

ISLAMIC LAW AND CIVIL LAW: INTERPRETATION OF SECTION 7 OF THE CIVIL LAW ACT 1956

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ABSTRACT

Islam existed in the Malaysian legal system since the period of Malacca Sultanate and survived through various periods of foreign colonisation. It once played a dominant role in the administration of the land. After Independence, Islamic law is confined to govern Muslim personal laws and dealt with in *Shari'ah* Courts. In the present, laws are passed by the Parliament and State Legislative Assemblies. Some scholars opine those laws passed by the Parliament is not Islamic as it is not guided by the primary sources of Islamic law that is Quran and Sunnah. Laws passed through State Legislative Assemblies should be confined to the respective states only thereto these differ from one state to another. At federal level, civil law is dominant. This paper analyses laws in Malaysia specifically Section 7 of the Civil Law Act 1956, which contains Islamic values as mandated by *Shari'ah*. The method used are case studies focussing on five selected court cases to shed light on the Islamic Law that is embodied in section 7 of the Civil Law Act 1956 examining how the judicial discretion is exercised and operates in the spirit of Islam.

Keyword: Islamic Law, Civil Law Act 1956, *Maqasid Shari'ah*, *Diyah*

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INTRODUCTION

Islam has an extensive history in Malaysia. During the Malacca Sultanate, Islam Law was not merely practised as a personal law, but it was also applied in the state administration and its criminal jurisdiction. The Sultan incorporated Islamic law with the local Adat where it became the sovereign law of the land. Malacca in its glorified years, was famously known for its two legal digests:

- i) *Undang – Undang Melaka* (Laws of Melaka), also known as *Hukum Kanun Melaka* and *Risalat Hukum Kanun*; and
- ii) *Undang – Undang Laut Melaka* (Maritime Laws of Melaka).

Undang – Undang Melaka covered a wide range of constitutional, civil and criminal matters whereas *Undang – Undang Laut Melaka* covered largely maritime matters¹.

Today, the subject matter of Federal and State laws is laid down in Article 74 of the Federal Constitution and must be read concurrently with List II in the 9th Schedule of the Federal Constitution. List II, or better known as the State List, enumerates matters that are exclusively within the power of the State. Islamic law, personal and family matters of persons professing the religion of Islam fall under the purview of State jurisdiction. Hence, all matters that are personal to a Muslim shall only be heard in *Shari'ah* Courts. Every *Shari'ah* Court has its own set of system, laws, procedural laws and is governed by respective enactments.²

The federal government's power to enact laws relating to civil and criminal matters, as well as the procedure and administration of justice for matters other than Muslim personal law is laid down in the Federal List³. The power provided in Article 74 must be read together with Article 3 of the Constitution. Article 3 confers special position to Islam, it being the religion of the Federation. In view of this, every law passed by the Parliament, must reflect universal principles such as justice, equality to all and importantly, it must not go against the spirit of Islam, that is *rahmatan lil aalamin* (mercy to the whole world).

¹ Wan Arfah Hamzah & Ramy Bulan, *An Introduction to The Malaysian Legal System*, p. 19.

² Federal Constitution, Item 1 of List II in the 9th Schedule.

³ Ibid, Item 4 of List I in the 9th Schedule.

This paper will discuss section 7 of the Civil Law Act 1956, as a law passed under the notion of civil jurisdiction of the Federal government and its relation to *Maqasid Shari'ah* and *Siyasah Shariyyah*. The discussion will look at the assessment of damages for fatal accident claims to the family of the deceased with special reference to the exercise of judicial discretion.

MAQASID SHARI'AH

Shari'ah is part of the religion of Islam that is sent by Allah through The Prophet Muhammad (SAW) to mankind. Islam has brought compassion and mercy to the universe including mankind which is also known as *Rahmatan lil aalamin*. *Al-Shatibi* refer to Surah *Al-Anbiya*⁴ to reinforce that mercy is a reflection of achieving *maslahah* and avoiding *mafsadah* which is the reason why Prophet Muhammad SAW was sent to mankind. The same was mentioned by Allah in Surah *Al-Nisa*⁵ where Allah uses the words *mubashshirin* (bearers of good tidings) and *mundhirin* (warning bearers) which is a symbol of good and evil to state the missions of the Prophets before Prophet Muhammad SAW. These verses, according to *Al-Shatibi*, indicate that *Shari'ah* is meant to guarantee human wellbeing in this World and the Hereafter⁶.

Ibn Qayyim, in the same tone has also explained that *Shari'ah* as a whole is fair and a blessing to mankind, bringing good and wisdom to all. Hence, every solution that departs from *maslahah* to *mafsadah* and leads to ignorance will not be considered part of *Shari'ah*⁷.

⁴ Verse 107: "And We have not sent you forth (O Muhammad) but as a mercy to all the worlds".

⁵ Verse 166: "The Messengers (that We sent, all of them) brought good news (to the believers and sinners), so that mankind might have no excuse (or other arguments) before Allah (on the Day of Judgment) after (the coming) of these Messengers. And (remember that) Allah is Almighty, All-Wise."

