing responsible lending in South Africa and to propose recommendations to improve laws/policies/guidelines regulating responsible lending among banking industry in Malaysia.

LITERATURE REVIEW

. The concept of lending activities can be divided into responsible and irresponsible lending. BNM assigns the banking institutions with the responsibility to ensure the borrowers' income can meet debt repayment after setting aside other expenditures (Bank Negara Malaysia, 2016). The borrower, as well as the lender, have the responsibility in carrying out the lending activity where the borrower needs to provide a proper evaluation of their capability to repay the loan while the lender holds the responsibility in making sure the borrower can pay back the loan (Thomas Prouza, 2013). Due to the economic problems in 2007, BNM introduced responsible lending guidelines to protect the consumer. This is in line with the guidelines issued by OECD and the World Bank, as there must be an organisation to protect consumer interests and financial providers (Habib Ahmed & Ili Rahilah Ibrahim, 2018). Based on a report by BNM of Guidelines on Responsible Financing, the objective of these guidelines is to promote a sustainable retail finance market by requiring financial service providers to engage in prudent, responsible and transparent financing practices. In 2012, the guidelines for granting household loans were introduced by BNM, and there was a decreasing number of loans released by the financial service in the two years after its implementation, which shows the effectiveness of the guidelines (Mohamad Yazid Isa & Mohd Yahya Mohd Husin, 2016). Furthermore, the responsible lending guidelines reduced the number of household loans from 13.4% in 2011 to 13% in 2012, and this reduction continued to 9.9% in 2014 (Muhammad Adli Musa, 2015). There is no law covered for a consumer in the Consumer Protection Act 1999 specifically on responsible business conduct, which makes the consumers have even fewer rights for their own protection (Habib Ahmed & Ili Rahilah Ibrahim, 2018). Despite the guideline of responsible lending introduced by the Bank Negara Malaysia, the indebtedness rate is not subsiding, and this would affect the bankruptcy statistics in this country. Though the Central Bank has taken steps to control the increasing debt in Malaysia, the debt rate is still rising every year (Selamah Abdullah Yusof et al., 2015). The rapid increase rate of the gross domestic product in 2008 has caused Malaysia to be the highest personal indebtedness rate country among 14 other Asian countries. It has also been recorded that 68 individuals are declared bankrupt daily (Nur Hafidzah Idris et al., 2018). The indebtedness problem in Malaysia has yet to be resolved, and the uncertainty as to what extent the compliance of banking institutions with the lending guideline set up by the BNM does not make the situation better. There has been no in-depth analysis or research which thoroughly addresses this issue as well as provides accurate evidence that discusses the compliance of the banking institutions with the responsible lending guideline introduced by the BNM. This research, therefore, fills in the gap in the existing literature in the area of financial consumer protection law

METHODOLOGY

This research adopted both doctrinal and non-doctrinal, including comparative research approaches. Doctrinal research involved a critical review of the Financial Services Act 2013 and Islamic Financial Services Act 2013, and the Guidelines of Responsible Financing introduced by Bank Negara Malaysia, along with journals and newspaper articles. As for the non-doctrinal research approach, a semi-structured interview was carried out by interviewing the respondents working in banking institutions to examine the responsible lending practice. The data from semi-structured interviews were triangulated with the literature and were analysed using descriptive analysis, thematic analysis, content analysis and comparative analysis, which was facilitated by the computer software Atlas. Ti.

FINDINGS AND DISCUSSION

Banking industries in Malaysia comply with the Guidelines of Responsible Financing in determining the suitability and affordability of consumers prior to granting the financing. This includes the determination of the Debt Service Ratio based on the formula stipulated in the said guidelines based on income and repayment obligations, verification of the documents, disclosure of the obligation of the consumer to supply truthful information and effect for non-compliance, and determination of financing tenure and financing approval. Compliance is promoted by the fear of stern action which will be taken by Bank Negara Malaysia. GRF is a regulatory instrument, so compliance solely relies on BNM as a regulator to take action. Since BNM is responsible for overseeing myriad financial issues, this non-compliance issue, as far as responsible financing is concerned, may be overlooked. This is reflected by the increased number of bankruptcies despite the presence of the GRF. Furthermore, the GRF does not stipulate that non-compliance issues

cannot be determined by a court or relevant alternative dispute resolution (ADR). Likewise, it does not spell out the legal effects of a consumer's untruthful disclosure.

CONCLUSION AND RECOMMENDATIONS

The qualitative study concludes that banks have adhered to the Guidelines for Responsible Financing. Nevertheless, there is a need to enhance the existing responsible lending regime in Malaysia with a view to increasing the protection of financial consumers from being over-indebted. There is a need for a legal and regulatory instrument to govern responsible lending practices by banking institutions to provide financial protection, including the enforcement of specific laws. By introducing regulations for responsible lending, consumers and banking institutions may be granted rights in the practice of borrowing and lending financial products. The Malaysian parliamentary body should consider enforcing a new regulation or statute which enables consumers to take action against banking institutions in the event of non-compliance issues and allow the courts to determine such cases. Other than that, since data which are not covered by CCRIS, CTOS or not stated in the payslip are not regarded for calculation of debt obligation and may seriously affect the accuracy of the evaluation, there is a need to establish a more comprehensive credit reporting system. Furthermore, BNM as a regulator and Credit Counselling and Debt Management (AKPK), can organise more financial literacy awareness programs to help people acquire some basic knowledge on how to manage their finances effectively and avoid being in the debt trap.

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DIGITAL SOLUTIONS IN ISLAMIC BANKING AND FINANCE

Haziqah Binti Hamzah[1*], Nur Hamizah Binti Hamzah[2], Hisyam Bin Yusof [3], Nur Atiqah Binti Ahmad Zairul[4] & Syuhaeda Aeni Mat Ali[5]

[1,2,3,4&5]*Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1]2020493964@student.uitm.edu.my; [2]2022132355@student.uitm.edu.my; [3]hisyamyusof@yahoo.com.my; [4]2021465198@student.uitm.edu.my; [5]syuha497@uitm.edu.my

**Corresponding author*

ABSTRACT

Another significant milestone in Malaysia's Islamic banking and finance industry has been achieved upon announcement by Bank Negara Malaysia ("**BNM**") on 29 April 2022 in relation to the successful applicants for the digital bank licenses i.e. a consortium of AEON Financial Service Co. Ltd., AEON Credit Service (M) Berhad and MoneyLion Inc. and a consortium led by KAF Investment Bank Sdn. Bhd., which has been licensed as the Islamic digital banking license holder under the Islamic Finance and Services Act 2013 ("**IFSA**"). New technologies have brought many changes to the Islamic banking and finance industry. This study aims to analyse the digitalisation of Islamic banking products and services in Malaysia. The methodology adopted is doctrinal analysis. This is qualitative research, and the methods used are based on the review of the literature. In this study, we have identified specific issues, in particular, the non-comprehensiveness of the existing regulatory and supervisory frameworks and the lack of expertise on financial technology ("**Fintech**") within the Shariah Committee and the Shariah Advisory Council. It cannot be argued that the digitalisation of Islamic banking products and services offers myriad benefits to the banking and finance sector and helps to enhance the growth of the Islamic finance market. Nevertheless, there should be consistent laws and regulations to regulate the digitalisation of Islamic banking products and services in Malaysia, as well as the appointment of expertise in the Fintech within the Shariah Committee and/or Shariah Advisory Council.

Keywords: *Banking, Conventional Banking, Islamic Banking, Digitalization, Economy*

Themes: Islamic Finance, Digitalisation, Globalisation

INTRODUCTION

The term "digitalisation of Islamic finance" refers to the digitisation of Islamic banking products and services. The banking products and services have been digitised and are available online without the need for customers to visit the banks. Big data, artificial intelligence, robotics, blockchain, cryptocurrency, the Internet of Things and smartphones are all used for digitising products and services. Nowadays, a lot of banking products, processes and activities, such as obtaining bank statements, cash withdrawals, funds transfers, checking/savings account management, opening deposit accounts, loan management, bill payments, cheque management and transaction records monitoring, have been digitised to serve the customers through online channels. The emergence of Fintech has changed the dynamic of the banking and finance system. It moves the sector from a product-centred approach to a more customer-centric approach. Fintech has wreaked chaos on the global finance industry with its simplicity of use, low costs, and high-efficiency goods and services.

