INSAF

THE JOURNAL OF THE MALAYSIAN BAR

Vol 39 No 1 Feb 2022 ISSN No: 0126-8538

The Bar Council Secretariat's new location at Wisma Badan Peguam Malaysia on 2 Leboh Pasar Besar, from 3 March 2020.

ISSN 0126-8538

9 770126 853002

Published by:
Malaysian Bar
Wisma Badan Peguam Malaysia
2 Leboh Pasar Besar, 50050 Kuala Lumpur
T: 03-2050 2050 E: council@malaysianbar.org.my
W: malaysianbar.org.my

ABOUT THE JOURNAL

INSAF is the journal of the Malaysian Bar, appearing first in January 1967. The journal consists of articles and academic papers.

The Joint Editorial Board welcomes original and unpublished submissions of case notes, book reviews, commentaries, legislation reports and articles on any particular legal topic that interests you. Contributions may be sent to: **bit.ly/insaf_2022**.

The Joint Editorial Board however, reserves the right, at its discretion, not to publish any manuscript received, or if published, to edit them for space, clarity and content. The views expressed in any editorials or articles published are not necessarily the views of the Bar Council or IIUM.

CONTENTS

A NEW BEGINNING

Greetings and welcome to the inaugural edition of the relaunched *INSAF*!

I am most pleased to be a part of this illustrious publication and honoured to be relaunching it in its current digital form, and in collaboration with one of Malaysia's top universities and its renowned academics — the International Islamic University Malaysia ("IIUM"). Collaborative work with academia means harnessing diverse opinions and thoughts on legal issues, contemporary issues relating to the law, and others, besides those from the legal community.

INSAF had its beginnings 54 years ago. It was birthed during the presidency of R R Chelliah, the longest-serving Chairman of the Bar Council (1964–1973). His tenure as President is known to have seen through many "firsts", one of which was the inception of this journal, first published in January 1967. There were only 540 Members of the Malaysian Bar in 1966, therefore a complimentary copy of the journal was sent to every Member of the Bar back then. Throughout the years of *INSAF*'s existence, it was helmed by a team of very capable and senior Members of the Bar who formed the *INSAF* Publication Committee, such as Chooi Mun Sou, James Puthucheary, Raja Aziz Addruse, Mahadev Shankar, and Cecil Rajendra, among others. It was a quarterly publication to primarily acquaint Members of the Malaysian Bar with the views and rulings of the Bar Council to, among others, regulate Members of the Malaysian Bar and to scrutinise proposed legislation with the expertise expected of a body dedicated to the promotion of justice and effective laws.

The new Editorial Board, broadened vision and collaboration, resume now to ignite the flames of interest that set the former Committee going. The Editorial Board is not being too bold, optimistic or radical in its firm belief that it is within the power of the legal profession to gradually support moulding statutes and effect adjustments in the law, especially in matters which involve questions of fundamental liberties.

The question perhaps on everyone's mind is the name of the journal. Why "insaf", which generally means "repentance"? In 1968, the then-Editorial Committee expounded on the selection of the name: "its objective was set towards true justice for all: true justice to the public, to the country and to ourselves". *INSAF* also aimed to inject into the lethargic condition of Members a stimulus to shake off the dust of long years of inactivity.

INSAF has always been a democratic and open platform for lawyers in Malaysia to voice out their opinions on legal-related developments in the country, and this collaboration with IIUM aims to do the same — to create and encourage high-quality and original research writings on law and its current developments.

As you can see, the materials in *INSAF* comprise of articles and academic papers. We further aim to publish a greater variety of contents, such as case notes, book reviews, and legislation reports / commentaries. But no matter what issues featured within these pages might take up, the goal to be achieved is that of "insaf" — towards true justice for all. And so, I personally invite Members of the Malaysian Bar to contribute a greater diversity of materials for the upcoming editions of *INSAF*.

I end by thanking IIUM, in particular Prof Dr Sharifah Zubaidah Syed Abdul Kader and her team: Asst. Prof Dr Areej Torla, Asst. Prof Dr Sodiq Omoola and Mohd Ziaolhaq Qazi Zada; my Bar Council colleagues, Nitin Kumar Gordhan, Mohamad Ezri Abdul Wahab and Lee Guan Tong, as well as the Bar Council Secretariat.

Enjoy reading!

SURINDAR SINGH
Chief Editor

SPECIAL MESSAGE FROM PRESIDENT OF THE MALAYSIAN BAR

The first edition of INSAF in 1967 started off as a newsletter for Members of the Bar. It was an experiment to attract participation and create interest in the activities of the Bar Council. This experiment ballooned in significance and impact as it served as a platform for Members of the Bar to pen their thoughts and opinions.

The wisdom and experience contained in past issues of INSAF still held in high regard by many among us, myself included continues to spearhead the development of legal writing in our nation. Ever since its last publication in 2008, the Bar Council has been looking for the right opportunity to re-launch INSAF. As fate would have it, the opportune moment to revive INSAF came in 2019 in the form of collaboration with one of the top universities in the country: the International Islamic University Malaysia ("IIUM").

The Bar Council recognises the important role of this journal in paving the way for a dynamic and resilient Bar. It will be a repository where our knowledge and argumentative rigour are effectively applied and disseminated.

We believe that through this synergistic collaboration between the Bar and IIUM, INSAF would be transformed into a world-class journal of law fusing the Bar's long tradition of talent, spirit, and wisdom with the academic acumen that IIUM has long cultivated in its halls.

INSAF thus revived will resume with renewed passion its mission to bring forth fresh voices from our Members, especially for our newer generations. We have further widened the variety of submissions to include more forms of written expression to ensure that lawyers who wish to express themselves will be heard.

The pages that follow represent the dynamic liveliness of carefully woven legal minds, both from academia and legal practice. They build on the heights of past INSAF contributors to present the cutting edge of legal thought today.

I would like to thank all authors and reviewers who have contributed to this inaugural relaunch issue. My appreciation also goes to the Bar Council Members, past and present — Dato' Abdul Fareed Abdul Gafoor, Salim Bashir, Surindar Singh, Mohamad Ezri Abdul Wahab, Yusfarizal Yussoff, Karen Cheah Yee Lynn, and Lee Guan Tong — for their dedicated effort in realising the collaboration with IIUM, leading up to the journal you now hold.

I would also like to thank the IIUM team for their dedication and support, especially Prof Emeritus Tan Sri Dato' Dzulkifli Abdul Razak, Prof Dr Farid Sufian Shuaib, Prof Dr Aiman @ Nariman Mohd Sulaiman, Assoc Prof Dr Majdah Zawawi, Assoc Prof Dr Sonny Zulhuda, Prof Dr Sharifah Zubaidah Syed Abdul Kader, Asst Prof Dr Areej Torla, Asst Prof Dr Sodiq Omoola, and Mohd Ziaolhaq Qazi Zada.

In closing, I hope that Members of the Bar and every other reader of this journal will find nuggets of insight that you can bring forth into your lives. I also hope that Members of the Bar would continue to share their extensive experience and knowledge with the wider legal community through the submission of legal articles to INSAF. May this journal soar to greater heights!

A G KALIDAS

REMARKS FROM THE DEAN, AHMAD IBRAHIM KULLIYYAH OF LAWS, IIUM

As a law school that is entrusted to mould the next generation of legal practitioners who could champion just causes and lead the industry, Ahmad Ibrahim Kulliyyah of Laws (AIKOL) views close collaboration with professional bodies as indispensable. With this in mind, the faculty paid a courtesy call on the President of the Bar Council, Datuk Abdul Fareed Abdul Gafoor on 5th September 2019 discussing collaborative efforts in the training of law students and young lawyers.

In this first meeting, we impressed upon the importance of the Journal of the Malaysian Bar, namely INSAF, as a platform to exchange ideas and to highlight critical issues in the development of the law and society. AIKOL and representatives of the Bar Council led by Mr Mohamad Ezri Abdul Wahab and Puan Murshidah Mustafa discussed further the details of the undertaking in a meeting at AIKOL on 15th November 2019. We are happy that our view is shared by the leadership of the Bar and the joint effort to revive the journal was formalised through the signing of a Memorandum of Understanding between IIUM and the Malaysian Bar on 10th March 2021 where the representative of the Bar was led by Mr. Salim Bashir, the then President of the Bar.

In implementing the MoU, a Joint Editorial Board was set up in April 2021 consisting of members of the Bar and colleagues from AIKOL. In the first meeting of the Board in May 2021, the Call for Papers and timeline was agreed upon, followed up by the appointment of a postgraduate student of AIKOL as an Editorial Assistant. The Editorial Board decided to implement the double-blind review where one of the reviewers is from the Bar and another from legal academia. We hope that the meeting of minds between the Bar and AIKOL in the Joint Editorial Board produces excellent articles for the benefit of the practice and the academia.

The revived INSAF is published one issue per year at this initial stage. It will be available as an E-Journal to adapt to the current need of the readers. It is accessible under the Open Journal System ('OJS') through the Malaysian Bar website. The team from AIKOL is assisting the migration of the back-issues of INSAF to the OJS .

Indeed, the effort to revive INSAF requires the commitment and perseverance from all parties, particularly from the Joint Editorial Board. On the part of the Kulliyyah, we want to record our utmost appreciation to our representatives on the Board, namely Professor Dr Sharifah Zubaidah Syed Abdul Kader as the Associate Editor, as well as Dr Sodiq Omoola and Dr Areej Torla as members, for their willingness to take up the challenge and their dedication to ensure the success of this endeavour. We also hope that Mr. Zia Qazizada acting as the Editorial Assistant gains valuable experience in assisting the Joint Editorial Board.

As a joint effort, certainly this project would not succeed without the shared vision and commitment from the Bar. We would like to thank the past and current leadership of the Malaysian Bar, in particular Mr AG Kalidas as the President for his continuous support. Our thanks also to the Chief Editor, Mr. Surindar Singh, and his team in the Joint Editorial Board, En. Mohamad Ezri Abdul Wahab and Mr. Lee Guan Tong.

It is our ardent hope that the revived INSAF continues to be the platform for everyone interested in the development of the law in Malaysia to share their thoughts, ideas and suggestions.

PROF. DR. FARID SUFIAN SHUAIB

ARTIFICIAL INTELLIGENCE IN THE MALAYSIAN LEGAL SYSTEM: ISSUES, CHALLENGES AND WAY FORWARD

Mahyuddin Daud[*]

ABSTRACT

The coming of the Industrial Revolution 4.0 has outraged those who have not braced themselves for it. The legal fraternity is one of the industries affected, stunned by the imminent digital technologies that learn on their own such as artificial intelligence (AI). Unlike any other previous technology, AI can make judgments freely and unexpectedly, causing concern on accountability for the harm inflicted by AI decision-making. The first part of this paper defines AI's functions and opportunities presented. Given the promising features of AI, the Malaysian judiciary has explored the used of AI in sentencing, as explained in the second part. Despite such opportunities, notable issues and challenges concerning negligence, vicarious liability, and crime arising from the use of AI technology cannot be overlooked. The paper concludes that the role of mankind is highly central in the use of AI despite the promising, yet risky potentials it could uncover.