⁶ Abu Musa Ibrahim bin Musa al-Syatibi, *Al-Muwafaqaat fi Usul al Syariah* (Bayrut: Dar al-Ma'rifah, 1998), p.2.

⁷ Ibn Qayyim al-Jawziyyah, *I'lam al Muwaqqi'in 'an Rab al-'Alamin* (Bayrut: Dar al-Kutub al-Ilmiyyah, 2015)p.9.

Maqasid Shari'ah as discussed above, confirms that the *maslahah*⁸ should be emphasized whereas *mafsadah*⁹ should be monitored in order to arrive at any decision based on Shari'ah¹⁰. *Maqasid Shari'ah* is divided into 3 categories:

- i) the essentials or needs (*dharuriyyat*);
- ii) the complimentaries (*hajiyyat*); and
- iii) the luxuries or embellishments (*tahsiniyyat*).

The essentials (*dharuriyyat*) is considered as the most important and without it, people will face hardships and sufferings in life. *Maqasid Shari'ah* thereto aims at protecting five crucial aspects of human life. Which are:

- i) preservation of religion (*din*);
- ii) preservation of life (*nafs*);
- iii) preservation of intellect (*aql*);
- iv) preservation of lineage (*nasl*); and
- v) preservation of property (*maal*).

Protection of Life in *Shari'ah* means all human being needs to be protected regardless of their religion. Since life is not limited to human being, it could be extended to animals and any other creations. This is the ultimate objectives of *Shari'ah* that is to ensure all human being and creations of Allah are protected by the laws of Allah.

SIYASAH SHAR'IYYAH

Siyasah Shar'iyyah is a field of knowledge that discusses the administration of an Islamic government. It includes laws and systems that is based on Islamic principles. The general affair of the Islamic state is administered in a way not only propagating good to the people but also prevents them from harms, without going against the Shari'ah

⁸ Public benefits

⁹ Harm

¹⁰ Mohamad Zaidi Abdul Rahman, "Aplikasi Maqasid al-Syariah dalam Pentadbiran Negara: Satu Tinjauan Sejarah Islam," *Jurnal Fiqh*, No. 12 (2015) p.32.

and *Maqasid Shariah* even in matters that is not agreed to by the *Mujtahidiin* scholars.¹¹

In general, it upholds all the five¹² *Maqasid Shariah* mentioned above. Therefore, it is of great importance for the people in authority to enact laws that aims in bringing peace and comfort for its citizens. The Quran highlights the necessity for the establishment of justice as one of the pillars in good governance.

Truly, Allah commands you to hand back your trusts to their (rightful) owners, and (Allah commands you) whenever you have to judge between people, to pass judgment upon them with fairness. Indeed, most excellent is that which Allah exhorts you to do. Truly, Allah is All-Hearing, All-Seeing.¹³

Ibn Taymiyyah states that a leader is responsible for promoting the religion and that he must make decisions for the benefit of his people¹⁴. *Siyasah Shariyyah*¹⁵ requires the government to enact laws that emphasized the above-mentioned objectives. The scope is wider for a government as government is allowed to enact laws especially in the fields where there is no specific revelation found. Generally, thereto, any laws will be considered as Islamic law even if it is not directly or indirectly derived from the divine revelations (Al Quran and As Sunnah), subject always that it does not go against the principles of Islam and is within the scope of *Maqasid al Shariah*.

The laws enacted must also conform to other principles such as justice (*'adl*) and equality before the law (*taswiyah*). Islam emphasizes on justice so much so that it has been mentioned in the Quran fifty-three times. *'Adl* (justice) is the major objective of the *Shari'ah* and it aims at establishing a balance between obligations and rights such that there remains no disparities in life.

¹¹ Abdul Wahhab Khallaf, *Siyasah Syar'iyah Wa Nizizam Ad Daulah Islamiyah Fi Syuun al-Dusturiyyah wa al-Kharijiyah wa al-Maliyah*, (Kaherah: Dar al-Ansar, 1982).

¹² Those five are Religion, Life, Intellect, Dignity and Property.

¹³ Al Nisa: 58

¹⁴ Ibn Taimiyyah, *Siyasah Syar'iyah fi Islah ar Ra'I wa ar Ra'iyah*, Beirut.pp.9-13.

¹⁵ Political administration which is based on Shariah,

Equality is derived from basic principles which includes the principle that all men are created by One and the Only God, the Lord of the universe and all mankind comes from common parentage of Adam and Eve. Allah is Most Gracious, Most Merciful¹⁶. He has no preference for any race or religion. Everyone is treated equal blurring the distinction between the living and dead. Every individual is judged based on his or her own merits and deeds.

In a multiracial and multi religious country like Malaysia, where people come from all walks of life, justice must not only be done, but must be seen to be done by the public regardless of their faiths, genders, and backgrounds. It is vital for the authority to institutionalise Islamic law by codifying laws or statutes in its spirit ensuring that the concept of justice is not only done but is seen to be done, especially by the authorities in Malaysia.