LITERATURE REVIEW

Efforts are not sufficient to establish a robust ecosystem for Islamic digital products and services due to a lack of regulator advocacy. Leaving FinTech without proper regulation will disrupt the whole digitalisation process with the possibility of deceptions, abuse and misapplication of the technology (Oseni & Ali, 2019). Malaysia has a robust framework to cater to Islamic finance-related activities; however, the progress on the technology part cannot be seen much by the authorities (Whitehead, 2018). Although the Central Bank of Malaysia (BNM) and the Securities Commission (SC) have issued the FinTech Regulatory Sandbox and the guidelines on crowdfunding, there is no adequate action taken in order to coordinate the component of Shariah-compliant in the extant FinTech solutions (Abdullah, 2017). Thus, this regulatory restraint shall

frustrate the potential of Islamic finance institutions to improve their products and services in adopting up-to-date models related to the FinTech solutions like cryptocurrency and blockchain technology (Islamic FinTech Summit, 2018). While in fact, the usage of RegTech would lessen the risk associated with probable breaches of the Shariah prerequisite (Qatar Financial Centre, 2018).

METHODOLOGY

The content analysis begins with multiple search engines and public databases such as ResearchGate and Springeropen to find relevant papers using keywords such as Fintech, Islamic banking, Islamic economics, social finance, and digitalisation. After collecting a sufficient number of research papers from online databases, the authors conducted the content analysis. They extracted pertinent information to delve deeper into assessing the digitalisation of Islamic banking products and services in Malaysia by comparing them to their conventional counterparts. The authors also refer to and analyse the implementation of digitalisation of Islamic banking in Singapore and Indonesia. The authors chose Singapore and Indonesia as both countries are in the same region of Asia.

FINDINGS AND DISCUSSION

Digital marketing bridges the gap between customer perspectives that frequently touch or interact with the digital world by utilising digital conversation interfaces used by businesses to provide relevant content for customers and utilising various digital media to create digital relationships with customers. Nevertheless, there are legal issues and challenges that should be discussed in respect of the implementation of Islamic digital products and services. In this paper, the existing regulatory and supervisory frameworks of Islamic finance are studied and scrutinised to determine whether such frameworks can accommodate the digitalisation of Islamic banking and finance. It appears that there is no specific structure relevant to Islamic banking in terms of digital banking goods and services. As a result, the Islamic banking business and operations are susceptible to the current frameworks in the lack of a framework that governs and supervises Islamic digital banking goods and services. Problems arise, given that present frameworks lack key digitalisation aspects. For example, IFSA controls payment systems, although it should be noted that digital payment systems differ slightly from their traditional equivalents. In addition, it is essential to note that Fintech is all about the technology utilised in the financial system. Therefore, it is critical for members of the SAC of BNM to be knowledgeable in this field. However, while choosing SAC members, the CBMA does not place much emphasis on the aforementioned condition. According to Section 53 of the CBMA, one of the prerequisites for nomination to the Shariah Advisory Council of BNM is having knowledge or experience, particularly in Fintech. Given the rapid expansion of Fintech in the Islamic banking and services industry, lawmakers should consider amending this section to add expertise or experience in Islamic digital banking products and services as one of the requirements for appointment to the BNM SAC.

CONCLUSION AND RECOMMENDATIONS

The current situation is obviously difficult for banks. However, with the appropriate approach, banks have a unique potential to prosper in the long run. Pursuing innovative technologies and digital ecosystems will be critical to success. With these factors in place, banks will reduce costs and increase efficiency, allowing them to weather the storm and redefine their value to clients in a changing market. The Islamic banking and finance industry ought to embrace digitalisation to diversify its products and services. In order to safeguard the assimilation of the technology into the existing traditional practice of Islamic finance, an effective and efficient Shariah-compliant regulation is, therefore, necessary for governing the potential risks associated with the process of financial activities. In the meanwhile, consistent laws and regulations are required to ensure the Islamic financial system's long-term development and efficiency. It will provide the momentum needed for the Islamic banking system's desired absolute acceptance and complete integration into the world financial system. Furthermore, it is critical to nominate people with technical competence to the SAC of BNM in order to guarantee that the requirement for Shariah-compliant regulation in the Islamic financial industry is appropriately met. Creating competent and comprehensive regulatory/supervisory and governance frameworks provides market players with enough information about their performance in this specific and overall sector.

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THE INTERNATIONALISATION AND GLOBALISATION IN CORPORATE LAW REFORMS: SPECIAL FOCUS ON THE NIGERIA COMPANIES AND ALLIED MATTERS ACT, 2020

Yusuf Usman Liman[1]*,

School of Law, Universiti Utara Malaysia (UUM), Malaysia

Email: yusuf_usman_liman@ gsgsg.uum.edu.my

**Corresponding author*

ABSTRACT

Nigeria, like most jurisdictions across the world, is influenced by International practices and the practices of foreign jurisdictions in the course of its corporate Law reforms. The growing recognition of the role of the United Nations, World Bank, IMF, and OECD, amongst other international players, in providing guides and norms for corporate law reforms have improved harmonisation and the emergence of International Corporate Law. These influences have significantly manifested in the form of legal transplants in jurisdictions. Despite the enormous benefits, there are concerns about the suitability of the adaptation of legal transplants to local contexts of jurisdictions. In this regard, this paper using a doctrinal research method examines the influence of internationalisation and globalisation on the reform of Nigeria's company law leading to the passage of the Companies and Allied Matters ACT, 2020 (CAMA 2020) to replace the defunct 1990 Act. The paper adopts historical, analytical and critical approaches to show that the introduction of the new provisions of the CAMA 2020 has been largely influenced by the practices of the United Kingdom being a common-wealth nation and the goal of attaining international benchmarks. However, some of the provisions will suffer from the Nigerian context's problem of applicability and efficacy. Hence, it is imperative for jurisdictions to carefully understudy the impacts of reforms in their local contexts and the concerns associated with legal transplanting

Keywords: *Company Law Reform, Legal Transplant, CAMA 2020, Local contexts*

Themes: (Track 13: Commercial Law)

INTRODUCTION

Company law reforms have consistently received significant attention in nearly all countries. (Hopt, 2000). The need for reform is due to the pivotal role of company law in stimulating the economy and facilitating businesses in the economy of nations. Company Law provides a framework in which entrepreneurial activities can be developed and sustained in an orderly and efficient manner (Smith and Ibrahim, 2013)

Beyond the internal factors within countries that constantly push for company law reforms, governments have historically, since the 19th century, designed their company legislations based on comparison with other countries and transplanting (Foster, 2000). Roberts (2022) pointed out that there is a growing practice of countries reforming their company laws in line with international conventions and the laws of other countries. The question is whether company law worldwide is moving towards harmonisation, convergence and closer ties among countries and actors. However, this trend has its positives and negatives (Pargendler, 2021). On this note, this paper seeks to examine the significant factors fueling company law reforms from the lens of internationalisation and globalisation with particular reference to the Nigerian experience leading to the passage of the current Companies and Allied Matters Act, 2020 (CAMA 2020), which replaced the defunct 1990 Act. Concisely, the paper seeks to understand the driving forces of internationalisation and globalisation of company reforms in Nigeria, which applies to most jurisdictions worldwide to a large extent.

LITERATURE REVIEW

Smith and Ibrahim (2013) examined the role of company laws in improving entrepreneurship and businesses. On the other hand, Pargendler(2020-2021) discussed the rise of international corporate law as a reflection of the influence of internationalisation and the goal of connecting markets through globalisation. The author concluded that through their guidelines and principles, international institutions had contributed a lot to shaping countries' reforms along the line of international best practices. Similarly,

Foster (2000) comparatively analysed the reliance of company law reforms in England and France on learning and copying from the laws of other nations. The author stated that the UK company law continues to be the most significant export to the world because of the unanimous adoption of the decision in Salomon v Salomon, which established the principle of separate corporate legal personality. However, despite its isolationist approach, the UK copied the Italian version of a fictitious person at the earliest. In Russia, Roberts(2002) traced the Russian Corporate Governance code's development to world scandals like ENRON and the need for the country to have a standard that meets "global standards of corporate behaviour". In Malaysia, New Zealand and Australia, Hee (2002) examined the internationalisation of the various company law of the respective countries by transplanting other jurisdictions' company legislations. In Nigeria, Abuah et al. (2021), in a historical examination of Company law in Nigeria, posited that the UK played an influential role in the days of colonisation, starting with the Bubble Act of 1720. Further efforts at reforming 1825, 1912, 1985, 1990 and the existing 2020 CAMA reflected the desire to copy the UK but not in all respects. According to Daodu and Adegbite (2017), the goal of complying with international standards led to reforms in corporate governance in Nigeria influenced by International Economic bodies such as OECD, World Bank, and IMF, amongst others. The reforms provided by CAMA 2020 reflected the need to improve the business climate in Nigeria, according to Ogenyi (2021). The defunct CAMA 1990 was obsolete in meeting global trends and providing the legal framework for modern businesses to thrive in Nigeria. However, Corporate Governance Society (2021), Nwangwu(2021) and Uzoka (2020) have criticised some provisions of the CAMA 2020 as not reflective of the reality of Nigeria and hence problematic in the application.