Keywords: artificial intelligence, legal system, Malaysia, sentencing

[*] Assistant Professor, Civil Law Department, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.
(mahyuddin@iium.edu.my)

INTRODUCTION

> *"People worry that computers will get too smart and take over the world, but the real problem is that they're too stupid and they've already taken over the world"*[1].

As much as the language of the above quotation can be improved, the message contains a hard truth we need to swallow. The hard truth is that the job of humans everywhere is being taken over by robots - especially those involving repeatable processes. Spell-checking and search engines are good examples that were introduced as early as the 1990s and have since revolutionised. AI and machine learning have been able to make search engines suggest the best key terms to assist research. On the other hand, facial recognition constantly detects passengers at airports – and with the COVID19 pandemic, advanced sensors have been developed to be able to detect body temperatures from afar. Developers are also working to make computers to forecast court rulings correctly. People are worried that there may come a time that we will no longer need human judges.[2] On that note, there have also been considerable objection – as will be explored in this article - on the use of AI in the legal fraternity particularly in court trials.

---

[1] Pedro Domingos, *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World* (New York: Allen Lane, 2015), 286

[2] Ziyaad Bhorat, "Do We Still Need Human Judges in the Age of ArtificialIntelligence? | OpenDemocracy," Open Democracy, August 8, 2017, https://www.opendemocracy.net/en/transformation/do-we-still-need-human-judges-in-age-of-artificial-intelligence/; Padraig Belton, "Would You Let a Robot Lawyer Defend You? - BBC News," BBC News, August 16, 2021, https://www.bbc.com/news/business-58158820; Eric Niiler, "Can AI Be a Fair Judge in Court? Estonia Thinks So ," WIRED, March 25, 2019, https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/.

Be that as it may, there are legal professionals who have found AI to be very helpful, rather than a mere threat. For example, Sally Hobson is a barrister with the London-based chambers 'The 36 Group' and specialises in criminal matters. She employed AI in a high-profile murder trial that required a rapid analysis of almost 10,000 documents. The software completed the work four weeks faster than people could, thus saving the company £50,000. AI is not only assisting attorneys in sorting through documented evidence. Additionally, it may now assist clients in preparing and structuring their case, as well as doing a search for any relevant legal precedents.[3] All these positive points seem too good to be true, however the use of AI may transform how legal tasks could have been executed far more effectively, hence reducing the cost for justice.

There have been considerable responses to the coming of AI around the world. The European Union has undertaken several efforts aiming at establishing a comprehensive AI policy, which will involve legislation. The UK's House of Lords Select Committee on AI and the All-Party Parliamentary Group on AI are at risk of doing both, too much and too little.[4] The UK's new Centre for Data Ethics and Innovation may prove to be "another toothless marvel" and the government has been criticised for not having a clear mandate, leadership, and action plan on artificial intelligence. Some experts fear the centre will devolve into a series of talking shops, producing one-off papers on abstract topics.[5]

---

3 Padraig Belton, "Would You Let a Robot Lawyer Defend You? - BBC News."

4 Job Turner, Robot Rules: Regulating Artificial Intelligence (London: Palgrave Macmillan, 2019), 225.

5 Rowland Manthorpe, "Theresa May's Davos Speech Exposed the Emptiness in the UK's AI Strategy | WIRED UK," Wired, January 28, 2018, https://www.wired.co.uk/article/theresa-may-davos-artificial-intelligence-centre-for-data-ethics-and-innovation; Theresa May, "Theresa May's Davos Address in Full | World Economic Forum,"

The Obama administration in its last months published a landmark study on the Future of Artificial Intelligence, along with an associated policy paper.[6] While significant private sector of AI development is occurring, the US Federal Government does not seem to be engaged in substantial regulation of AI at the time of writing. China has established a special committee on artificial intelligence, with Wael Diab, a senior director of Huawei, as the chair.[7] China is desirous to be a leader in AI regulation, as reflected at the United Nations Group of Governmental Experts on lethal autonomous weapons systems in April 2018. On the other hand, the Japanese government has also been proactive in AI development, fuelled by its national economic policy and assisted by a robust public dialogue on AI. Such exemplifies how governments may encourage national and worldwide discussion on AI. Japan's task will be to maintain this early momentum, which will be aided if other countries adopt a similar strategy.

Defining AI

Despite arguably being of importance in the modern era, defining AI has not been easy. In plain language, the term 'artificial' refers to anything manufactured and not found in nature. The fundamental issue is with the term 'intelligence,'

World Economic Forum, January 25, 2018, https://www.weforum.org/agenda/2018/01/theresa-may-davos-address/.

6 Ed Felten and Terah Lyons, *"The Administration's Report on the Future of Artificial Intelligence | Whitehouse.Gov*," The White House, October 12, 2016, https://obamawhitehouse.archives.gov/blog/2016/10/12/administrations-report-future-artificial-intelligence.

7 Jeffrey Ding, "Deciphering China's AI Dream," Governance of AI Program, Future of Humanity Institute, 2018, https://www.fhi.ox.ac.uk/wp-content/uploads/Deciphering_Chinas_AI-Dream.pdf.

which may refer to a wide variety of characteristics or talents. Job Turner submitted that rather than focusing on 'what AI is', it is better to shift to the question of 'why do we need to define AI' at all? US Supreme Court Justice Potter Stewart in the case of *Jacobellis v. Ohio*, 378 U.S. 184 (1964), 197, once stated that he could not describe hard-core pornography, but "I know it when I see it."

Job Turner offered the following context to understand AI workability: - AI be understood as the ability of a machine or computer programme to behave intelligently in the same way that a human being would.[8] Hence, human intelligence becomes the serving yardstick for what AI does. Intelligence is the capacity to reason abstractly, logically, and consistently, to discover, lay, and see-through correlations, to solve problems, to discover rules in seemingly disordered material, to solve new tasks, to adapt flexibly to new situations, and to learn independently, without the need for direct and comprehensive instruction.[9]

To put it simply, no one thing can be pointed as 'Hey this is AI' – equivalent to a pen. An AI can be anything, any programme or computer – so long as it performs automated intelligent functions.

Before we worry about the potential dangers AI could cause, let us consider what it could do to offer benefits. As far as court judges are concerned, it has been argued that AI will make judgments fairer, does not get exhausted and does not depend on its glucose levels to work, unlike human judges.[10] Nevertheless, this article does not wish to argue on the need to replace human judges with AI – as this stance will be premature to conclude at this moment.

---

8 *Turner, Robot Rules: Regulating Artificial Intelligence*, 7–8.

9 Jerry Kaplan, *Artificial Intelligence: What Everyone Needs to Know* (London: Oxford University Press, 2016).

10 Daniel Kahneman, Thinking, Fast and Slow (London: Penguin, 2011).

According to Pew Research, 68 per cent of individuals from 11 most developed economies owned at least one smartphone in 2016.[11] The Malaysian Communications and Multimedia Commission in 2020 reported Internet users accessing the Internet via smartphones reached a near-saturation level of 98.7 per cent in 2020, up from 93.1 per cent in 2018, owing to smartphones' robust connectivity, efficiency, and variety of functions and applications.[12] Smartphone applications (or 'apps'), such as music library recommendations are examples of AI that detect previous listening behaviour and predictive text suggestions for texting. AI are sophisticated algorithms adopted by Internet search engines to continuously improve based on our queries and responses to the results. More accurately, each time we use a search engine, we are being 'used' by that search engine.[13] Virtual Personal Assistants (VPAs) such as Apple's Siri, Google's Assistant, Amazon's Alexa, and Microsoft's Cortana are examples of AI that have penetrated the global market. This tendency is related to the rise of the Internet of Things, a network of linked household gadgets. Whether it's a refrigerator that learns when you're low on eggs and orders some for you or a vacuum cleaner that can determine which areas of your floor require the most cleaning, AI is poised to take on tasks once held by a human.

---

[11] Jacob Poushter, "Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies | Pew Research Center," Pew Research Center, 2016, https://www.pewresearch.org/global/2016/02/22/smartphone-ownership-and-internet-usage-continues-to-climb-in-emerging-economies/.

[12] Malaysian Communications and Multimedia Commission, "Internet Users Survey 2020," Malaysian Communications and Multimedia Commission, 2020, https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/IUS-2020-Report.pdf.

[13] Ariel Ezrachi Maurice E. Stucke, *Virtual Competition* (London: Oxford University Press, 2016).

Article 6 of the European Convention on Human Rights (ECHR) and the Rules on Ethics lays down the standard for an acceptable AI practice in the context of the right to a fair trial. It needs, inter *alia*, a transparent process, the freedom of the parties to the trial and a well-founded decision. Therefore, the reduction in judicial complexity must be substantiated in a straightforward manner, hence providing litigants with a level playing field. On this basis, ECHR provides for a legal framework for the legal fraternity to enjoy the benefits offered by AI, within the acceptable legal norms and standards.

AI may be helpful to identify patterns in text records and files, such as when sorting huge quantities of cases or in complicated cases that contain a lot of detail. In the United States, an automatic investigation of computer evidence for discovery known as 'eDiscovery' utilises AI machine learning to help parties negotiate on the terms of the search and coding their use in negotiations. The court reviews the agreement and approves it. This is a procedure accepted by the courts of the United States and the United Kingdom for record investigation.[14] The method is easier and more precise than manual file analysis.

---

[14] See *Anti-Monopoly, Inc. v. Hasbro, Inc*., 1995 WL 649934 (S.D.N.Y., Nov. 3, 1995) was the first case in which the AI approach was recognized as constitutionally legitimate. In *Da Silva Moore v. MSL Party & Publicis Groupe*, No. 11 Civ. 1279 (ALC) (AJP) (S.D.N.Y., Feb. 24, 2012), Peck decided that eDiscovery is an acceptable way of searching for relevant digital information in applicable cases. In *Rio Tinto PLC v. Vale S.A., et al*., 2015 WL 872294 (S.D.N.Y., Mar. 2, 2015) the judge approved the parties' stipulated review protocol for the technology assisted review (TAR) of documents, noting judicial acceptance of the practice when proposed by the parties and the emerging issue of disclosure of the seed set used to train the program. In *Hyles v. New York City, et al.,* Num. 10 Civ., the judge noted that "While TAR will be allowed before his court in cases, its use will not be mandated. The procedure was also recognised in the United Kingdom, in

AI that can offer advice is beneficial for individuals and prospective parties to a court case who are searching for a solution to their problem but do not yet realise what they can do. For legal practitioners, advisory AI may also be helpful where it does not only search for specific details but also answers a query. This advisory role can help people to resolve legal problems on their own thereby avoiding conflicts or potential court proceedings.

Hence, for AI to work, the legal details must first be made machine-processable for it to be able to scan legal information efficiently. When legal material, such as court rulings, is made machine-processable with textual readability, record structures, identity codes and metadata all accessible before release, AI can be used even more efficiently. In the context of formal terms, incorporating legal meaning would help improve the usefulness of AI in the judicial process.[15]

There is a great deal of curiosity amongst the legal fraternity when AI also has the potential to foresee court rulings, in other words, exercise 'predictive justice.' On this note, predictive justice has given rise to controversy since the result of the predictive algorithms is neither rational nor predictive. Much like the weather, court hearings are at risk of an unexpected outcome. The risks increase as the situation gets more difficult with more complexity and more challenges.