Fiqh Muwazanaat is another important principle in *Siyasah Shar'iyah* where the government must balance the rights and obligations of its citizens with the rights and obligations of the industry operating in the country when introducing or establishing laws that aims to create fairness for all. In the context of section 7 of the Civil Law Act 1956, the mechanism utilised in awarding compensation must reasonably compensate the claimants and at the same time must not overburden the insurance companies.

This is where *Fiqh Al Hal* comes into the picture. Judges are given specific legal frameworks to adhere to and they are obliged to consider every evidence brought before them. Every case must be decided individually, based on its surrounding facts. This is crucial in awarding damages, as not every fact will bring the same result.

SECTION 7 OF CIVIL LAW ACT 1956

Section 7 of the Civil Law Act 1956 deals with the compensation to be paid, for loss occasioned by a person's death, to his family. This section provides the outline legal framework including the cause of action for the courts to assess damages and determine the amount of

¹⁶ Ramizah Wan Muhammad, "What Makes a Law "Islamic"? A Preliminary Study on the Islamicity of Laws in Malaysia," 27 (1) 2019 *IJUM Law Journal* 215

compensation to be paid to the deceased's family when an occasion of death as a consequence of someone's negligence, regardless of whether such wrongful act amounts to a criminal offence or not. This section thereto is connected to the insurance industry. Our discussion here is confined to the position prior to the 2019 Amendment. In this article we will discuss issues as provided in section 7 on who can make the claim and what claims can be made under the said section.

WHO CAN CLAIM UNDER S.7 OF THE CIVIL LAW ACT 1956?

Those who can benefit from the claim under this section are the deceased's spouse, parents and children. The claim can be filed by the executor¹⁷ or the beneficiaries themselves¹⁸. When filing the claim, the writ must state the full particulars of the person claiming or person for whom or on whose behalf the action is brought, and the nature of claim sought to be recovered¹⁹. The claim can only be made once, and it must be made within 3 years from the death of the deceased²⁰.

The definition of beneficiaries is:

“child” includes son, daughter, grandson, grand-daughter, stepson and step-daughter; “parent” includes father, mother, grandfather, grandmother; provided that in deducing any relationship referred to in this subsection any illegitimate child who has been adopted or whose adoption has been legally registered under any written law shall be treated as being or as having been the legitimate child of his mother or father, or as the as the case may be, his adopters.²¹

Under the definition of section 7(11), it appears that only the adopted child who is registered legally under written law will be able to make a claim as a beneficiary. The requirement for legal registration of the adoption is intended to avoid false claims so that one cannot simply come out and claim the deceased is his adopted child in the absence of proper documents of registration. Otherwise, the

¹⁷ Ibid, section 7(2)

¹⁸ Ibid, section 7(8)

¹⁹ Ibid, section 7(7)

²⁰ Ibid, section 7(5)

²¹ Ibid, section 7(11)

compensation will become a windfall for the so-called adopters (without proper documents of registration).

However, the courts have made an exception to the Orang Asli. A good example is the case of *Ali Tan & Ors v Mazlan Bidin & Anor*.²² This is an appeal case in relation to a motor vehicle accident between a motorcycle ridden by one Yakin Ali, deceased (D1) along with his pillion rider, one Hok Ancis, deceased (D2), and the second respondent's lorry which was driven by the first respondent. As a result of the said accident, D1 and D2 died. The Sessions Court found that the rider and the driver were equally liable for the accident. However, the Sessions Court dismissed the third and fourth plaintiffs' claim since they had failed to produce any document to support their claim that D2 was their lawfully adopted son. The High Court agreed with the reasoning of the Sessions Court. Hence the plaintiffs appealed to the Court of Appeal. It was the third and fourth plaintiffs' contention that they had never registered D2's adoption as they were "Orang Asli."

The Court of Appeal held that the Sessions Court and High Court erred in dismissing the third and fourth plaintiffs' claim. There was evidence that ever since the death of D2's father, the said plaintiffs had adopted him as their child. Section 7(11) of the Act was not meant to deny the claim of a parent in respect of his/her deceased de facto adopted child such as in the present case. It would be unrealistic, harsh, and unjust to deny the claim in respect of their adopted child, D2.

The Court of Appeal further said that the Session Court and the High Court should have taken judicial notice of the fact that various "Orang Asli" communities of this country live in the outer fringes of the mainstream society, and some still live in the remote jungle. The vast majority are still socially backward and is often the case that they do not have birth certificates, identity cards, etc. They cannot be expected to have adoption orders issued under s.3 of the Adoption Act 1952. If strict compliance with the law pertaining to marriage was never insisted upon by the courts in respect of persons claiming to be 'wife' of the deceased persons in claims under s.7 of the Act, there was no reason why similar flexibility could not be accorded to cases of de facto adoption, particularly where it involves the "Orang Asli". Hence,

²² [2012] 4 CLJ 736

for the purpose of s.7 of the Act, the de facto adopted parents of D2 were his parents.

This decision above indeed reflects wisdom (*hikmah*) as the judge took into consideration the lifestyle of the claimants' community and acknowledged their custom.