The scepticism of the whole transplant of company legislations due to fear of suitability to national interests and norms is in the failure of Nigeria and the other Asian States in the UNCITRAL model law on Cross Border Insolvency (Mannan, 2016)

METHODOLOGY

The paper adopts a doctrinal legal research method to achieve the objectives. The method provides the means of engaging with legal concepts and sources of law in a rigorous, evaluative and interpretive manner. Bhat (2019) argued that it is the predominant method employed in research with a deep legal history despite its criticism of lack of taking into consideration the social contexts of law. The paper used library sources to access the primary sources of law (legislations mainly, the Nigeria Companies and Allied Matters Act, 2020 and case laws) and secondary sources of law (journal articles, books and the guides of International Institutions such as OECD, IMF, UN amongst others). Historical and analytical analyses were deployed to understand the past and "…the interconnections with norms at different hierarchies, and the force behind it which may reflect social recognition." (Bhat, 2019) and (Wyche et al., 2006)

FINDINGS AND DISCUSSION

The paper found that globally, countries worldwide have copied and imitated the laws of each other from time immemorial. Comparison with other jurisdictions has been an active factor influencing company law reforms. The decision in the UK case of *Salomon v Salomon* has provided a global feature of a modern company. It continues to serve as a foundation in most countries that an incorporated company has a separate and distinct personality from its owners.

The paper traced the company reforms of the US, Australia, Malaysia, France, Russia and Nigeria, particularly in corporate governance, to the desire of nations to attain international standards, copy other countries and facilitate trade easily. However, despite the role of international bodies in providing guides, standards and yardsticks for company law reforms, countries have not reformed their company legislations in total compliance with international standards and that of other nations. Focusing on Nigeria, all successive company reforms were driven by the need to copy the UK and facilitate trade and businesses. The CAMA 2020, which replaced the CAMA 1990, is regarded as the most comprehensive business legislation to attain international best practices. However, the CAMA 2020 did not in all respects adopt the UK Companies Act, 2006, nor the standards of the OECD, World Bank and UN. For example, Nigeria, like many other countries, have not adopted the 25-year-old UNCITRAL Model Law for Cross Border insolvency aimed at facilitating the resolution of insolvencies across jurisdictions (Bassey et al., 2022).

CONCLUSION AND RECOMMENDATIONS

The paper has demonstrated that company reforms across jurisdictions continue to be impacted and influenced by the globalised nature of the world and international benchmarks set by international bodies like the OECD, World Bank, IMF, UN, and OHADA, amongst others. Historically, countries have embarked on comparisons and legal transplants of company laws of other jurisdictions.

Nigeria is not immune from these influencing factors in its successive company legislations leading to the passage of the CAMA 2020. However, despite the aim of meeting international company law standards and transplanting mainly from the UK, Nigeria has not fully adopted the benchmarks of international bodies in its consideration, leading to the CAMA 2020. In addition, the authors are unanimous that Nigeria needs to be mindful of local contexts in its drive toward transplantation. Thus, like most countries, Nigeria is moving toward convergence in company law with other jurisdictions and not harmonisation.

The paper presents an underpinning puzzle for policymakers in various jurisdictions to consider whether company law reforms should move towards convergence or harmonisation. In these debates, the force of globalisation continues to influence company reforms.

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THE LIMITED LIABILITY PARTNERSHIP IN MALAYSIA

Ravindran Nadarajan[1]*, Hamizah Abd Rahman[2], Tengku Adida binti Tengku Zainal Mulok [3], Mohamad Syauqi Bin Mohamad Arifin[4], Che Natheera Binti Syed Abdul Aziz[5]

[1]*Postgraduate student at Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM), Malaysia*
[2,3]*Lecturer at Faculty of Law, UiTM Cawangan Kelantan, Malaysia*
[4] *Lecturer at Faculty of Information Management, UiTM Cawangan Kelantan, Malaysia*
[5]*Lecturer at Business and Finance, UTAR, Kampar, Perak.*
Email: [1]ravindrann@utar.edu.my; [2]hamizahabdrahman@uitm.edu.my; [3]adida359@uitm.edu.my
[4]*mohdsyauqi@gmail.com;*

[*]*Corresponding author*

ABSTRACT
A limited Liability Partnership (LLP) is an additional form of business entity available for an entrepreneur who decides to carry on a business in Malaysia. The Companies Commission of Malaysia introduced this business entity under the Limited Liability Partnership Act (LLPA) in 2012. This paper uses the doctrinal approach to identify the nature of LLPA in Malaysia. The conceptual understanding of LLP and a valid definition of LLP is presented by referring to provisions of LLPA. An evaluation of the best features of LLP is provided, and the important provisions of LLPA are included and discussed in detail. By doing so, a clear exposure in the application of LLP can be provided.

Keywords: *Limited Liability Partnership, LLPA 2012, Business Entity, Rights of Limited Liability of Partnership*

Themes: Limited Liability Partnership Law

INTRODUCTION

The Limited Liability Partnership Act 2012 (LLPA 2012) was passed and gazetted in 2012, but it only took effect in 2014. This entity was not entirely new in Malaysia because, previously, an earlier LLP Act had been introduced in the Malaysian offshore territory of Labuan. The LLP Act is known as the Labuan Limited Partnership Act 2010 and was formerly known as Labuan Offshore Limited Partnerships (Malaysia) Act 1977. In contrast with other countries that adopted LLP as the abbreviation for limited liability partnership, the Malaysian LLP used the abbreviation of PLT and is known in Malay term as "Perkongsian Liabiliti Terhad".

According to the LLPA 2012, the term "limited liability partnership" refers to "a limited liability partnership registered under section 11 or a foreign limited liability partnership registered under section 45". The term "limited liability partnership agreement" under LLPA 2012 refers to: "a written agreement between the partners of a limited liability partnership or between a limited liability partnership and its partners, which determines the mutual rights and duties of the partners among themselves and their rights and duties concerning the limited liability partnership". Unlike with corporate companies that are established under the Company Act 2016 in Malaysia, an LLP agreement becomes the so-called "constitution" of any established LLP, instead of having the Memorandum and Articles of Associations, or a separate Constitution for the company. According to the Companies Commission of Malaysia (SSM), LLPs are an alternative business vehicle that combines the characteristics of both companies and conventional partnerships.

LLPs are governed directly under the LLPA 2012 (Act 743) (LLPA 2012). LLPA 2012 is supplemented with the LLP Regulations Act 2012, for comprehensive implementation. Furthermore, the SSM also provides: (i) the general guidelines for registration of LLPs and related matters; (ii) the manual for online lodgment specifically for annual declarations by LLPs in Malaysia; (iii) LLP brochures; and (iv) LLP booklets for those who are interested in establishing an LLP. In Malaysia, LLPs have been introduced and

recognized as a corporate body. By having the corporate body status, an LLP has similar attributes to a company, rather than a partnership, and is therefore capable of exercising all the functions of an incorporated company - for instance, it has a separate legal entity, the ability to sue and be sued, enjoys perpetual succession and also it has the power to hold property and the liability of the partners also limited. According to the Companies Act 2016, an incorporated company is a corporation that has a separate legal entity or artificial legal person status and exists independently. In other words, a company exists separately from the members, officers, and employees, as well as the owners of the company. With these features of a company, an LLP also has a separate legal entity distinct from its members. Therefore, the nature of LLP will be analyzed in this paper.