On this note, how receptive AI has been particularly in the Malaysian legal environment. The following part analyses the current development on the use of AI in the Malaysian judiciary and arising issues thereof.

---

the High Court of Justice Chancery Division, U.K. in the case of *Pyrrho Investments Ltd v. MWB Property Ltd* [2016] (Ch).

15 A. D. (Dory) Reiling, "Courts and Artificial Intelligence," International Journal for Court Administration 11, no. 2 (August 10, 2020): 1–10, https://doi.org/10.36745/ijca.343.

AI in the Malaysian Judiciary

Even before the pandemic forced industries to embrace digital transformation, the Sabah and Sarawak courts had already launched a pilot AI tool as a guide to help judges with sentencing decisions. The High Court case of *Denis P. Modili v. Public Prosecutor*[16] is one that rocked the Malaysian judiciary recently. This case was an appeal against a Magistrates' court judgement dated 19.2.2020 about a sentence imposed. On February 20, 2020, an appeal notice was filed by the accused, expressing dissatisfaction with the verdict as it was decided through the application of AI. This case was the first to apply Al in sentencing and as a result, it marks a new history in Malaysian law.

The primary goal for applying AI in sentencing is to assist the Court in enforcing criminal sentences and to achieve greater consistency in sentencing.[17] The Court's internal database was used to compile the data, which covered the period from 2014 to 2019. The Al requires critical information referred to as 'parameters' to analyse and make recommendations on sentencing. For instance, Section 12(2) of the Dangerous Drugs Act 1952[18] requires the weight of the narcotics, the accused's age, and job history. Once these critical pieces of information have been entered, the Al system will make its own recommendations (for either a fine or

---

16 BKl-83D-3506/12-2019.

17 Olivia Miwil, "Malaysian Judiciary Makes History, Uses AI in Sentencing," New Straits Times, February 19, 2021, https://www.nst.com.my/news/nation/2020/02/567024/malaysian-judiciary-makes-history-uses-ai-sentencing.

18 Act 234.

imprisonment) which will be expressed in the form of a percentage.[19]

Whichever proportion is greater, the recommendations presented are merely guidelines to assist the presiding judge in following the proper sentencing standards as established by prior precedents. This, in turn, will prevent judges from imposing inconsistent penalties and it is likely that any future appeals to higher courts will be minimised, as a unified standard of sentencing principles will be applied. In the future, the issue of the presiding judges' sentencing concepts being inadequate or excessive will be mitigated and/or avoided.

The accused's counsel objected to the punishment being determined using Al, citing violation of Article 5(1) and 8(1) of the Federal Constitution. Despite the accused counsel's protests, the court continued to employ Al as it was merely a guideline intended to assist the Court in remaining loyal to the spirit of a reasonable sentencing approach. In this case, the recommended percentage from the Al was ten (10) months imprisonment, based on a 54.31 per cent calculated probability. Such recommendation of the Al was read to the accused, and he was enlightened on the Al system before his plea of guilt was accepted for the second time to ensure that it was unequivocal and absolute. The Al method operates in such a way that the presiding judge may concur with or deviate from Al's proposed sentence. Finally, the presiding judge has sole authority over the accused person's sentence.

Accordingly, the court sentenced the accused to 12 months imprisonment notwithstanding that the artificial intelligence system recommended that the accused be sentenced to 10 months. The sentences were passed taking into consideration several factors, such as a very high rate of drugs

---

[19] Per Magistrate Jessica Ombou Kakayun in *Denis P. Modili v. Public Prosecutor* at p.4-5.

cases in the area. However, on appeal to the High Court, the learned High Court judge allowed the appeal and reduced the sentence to 6 months. No reason was given for the reduction of the sentence and the issue of constitutionality was not addressed by the High Court.[20]

Accordingly, the Bar Council has expressed its reservation about the judiciary's decision to introduce a sentencing guideline *via* AI technology that evaluates and recommends sentences applicable to the lower courts. They expressed concerns about its implementation, stating that there was a possibility of judges undertaking a technical exercise during the procedure. Before inflicting punishment, human issues must be considered. The judge's thought process is critical after weighing the mitigating and aggravating aspects of a case.

The Office of the Chief Registrar, Federal Court of Malaysia explained that AI technology-based sentencing guidelines are designed to serve as a quick reference and guidance for Sessions Court judges and magistrates. From July 23, 2021, onwards, the AI system will be introduced in lower courts in Kuala Lumpur and Shah Alam, covering 20 common offences including physical and sexual assault, theft of property, drug possession, and traffic violations. The second phase of the system would be deployed from August to December 2021 and would contain additional offences but the nature of these offences have yet to be announced. The final step, which would take place between January and April of 2022, would comprise further recorded offences in the e-Courts System. According to the announcement, the system was created and implemented in Sabah and Sarawak last year. Meanwhile, Salim Bashir, the ex-

---

[20] Foong Cheng Leong, "Bread & Kaya 27: 2020 Cyberlaw Cases: Cyberlaw in the Covid-19 Era - Public Prosecutor v Denis P. Modili," Foong Cheng Leong, June 4, 2021, https://foongchengleong.com/tag/public-prosecutor-v-denis-p-modili/.

president of the Malaysian Bar, stated that the system did not take off in the peninsula last year due to its flaws.[21]

Though Denis's case was the first case to challenge the valid use of AI for sentencing, we have yet to observe the extent of legal issues it poses when used in different legal contexts. What would be the situation when an autonomous car causes accidents and deaths? To what extent would the AI manufacturer (or perhaps the owner of the device) be attributed to civil or criminal liability for the predictive actions taken by AI? The next part addresses the issues and challenges brought by the use of AI, with special reference to negligence, vicarious liability, and crime.

Issues and Challenges

The applications of AI as a substitute for human judgement and decision-making range from the trivial (such as choosing which music to play next), —to significant matters. For example, in early 2017, Durham police force in the United Kingdom stated that it was launching a software called the 'Harm Assessment Risk Tool' to assess whether a suspect should be held in prison or released on bond based on a variety of facts.[22] Self-driving vehicles are one of the most well-known applications of artificial intelligence. Advanced prototypes are currently being

---

[21] Olivia Miwil, "Malaysian Judiciary Makes History, Uses AI in Sentencing"; V Anbalagan, "Malaysian Bar Troubled over Judges Using AI for Sentencing | Free Malaysia Today (FMT)," Free Malaysia Today, July 24, 2021, https://www.freemalaysiatoday.com/category/nation/2021/07/24/malaysian-bar-troubled-over-judges-using-ai-for-sentencing/.

[22] Aatif Sulleyman, "Durham Police to Use AI to Predict Future Crimes of Suspects, despite Racial Bias Concerns | The Independent | The Independent," Independent, 2017, https://www.independent.co.uk/life-style/gadgets-and-tech/news/durham-police-ai-predict-crimes-artificial-intelligence-future-suspects-racial-bias-minority-report-a7732641.html.

tested on our roads by technology businesses like Google and Uber, as well as traditional automobile manufacturers such as Tesla and Toyota.[23]

Although self-driving AI is still under development, fatalities were reported in 2017, whereby a Tesla Model S that was on autopilot collided with a truck, killing its passenger. In 2018, an Uber test vehicle operating in autonomous mode struck and killed a lady in Arizona.[24] Although they may count as isolated test-drive accidents, one can never be assured that another similar incident may occur again in time. From unintentional to deliberate killing, the military around the world is developing semi- and wholly autonomous weapon systems. In the air, AI drones are capable to recognise, track, and kill targets without human intervention. According to a 2017 Chatham House Report, military worldwide are developing AI weapon capabilities that might enable them to perform operations and missions on their own.[25] Allowing AI to murder targets autonomously remains one of the most contentious possible applications.

The most fatal known use of autonomous ground-based weapons occurred during a friendly fire event, in which a South African artillery gun malfunctioned, killing nine troops.[26]

---

[23] US Department of Transportation, "USDOT Automated Vehicles Activities | US Department of Transportation," US Department of Transportation, January 19, 2021, https://www.transportation.gov/AV.

[24] Gareth Corfield, "Tesla Death Smash Probe: Neither Driver nor Autopilot Saw the Truck • The Register," The Register, June 20, 2017, https://www.theregister.com/2017/06/20/tesla_death_crash_accident_report_ntsb/; Sam Levin and Julia Carrie Wong, "Self-Driving Uber Kills Arizona Woman in First Fatal Crash Involving Pedestrian | Uber | The Guardian," The Guardian, March 19, 2018, https://www.theguardian.com/technology/2018/mar/19/uber-self-driving-car-kills-woman-arizona-tempe.

[25] Turner, *Robot Rules: Regulating Artificial Intelligence*, 25.

[26] Tom Simonite, "'Robotic Rampage' Unlikely Reason for Deaths | New Scientist," New Scientist, October 19, 2007,

However, the authority denied that such an accident was caused by an automated artillery gun that went out of control as the decision to fire remained on the ground staff. In Israel and Japan, more advanced AI systems are being used to offer physical and emotional assistance to elderly people, as the world continues to adapt to ageing populations.[27] AI is also being utilised in medicine to assist clinicians in making clinical decisions. Other technologies under development and operation provide for automated diagnosis and therapy.

The next part examines specific legal issues that may occur due to the use of AI. We will first assess potential issues AI could cause as far as liability in negligence is concerned.

Issue on Negligence

Negligence occurs when one owing a duty of care causes behaviour that falls short of a necessary standard thereby inflicting harm to a victim. The well-known neighbourhood test was established in the House of Lords' landmark case of *Donoghue v. Stevenson.*[28] A manufacturer of bottled ginger beer was liable to compensate a woman who became unwell after opening an opaque bottle containing a dead snail. Even though there was no formal contract between them, the manufacturer owed a duty of care to anyone who may reasonably be anticipated to open the bottle. The House of Lords opined that one must use reasonable care to avoid acts or omissions that might reasonably be anticipated to cause injury to his 'neighbour'. Neighbours are:

---

https://www.newscientist.com/article/dn12812-robotic-rampage-unlikely-reason-for-deaths/.

27 Accesssi, "Sex Robots vs. Sex Dating in Hongkong," Accesssi , December 6, 2019, http://www.access-ai.com/.

28 [1932] All ER Rep 1.

> *"persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*[29]

Numerous legal systems, including those of France, Germany, and Malaysia, have adopted this doctrine.

If an injury is inflicted, upon the use of AI, to determine liability in negligence - the first question is whether there is any person who owed a duty of care to refrain from causing or preventing the harm.[30] For example, the owner of a robot lawnmower may have a responsibility to anybody who is in his garden. The law may require the owner to use reasonable care to prevent the AI lawnmower from wandering into the garden of the next-door neighbour and destroying their beautiful flowers. Secondly, whether such duty of care has been breached. If the lawnmower's owner used reasonable care under the circumstances, in so far as what 'other reasonable owners'[31] would do, perhaps he will not be liable – although an injury was

---

29 *Donoghue v Stevenson*, 1932 SC (HL) 31 (UKHL 26 May 1932)

30 The preferred test for the establishment of a duty of care in tort in Malaysia was the three-fold test of foreseeability, proximity, and policy considerations. See the Federal Court decision in *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553.