What can be claimed under section 7 of the Civil Law Act 1956

The main claim under section 7 is the dependency claim²³. Besides that, beneficiaries can also claim for funeral expenses, bereavement, and any reasonable expenses incurred as a result of the wrongful act of the defendant. The claims are discussed in detail below.

DEPENDENCY CLAIM OR LOSS OF SUPPORT

The calculation of the amount of compensation for dependency claim has been formulated by the Parliament.²⁴ The formula takes into consideration the deceased's income at the time of his death and the deceased's age at the time of his death. Therefore, two issues need to be determined before the compensation can be calculated i.e., the multiplicand and the multiplier. The multiplicand is the monthly monetary compensation whereas the multiplier is the years' purchase or in layman's term how long or how many months or years are payable to the family of the deceased. In short, multiplicand x multiplier = dependency claim.

For the multiplicand, the court considers only the earnings of the deceased at the time of his death without any consideration that the earnings might increase subsequently, i.e., after the person's death.²⁵ The deceased's earning will be further deducted by his living expenses, leaving the balance which will be used in the formulation to calculate the multiplicand.²⁶

²³ Ibid, section 7(3)

²⁴ Ibid, section 7(3)(iv)

²⁵ Ibid, section 7(3)(iv)(b)

²⁶ Ibid, section 7(3)(iv)(c)

Currently, the courts apply the modern trend of deducting approximately 1/3 from the monthly earnings instead of taking into account various expenditures incurred by the deceased.

For the multiplier, if the deceased at the time of his death was 30 years old or below, the multiplier shall be 16 years; and in the case of deceased aged range between 31 and 60 years old, the multiplier shall be calculated by using the figure 60 minus his age at the time of his death and dividing the remainder by 2. For example, if the deceased died at the age of 29, the multiplier shall be 16 years. If the deceased died at the age of 40, the multiplier shall be $(60 - 40) / 2 = 10$ years.

In the case of *Ali Tan & Ors v Mazlan Bidin & Anor.*,²⁷ the Court of Appeal held that in relation to the claim by the first and second plaintiffs, the High Court had erred in reducing the multiplicand to RM 100 per month since there was evidence from D1's employer that he was earning RM 750 per month. There was also evidence from the first plaintiff that D1 gave his parents RM 500 – RM 600 per month. Hence, the multiplicand of RM 500 per month was restored as previously determined by the Sessions Court. Further the multiplier of 16 years was confirmed as it complied with s. 7(3)(iv)(d) of the Civil Law Act 1956.

In the case of *Rohani a/p Tengah* (widow suing on behalf and on behalf of two children, as dependence of *Zinuddin bin Sipoh, deceased*) *v Zainal bin Lani & Anor.*,²⁸ the plaintiff appealed to the High Court at Shah Alam against the decision of the Session Court. Among the grounds appealed from was the Session Court's decision in using RM 500 as the multiplicand in calculating the sum to be awarded, when the deceased's salary was RM 1,300. He had a wife and two children (all three were the plaintiff in the dependency claim). Out of the RM 1,300, he gave RM 900 to his wife plaintiff (a housewife) for the family expenses. No evidence was led as to what happened to the RM 400 (i. RM 1,300 – RM 900 = RM 400) kept by the deceased. From the RM 900 that she received from the deceased, the plaintiff wife in turn gave RM 100 to the deceased's parents, i.e., her in-laws, RM 100 to her own parents, and RM 40 to her *adik* (i.e., a younger sibling, but it was not

²⁷ *supra*, p. 744.

²⁸ [2004] 2 MLJ 289

stated in the evidence whether it was a younger brother or a younger sister of the plaintiff).

The Sessions Court judge arrived at the multiplicand of RM 500 by starting with the figure of RM 900 as his base figure, and he did not explain why he did not use the monthly earnings of RM 1,300 as his base figure. From that RM 900 sum, the learned Sessions Court judge made several deductions as follows: -

- a) He deducted a sum of RM 100 which the plaintiff wife gave to the deceased's parents;
- b) He deducted a sum of RM 100 which the plaintiff wife gave to her own parents; and
- c) He deducted a sum of RM 40 which the plaintiff wife gave to her younger sibling;

and arrived at the balance sum of RM 660. From this balance sum of RM 660, the judge made a further deduction of RM 160 (he did not specifically mention the amount RM 160 but this sum was arrived at arithmetically by subtracting RM 500 from RM 660) on the ground that the deceased, whilst alive, lived with the plaintiff wife and children and 'consumed the food bought by the plaintiff wife'.

The High Court judge held that the approach taken by the Sessions Court judge was wrong in law and that he should have taken the whole of the deceased's earning of RM 1,300 as the starting point (i.e. as the base figure). Under the law, what can lawfully be deducted from the deceased's earning are the deceased's living expenses. In assessing the living expenses, the learned judge adopted what LC Vohrah J in *Low Suit (m, w) Administratrix of the estate of Tan Mee Ho (†) and Tan Mee Kiau (f) both deceased v Lim Sun Hiang t/a Syarikat Ta Thong & Anor* [1992] 2 CLJ 1035, called the 'modern trend', that is, the practice of merely deducting a percentage from the monthly earnings, instead of going through laboriously and painstakingly in detail on the various expenditures incurred by the deceased when alive, in order to determine his living expenses.