LITERATURE REVIEW

From the literature, there is no specific definition provided for corporate governance in Malaysia. The Companies Commission of Malaysia (SSM) as of Jun 2022 relies on the acceptable definition provided by the Finance Committee Report of 1999 and the Corporate Governance Blueprint 2011.
Mohd. Sulaiman et al. (2011) find that in relation to corporate governance of companies:

> "Development in corporate governance in Malaysia was influenced primarily by the developments in the UK arising out of the 1993 Cadbury Committee's report. The Malaysian Code of Corporate Governance (MCCG) was first promulgated in 2000 as a result of the recommendations of the Malaysian Finance Committee on Corporate Governance (1999). The MCCG 2000 was reviewed in 2007 and more recently in 2012".

The SSM is maintained as "… the leading authority for the improvement of corporate governance… through the comprehensive enforcement and monitoring activities, so as to sustain positive development in the corporate and business sectors" in Malaysia.

Under the MCCG 2012, companies that are listed under the Securities Commission of Malaysia must comply with the MCCG 2012 and report their performance in their annual reports. However, the MCCG 2012 is silent on whether the MCCG 2012 can be applicable to other forms of business structures, such as LLPs or partnerships. Based on research done by Salim, the corporate governance of LLPs may be different from the corporate governance established under a company or partnership due to an LLP's features.

According to Zulkafli et al.(2007), Malaysia had a major reform of its corporate governance after the economic, and financial crisis of 1997. There is no specific differentiation between the application of corporate governance in the finance sector, with other sectors, such as the private and public sectors. There is also no uniformity in the application of corporate governance in Malaysia that encourages flexibility in the application of corporate governance. Therefore, business governance becomes dependent entirely on those responsible people who choose to adopt it, as supported by Haniffa and Cooke (2000).

With such flexibility in the structuring of corporate governance, regardless of the specific format for the adaptation, Mitton (2002) found that corporate governance has a significant impact on the performance of businesses, especially during economic and financial crises. Analysing a total of 398 firms in several countries (including Malaysia), research by Mitton (2002) clearly indicates the importance of corporate governance to any form of business entity. This may also include LLPs. Furthermore, there is a lacuna in the literature concerning the existence of corporate governance as applied to LLPs established in Malaysia.

According to Singam (2003), there is significant room for improvement in corporate governance in Malaysia. This is not limited to incorporated business structures, partnerships or any other new forms such as LLPs. Without proper application of corporate governance, companies, partnerships, and LLPs are all open to mismanagement, misappropriation of funds or profits, and legal liability for negligent actions.

METHODOLOGY

This paper uses the doctrinal approach to identify the nature of LLPA in Malaysia. The conceptual understanding of LLP and a valid definition of LLP is presented by referring to provisions of LLPA. An evaluation of the best features of LLP is provided, and the important provisions of LLPA are included and discussed in detail. By doing so, a clear exposure in the application of LLP can be provided.

FINDINGS AND DISCUSSION

Section 3 (1) of the LLPA 2012 clearly states that an LLP is a corporate body and shall have a legal personality separate from its partners. Moreover, the other feature of the company is also applicable to the LLP. For instance, the LLP has perpetual succession, can sue and be sued and also has the power to own property. Lord McNaughton commented that: "there is nothing in the Act requiring the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take substantial interest in the undertaking, or that they must have a mind and will of their own". Therefore, the fact that all the shares were held for the benefit of one person does not affect the status of the company as a separate legal entity. It does not cause the company and the sole beneficial owner of the shares to be one legal person. This principle was applied to the LLP under the external regulation of the LLP, which is similar to the company. Section 3(2) stated that LLPs should have perpetual succession, whereby once incorporated, the LLP shall continue to exist despite the death, bankruptcy, insanity, change in membership or an exit from the business of any owner or member, or any transfer of stock. Similarly, section 16(6) states that upon the incorporation of a company, the persons whose names appear in the company's register of members shall, from time to time, come together as the members of the company, and together they shall be a body corporate. In Section 16(5), the corporate body shall enjoy a separate legal entity with an existence that does not depend on the identity of its members. Similar to a company, an LLP can sue and be sued in its name. It can sue in respect of rights that it has, and if it has liabilities, others may sue against it. The partners of an LLP cannot generally take any legal action on behalf of the LLP. Only the LLP itself can enforce its rights. If a wrong has been committed against the company, a member cannot take action on behalf of the company. LLPs have the power to own, dispose of, and develop their property, similar to a company.

The property of an LLP is it's own and not that of its partners. Even if a partner holds almost all the shares of the LLP, he does not have any proprietary interest in the LLP's property. Once a person has sold or given his property to the LLP, he no longer has rights over it. The property belongs to the LLP, and the partners no longer have any rights or interests.

In Malaysia, LLPs have similar liability protection to a company, where all partners have limited liability against debt. However, the protection of the limited liability of partners in an LLP is only partial. This is because section 21(2) of LLPA 2012 clearly states that although an LLP shall be liable for all claims against it, the defaulting partners who caused or contributed to the claims shall be jointly liable with the LLP for the claims of the third party. Meanwhile, therefore, innocent partners are protected from any liability against third-party claims, as the LLP is liable for it. LLP partners are the agents of the LLP and not each other. LLPs are also not bound by anything done by a partner in dealing with a third person. The liability of partners will be unlimited in such a case where the LLP still operates but the number of partners falls below two. In this case, the LLP can still operate for a period of no longer than six months (or longer if determined by the Registrar). To continue to exist, the LLP must find new partners because one of the requirements of an LLP is that it has two or more partners. Failure to fulfil this minimum requirement will make the sole partner jointly and multiply liable with the LLP for all the LLP's obligations. With regards to the liabilities of partners in the case of insolvency, sections 22(a) and (b) state that the partner's liability will be unlimited and that they are personally liable total of the LLP's debts during winding up if they had knowledge that when they distributed the LLP's assets, that the LLP would no longer have the capability to operate or become insolvent.

The right and duties of partners are based on partnership agreements whereby partners play specific roles in decision-making. Under the management of an LLP in the LLPA 2012, it is clear that LLPs hold a complete obligation for any concluded contract and any action of tort. The partners of an LLP are not personally liable (either directly or indirectly) for any obligations of the LLP simply because they are the

LLP's partners. Such liability that arises from the LLP's obligations may appear through indemnification, contribution, assessment, etc. The LLP's partners own their very own personal liability in any tort action for their wrongdoing. This means that the LLP's partners do not share the liability of a wrongful act that is committed by one of them.

By referring to section 21 (3) of the LLPA, it is clear that a partner is exempted from any liability for any wrongful act or omission that is committed by another partner in the LLP. The LLP will be liable to the same extent as the partner who committed the wrongful act when they did so in the course of the LLP's business or under the LLP's authority. As a legal person, the LLP will resolve its liability using the assets that the LLP owns. In the case of insolvency or bankruptcy proceedings, two situations need to be considered. The first situation arises when an LLP becomes insolvent. An LLP is considered insolvent when it cannot pay its debts that are due in the normal course of business operation. In this situation, the partners will be liable to pay the debts if they receive a distribution from the LLP that results in the insolvency of the LLP. Under section 22 of the LLPA 2012, the partner or ex-partner must know that (i) the LLP is insolvent at the time of distribution, or (ii) the distribution would result in the insolvency of the LLP, and they ought to have known such situation would happen. The liability of the partner or ex-partner is extended to the total value of the distribution that they receive from the LLP. Such liability of a partner or ex-partner is extended to (i) distribution received within 2 years before the commencement of the winding-up process of an LLP; and (ii) distribution is received by their assignee or nominee.

The second situation occurs when the partner of an LLP becomes bankrupt. The partner must be officially adjudicated as bankrupt. The bankruptcy of the partner will not by itself lead to the partner's cessation from the LLP. The Director-General of insolvency or the trustee of the bankrupt partner's estate is entitled to receive the distribution from the LLP. Such distribution of the LLP is subject to the agreed portion that the bankrupt partner should receive from the LLP, based on the LLP agreement.
Nevertheless, the LLPA 2012 provides strict resolve, whereby the bankrupt partner, the Director-General of the insolvency, or the bankrupt partner's trustee of the estate, must not interfere in the LLP's management. The bankrupt partner can still continue with their original position managing the LLP.
Nevertheless, the bankrupt partner must accordingly get leave from the Director-General of Insolvency; or the courts and fulfil two conditions: (i) the notice of intention to apply for leave must be properly served to the Director-General of insolvency, and (ii) such application for leave has already been heard by the Director-General of Insolvency.