31 It is established in the torts of negligence that the duty of care expected by law will depend on the reasonable man's test for that profession. See Federal Court judgments' in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2006] MLJU 0518; [2007] 1 AMR 621; [2007] 1 CLJ 229 concerning standard of care for orthopedic surgeon. See also *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169 concerning duty of care of lead arranger for issuance of bonds. See also *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553 concerning whether a lawyer owed duty of care to plaintiff as real owner of land when lawyer was acting for fraudster who claimed to be owner of land. See also *Government of Malaysia & Ors v. Jumat Bin Mahmud & Anor* [1977] 2 MLJ 103 concerning duty of care for teachers.

caused. In contrast, if the neighbour borrows the lawnmower without the owner's consent and subsequently damages her garden, the owner will have a solid claim that the damage was not triggered by his breach of duty of care.

Thirdly, did the breach of duty become the cause for the damage? If the lawnmower was rolling towards the neighbours' garden due to the owner's negligence but was stopped by a car that ran off the road and destroyed the neighbour's rose bed, the lawnmower owner may have breached his duty to keep the machine under control, but the damage would not have been caused by the breach due to the car driver's intervening act. In Malaysia, the court needs to consider whether the injury was reasonably foreseeable. While the expense to replace with new roses is obvious, the loss of prize money from a particularly expensive rose-growing competition that the neighbour would have participated in otherwise, is not. The owner is not the only one who may be subject to a duty of care in the scenario. This may equally be said of the AI's designer or the human (if any) who taught or programmed it. For instance, if the AI was designed with a fundamental defect - it mistook children for weeds to be killed, then the manufacturer or programmer may have violated the responsibility to build a safe robot.

The next part analyses legal issues that may arise due to the use of AI as far as vicarious liability is concerned.

Issue on Vicarious Liability

Legal systems employ a number of rules and procedures to establish accountability towards the principal for the conduct of his agent. Vicarious liability refers to the liability imposed on one person for the wrongful act of another based on the legal relationship between them, usually that of employer and employee. A principal who employs an agent to perform work on the principal's behalf is vicariously liable for acts performed by the person within the scope of his or her authority.

It does not matter that the act was not authorised. It is enough that the agent was put in a position to do the class of action complained of. If an unlawful act was done by the agent within the scope of his or her authority, it is immaterial that the principal directed the agent not to do it – he may still be vicariously liable for the agent's act.[32] Generally, the agent is also responsible for their damaging conduct, but the victim may elect to pursue a claim against their principal due to the latter's greater financial resources. After compensating the victim, the principal can typically pursue the agent for damages.[33]

Vicarious liability is distinguished from strict liability by the fact that not every act of the agent makes the principal responsible. Vicarious liability is formed when there exists a relationship between principal and agent, such as employment. Second, the wrongdoing must typically occur within the context of that connection. In *Mohamud v. WM Morrison Supermarkets plc*[34], the UK Supreme Court decided that a gas station owner was vicariously liable for the acts of an employee who assaulted a customer after the customer requested to use a printer. Crucial to the supermarket's responsibility was the existence of a 'close link' between the attack and the employee's position, even though the assault violated the employee's terms of the contract. For example, Germany requires that there be unlawful conduct by the agent to establish vicarious liability. Thus, if the agent did not behave improperly (e.g., due to a lack of foreseeability), the principal has no vicarious responsibility.[35]

As far as the relationship of vicarious liability for AI is concerned, the situation appears to be complex. For example, the Kuala Lumpur police department employed AI drones to

---

[32] Colonial Mutual Life Assurance Ltd v Producers and Citizens cooperative Assurance Co of Australia Ltd (1931) 46 CLR 41 .

[33] Turner, Robot Rules: Regulating Artificial Intelligence, 98–101.

[34] [2016] UKSC 11.

[35] Turner, Robot Rules: Regulating Artificial Intelligence, 100.

conduct patrolling around the city.[36] The police chief may be held vicariously liable if the drone attacks a suspected member of the public while conducting its patrol. Even though the police force did not design the AI system that the robot utilises, they may be held most directly accountable for the drone's behaviour and/or benefiting from the drone. While the police force may not have intended or approved the attack, it happened within the limits of the drone's designated job. In some ways, the robot would be comparable to an intellectual agent whose actions may be assigned to a principal but not recognised as a full legal person. Of course, such liability should never simply be attributed to the police until a proper judicial process takes place.

Vicarious liability finds a compromise between recognising AI's autonomous agency and holding a currently recognised legal person accountable for AI's actions. Negligence and product liability often see AI as an 'object' rather than an agent or a legal person. On the other hand, vicarious liability functions to the contrary. , Unforeseeable autonomous actions of AI do not always sever the chain of causation between the person held accountable and the injury. As a result, the vicarious liability model is more suited to the specific tasks of AI that set it apart from other man-made entities.

The fact that vicarious liability is often restricted to the scope of the agent's activity is both a benefit and a disadvantage. This means that not all an AI's actions will be attributable to the AI's owner or operator. For instance, the more AI deviates from its defined responsibilities, the greater the likelihood of a responsibility gap that may break the causation.

---

[36] Nor Azizah Mokhtar, "Dron Baharu PDRM Guna Teknologi Tinggi Terkini," BH Online, July 26, 2021, https://www.bharian.com.my/berita/nasional/2021/07/843663/dron-baharu-pdrm-guna-teknologi-tinggi-terkini.

In the short to medium term, this problem is less serious, if (predominantly narrow) AI continues to work within narrowly constrained boundaries. AI may be seen as a student, child, employee, or servant, whereas a human may be regarded as the teacher, father, employer, or master. Each of these models has unique peculiarities about the extent and boundaries of one party's obligation to the other.[37]

The next part considers legal issues that may arise due to the use of AI as far as criminal liability is concerned.

Liability in Crime

A person is not criminally responsible for an act prohibited by law unless he acted with a guilty or legally culpable mentality as per the Latin maxim *actus non facit reum, nisi mens sit rea.*[38] Criminal responsibility involves not just criminal conduct (or *actus reus*), but also a certain state of mind on the defendant's part: the guilty mind or *mens rea*. Criminal law primarily focuses on the accused's objective state of mind: what did the offender truly think and plan to do. As opposed to the law of torts that applies a subjective mental test - asking what a reasonable person would have done. The mental prerequisites for committing a crime vary by the legal systems and by type of crime. Occasionally, the *mens rea* necessary for conviction extends beyond the defendant foreseeing the consequences of her acts - to requiring that she wanted, wished, or willed the outcomes (or crime) to occur. A person who tosses a brick from a balcony is unlikely to be convicted of murdering the person on

---

[37] Turner, *Robot Rules: Regulating Artificial Intelligence*, 101.

[38] Shamsuddin Suhor and Kho Feng Ming, "The Right to Defense in Strict Liability Offences," *Malayan Law Journal Articles* 5 (2018): xcii.

whom the brick lands unless she meant to cause death or serious injury.[39]

This brings us to consider the following point: how would humans be punished for the actions of AI? Where AI is found to have obeyed human instructions and committed an act that would constitute a crime if committed by a person, the AI's activities are often attributed to the human. If the human has the necessary mental condition, she will be found guilty. Gabriel submitted that the AI would be irrelevant as it would be equated to a weapon in the perpetrator's hands, like the knife used by a murderer.[40] This argument could find support from the case of *People v. Davis*[41] decided by the California Supreme Court. It held that:

> *"Instruments other than traditional burglary tools certainly can be used to commit the offense of burglary… a robot could be used to enter the building."*

On the other hand, UK and Australian jurisdictions have developed what is coined as the 'innocent agent' principle. Even if an entity is deemed to have intelligence, it may nevertheless be an innocent actor. If an adult instructs a kid to pour poison into another person's drink when he is not seeing, the adult who supplied the poison and instructed the child is

---

39 The Crown Prosecution Service, "Homicide: Murder and Manslaughter," The Crown Prosecution Service, March 18, 2019, https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter#intent.

40 Hallevy Gabriel, "The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control," Akron Intellectual Property Journal 4, no. 2 (2010), https://ideaexchange.uakron.edu/akronintellectualproperty/vol4/iss2/1?utm_source=ideaexchange.uakron.edu%2Fakronintellectualproperty%2Fvol4%2Fiss2%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages.

41 958 P.2d 1083 (Cal. 1998).

likely to be charged with a crime, even if the child is not. The principle of innocent agency allows for the conviction of an offender who employs another to commit an offence. In the nineteenth-century English case of *R. v. Michael,*[42] a mother handed a bottle of poison to her baby's caregiver, claiming it was medication, and instructing her to administer it to the infant. The mother meant for the infant to die. The nurse refused, but her five-year-old son discovered the container and gave the deadly dose to the infant. The court held that while it was the son's intervention, not Michael's acts that caused the infant's death, the son was an innocent agent. Michael purchased the poison and attempted to have someone else administer it to her infant before. The court found her to possess the required *mens rea* to be held guilty. Michael was responsible for the death even if her acts did not directly cause it. This is an illustration of 'legal causation', in which her *actus reus* was the proximate cause of the poison being fed to the infant. A person is said to have committed an *actus reus* if their acts directly resulted in the forbidden consequence.

In these instances, the concept of innocent agency attributes the innocent child's deed to the mother. Because the mother meant for her kid to die and the act of poisoning by her unsuspecting agent is seen to be her own conduct, she is guilty of murder. Additionally, the concept extends to instances in which the principal is exempted from liability due to insanity or accident.[43] The principle serves as a supplement to complicity, allowing for conviction of an offender in instances where the guilt of an individual who committed the prohibited behaviour cannot be proven.[44]

---

42 (1840) 169 ER 48.

43 Matusevich (1977) 137 CLR 633; Demerian [1989] VR 97.

44 David Perry, "Secondary Liability In The Criminal Law - Criminal Law - UK," Mondaq, June 24, 2011, https://www.mondaq.com/uk/crime/136506/secondary-liability-in-the-criminal-law.

In criminal law, vicarious liability functions comparably to tort law, subject to the same restrictions as laid forth above. One significant distinction between the two is that private law vicarious liability is not concerned with the principal's *mens rea*. It is concerned with the connection between the principal and agent. By contrast, under criminal law, the principal must typically possess the *mens rea* required to commit the offence. If the *mens rea* requirement is simply that the principal was careless about the injury (as opposed to intending harm), then such intent would be appropriate to prosecute him under relevant criminal offences.[45]

There is however another way to decode AI criminal liability proposed by Gabriel Hallevy. For example, an AI manufacturer develops an AI system to be used in a grilling machine and installed an algorithm that 'all meat will be cooked to perfection.' Due to a malfunction, the AI grill machine then burns down an entire home killing everyone. Gabriel submitted that in this situation, the manufacturer may face criminal charges for their irresponsible behaviour in developing such software. Gabriel Hallevy referred to this notion as the liability for "natural-probable-consequence" where it appears to be legally appropriate for circumstances in which an AI entity commits a crime without the programmer or user being aware of it, intending it, or participating in it.[46]

Although the approach seems to replicate the law of torts, however, the prosecution must prove his case 'beyond any reasonable doubt' and establish the case prima facie. An accused person is always accorded with the right to plead available defences, such as accident[47] or negligence[48] –

---

45 R v. Jogee, Ruddock v. The Queen [2016] UKSC 8, [2016] UKPC 7.

46 Gabriel, "The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control," 13.

47 See Section 80 of the Malaysian Penal Code.

48 See Section 290 of the Malaysian Penal Code.

especially in the situation where AI went out of control inadvertently. Up to this point, AI has yet to be recognised as a 'legal person' holding them answerable for criminal actions. Hence, criminal liability will be attributable to its owner or programmer, whichever is closer in the causation chain. Until both *actus reus* and *mens rea* are proven to the satisfaction of the court, no accused person should simply be convicted for any criminal offences caused by AI.