Accordingly, following the modern trend, the High Court judge deducted approximately 1/3 of RM 1,300 is RM 433, but for ease of calculation, he rounded up the figure to RM 400, and arrived at the multiplicand of RM 900 (i.e. RM 1,300 – RM 400 = RM 900). The

appeal in respect of the multiplicand was allowed and the award was adjusted accordingly based on this new multiplicand.

Another issue worth discussing is, what if the deceased has no proper documentation for his earnings? Will the claim made by his family for dependency be denied by the court? The answer can be found in the case of *Latif Che Ngah & Anor v Maimunah Zakaria*.²⁹ This case is an appeal against the decision of the Session Court Kuala Terengganu. The issue of quantum of damages only stemmed from a road accident which took place on 17 April 1997. The Respondent Plaintiff, a housewife with six children had lost her husband and brought this action for loss of dependency pursuant to s.7 of the Civil Law Act 1956. The High Court judge, Nik Hashim J, held that the Session Court judge was correct when he accepted the evidence of the respondent and had taken into consideration the fact that she had six children to support in awarding the amount. In his decision, the High Court referred to the Ground of Judgment in the Appeal Record which stated:

“Mengenai pendapatan simati saya menerima penghujahan peguam plaintif bahawa pendapatannya adalah sebanyak RM4,000.00 sebulan walaupun tidak disokong oleh apa-apa keterangan dokumentari. SD1 (1st Appellant) di dalam keterangannya juga telah mengesahkan bahawa simati telah bekerja di Singapura kerana beliau memang kenal dengan simati.

Saya juga menerima keterangan SP2 (the respondent) bahawa pemberian sebanyak RM1,500.00 oleh suaminya sebulan kerana jumlah ini adalah munasabah memandangkan simati mempunyai 6 orang anak sebelum kematiannya.”

The High Court judged agreed with the Sessions Court judge that the SP1’s explanation that she did not know about her deceased husband’s employer in Singapore as she was not told by her husband, was reasonable, for the deceased did not expect to die on that fateful day. If he had, then perhaps he may have told his wife the name and address of his employer in Singapore. That explained the absence of documentary proof of the deceased’s income in this case. Further, the

²⁹ [2002] 4 CLJ 442

1st appellant (SD1) had also admitted he knew that the deceased was working in Singapore. The High Court judge held:

“Thus, from this evidence, it is manifestly clear that the deceased was working and earning a living as a plasterer in Singapore for five years before the accident. SD35 – 40 at 1997 rates would have translated into RM80 – 90 per day at an exchange rate of RM2.30 to one Singapore Dollar. Assuming the deceased worked only 25 days per month, excluding working overtime, the appellant’s evidence disclosed a monthly income of RM2,000 to RM2,300, out of which the learned judge awarded a sum of RM1,500 as loss of support to the respondent and six children. In this regard, I do not think the learned judge erred in his award. With respect, I agree with the learned counsel for the respondent that it is not sufficient to say that the respondent would not need so much money a month just because she lives in a little kampong in Besut, Terengganu. It was common knowledge then that people from Kelantan and Terengganu went to work in Singapore for good money. I take judicial notice that the wages there were substantially higher than those in Malaysia. It is therefore obvious that the reason for the respondent’s deceased husband choosing to work away from his family in a foreign country was to improve his standard of living and the standard of living of his family”.

This case shows that the court will not deny the dependency claim solely on the ground that there was no proper documentary proof on how much the deceased was earning before his death. As long as the family of the deceased is able to prove that the deceased was working and contributed to his family during his lifetime, the court will still allow dependency claim by taking judicial notice on wages of the relevant employment.

It is also important to note that in order to successfully claim for dependency, the deceased’s earning must not be illegal. One must not be allowed to profit from an illegal act. If the deceased was a snatch thief, and the deceased had been contributing to his family every month by using the proceeds of his stolen goods, such illegal earning will not be taken into account by the court in assessing the multiplicand for the dependency claim. However, this concept of illegal earning is not blindly applied to all illegal acts. Its application is mostly confined to

deliberate crimes or hardcore criminal acts such as robbery, drug trafficking or prostitution.

In *Tan Phaik See v Multi-Purpose Insurance Bhd*,³⁰ the deceased was involved in a road accident. The deceased was baking biscuits from his house and selling them. He did not have a license to manufacture and sell the biscuits. The mother claimed as a dependent. The defendant pleaded that since the deceased's earnings arose out of an unlicensed income it was illegal earnings. The Session Court disallowed the claim. Her appeal to the High Court was dismissed in spite of authorities allowing the claim as the court adopt the principle that each case had to be looked individually. While the Government is encouraging cottage industries for which the Government has embarked in encouraging every man and woman to be self-reliant and self-supporting, the courts should not readily strike down earnings gained out of businesses just because it is carried on without licence. Running a business without a license is an offence under licensing laws. Earnings acquired cannot therefore be considered illegal earnings as the profits are not from an illegal business, but a business runs illegally. Fortunately, the plaintiff's appeal to the Court of Appeal was successful.