CONCLUSION

LLP is one of the good Malaysian business vehicles with the legal attributes of the company and also partnership. However, this unique combination causes several questions about the governance structure of the LLP. As we know that the legal attributes of LLP are similar to the company, it is impossible to apply the current corporate governance of the company to LLP. There must be a good mechanism for LLP to have its own corporate governance structure. Future research should focus on a suitable corporate governance structure for LLP while having both internal and external characteristics of the company and partnership.

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TRACK 14 MARITIME LAW

THE RIGGED RACE FOR RESOURCES: DEEP-SEA EXPLOITATION AND DEVELOPING STATES

Stephanie Kristina Susanto[1]*
[1]*Faculty of Law, Universitas Gadjah Mada, Indonesia.*
Email: [1]*stephaniekristina@mail.ugm.ac.id*

[*]*Corresponding author*

ABSTRACT
Deep-sea exploitation has presented a novel challenge for lawmakers worldwide to create a legal framework capable of balancing delicate interests, protecting the environment, and providing a profitable system for all the stakeholders concerned. The existence of valuable minerals found on the deep-sea further amplifies the urgency of stakeholders to secure their stake. Due to an already existing imbalance of technologies, expertise, and know-how, developing and least-developed states are considered some of the more vulnerable groups impacted by the current framework. To this extent, this paper uses a normative methodology to analyse primary sources (original legal texts) and secondary sources (books, commentaries, essays, newspaper articles, online sources) to explicate the principle of Common Heritage of Mankind and its application within the current legal framework for deep-sea mining. While there have been many scholarly works discussing the common heritage of mankind as a principle, there have yet been any publications on the application of the common heritage of mankind on deep-sea exploitation, which specifically analyses its potential disadvantages towards technologically less advanced developing states. The author seeks to fill this gap by utilizing a case example of Indonesia to provide an example of how domestic legislation might help balance out the scales, pending the enactment of the on Draft Regulations on Exploitation of Mineral Resources in the Area. This research found that the novelty of the legal framework of deep-sea exploitation presents a rare opportunity for states to correct, fill the gaps, and hopefully create a better, fairer system that provides equal benefits to industrialized Western states and developing least developed states

Keywords: *Maritime Law, Common Heritage of Mankind, The Area, Deep-Sea Mining, International Law* **Themes:** Maritime Law

INTRODUCTION

Home to billions of biodiversity and natural resources, our seas are vital to our planet's natural ecosystem. They are also an essential element of our world's global economy. Research shows that almost 90 percent of global trade by volume is borne by sea.[1] To this extent, many have opined that it should have been unfitting to call our planet "Earth" as it is vastly comprised of open seas and large bodies of water. As with all resource-bearing sites, sovereign states have raced for ownership and control of the seas ever since the dawn of time. A statement by the United Kingdom Prime Minister David Cameron clearly illustrates states', and most predominantly, Western states' ambition to dominate, at that time specifically marine resources; "[w]e are involved in a global race where we have to compete with the fast-growing economies of the South and East of the world ... We want to make sure we get every opportunity out of this".[2]

In the current century, three types of mineral deposits exist in the deep-sea: polymetallic nodules, cobalt-rich crusts, and massive polymetallic sulfides. These mineral deposits are highly valued and highly sought

[1] Scheiber, H. N. (2011). "Economic Uses of the Oceans and the Impacts on Marine Environments:". In *The World Ocean in Globalisation*. Leiden, The Netherlands: Brill | Nijhoff, at 12.
[2] UK Prime Minister David Cameron, as quoted in the Financial Times, 24 March 2013 in Zalik, A. (2018). Mining the seabed, enclosing the Area: ocean grabbing, proprietary knowledge and the geopolitics of the extractive frontier beyond national jurisdiction. *International Social Science Journal, 68*(229–230), 343–359, at 343.

after by states.[3]As a result, the total economic value of the deep-sea was estimated at US $266/billion a year in 2019, with 92 percent from abiotic resources such as oil and minerals.[4]

Although the deep-sea has been considered a Common Heritage of Mankind, as with almost everything in our world, Western states are increasingly dominating in critical decision-making around exploiting resources locked within. The exploitation of the deep-sea has been subject to countless debates, which scholars have been said to be deeply dominated by Western ambitions, which have placed developing and least developed states on the periphery.[5][5] While developing and least developed states (especially archipelagic or coastal states like Indonesia, Malta, and Fiji) did provide substantial contributions to the regulations surrounding the law of the sea, such as the determination of the exclusive economic zone (EEZ) during the drafting of the United Nations Convention on the Law of the Sea ("UNCLOS"),[6][6] other discourses are still dominated by the more vocal interests of the Western world.[7] [7]

These frustrations with the domination of the Western states are not novel to the scholarly world. Scholars adopting the Third World Approach to International Law or TWAIL approach, which aims to "understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms," has since the end of the Second World War opined that our international law framework is deeply skewed towards the favor of a few select Western states.[8][8] Even further, TWAIL scholars have argued that Western states are always looking for new frontiers of imperialism and that the novelty of the situation surrounding the deep-sea and outer space and lacking regulation might just give the perfect opportunity for a new imperialistic project.[9][9]

This paper aims to criticize the application of the principle of Common Heritage of Mankind within the current proposed framework on deep-sea exploitation and posits that the present framework disadvantages developing and least developed states, which are less technologically advanced, and serves as a tool to further Western interests and domination.[10][10] The article will provide recommendations for domestic legislation to safeguard the national interests of developing and least-developed states.

LITERATURE REVIEW

Whilst literature on deep-sea exploitation regimes and its impacts generally towards Mankind and more specifically towards developing and least-developed states have been quite ample, research focusing specifically on the Indonesian perspective has been lacking.

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[3] Fritz, J. S. (2015). Deep Sea Anarchy: Mining at the Frontiers of International Law. *The International Journal of Marine and Coastal Law*, *30*(3), 445–476, at 446.

[4] FAO. (2020). *Report of the Areas Beyond National Jurisdiction Deep Sea Meeting 2019, 7–9 May 2019*, Rome, Italy, at 23

[5] Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law (Cambridge Studies in International and Comparative Law Book 37)*. Cambridge University Press.

[6] UN General Assembly, *Convention on the Law of the Sea*, 1833 U.N.T.S. 397, 10 December 1982, available at: https://www.refworld.org/docid/3dd8fd1b4.html

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[8] Mutua, M. (2000). What is TWAIL? *Proceedings of the ASIL Annual Meeting*, *94*, 31–38.

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[10] DeLoughrey, E. (2015). "Ordinary Futures: Interspecies Worldlings in the Anthropocene" in *Global Ecologies and the Environmental Humanities: Postcolonial Approaches*. New York | Routledge, at 355-356.

METHODOLOGY

This research utilizes a normative methodology. The author uses the secondary data, which consists of primary, secondary, and tertiary legal materials, specifically the United Nations Convention on the Law of the Sea, Law No. 6 of 1996 on Indonesian Waters and Law No. 32 of 2014 on the Sea. The secondary data of this research is comprised of primary legal materials such as legislation, secondary legal materials such as journals, books, reports, and internet-based sources, and tertiary legal materials such as the Black"s Law dictionary and the English dictionary.