CONCLUSION

Certainly, the advent of AI particularly in the legal fraternity has invited causes for concerns. Such is acceptable as the crux of the issue is that AI is not a legal entity, nevertheless it is being allowed to make important decisions affecting human lives. Algorithms employed by AI may be continuously updated, however, it does not change the fact that AI is not a legal person and whatever it decides, it will not be answerable for the decisions. This is precisely the reason why the use of AI in courts or even elsewhere should be limited to guiding human, without replacing the job of a human to think critically, evaluate, and make decisions. The strange concepts of blaming AI for civil or criminal offences it has caused must never be allowed to develop further as it may detach the owner's or programmer's chain of causation as well as liability. They may continue to conduct experiments, however, such must also be carried on with attributable liability. It is proposed that the appropriate liability for the use of AI should be tortious in nature, to strike a balance between the need for AI and attribution of liability. As much as we want technology to further improve, scientists and manufacturers generally develop AI for the good of mankind. Unless there is evidence to the contrary, AI that went out of control and caused a car accident must be dealt with in the realm of torts. In this manner, the legal fraternity will not be accused of hindering modern development. At the same time, AI can be used as a tool to elevate access to

justice – cheaper, faster, and more effectively than ever before. There should also be an ongoing consultative and collaborative process between the AI users and the software development team, stakeholder consultations, and development of an ethical framework. The role of humans in the justice system should never be replaced by AI, no matter how advanced technologies will become.

REMOVAL OF JUDGES IN THE COMMONWEALTH – AN EXPLAINER

*Jenita Kanapathy**

*Nadhratul Wardah Salman***

ABSTRACT

Removal of judges from office is a serious form of judicial accountability. As such, international instruments, and declarations on the independence of the judiciary have expressed three principles on the substantive grounds for removal of judges. Firstly, the grounds of removal must be apparent, secondly, judges should only be removed on grounds of incapacity or misconduct and thirdly there must be grave misconduct warranting the removal of a judge. Around the world, there are a few types of removal mechanisms of judges in the higher courts. The most common type of removal mechanism is by ad hoc tribunal or parliament. Most commonwealth countries, including Malaysia, have adopted the *ad hoc* tribunal system. This article provides an overview of the different types of removal mechanisms adopted by commonwealth countries in removing judges from the higher courts, in particular the United Kingdom, South Africa and Malaysia.

Keywords: removal mechanisms, types, higher courts, judges, Malaysia

* School of Business & Law, Taylor's University, Subang Jaya Selangor Darul Ehsan. e-mail: jenitha.kanapathy@yahoo.com

** Faculty of Law, University Malaya, Kuala Lumpur. e-mail: wardah@um.edu.my

INTRODUCTION

The mechanism for the removal of judges from their office is an indispensable component of autonomy in any independent judiciary. The implementation of a free and effective judicial appointment system in any jurisdiction would not be worth its salt if higher court judges can be facilely vacated from their office especially to the whims of the executive. Therefore, mechanisms involved in judicial removals should be accorded an even higher weightage of importance compared to judicial appointments. International instruments have expressed three foundational principles that shall guide and guard the removal of judges.

The first is that the grounds of removals should not be ambiguous and there is clear evidence to institute removal proceedings against a judge as enshrined in Article 19 of the United Nations Basic Principles on the Independence of the Judiciary. Secondly, Article 18 of the United Nations Basic Principles on the Independence of the Judiciary states that countries ought not to embrace a removal mechanism that undermines judicial independence, and the removal shall be only on grounds of incapacity or misconduct. Thirdly, international instruments mandate that the gravity of the misconduct committed by the judge should be sufficient to warrant a removal proceeding. The Latimer House Guidelines provide some guidance in this respect.[1]

In addition, the Annual Report 2014 of the United Nations Special Rapporteur states that the removal and disciplinary procedures against judges should focus on a grave and intolerable professional misconduct that tarnishes the reputation of the judiciary. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa defined the threshold for judicial removal as misconduct

---

1 Guideline Vl.l.(a)(A).

unbecoming of a judicial office[2] whereas Article 30 of the International Bar Association ('IBA') Minimum Standards of Judicial Independence states that a judge is deemed unfit for judicial office if the judge has committed any act of crime or grave or repeated neglect. All international instruments examined above unanimously concur that judges must not be removed from office on any other grounds save for incapacity and misconduct. They also prescribe a high threshold of burden on the state when removing any judge from office. The instance of the Chief Justice of Gibraltar[3] would be a genuine case where the Privy Council emphasised the requirement for a thorough evaluation to be made to determine if the appointed judge might be entrusted to remain in his or her judicial office. The Privy Council asserted that the test for judicial removal requires any failings of the judge to be severe enough to undermine trust in the judge's ability to perform his or her duty properly. Further, in the case of *Re Levers*[4], the Privy Council highlighted that although the standard of behaviour to be expected of a judge is set out in the Bangalore Principles of Judicial Conduct (Resolution 2006/23 of the United Nations Economic and Security Council), these standards should aspire all judges to achieve but it does not follow that a failure to do so will automatically amount to misconduct. The Privy Council expressed that the public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public

---

2 Article A.4(p).

3 *Re Chief Justice of Gibraltar [2009] UKPC 43*.

4 [2010] UKPC 24.

in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit.[5]

In addition, the United Nations Human Rights Committee reported that the right to an independent and fair trial of a judge would be threatened if the power to remove judges is vested with the executive.[6] The IBA Minimum Standards of Judicial Independence advocates that, as a minimum standard, an independent judicial tribunal be established to hear cases involving judicial removal via Article 4(a) and on the other hand, by virtue of Article 4(c) the IBA Minimum standards does also allow for removal of judges via legislative council but based on the recommendation of an independent commission. The Venice Commission in its 2010 report on the Independence of Judicial System[7] recommended that the arbiter in such judicial removal cases shall be a court of permanent status or a judicial council.

Most Commonwealth nations have indicated the reasons for judges to be removed were due to judges' inability to carry out their judicial functions or conducts which are not in conformance to the standards set out in the Commonwealth Latimer House Principles and other international standards for judicial conduct. In South Africa, however, gross ineptitude is an additional ground that might warrant the removal of a judge as permitted under Section 177(1)(a) of the South Africa Constitution. Ineptitude might be acceptable grounds for dismissal in certain circumstances especially when judges deliberately disregard the obligations of their office, however, this may also expose judges to unfair and indiscriminate accusations of ineptitude for delays or errors attributable to other factors such as work overload and lack of administrative

---

5 *Therrien v Canada (Minister for Justice) [2001] 2 SCR 3.*

6 UN Doc CCPR/C/GC/32 (23 August 2007), para 20

7 Report on the Independence of the Judicial System, Part One: The Independence of Judges, CDL-AD (2010)004, para 33 to 34 of page 84.

support.[8] In the Malaysian context, Article 125(3A) of the Federal Constitution allows the Chief Justice to exercise discretionary powers to refer any judge to a disciplinary body for a minor breach of codes of ethics. The vesting of such discretionary power on a single actor, the Chief Justice, in this case, creates ambiguity and gives an appearance of lack of judicial independence as currently there are no express guidelines on what constitutes a minor breach of ethical conduct that require lesser disciplinary sanctions or grave misconduct which warrant a judge to be removed from office.

Judicial Removal Mechanisms

Nations all over the world require a system for removing judges from office. Nonetheless, the challenge for legal frameworks is to ensure that the removal process is not used to penalise or intimidate judges. There are several different types of mechanisms to remove a judge from office in Commonwealth nations, which are ad-hoc tribunals, disciplinary councils, a hybrid mechanism involving the legislative assembly or Parliament and a disciplinary council, and a mechanism involving only the legislative assembly or Parliament. There is not a single Commonwealth nation that gives sole discretionary power to the executive to remove judges from office.[9] Figure 1 shows a percentage breakdown of the types of judicial removal mechanisms employed for higher courts across Commonwealth

---

[8] Solik, Greg. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by the Bingham Centre for the Rule of Law), J van Zyl Smit." *South African Law Journal* 133, no. 3 (2016): 708-711.

[9] Solik, Greg. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by the Bingham Centre for the Rule of Law), J van Zyl Smit." *South African Law Journal* 133, no. 3 (2016): 708-711.

nations. A summary of findings revealed that in 42% of Commonwealth jurisdictions, once an initial investigation establishes that a question of removal has arisen, an ad hoc tribunal is formed to resolve the issue. Furthermore, a permanent disciplinary council is established in another 21% of jurisdictions for that purpose, and a parliamentary removal mechanism is found in 34% of jurisdictions, while in the remaining 4% of jurisdictions, some judges are removed through a parliamentary process and others through a disciplinary council.[10]

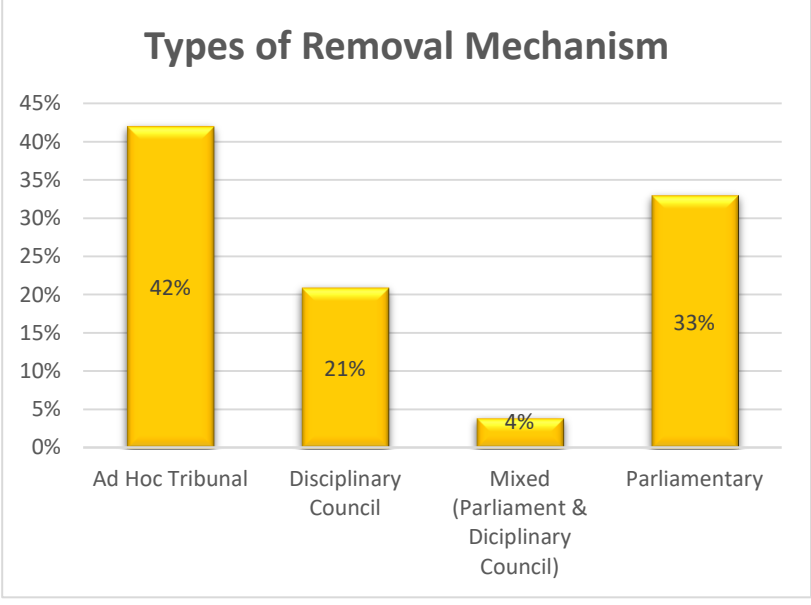

FIGURE 1: Types of removal mechanisms of higher court judges in the commonwealth countries.