The stand taken by the court to recognise only legal earnings is in line with Allah's command in *Surah An Nisa* verse 29³¹ and *Surah Al Baqarah* verse 188.³² The Prophet SAW was also reported to have said;

“Every flesh nourished by haram deserves fire”³³

³⁰ [2004] 7 CLJ 289

³¹ “O believers! Do not consume (use) your wealth among yourselves illegally (such as by means of cheating, gambling and others of illegal nature), but rather trade with it by mutual consent.”

³² “Do not eat up your property among yourselves by unjust means, nor use it as bait for the judges in order that you may knowingly (and wrongfully) commit sin by eating up a part of other people's property”.

³³ Abu Bakar Ahmad bin Hussain al-Bayhaqi, *Shua'bul Iman*, Hadith No. 5521 (Bayrut: Dar al-Kutub al-Ilmiyah, 2008)

Funeral expenses

The family of the deceased can claim for funeral expenses.³⁴ The court will take judicial notice on the cost based on the deceased's ethnicity. For Chinese, usually the court awards RM 5,000 while for Muslim, a range between RM 2,000 to RM 3,000 has been awarded. In *Jub'li Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd*,³⁵ the High Court held that:

“I am of the view that funeral expenses are normally incurred in a Muslim funeral. As such I award the sum of RM 2,000 as funeral expenses.”

Bereavement

The family of the deceased can claim for bereavement³⁶. Bereavement means sadness and it was quantified by the Parliament in monetary value as RM 30,000³⁷. The RM 30,000 shall be divided equally between the family members who can claim under section 7 of the Civil Law Act 1956.³⁸

Any other reasonable expenses incurred

Besides the above, the family of the deceased can also claim for any other reasonable expenses incurred as the result of the wrongful act³⁹. The definition of any reasonable expenses incurred is very subjective and has to be assessed case by case basis. In *Jub'li Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd*,⁴⁰ the High Court had also allowed the following claims:

³⁴ Ibid, section 7(3)(ii)

³⁵ 2001 4 CLJ 599

³⁶ Ibid, section 7(3)(b)

³⁷ Ibid, section 7(3A)

³⁸ Ibid, section 7(3C)

³⁹ Ibid, section 7(3)

⁴⁰ [2001] 4 CLJ 599

Tuition fees for children	RM10,800.00
Fees for Al Quran classes	RM5,760.00
Laundry	RM3,840.00
Cost of employing servant to look after the children	RM19,200.00

In this very fascinating case, the 1st Plaintiff (SP1), his wife and two children (the 2nd and 3rd Plaintiffs) went to the Sunway Lagoon Theme Park. The said park was owned by the Defendant. While he and his wife (the deceased) were on the runaway train ride, his wife was flung out of the train and fell to her death. SP1 claimed damages for him and his children under s.7 of the Civil Law Act 1956 together including special damages against the Defendant. As liability was not contested, the only issue before the court was on the quantum of damages the Plaintiffs were entitled to.

SP1 testified that he is the husband of the deceased, and they have two children aged 8 years old (2nd Plaintiff) and 5 years old (3rd Plaintiff) at the time of the deceased's death. The deceased was born on 27 March 1968 and at the time of her death on 20 November 1997, she was 29 years old. Before her death, the deceased was working as a clerk in Bank Simpanan Nasional with a monthly basic pay of RM1,140.00, a teller allowance of RM70.00 per month and overtime about RM100.00 per month. She also received "*pelarasan gaji* RM150.00 *sebulan dan juga bonus minimum sebulan gaji.*"

SP1 testified that as a consequence of the death of the deceased, he has incurred additional expenses. In examination-in-chief his evidence was as follows:

S: Akibat dari kematian isteri kamu adakah kamu alami perbelanjaan lain?

J: Ada. Perbelanjaan makan dan minum yang dibeli di kedai makan sebanyak RM500.00 sebulan. Tuition anak-anak sebanyak RM150.00 sebulan. Yang ketiga kelas Al-Quran, RM80.00 sebulan. Pakaian dobi RM40.00 sebulan.

S: Adakah perbelanjaan-perbelanjaan ini kamu tidak alami sebelum kematian isteri kamu?

J: Untuk makan dan minum isteri saya memasak sendiri. Pakaian digosok sendiri oleh isteri. Pelajaran dan Al-Quran diajar sendiri oleh isteri.

S: Adakah apa-apa belanja lain yang kamu terpaksa tanggung untuk anak-anak kerana kematian isteri kamu?

J: Saya memberi RM200.00 sebulan kepada kakak ipar untuk menjaga dan mendidik serta makan minum semasa ketiadaan saya untuk anak-anak saya.

Tee Ah Sing J, in his judgment, disallowed the claim of additional expenses incurred to buy food and drinks in the shop at RM 500 per month and stated that there was no basis for this because it is not part of the services of the deceased as a wife and mother. What SP1 should have done is to employ a cook or housekeeper to cook food and prepare drinks on a monthly basis. If the amount he paid to the cook or housekeeper is reasonable then this sum can be claimed as the deceased would have performed the service of cooking and preparing drinks if she was still alive.