FINDINGS AND DISCUSSION

As an archipelagic state, Indonesia possesses an immense interest in regulating matters relating to the exploration and exploitation of its waters. With an area of 6,400,000 km^2, the mining of Indonesian waters have always been one of the interests of each presidential regime. This interest has in the past led to government-run or jointly-run research and exploration projects of the deep-sea such as the Snellius II Expedition (1985); *Hahuko Maru* Expedition (1986); *IASSHA* Expeditions (2001); *Bandamin I* Expedition; Indonesia-Japan Expedition Deepsea Expedition Java Trench (2002); *IASHA* Expeditions continued (2003); *Bandamin II* Expedition (2003); *Banda Sea* Expedition (2005); and the *INDEX-SATAL* Expedition (2010).[11]

Apart from the regulation ratifying UNCLOS, Indonesia's domestic regulation regarding its waters includes Law No. 6 of 1996 on Indonesian Waters and Law No. 32 of 2014 on the Sea. According to Law No. 32 of 2014 on the Sea, the "[s]ea region consists of the territorial waters and the territorial jurisdiction and the high seas and the international seabed area,[1212] and the "the Republic of Indonesia is entitled to carry out the management and utilization of natural resources and the environment in the sea region" as referred above.[13]According to the subsequent articles in the law, the term "sea region" encompasses territorial waters, which includes inland waters, archipelagic waters, and territorial sea and territorial jurisdiction, which includes additional zones, the Indonesian EEZ, and the continental shelf, along with the high seas and international seabed area.[14]

The regulatory framework for mining territorial waters can be observed through Law No. 3 of 2020 on Amendments to Law No. 4 of 2009 on Mineral and Coal Mining ("Mining Law"). According to Article 1(28), the area regulated by the Mining Law includes "the entire land space, sea space, including space within the earth as a single territorial unit, namely the archipelagic waters, inland waters, and the continental shelf." The Mining Law employs a regulatory framework through permits, providing for three types of permits, namely Mining Business License (IUP), Special Mining Business License (UPK), and People's Mining License (IPR). The IUP and IUPK each consist of two kinds of licenses: exploration and production.[15]

Indonesia currently has no regulation concerning the prospecting, exploration, and exploitation of the deep-sea in the Area, and consequently, Indonesia also does not have any regulation surrounding sponsorship regimes for deep-sea exploration and exploitation. This becomes a concern as the UNCLOS does not explicitly set out provisions to regulate sponsorship agreements, and domestic regulation comes into play. Therefore, it has become prudent for Indonesia to create a framework to regulate sponsorship agreements between itself and prospective contractors or commercial mining enterprises.

In retrospect, Indonesia already has previous experience with foreign mining enterprises: Freeport. Freeport's early history of entering Indonesia started during President Suharto's regime. Through Law No. 1 of 1967 on Foreign Direct Investments, Freeport signed a 30-year contract with Indonesia, giving them a massive amount of privileges, including three years of tax-free privileges and seven years of 35 percent

[11] Aryanto, N. C., & Kurnio, H. (2020). Tectonics of Volcanogenic Massive Sulphide (VMS) Deposits at Flores Back Arc Basin: A Review. *Bulletin of The Marine Geology*, *35*(2). 91-102.

[12] Article 6(1). Law No. 32 of 2014 on the Sea. Translation accessed through https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98587/117397/F503452426/IDN98587%20Eng:Idn.pdf

[13] *Ibid.*, Article 6(2).

[14] *Ibid.*, Article 7.

[15] *Sea Bed Mining Potensi Yang Belum Termanfaatkan*. (2016). ESDM. https://www.esdm.go.id /id/media-center/arsip berita/sea-bed-mining-potensi-yang-belum-termanfaatkan

withholding tax. Freeport was also free from taxes or royalties other than a 5 percent sales tax. It was only in 2018 that Freeport divested 51 percent of its shares to the Indonesian government.[16]The long-term consequence of the Freeport case was not limited to an economic one, and multiple environmental harms were created due to unsupervised mining, which left permanent damages to the surrounding area. Learning from this experience, a comprehensive domestic legal framework regulating deep-sea mining sponsorships is required.

Departing from an analysis of the current international framework, other states' domestic framework, and Indonesia's distinct legal system, it is proposed that domestic legislation is enacted that tackles the critical issues below. Albeit, national legislation should always be consistent with the UNCLOS and hence must aim to comprehensively incorporate all the relevant international law obligations provided under the UNCLOS and 1994 Agreement.

Firstly, provisions on the transfer of technology. Although under the UNCLOS and the Draft Exploitation Regulations, contractors or mining enterprises are required to create training programs for developing states, neither the UNCLOS, 1994 Agreement nor the Draft Exploitation provide a detailed rule as to the content and the expected outcome of the programs.[17] Contractors are only expected to submit their training program proposal to the ISA for review and approval. Through domestic legislation, developing countries like Indonesia can provide detailed requirements to be fulfilled by prospective contractors or commercial mining enterprises that are customized and can cater to Indonesia's national needs and interests. Additionally, Indonesia can also include provisions that require contractors or sponsored enterprises to promote local employment, capacity building, and long term economic benefits, such as what has been applied by several Pacific island states in the Pacific Community.[18] In specific, the domestic legislation can include the duty for contractors or sponsored enterprises to employ local workers, use local goods and services, provide training opportunities, and permit the use of their technology such as vessels or research tools for government research activities.

Secondly, the framework must also regulate monitoring and due diligence regimes. State parties to the UNCLOS and sponsoring states for deep-sea mining are imposed a due diligence obligation and are obliged not to cause harm to the environment beyond their national jurisdiction.[19] In this regard, the Indonesian government can employ a framework similar to the mining framework, where contractors or sponsored enterprises must acquire an environmental license and create and maintain an environmental impact assessment (AMDAL) which has three components: an environmental impact assessment, an environmental management plan, and an environmental monitoring plan. Where the AMDAL is not necessary, contractors or sponsored enterprises must undertake environmental management efforts (UKL) and environment monitoring efforts (UPL).

Thirdly, the regulatory framework must provide for corrective measures and sanctions for non-compliance. As with the current mining framework under Law No. 4 of 2009, the Indonesian government provides a system for corrective measures in the form of both administrative and penal sanctions. Under Law No. 4 of 2009, administrative sanctions include written warning; suspension of part or all of exploration or production operation activities; and/or revocation of Mining Licenses or Special Mining Licenses, whilst penal sanctions include imprisonment of at most 10 years and a fine of at most Rp10,000,000,000.00 (ten

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[16] Rifai-Hasan, P. A. (2009). Development, Power, and the Mining Industry in Papua: A Study of Freeport Indonesia. *Journal of Business Ethics*, *89*(S2), 129–143. https://doi.org/10.1007/s10551-010-0371-y

[17] ISA. (2013) Recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration. ISBA/19/LTC/14. https://isa.or g.jm/files/files/documents/isba-19ltc-14_0.pdf

[18] Pacific Community. (2012). Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation. Smenet. https://www.smenet.org/docs/public/FinalDeepSeaMineralsProjectReport.pdf

[19] Advisory Opinion of the International Tribunal for the Law of the Sea. (2011). *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf

billion rupiahs).[20] Indonesia might also benefit from strengthening these sanctions by providing a framework for corrective measures, which may include *inter alia* the remedy of harms and removal of potential hazards. In addition, this framework serves as a safeguard mechanism in case the sponsored contractor or enterprise decides to deviate from the rules in the domestic legislation and international regulations.

Fourthly, provisions for fiscal terms and regimes. Fiscal regimes to be regulated domestically may include *inter alia* the application of taxes, royalties, fees, levies, and other fiscal regimes that determine how revenues are shared between the State and contractors or sponsored enterprises. This part requires very delicate handling by the government as they have to balance the national fiscal interest with the fiscal regime of the UNCLOS. In this regard, the rule of thumb seems to be that as long as sponsoring states do not take a piece of the figurative fiscal pie before it can be divided among state parties, adapting their fiscal interests in domestic legislation is generally deemed to be okay. To illustrate, regimes that introduce recovery fees based on the amount and value of the mineral resources or corporate taxes should be avoided. However, pending the establishment of a fiscal regime of equity or benefit-sharing under the Draft Exploitation Regulations and its guidelines, reference is deferred to domestic legislation.

Lastly, provisions concerning dispute resolution. Article 187 and 289(2) of the UNCLOS grant the International Tribunal for the Law of the Sea a compulsory jurisdiction in some regard toward state parties. However, there may be a virtue in including a provision in the national legislation for international decisions and awards to be enforced domestically to ensure compliance. Additionally, domestic courts might provide prompt access to compensation for cases of third-party claims and domestic environmental damage.

Whilst the above recommendations might be argued as promoting the pursuance of national interest, which may thwart the original purpose of the principle of Common Heritage of Mankind, bearing in mind the already unbalanced scales, these domestic legislation acts as an additional safeguard to protect the national interests and security of developing and least-developed states against the advancements of Western imperialism.