[10] Smit, Jan Van Zyl;"The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Aalysis of Best Practice. *British Institute of International and Comparative Law*, 2015, xxi.

Ad-Hoc Tribunal

The ad-hoc tribunal model for removing judges from office is the most popular amongst Commonwealth nations. It was found that 20 Commonwealth jurisdictions subscribe to this model which includes Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organization of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda, and Zambia. Australian states of Victoria and Queensland, and the Australian Capital Territory.[11] The ad-hoc tribunal model is popular because it is found to be the most viable amongst all other types of mechanisms.[12] In this type of model, the tribunal is given the mandate to examine whether there are any valid grounds to remove the judge accused of being unfit to perform his or her judicial duties. The tribunal is usually made up of a combination of current and former judges and members may also be invited from foreign judiciary to give the tribunal a sense of international legitimacy and to allay any unbiased perception of domestic political interference. Also, foreign expertise is considered to ensure that the tribunal proceedings follow best practices as adopted in similar jurisdictions.[13] This kind of foreign appointment is allowed in Malaysia. The Federal Constitution under Article 125(4) allows for the appointments of tribunal members from other Commonwealth jurisdictions provided the said appointees meet the stipulated qualification criteria.

---

[11] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 96.

[12] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 91.

[13] Kenneth Owen Roberts-Wray, *Commonwealth and Colonial Law*. (London: Stevens & Sons, 1966), liv.

Generally, a preliminary inquiry phase is initiated prior to any removal proceedings. This is a salient part of the judicial removal mechanism to determine whether an ad-hoc tribunal is warranted or otherwise. The United Nations Basic Principles and Article 25 of the Beijing Statements of Principles of the Independence of the Judiciary both advocates that some form of initial investigation be conducted before instituting removal proceedings against any judge. In most of the commonwealth countries that practice the ad-hoc tribunal mechanism, the Chief Justice or a commission is tasked with the duty to first conduct a preliminary inquiry to ascertain the validity of the charges against any judge and to determine if the said judge is to be subjected to a removal proceeding as currently practised inter alia in Barbados, Bahamas, Fiji, Ghana, Guyana, Jamaica, Kenya, Mauritius, the Organisation of Eastern Caribbean States, Papua New Guinea, Seychelles and Trinidad and Tobago.[14] However, if the accused judge is the Chief Justice or in some cases the President of the Court of Appeal, then the removal process is generally initiated by the executive. This applies to all countries mentioned earlier except for Kenya.[15] In Seychelles, the appointment and removal of judges fall under the purview of the Constitutional Appointments Authority (CAA). It should be noted that it is not mandatory for the CAA to include judges as members.

In some Commonwealth countries, the judicial removal mechanism involves a hybrid ad-hoc tribunal mechanism that combines both the Chief Judge or a commission and the executive as who are jointly responsible to decide to initiate tribunal proceedings. The countries that practice this type of hybrid system are Botswana, Lesotho, Malaysia, Singapore, Solomon Islands, Tanzania, Uganda, and Zambia.

[14] Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best practice. British Institute of International and Comparative Law, 2015, 95.

[15] Article 168. Constitution of Kenya.

Figure 2 illustrates the various types of appointments in the ad-hoc tribunal model.

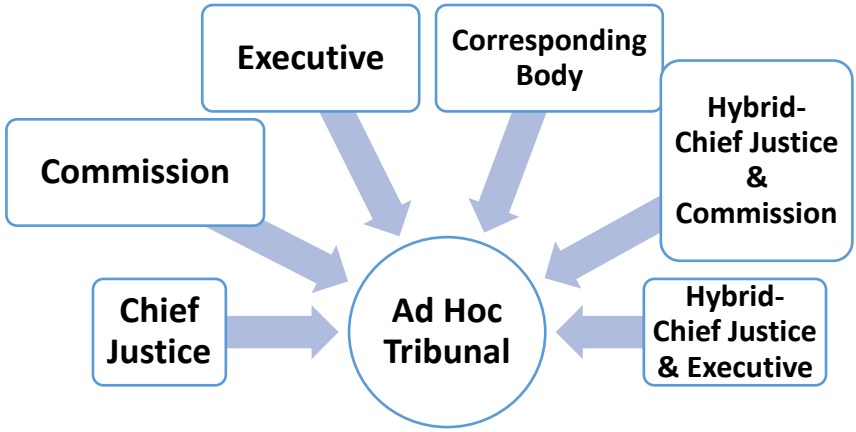

Figure 2: Types of appointment of Ad Hoc Tribunal

However, there is an inherent risk of abuse of power by the executive in this type of ad-hoc tribunal model when the power to commence removal proceedings against judges is vested in the executive. An example of this was the tribunal of the former Lord President of Malaysia, Tun Salleh Abas, where it was alleged that the Prime Minister purportedly used his constitutional powers under Article 125 of the Federal Constitution to select the members[16] of the tribunal; the qualification of some members remains questionable until

[16] Report of the Tribunal Established under Article 125 (3) and (4) of the Federal Constitution Re: Y.A.A. Tun Dato' Hj Mohamed Salleh Abas, Lord President, Malaysia. (Kuala Lumpur Government Printer, 1998). https://trove.nla.gov.au/work/19170446.

today.[17] This dark episode in the history of the Malaysian judiciary seems to demonstrate that the model does not guarantee an independent judicial removal proceeding if safeguards in such a mechanism do not adequately shield the judiciary against executive intimidation. According to Harding, it is not a bad idea to have fellow judges scrutinize the alleged breach of ethics or misconduct of their brother or sister judges if there are clear and guiding principles that expressly delineates the rules in the composition of the tribunal members, the procedures as well as the grounds for such removal proceedings. He pointed out that the reason for Malaysia to choose the tribunal mechanism for instituting judicial removals is to avert any manipulation by an executive with majority control of Parliament in a legislative council judicial removal mechanism.[18] However, there is an ominous weakness in the Malaysian system that manifested in the Tun Salleh case which is that the Prime Minister holds the constitutional discretionary powers in the removal process under Article 125.

Parliamentary Removal

Another mechanism that is widely used in the removal of judges in Commonwealth nations is the Parliamentary removal mechanism. Although it is not as popular as the Ad-Hoc tribunal method, it has nevertheless found acceptance in countries such as Australia, Bangladesh, Canada, India, Kiribati, Malawi, Maldives, Malta, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu and also the United Kingdom.[19] It is also applicable to Nigeria and

---

17 Harding, Andrew J. "The 1988 constitutional crisis in Malaysia." *The International and Comparative Law Quarterly* 39, no. 1 (1990): 57-81.

18 Harding, Andrew J. "The 1988 constitutional crisis in Malaysia." *The International and Comparative Law Quarterly* 39, no. 1 (1990): 57-81.

19 Smit, Jan Van Zyl. The appointment, tenure and removal of judges under commonwealth principles: A compendium and analysis of best

Rwanda for certain judicial positions. The minimum standards set by Article 4(c) of the IBA Minimum Standards of Judicial Independence requires that in a Parliamentary removal system, the judicial removal powers exercised by the parliament should be founded on the recommendation by a commission. Notwithstanding this, Chief Justices namely from the Asia-Pacific region had expressed their concerns that this parliamentary removal system is susceptible to abuse by the executive if the parliament is under the control of the executive.[20]

In a situation where the executive commands the support of the parliament, any judge whose decisions are unfavourable to the government of the day could potentially see the said judge being ousted from his or her judicial position with a simple majority vote in the parliament. Any opposition voice would be drowned, futile against the majority rule of the executive and the executive could potentially pack the courts with executive-minded judges. Considering this, most commonwealth jurisdictions adopt a hybrid system combining both the Ad-Hoc Tribunal and parliamentary removal mechanism instead of a vesting removal power solely on parliament for instance in the United Kingdom[21] and South Africa.[22] Alternatively, the threshold for parliamentary approval to remove a judge could be set higher by requiring a two-thirds majority instead of a simple majority for parliament to remove any judge from office. This would further enhance safeguards in the countries adopting the parliamentary removal mechanism.

---

practice. British Institute of International and Comparative Law, 2015, 106.

20 Beijing Statement on the Independence of the Judiciary (1997).

21 Regulation 2, 4(2), 14(b) and 15. Judicial Discipline (Prescribed Procedures) Regulations 2014.

22 Section 20 and 30. Judicial Service Commission Act 1994.

Removal by Disciplinary Council

Judicial service commissions, judicial councils, and other permanent bodies are examples of disciplinary councils that are authorised in some Commonwealth jurisdictions to decide whether a judge should be removed from office. International norms require these to be judicial bodies, but in some Commonwealth states that follow this model,[23] only a minority of members are required to be judges, with some jurisdictions entrusting the executive with the power to appoint council members.[24] It is still common practice for disciplinary bodies, such as ad hoc tribunals, to recommend that a judge be removed to the Head of State, who oversees the formal act of removal. The role of the head of state is merely perfunctory in the removal process. In the absence of a viable review or appeal mechanism, it is not inconceivable that a Head of State would refuse to act on such a recommendation if there is clear evidence of illegality or irregularity in the disciplinary process. To affirm a broader discretion on the Head of State would be to reintroduce an element of executive control over the removal of judges, which would be incompatible with the judiciary's independence. It is pertinent to note that an advantage of entrusting removal decisions to disciplinary councils rather than ad hoc tribunals is that their members are not chosen for the purpose of investigating a specific judge, making manipulation of the body more difficult.

Dual Removal Mechanism

Some countries have adopted a combination of two types of removal mechanisms in their judicial removal system consisting of the judiciary and the legislative assembly. In the context of this article, the dual system for England and Wales in the United Kingdom and South Africa are selected for discussion.

---

[23] Belize, Cameroon, Namibia, Swaziland, Tonga, and Vanuatu.

[24] Section 159(2). Constitution of Swaziland.

The South African Model

The South African Constitution under section 177(1)(a) empowers the Judicial Service Commission to conduct an investigation to ascertain if any judge is incapacitated or is grossly incompetent or is guilty of gross coffences of misconduct. If the commission finds prima facie evidence of such incapacity, incompetence, or misconduct then a tribunal shall be established to initiate a removal hearing.[25] The full hearing shall be before a tribunal consisting of two judges and a layperson who is not a member of the national assembly.[26] The exclusion of legislative council members in the tribunal ensures conformance with the Latimer House Guidelines and assures an independent and impartial tribunal in accordance with Section 178(5) of the South African Constitution. The accused judge would be given reasonable notice to defend himself or herself and could also be represented by a counsel of his or her choice and given the right to call and question witnesses. If the judge is found to be incapacitated or guilty of gross incompetency or misconduct, the said judge would be referred to the National Assembly for a parliamentary resolution as prescribed under sections 22 and 33 of the Judicial Service Commission Act 1994. A two-third majority would be required in the National Assembly to remove the judge from office in accordance with section 177(1)(b) of the South African constitution. In the South African model, the safeguards in the judicial removal under section 177 (1)(a) reduced the risk of parliamentary interference as it limits the parliament to act at the advice of the tribunal. Once the two-third majority endorsement is complied with, section 177(2) of the South African constitution mandates the President to remove the affected judge from office.