He accepted the evidence of SP1 that when his wife was still alive, she gave tuition and taught Quran to the children. He also accepted SP1's evidence that he spent RM150.00 in tuition fees and RM80.00 on Quran classes per month and that the multiplier should be six years when the children are still in primary school. As such, the court awarded damages for tuition fees at $RM150.00 \times 6 \times 12 = RM10,800.00$ and for the fees for Al Quran at $RM80.00 \times 6 \times 12 = RM5,760.00$.

In respect of the laundry charges, the judge accepted SP1's evidence that he spent RM40.00 on the laundry bill after the death of his wife, which was done by the wife before her death. Taking into consideration that the children are still young and there is possibility of SP1 remarrying, the multiplier awarded is eight years ($RM40.00 \times 8 \times 12 = RM3,840.00$).

In regards to the claims for expenses for looking after the children, the court is of the view the most appropriate multiplier is eight years and the sum awarded is RM19,200.00 ($RM200.00 \times 8 \times 12$).

It is interesting to note that the court disallowed the claim for buying mineral water to water the grave (*menyiram air di kubur*). SP1 claimed for the cost of purchase of mineral water at RM17.60 per

month and still continuing. In cross examination SP1 was asked as follows:

S: Item 7 bukan air mawar tapi air mineral?

J: Ia.

S: Encik Jub'li apa-apa dokumen untuk bukti tuntutan ini?

J: Tidak ada.

S: Adakah ini wajib dalam agama Islam untuk menyiram air mineral di kubur tiap-tiap minggu dengan berterusan?

J: Digalakkan.

S: Adakah ini wajib dalam agama Islam di mana air mineral mesti dipakai?

J: Tidak.

S: Kalau kamu boleh pakai air paip tak payah pakai air Evian atau apa-apa brand air mineral?

J: Tidak diminta dalam agama Islam untuk menggunakan air mineral.

S: Kegunaan air mineral adalah kehendak sendiri.

J: Ya.

The court held that it was done on the plaintiff's own volition and that the Muslim law does not obligate such action. The court also decided on costs of flowers at RM40.00 per month and the travelling expenses at RM20.00 per month for visiting the grave since the death and still continuing in the same manner. In cross examination, the SP1 was asked as follows:

S: Adakah ini wajib dalam Agama Islam untuk meletakkan bunga di kubur tiap-tiap minggu secara berterusan?

J: Tidak

And in respect of the claim for travelling expenses he was asked as follows:

S: Item k dalam Agama Islam adakah dikatakan dalam Al Quran kamu mesti ziarah kubur minggu-minggu?

J: Ziarah kubur ia, dalam Al-Quran tidak menyebut ziarah setiap minggu.

S: Ziarah kubur berminggu-minggu ini adalah kehendak sendiri?

J: Ya

From the above case, it can be noted that the court had carefully considered the reasonable expenses incurred by SP1. The court had rightly rejected the claims for *bunga mawar* and mineral water which will be continuously used by SP1 every time when he visited his wife's grave. This act of putting *bunga mawar* and pouring mineral water on the grave is not part of the Muslim law and a Muslim is not obliged to do so. These claims had no basis and therefore ought to be dismissed as in my humble view that SP1 was just trying his luck. Allowing such claims will enrich SP1 unjustly which is prohibited in Islam. The call for justice has been made numerous times by Allah in the Al Quran; among His words are in Surah Al Maidah verse 8⁴¹.

THE AMENDMENT IN 2019

The Civil Law (Amendment) Act 2019 received royal assent on 29th May 2019 and was gazetted on 30th May 2019. It came into force on 1st September 2019. The key amendments made to section 7 of the Act include:

1. The categories of people who can claim damages for loss of dependency are extended to persons with disabilities under the care of a deceased person. The previous provision only allowed the wife, husband, parent and child of the deceased person to claim damages for loss of dependency.
2. Pursuant to the extension of the retirement age to 60 years old under the Pensions (Amendment) Act 2011 and Minimum Retirement Age Act 2012, the age limit for the purpose of assessing the loss of earning in dependency claim is extended from the present age limit from 55 years to 60 years.

⁴¹ “O believers! Be dutiful to Allah, bearing witness to the truth in all equality. Do not allow your hatred for other men lead you into sin deviating from justice. Deal justly (with all people), for justice is closest to God-consciousness. And remain conscious of Allah, for truly Allah is Ever-Aware of all that you do.”

Accordingly, the computation of the multiplier for assessment of loss of earning is also amended.

3. It is no longer required to prove good health prior to the deceased's death in claiming for loss of earning in respect of any period after the death of the deceased.
4. The amount of damages for bereavement is increased from RM10,000.00 to RM30,000.00.
5. The child of the deceased is now entitled to claim damages for bereavement. Prior to the amendment, only the spouse of the deceased, the parents of the deceased and minor who was never married may make a claim for bereavement.