CONCLUSION AND RECOMMENDATIONS

Prof. Ikechi Mgbeoji writes that "[i]deologically, the principle of Common Heritage of Mankind is a political and rhetorical tool of convenience used by both the industrialized and the industrializing worlds whenever it suits their respective interests."[21] It is becoming more apparent that the principle of Common Heritage of Mankind can be utilized by Western technologically advanced industrialized states to dominate the last frontiers of the world, such as the deep-sea and outer space.[22]

Nonetheless, the novelty of the legal framework of deep-sea exploitation presents a rare opportunity for states to correct, fill the gaps, and hopefully create a better, fairer system that provides equal benefits to industrialized Western states and developing least developed states. This opportunity must be seized by legal scholars and governments, particularly from developing and least-developed states as the most vulnerable group. With at least 37 countries, leading technology companies, and 622 scientists calling for a moratorium on deep-sea mining,[23] the next few years present the perfect momentum for all states to

[20] Law No. 4 of 2009 on Mineral and Coal Mining.

[21] Mgbeoji, I. (2003). Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources. *Leiden Journal of International Law*, *16*(4), 821–837.

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rethink the system for deep-sea mining to create the best practice of the principle of the common heritage of mankind both internationally and domestically.

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TRACK 17 COMPETITION LAW

THE REGULATED FEES UNDER THE SOLICITORS' REMUNERATION ORDER 2005: A REVIEW UNDER THE MALAYSIAN COMPETITION LAW

Zarith Nasytah binti Mohamad Zulkifli[1]*, Nurul Aqilah binti Ghazi[2], Siti Nuraisyah bin Zulkipli[3], Nur Hazirah binti Muhd Helmi[4] & Noraziah binti Abu Bakar[5]

[1,2,3,4,5] *Faculty of Law, Universiti Teknologi MARA, Malaysia.*

Email: [1]2019810708@student.uitm.edu.my; [2]2019811112@student.uitm.edu.my; [3]2019810962@student.uitm.edu.my; [4]2019847868@student.uitm.edu.my; [5]noraziah@uitm.edu.my

* *Corresponding author*

ABSTRACT

Price-fixing is illegal under the Competition Act 2010 (CA 2010), yet, exceptions are provided whereby one of the exceptions is when the act complies with the legislative requirement. The ambiguity of what may be regarded as a legislative requirement confuses whether the exclusion of price-fixing under the Solicitors' Remuneration Order 2005 shall be regarded and included as the exclusion of legislative requirements. Therefore, this research aims to investigate the legality of the regulated legal fees by the legal profession that may create unfair competition as prescribed under the CA 2010. It will also review the liability of the mandatory regulated fees under the Solicitors Remuneration Order 2005 (SRO 2005) for infringement of the prohibition of price-fixing under the MCA 2010. Ultimately, the core business of the legal profession is providing legal services, and the SRO 2005 only regulates non-contentious legal matters such as conveyancing matters. It requires standard procedures in completing the tasks given by clients. Hence, the lawyer's role is not just to affix his signature and prepare documents.

Keywords: *Legal Fees, Consumers, Price Fixing, Non-Contentious Matter, Review*

Themes: Competition Law

INTRODUCTION

This study critically analyses the regulation of competition law in Malaysia regarding fixing fees in the legal profession. The Competition Act 2010 ('CA 2010') aims to regulate Malaysia's competition law by prohibiting anti-competition behaviours. The restrictions prescribed under Sections 4 and 10 of the CA 2010 on the conduct of enterprises engaging in anti-competitive agreements. The object or effect is to prevent significantly restricting or distorting competition in any market for goods or services (e.g., an agreement to fix price), ultimately ensuring the protection of the consumers' welfare. Accordingly, the enterprises are operating in a free market economy without any restrictions or market distortion. On the surface, this study intends to show that the conduct of the legal profession in regulating legal fees is against the spirit of the competition law, as such action does not encourage competition amongst law firms. Relating to this issue, the Bar Council has enacted the Solicitors Remuneration Order 2005 (SRO 2005), which introduces the regulated legal fees for non–contentious matters consisting of transfers, charges, debentures, discharges, tenancies and leases. SRO 2005 falls within the exemption provided under Section 13(a) of the CA 2010 due to the powers conferred to the Solicitors Cost Committee (SCC) under Section 113(3) of the Legal Profession Act 1976 (LPA 1976). The conduct of the legal profession in fixing its legal fees under SRO 2005 contradicts Section 4 of the CA 2010. Therefore, the regulated fees conducted under the SRO 2005 must be reviewed from the Competition law perspective as this conduct infringes and is against the Competition law principle.

The objectives of this research are;

(i) to examine the legal principles and exclusions provided under the Malaysian Competition Law,

(ii) to analyse the regulated fees under the Solicitors' Remuneration Order 2005 as part of the 'legislative requirement' in Second Schedule, Section 13(a) of the Competition Act 2010 for the legal profession to escape the liability,

(iii) to compare and contrast the legal position relating to the legal fees of the legal professions benchmarking with the position in the other jurisdictions

LITERATURE REVIEW

Price fixing agreements do not promote the consumers' welfare as they could cause incentives to innovate to be reduced and barriers for others to enter the market. Most commentators view the act of price fixing as illegal and detrimental to their respective countries' competition laws (Encaoua,2014; Lee, 2014; Amadeo, 2020).

The three exclusions under Malaysia's Competition Act 2010 are; (i) regulated industries; (ii) definition of 'commercial activity; and (iii) certain excluded agreements and conduct (Eng,2012). Fee fixing of the legal fees for conveyancing work is an example of the first exclusion under the Second Schedule of the Act. Besides, it has been highlighted by the MyCC (2013) that the behaviour in fixing their fees cannot be allowed to be effective and to fall under the exclusion of the 'legislative requirement' without legal authority. It is highlighted that the requirement provided in national legislation must be fulfilled to allow the anti-competitive act by legal bodies, besides having an inspection to ensure it falls under factors allowed by the law. It can be seen in the preamble of SRO 2005, which Section 113(3) of the LPA 1976 provides specific power to the Solicitors Costs Committee or any four of the members of the Committee in any manner they think fair and reasonable to regulate the remuneration of advocates and solicitors.

METHODOLOGY

This research paper employs three various qualitative research methods in collecting data. The library-based research method is by analysing the CA 2010, SRO 2005 and the LPA 1976 to investigate whether the act of fixing the legal fees can be considered one of the exclusions under the CA 2010. The semi-structured interviews were conducted with the academicians, a practising competition law lawyer in Kuala Lumpur. A comparative study between Malaysia and Singapore was also examined to compare and contrast the fixing-price fees in the Malaysian legal profession.

FINDINGS AND DISCUSSION

A comparison has been made between Malaysia's competition laws and Singapore's due to similar legislation in which, under Singapore law, activities needed to comply with legal requirements or to avoid conflict with international obligations are one of the exclusions which are excluded from Section 34 prohibitions (Nguan and Han, 2019). The Singapore Competition Law provides that 'any agreements or conducts that directly or indirectly fix the prices are deemed to be an infringement of its competition law provided that such conducts do not fall within the ambit of the exclusions provided by the Third Schedule of the Act. Additionally, according to Toh (2021), the Singapore Law Society has abolished the regulated legal fees since February 1 2003, to comply with the spirit of the competition law. It leaves the property transaction entirely negotiable depending on the amount of work completed for the client.

On the other hand, the legal profession has yet to abolish the regulated fees even though it is anti-competitive law in Malaysia (MyCC, 2015). This is because it has only been highlighted that regulated fees by any trade or professional bodies are prohibited if there is clear and definite proof that such bodies do not have any legal basis for setting scale fees.

CONCLUSION AND RECOMMENDATIONS

The SRO 2005 specifies the obligations imposed upon the solicitors to charge their clients based on the fixed scale fees, besides complying with its limited discount rules hence, challenging the spirit of the competition as embedded in Section 4 of the C 2010. On the surface, the SRO 2005 falls within the exclusions of the CA 2010 because it was enacted according to the legislative requirement. Nevertheless, referring to the finding in Criminal proceedings against Manuele Arduino (2002), it is reasonably argued that it does fall under the prohibition in section 4 of the CA 2010 Act as it was regulated upon the decision of an enterprise, i.e., the Bar Council.

Appropriately the regulated fees enacted under the SRO 2005 could be abolished as adopted by Singapore.