---

[25] Dane Ally, "A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa," *Athens Journal of Law* (AJL) 2, no. 3 (July 2016): 150.

[26] Section 22(1). Judicial Service Commission Act 1994.

The United Kingdom (England and Wales) Model

For key judicial positions such as the Lord Chief Justice, Lords Justices of the Appeal Court and judge of the High Courts, Her Majesty the Queen of England is the final authority in the removal of higher court judges from their positions. However, this is subject to an address in the Parliament pursuant to section 11(3) of the Supreme Court Act 1981. However, the Lord Chancellor can exercise powers given under the Constitutional Reform Act 2005 to remove other judicial officers not mentioned above on grounds of incapacitation and misbehaviour. In the United Kingdom, Judicial Conduct Investigations Office (JCIO) was established as an independent statutory organisation to assist the Lord Chancellor and Lord Chief Justice in conducting investigation into complaints of judicial misconduct with exception of Supreme Court judges.[27] Rule 1 of the Judicial Conduct (Judicial and other office holders) Rules 2014 Supplementary Guidance states that the overall responsibility to conduct a proper investigation and ascertain whether there is any credibility in the complaints of misconduct against judges shall be shared by the Lord Chancellor and Chief Justice. The officers in JCIO are appointed by the Lord Chancellor with the consent of the Chief Justice as per Regulation 4 of the Judicial Discipline (Prescribed Procedures) Regulations 2014 and is tasked to handle complaints against the conduct of judges in a consistent, fair, and efficient manner.

When a complaint had been filed, the Lord Chancellor and the Lord Chief Justice may assign the case to any designated person or body for investigation as per Regulation 13(2) of the Judicial Discipline (Prescribed Procedures) Regulations 2014 (JDR 2014). The designated person may be a nominated judge or a disciplinary panel. In cases involving

---

[27] Judicial Conduct Investigations Office, accessed on October 4, 2021, https://www.complaints.judicialconduct.gov.uk.

tribunal judges, the President of the relevant tribunal may be nominated to investigate the complaint whereas if it involves a magistrate, an advisory committee may be tasked to conduct the investigation. If the outcome of the investigation into any complaints does not warrant removal or suspension of a judge, the matter may be referred to a disciplinary panel constituted jointly by the Lord Chancellor and Lord Chief Justice in accordance with Regulation 14 of the JDR 2014. The possible penalties or sanctions against any judge found guilty of judicial misconduct is set out in The Constitutional Reform Act 2005 (CRA). Regulation 15 of the JDR 2014 describes that the sanctions shall be commensurate with the degree of severity of the offense. These include sanctions such as a formal advice, formal warning, reprimand, and removal from office. Hodge[28] indicated that the UK model espouses shared responsibility in disciplinary or judicial removal cases as to avert any perception or suspicion that the Lord Chief is protecting his or her fellow judges.

The United Kingdom model is founded on a consensus between the Lord Chancellor and the Lord Chief Justice. There is also additional protection to safeguard the system by requiring both chambers of the UK Parliament to vote on the matter concerning High Court judge and above. These are stipulated in regulations 2, 4(2), 14(b) and 15 of the JDR 2014. The mechanism for the removal of Supreme court judges is based on provisions under Section 33 and Note 219 of the CRA which allows removal only if passed by both the House of Commons and the House of Lords.

---

[28] Lord Hodge, "Upholding the Rule of Law: How We Preserve Judicial Independence in the United Kingdom," Lincoln's Inn Denning Society, accessed October 1,2021, https://www.supremecourt.uk/docs/speech-161107.pdf.

CONCLUSION

The comparative analysis of different types of removal mechanisms in the commonwealth countries illuminated the benefits and inadequacies of various removal mechanisms and had also assisted in determining the most viable method in the removal of higher court judges. It is incumbent on legislators to create a suitable legal framework with best practices and standards that adopts a more executive-free approach in the removal of higher court judges in order to regain the public trust in the judiciary and as not to repeat the judicial crisis of 1988 involving Tun Salleh Abbas.

After considering the various types of removal mechanisms used in the commonwealth countries in particular the United Kingdom, South Africa and Malaysia, the question arises whether Malaysia's method of adopting ad hoc tribunal should be retained or changed. Removal of higher court judges by way of parliament is a far cry from our intention to have a more independent judiciary, whereas a hybrid system of both ad hoc tribunals and parliamentary removal or setting a higher threshold of the two-thirds majority would also not be a viable option for Malaysia given the history of political consideration in the removal of judges in the Malaysian higher courts. This type of mechanism may be abused by the executive if it commands the majority in the parliament. Furthermore, the current political landscape and the suspension of parliament due to the Covid 19 pandemic by the Government does not augur well for the removal mechanism method by the parliament. Therefore, the parliamentary removal system is also not viable in Malaysia.

The next question is whether the ad hoc tribunal system appointed by the Head of State on the advice of the executive would be the best removal mechanism for higher court judges in Malaysia. The answer is an approving – YES. As previously stated, the reality is that the removal of the judges at higher courts in Malaysia may be initiated by the Prime Minister.

Therefore, this concentration of power in the executive would still impose an inherent risk of abuse and the errors of the past can still be repeated when the Prime Minister's position is challenged be it within his political party or externally in the parliament. The case of Tun Salleh Abbas proves that the ad hoc tribunal system has its flaws if there is executive interference and involvement.

Therefore the ad hoc tribunal system must be maintained as it appears to be the best method to guarantee a more independent method of removing judges from the higher courts compared to a parliamentary system. However, the degree of independence of the ad hoc tribunal is heavily dependent on the extent of executive involvement in its appointment as well as the appointment of members to the ad hoc tribunal. The best way forward in a Malaysian context is to amend the current Malaysian Constitution to ensure that appointment of the ad hoc tribunal and its members is conferred to the commission as opposed to the Prime Minister or confined only to the top judges of the land. In addition, the commission should be composed of pertinent stakeholders in the Malaysian judicial system. In this way, there is a greater possibility of ensuring independence even in the removal system of the higher court judges in Malaysia.

PROTECTING REFUGEES, PRESERVING STATE SOVEREIGNTY AND MANDATING EQUITABLE INTERNATIONAL BURDEN-SHARING: FINDING THE BALANCE FOR MALAYSIA

Farid Sufian Shuaib[*]

Saiful Izan bin Nordin[†]

ABSTRACT

The main international treaty pertaining to refugees and asylum-seekers is the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. Many countries within the region of Southeast Asia, including Malaysia, had not ratified or acceded to the treaty. There are many reasons to it but one of the main reasons relates to the sovereignty of the nation which include cross-border movements and for fear of its negative impact to the security of the nation. The non-recognition of refugees and asylum-seekers together with the absence of the legal framework as required under the Convention cause hardship and compromise the safety of refugees and asylum-seekers. This article investigates the historical aspect of migration within the Malay Archipelago and shows how Malaysia has always welcomed the integration of others into its community. The article then discusses the dilemma faced by a country such as Malaysia and the manner upon which Malaysia seeks to contribute to the aim of the abovementioned treaty by

[*] *Farid Sufian Shuaib*, Professor of Laws, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 53100 Jalan Gombak, Kuala Lumpur Malaysia, Email: farid@iium.edu.my

[†] *Saiful Izan bin Nordin*, PhD Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, 53100 Jalan Gombak, Kuala Lumpur, Malaysia, Email: nordinsaifulizan@gmail.com

ensuring that the humanitarian needs of individuals who are fleeing their country as refugees and asylum-seekers are fulfilled. This article then highlights some of the current initiatives to overcome the humanitarian challenges pertaining to refugees and asylum-seekers. The article finally discusses the means to assuage the hesitancy of Malaysia in ratifying or acceding to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, including mandating equitable international burden sharing.

Keywords: refugee, asylum, Malaysia, treaty

INTRODUCTION

A refugee is someone who is outside his/her country and fearful of persecution because of his/her race, religion, or nationality and is unwilling to return for fear of persecution.[1] He/she may also be compelled to leave his/her country because of external aggression or serious disturbance in public order.[2] This would include threat of generalised violence, foreign aggression, internal conflicts, massive violation of human rights, and serious disturbance of public order.[3] For persons who claim to be refugees but whose status have yet to be determined, they are referred to as asylum-seekers.

Malaysia has approximately 179,550 refugees and asylum-seekers registered with the United Nation High Commissioner for Refugees (UNHCR). The numbers include some 45,900 children below the age of 18; 68% of refugees and asylum-seekers are men, while the remaining 32% are women.[4] The vast majority are from Myanmar (including Rohingyas), and the rest are from Afghanistan, Pakistan, Yemen, Syria, Iraq, and other countries.

---

1 "Convention Relating to the Status of Refugees" (1951), Opening date for signature (July 28, 1951), Date of Entry into Force (April 22, 1954): 189 U.N.T.S. 150; "Protocol Relating to the Status of Refugees" (1967), Opening date for signature (January 31, 1967), Date of Entry into Force (October 4, 1967): 606 U.N.T.S. 267.

2 "OAU Convention Governing the Specific Aspects of Refugee Problems in Africa," (1969), adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa (September 10, 1969).

3 "The Cartagena Declaration on Refugees" adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, (November 22, 1984).

4 UNHCR, "Figures at a Glance in Malaysia", accessed August 8, 2021, https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html?query=statistic%20malaysia.

Refugees require humanitarian assistance and protection throughout their journey, especially since they are venturing outside their countries of origin and familiar territories, and therefore, desperately require support from the host states and host communities.

However, the State also ensures the preservation of its sovereignty — such as protecting the integrity of its territories, including cross-border movements as well. It is in these sometime conflicting considerations that the Malaysian authority must continue to find a balance.

International Legal Protection for Refugees

Although the legal framework for refugees within the region of Southeast Asia is considered to be generally weak,[5] legal protection is offered to refugees and asylum-seekers under international law which offers legal protection to those who flee their country because of fear of persecution or threat of violence[6] and require assistance. This recognition evolved from the juridical term because an individual may find himself/herself without the benefit of the formal protection of his/her government, to the social term which emphasises on the need to render assistance to individuals who are away from his/her home society, and to the individualist

---

5 Joyce Chia, and Justice Susan Kenny, "The Children of Mae La: Reflections on Regional Refugee Cooperation", *Melbourne Journal of International Law* 13, (2012): 1.

6 UN General Assembly Official Records, "Universal Declaration of Human Rights", G.A. res. 217A (III), 3rd session, 183rd plen mtg, U.N. Doc A/RES/217A (III), (December 10, 1948): article 14(1); "American Declaration of the Rights and Duties of Man", OAS Res XXX, (1948) article XXVII; "African Charter on Human and Peoples' Rights", Opened for signature (June 27, 1981), 1520, U.N.T.S. 217, entered into force (October 21, 1986): article 12(3).

terminology where a refugee is defined as someone escaping persecution from his/her home country.[7]

The two main legal documents that define "refugees" are the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. They confer the rights to refugees and lay out the obligations of States. Among the ASEAN countries, only Cambodia and Philippines have ratified or acceded to the Convention and Protocol.[8] The rights of refugees are also supplemented by other international and regional human rights treaties such as the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT),[9] the International Covenant on Civil and Political Rights (ICCPR),[10] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[11] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[12] the Convention on the Rights of the Child

---

7 James C. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", *International and Comparative Law Quarterly* 33, no. 2 (April 1984): 348.