THE SIMILARITIES OF *DIYYAH* IN ISLAM AND COMPENSATION UNDER SECTION 7 OF THE CIVIL LAW ACT 1956

Diyyah is a type of punishment in Islamic criminal law which literally means blood money. It originates from the Quran⁴² and Sunnah⁴³. It is a monetary compensation payable to the victim or the victim's next of

⁴² Surah Al Nisa: verse 92 where Allah says: It is not conceivable that a believer should kill another believer unless it be by mistake. He who kills a believer by mistake must (pay the fine by) freeing one believing slave and paying the blood-money to the family of the victim, unless they forgo it as charity (to forgive him). If the victim (who was killed unintentionally) is a believer from an (unbelieving) tribe against you, the (obligatory) penalty is the freeing of one believing slave. But if the victim (who was killed unintentionally) is an (unbeliever) from a tribe between whom and you there is a covenant, then the blood-money must be paid to his family and also a believing slave must be set free. If a man cannot afford to (find a slave to free), he must fast two consecutive months. (Such penance) is imposed by Allah so that your repentance is acceptable to Him (for your purification). And (remember that) Allah is All-Knowing, All-Wise.

⁴³ "Anyone who is killed, his legal heirs have two options against his murderer: to exact *qisas* or to pardon him upon *diyyah*" (Sahih al-Bukhari, Kitab al-Diyat). In another hadith, the Prophet said: "If anyone kills a man deliberately, he is to be handed over to the relative of the one who has been killed; if they wish can retaliate or if they like can accept blood-money".

kin in cases of crime against an individual, such as homicide, bodily injuries including infliction of wounds, or battery, in place of retribution⁴⁴. The amount *Diyyah* has been fixed by the Quran and Sunnah of the Prophet SAW as one *diyyah* is equivalent to 100 camels.

Besides *diyyah* there are several other types of financial punishments which falls under the category of *Ta'zir* punishment. *Ta'zir* punishment is appropriate to be considered by the courts in Malaysia in exercising their discretionary power for judgements and sentencing.⁴⁵ *Ta'zir* punishment could be decided for moral injuries such as bereavement and grief. It is up to the court to decide how much damages or financial punishment is to be awarded to the victim. The issue of moral injuries in Islamic law is open for debate since there are a few *Mazhab* or Islamic schools of thought did not acknowledge it.⁴⁶ The differences of opinions among the Islamic schools of thought do not invalidate the authorities and the courts to adopt opinions from the minority group in allowing monetary compensations being awarded to parties who are suffering from personal or moral injuries.

Likewise, section 7 of the Civil Law Act 1956 also relates to monetary compensation payable to the victim's family. The damages prescribed under the section is man-made. True enough it has no direct origin from the Quran or Sunnah, but its spirit is undoubtedly in line with *Maqasid Shari'ah*.

Section 7 provides for various heads of claims to the deceased's family. The discretionary powers of the judge in such claims are limited in the sense that restrictions must be deliberated and comply with. This section acknowledges the modern day's need and consider it as necessities in life, for example the cost of childcare, loss of dependency, loss of spouse's contribution, funeral costs, bereavement

⁴⁴ www.oxfordislamicstudies.com/article

⁴⁵ Mohammad Azam Adil & Ahmad Badri Abdullah, "The Application of Shari'ah Principles of Ta'zir in Malaysian Common Law: A Maqasid - Based Proposal. ICR Vol.7. No.1, p.51.

⁴⁶ Alshaibani, Majed, "Compensatory Damages Granted in Personal Injuries: Supplementing Islamic Jurisprudence with Elements of Common Law" (2017). Theses and Dissertations. Indiana University Maurer School of Law.Pp.28-31

suffered by the family members and the fact whether the deceased could potentially be the sole breadwinner of the family.

On a larger scale, it takes into account the need to protect the insurance industry by ensuring damages awarded for fatal accident claims arising out of motor vehicle accidents is consistent, fair and reasonable to the claimant as well as to the insurance industry.

The recent amendment to section 7 of Civil Law Act not only makes room for justice to be served better and proper, but it is akin to the spirit of Islamic law compared to the previous provisions.

CONCLUSION

Islam upholds justice for all. Although Malaysia is not a full-fledged Islamic country, by virtue of Article 3 of the Federal Constitution, any laws enacted must reflect the spirit of Islam. It is indeed the nature of Islam as a religion that gives mercy to all in this universe. The exercise of judicial discretion in light of section 7 of the Civil Law Act 1956 in the cases referred to above are in line with *Maqasid Shari'ah*. The term “any reasonable expenses incurred arising from the wrongful act” has been interpreted by taking into account not only the legal basis of such claim but includes whether religion obligates such expenses, or the actions concerned are reasonably part of the deceased spouse’s contribution to the family. The multiplier and the multiplicand will fairly determine the amount of damages and guide the judges not to under compensate in a way that would bring hardship to the deceased’s family or overcompensated that could establish imbalance in the insurance industry. Section 7, indeed is a provision of law that goes by the spirit of justice and equality, as promoted by Islam.