Section 11(1) of the CA 2010 provides that before abolishing the regulated fees, it is to conduct a legal market review relating to the conveyancing scale fees. The objective is to examine whether the scale fees are against the competition law principle. MyCC can also take action under Section 11(1) of the Competition Act 2010 by initiating a judicial review relating to the conveyancing scale fees; to examine whether the term 'shall' in Order 2 SRO indicates a mandatory rule or merely a recommendation and whether the word ‘may’ under Section 113(3) LPA provides power to the Solicitors Cost Committee to regulate the scale fees or not (refer to the case of State of Uttar Pradesh v Babu Ram (1978)).

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TRACK 18 CRIMINAL LAW AND ENFORCEMENT

REVISITING RAPE PUNISHMENT IN MALAYSIA

Nazrin Bin Feizal[1]*, Nur Maisarah Binti Zamani[2], Wan Zaillmeer Eiman Bin Wan Zainolldin[3], Sharifah Nur Aneesa Al Aidid Binti Habib Abdullah[4], Muhammad Muáz Bin Mohd Sariful Lim[5].

[1,2,3,4,5] *Faculty of Law, University of Technology MARA, Malaysia.*

Email: [1]nazrin130@gmail.com; [2]maisarahzamani.lw@gmail.com; [3]wanzaillmeer01@gmail.com; [4]aneesa292@gmail.com; [5]99muaz@gmail.com

**Corresponding author*

ABSTRACT

This paper addresses the extent to which our justice system should review the current punishment for rape under Section 376 of the Penal Code as well as the psychological aspects of the parties involved in a rape offence. More deficiencies of the current punishments can be found compared to the efficiency due to several reasons, which will be discussed in this paper. This paper also suggests alternative punishments to be replaced with the existing sentences for rape by considering the psychological aspects of rapists and the victims of rape. Qualitative methodologies are used to gather and analyse data relevant to the research, such as library searches and online searches. This paper will further scrutinise whether the offence of rape is a greater evil compared to murder, especially when it comes to aggravated rape. In our opinion, the existing provisions in the Penal Code should be amended in order to ensure they are in line with a more just system of punishment.

Keywords: *Criminal Law, Rape, Rape Punishment, Penal Code, Psychology.*

Themes: Criminal and Law Enforcement.

INTRODUCTION

What is rape? Malaysian Law defines it as engaging in sexual activity with a woman against her will or consent under Section 375 of the Malaysian Penal Code. Malaysia's Penang Women's Centre for Change reports that a woman is raped every 35 minutes in Malaysia (Malaysiakini, 2015). In Malaysia, there are discussions on harsher and more appropriate rape penalties. This paper analyses the research literature on the revision of the rape offence punishment outlined in the Penal Code by examining how effective the existing punishment is in Malaysia. This paper also identifies the psychological characteristics of both the rapist and the victim in order to determine the appropriate punishment to match the severity of the offence.

LITERATURE REVIEW

Rape under the Malaysian Penal Code is raised when there is sexual intercourse, penetration, and without consent which is subject to provision contained in Section 375(a)-(g) of the Penal Code and punishable with imprisonment and whipping under Section 376 of the Penal Code. However, criticism of the effectiveness of the current punishment for rape in Malaysia proves injustice to the victims as the trauma and mental distress faced were not compensated for by just imprisonment and whipping. According to research conducted by the University of Missouri, shows 92% of the respondents suffered fear and anxiety, 84% suffered depression, 96% suffered exhaustion, 88% suffered restlessness, and 80% contemplated suicide, as the psychological impact of rape upon the victims after rape (Patria A. Resick, 2015). The level of violence of the rape experienced by the victims would cause different levels of psychological effects upon them (Patria A. Resick, 2015).

Studies show that alternative punishments such as castration than incarceration (Kari A. Vanderzyl, 1994) would be an adequate punishment as retribution against the offender. There are two types of castration, namely surgical and chemical castration. Surgical castration is the removal of the testicle, which will permanently remove a person's sex drive (Kari A. Vanderzyl, 1994), while chemical castration is the usage of Depo-Provera which will reduce the user's sex drive but temporarily (Kari A. Vanderzyl, 1994).

Criticism of the usage of castration is acknowledged as a violation of the rights being executed (Listiningrum & Bachtiar, 2016). However, it must be remembered that the offender violated the victim's rights in the first place, which leads us to this discussion in order to alter the punishment for rape offenders.

METHODOLOGY

The aftermath of rape not only violates the victims' physical but also disrupts their psychological aspect. The psychological damage is latent compared to physical effects, which makes it more difficult to diagnose and treat (Shizreen, 2022).

The first benchmark principle: For first-time rape offenders, Section 294 of the Criminal Procedure Code (CPC) may be relevant. The rape offender may be released on a bond and only be liable to be punished for the full original offence if there is a failure to comply with the full conditions attached to the bond. As the Court of Appeal (per Ong Hock Sim FJ) in *Nor Afizal bin Azizan v Pendakwa Raya* [2012] 1 MLJU 812 at para [21] explained, the rape offender is not exonerated of the original rape offence that he committed. The conviction is recorded and forms part of the offender's record, thus remaining there for the rest of the person's life.

The second benchmark principle: The inadequacy of punishment of rape offender can be seen in a case where a 16-year-old girl was gang raped and traumatised, but the punishment imposed were not adequate as the jail time given was from 5 years to 8 years and whipping (Muhammad Zakwan bin Zainuddin v PP and anor, 2019) and in another situation where a 63-year-old female lady was raped twice in front of her helpless husband (Ahmad Nazari bin Abd Majid v PP, 2009). The fact that the rapist did rape the victim twice, the sentence of eight years imprisonment term and two strokes of whipping was manifestly insufficient and opposed by the learned deputy since the public interest had not been considered. The court found the behaviour manifested by the rapist was perverted or psychopathic tendencies or gross personality disorder, which proved the psychology of the rapists that led them to commit such crimes varies (Michelle Ann Crawford, 2015).

The third benchmark principle: The crime of rape is already an aggravated action, where aggravated rape happens when violence is used on a body or property to force one to perform sexual intercourse (Suharman bin Mohamad Noor @ Ismail v PP and anor, 2020) as enumerated by section 376(2) Penal Code. Undeniably, Malaysia alerts the seriousness of the rape offence circulating around the country since the period of imprisonment was enhanced from 20 years to 30 years as in the Penal Code (Amendment) Act 2003 by the Parliament. However, a five-year term is still the minimum term of imprisonment.

Table 1: Number of reported cases

Year	Number of Reported Cases
2013	2767
2014	2045
2015	1873
2016	1698
2017	1582
2018	1835
2019	1738
2020	1582

Source: Department of Statistics Malaysia (DOSM)

Based on the table above, the decrement in the number of reported rape cases did not guarantee the exact number of the offence. According to the Women's Aid Organisation (WAO), in 2014, the stereotype of society was one of the factors leading to only 10% of reported rape cases (Devi, K, 2014). Ignorance of marital rape (Norazlina Abdul Aziz, 2015) also contributes to unreported cases since over 9 000 cases of domestic violence were reported during the Malaysian Movement Control Order (MCO) from the 18th of March 2020 until the 31st of September 2021 to the Royal Malaysia Police (PDRM) (Rahimy Rahim, 2021).

CONCLUSION AND RECOMMENDATIONS

In ensuring that the punishment for rape is adequate and fair, it is necessary to consider the victim's distress and the rapist's mental state. A severe penalty could deter the rapist from committing additional rape offences. As a modification to the current rape punishment in the Penal Code, chemical castration, which decreases a man's sex drive and seminal fluid (Scott CL, Holmberg T., 2003), could be suggested

and used as a form of rehabilitation for offenders while considering the psychological needs of offenders and human rights. Nonetheless, it must be ensured that additional research and consultation are conducted prior to its implementation as a punishment. Following the brutal gang rape of a 14-year-old girl (Kayla, 2018), Indonesia was the first country in Southeast Asia to implement chemical castration. Moreover, the Corrections Department of Thailand reports that within a year of their release, 1,037 sexual offenders committed new crimes. Within two years, 1,700 offenders and 2,111 sexual assault victims committed new offences. In response, they made chemical castration a requirement for punishment (Thai PBS, 2022). In conclusion, revising the current rape penalty in the Penal Code is imperative to engage the public and ensure future women's safety. As our country develops, we must eradicate the culture of rape and educate the public about rape, the immorality of non-consensual sexual encounters, and the repercussions for the offender, regardless of age or socioeconomic status.

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