8 UNHCR, "States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", accessed August 26, 2021, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

9 "The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", Opened for signature (December 10, 1984), entered into force (June 26, 1987): 1465 U.N.T.S. 85.

10 "International Covenant on Civil and Political Rights", Opened for signature (December 19, 1966), entered into force (March 23, 1976): 999 U.N.T.S. 171.

11 "International Covenant on Economic, Social and Cultural Rights", Opened for signature (December 19, 1966), entered into force (January 3, 1976): 993 U.N.T.S. 3.

12 "Convention for the Protection of Human Rights and Fundamental Freedoms", Opened for signature (November 4, 1950), entered into force (September 3, 1953): 213 UNTS 222, as amended by "Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms", opened for signature (May 27, 2009), entered into force (September 1, 2009): CETS No. 204.

(CRC),[13] and the Declaration on Fundamental Principles and Rights at Work and Its Follow-Up.[14] According to the Convention Relating to the Status of Refugees 1951, a refugee is someone who "has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The person is outside his/her country of nationality or of habitual residence and is unable or unwilling to avail himself/herself of the protection of that country because of the fear of persecution.[15]

The Convention offers protections to refugees in recognising the precarious condition that they are in. The contracting State parties of the Convention agree not to discriminate refugees based on race, religion, or country of origin.[16] The contracting State parties agree to provide refugees with freedom of religion,[17] competency to acquire properties,[18] right to intellectual property,[19] right to non-political and non-profit associations,[20] access to courts,[21] access to employment and profession,[22] and access to welfare provisions including public elementary education.[23]

---

13 "Convention on the Rights of the Child", Opened for signature (November 20, 1989), entered into force (September 2, 1990): 1577 U.N.T.S. 3.

14 "International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up", Declaration adopted by the International Labour Conference, 86th session, Geneva, 18 June 1998.

15 "Convention Relating to the Status of Refugees" (1951), article 1; reads together with "Protocol Relating to the Status of Refugees," (1967).

16 "Convention Relating to the Status of Refugees" (1951), article 3.

17 "Convention Relating to the Status of Refugees" (1951), article 4.

18 "Convention Relating to the Status of Refugees" (1951), article 13.

19 "Convention Relating to the Status of Refugees" (1951), article 14.

20 "Convention Relating to the Status of Refugees" (1951), article 15.

21 "Convention Relating to the Status of Refugees" (1951), article 16(1).

22 "Convention Relating to the Status of Refugees" (1951), articles 17, 18 and 19; ICESCR, article 6 on the grant of the right to work; "Declaration

Recognising the interest of the security of host States, such rights of refugees do not extend to any person who has committed a war crime, crime against humanity, or serious crimes.[24]

Considering that refugees are fleeing from their own country for fear of persecution, one of the main principles is non-expulsion from the host State. However, exception is given on the grounds of national security or public order.[25] Nevertheless, the expulsion may only be made after it has undergone the due process of law where the refugee is given the opportunity to provide evidence, to appeal, and to be represented before the competent authority.[26]

The core principle of refugee law relating to expulsion is *non-refoulement*. According to this principle, a refugee should not be returned to a country where he/she faces serious threats to his/her life or freedom.[27] This rule is now part of customary international law.[28] Additionally, the

---

on Fundamental Principles and Rights at Work and Its Follow-Up", which declares on the principle of equality of treatment in labour and freedom from servitude and forced labour.

23 "Convention Relating to the Status of Refugees" (1951), article 22.

24 "Convention Relating to the Status of Refugees" (1951), article 1(F).

25 "Convention Relating to the Status of Refugees" (1951), article 32(1).

26 "Convention Relating to the Status of Refugees" (1951), article 32(2).

27 "Convention Relating to the Status of Refugees" (1951), article 33(1). "The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", article 3 prohibits refoulement regarding a real risk of torture; "Convention for the Protection of Human Rights and Fundamental Freedoms", article 5(1).

28 UN High Commissioner for Refugees (UNHCR), "The Principle of Non-Refoulement as a Norm of Customary International Law", Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, (January 31, 1994), accessed July 25, 2021, https://www.refworld.org/docid/437b6db64.html; Mohamad Naqib

non-refoulement principle is supported under Shariah law, under the principle of "*aman*" or safety where anyone who requires refuge should be given protection.[29]

On the other hand, refugees are obligated to abide by the laws and regulations of the host States.[30] It is incumbent upon them to conform to measures that are imposed for the purpose of maintaining public order.

To safeguard the rights of refugees, the host country needs to provide administrative assistance, including the issuance of necessary documentations, certifications, identity papers, and travel documents.[31] Refugees should be able to move freely and to choose the place of residence.[32] Apart from the option of facilitating the admission of refugees to another country, the host State should also facilitate the assimilation and naturalisation of the refugees.[33]

The Convention also envisages the host country to take provisional measures by firstly determining the refugee status of the asylum-seeker and the need of such process because of national security. However, such provisional measures are restricted to circumstances connected with necessity during the period of armed conflict and other exceptional circumstances.[34]

Ishan Jan, Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad, *International Refugee Law* (Gombak: IIUM Press, 2017).

29 Ahmed Abou-el-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study* (Riyadh: UNHCR, 2009); "The Cairo Declaration of Human Rights in Islam" (1990), article 12.

30 "Convention Relating to the Status of Refugees" (1951), article 2.

31 "Convention Relating to the Status of Refugees" (1951), articles 25, 27 and 28.

32 "Convention Relating to the Status of Refugees" (1951), article 26.

33 "Convention Relating to the Status of Refugees" (1951), article 34.

34 "Convention Relating to the Status of Refugees" (1951), article 9.

The list of rights stated above refers to "refugees lawfully staying" in the States. Thus, this implies that the Convention does envisage the entry as irregular migrants. In such circumstances, the individual who is fleeing from persecution or threat of persecution may have no other option but to enter into the territory of another without authorisation. For such refugees, they are under the obligation to present themselves to the authority of the host country and explain their unlawful entry.[35] Any restriction of movement to such refugees should only be until their legal status in the country are regularised or until they have obtained admission to another country.[36]

During such restriction or detention, consideration should also be given in ensuring non-separation of a child from his/her parents against his/her will unless it is "necessary for the best interests of the child".[37] Such restriction of movement or detention should not be arbitrary and should be treated in accordance with the spirit of humanity and dignity.[38]

The host country is expected to work together with the United Nations High Commissioner for Refugees (UNHCR) on matters pertaining to the protection and assistance of refugees.[39] The UNHCR is regarded as the "guardian" of the 1951 Convention and its 1967 Protocol that looks at about 26.4 million refugees in the world. This is by working in 132 countries and territories with approximately 180,000 people under its employment using

---

35 "Convention Relating to the Status of Refugees" (1951), article 31(1).

36 "Convention Relating to the Status of Refugees" (1951), article 31(2).

37 UN General Assembly, "Convention on the Rights of the Child", United Nations, Treaty Series, vol. 1577 (November 20, 1989), article 9(1).

38 ICCPR, articles 9(1), 10(1).

39 "Convention Relating to the Status of Refugees" (1951), article 1(D).

an annual budget of about USD1 billion.[40] UNHCR was established in 1950 to assist European refugees in the aftermath of World War II. It started its operations in Malaysia in 1975 in managing the arrival of Vietnamese refugees. Since then, it has been working very closely with the Malaysian Government.

I. Malaysia and The History of Movement of People

Malaysia is a multi-ethnic, multi-religious and multi-cultural society. From the Malaysian population of approximately 32.7 million, the number of non-citizens has declined from 3 million in 2020 to 2.7 million in 2021 with the closure of national borders and return of foreigners following the COVID-19 pandemic.[41] The Bumiputera (indigenous peoples consisting of the Malays, aborigines in the Malay Peninsula and the Natives in Sabah and Sarawak) composition is 69.8 percent, the Chinese composition is 22.4 percent, the Indian composition 6.8 percent, and other ethnicities at 1.0 percent.[42] This ethnic mix did not change much after the formation of the Federation of Malaya in 1957 and the subsequent inclusion of Sabah and Sarawak in the Federation to form Malaysia in 1963.[43]

Malaysia is situated in the Malay Archipelago, situated between the Indian and Pacific Oceans, and consisting of waterways and islands. The practice of geographical mobility has its origins during the period when

---

40 UNHCR, "Figures at a Glance", accessed July 25, 2021, https://www.unhcr.org/en-my/figures-at-a-glance.html

41 Department of Statistics Malaysia, "Current Population Estimates, Malaysia, 2021", accessed July 25, 2021, https://www.dosm.gov.my.

42 Department of Statistics Malaysia, "Current Population Estimates, Malaysia, 2021", accessed July 25, 2021, https://www.dosm.gov.my.

43 Singapore joined the Federation of Malaya in 1963 but left the Federation in 1965.

the Malay Archipelago consisted of kingdoms of Malay Sultanates. This practice led to the creation and existence of a plural society even before the arrival of colonial powers. This plural society was linked together by religious, social and political relationship.[44] Prior to colonialism, amicable relationships between ethnic groups were well established, and exemplified by the Malays accepting the absorption of the Bugis population into the Malay royalties, and intermarriages between the Malays and the Chinese and Indian Muslims, producing the Baba and Jawi Peranakan, respectively.[45]

In the years leading to Independence, the readiness of the Malays to again provide refuge to other ethnic groups was seen when they agreed to provide to the Chinese and Indian migrant communities who intended to make the Malay Peninsula their permanent abode, citizenship through inter-ethnic negotiations.[46] Although some may want to highlight the inter-racial conflicts that happened in the lead-up to the negotiations for independent Malaya, and the post-independence racial riot of 13 May 1969, all-in-all, the absence of major violence post-1969 is

---

44 Zawawi Ibrahim, "Globalization and National Identity: Managing Ethnicity and Cultural Pluralism in Malaysia," in *Growth and Governance in Asia*, ed. Yoichiro Sato (Honolulu: Asia-Pacific Center for Security Studies, 2004).

45 Charles Hirschman, "The Making of Race in Colonial Malaya: Political Economy and Racial Ideology", *Social Forum* 1, no. 2 (1986): 330.

46 Joseph M Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: The Malaysian Branch of the Royal Asiatic Society, 2002); Mohd Rizal Yaakop, and Shamrahayu A Aziz, *Kontrak Sosial Perlembagaan Persekutuan* 1957 (Kuala Lumpur: ITBM, 2014); Farid Sufian Shuaib, "Islam, Nation-State and the Legal System of Malaysia", *SDUHFD* 7, no. 1 (2017): 75.

considered exceptional for some, for a multi-racial and multi-religious society such as Malaysia.[47]

Offering refuge to people of forced migration is not an alien practice in Malaysia. Forced migration within the region of Southeast Asia has occurred due to armed conflicts involving foreign powers such as the Vietnam War, the rebellious forces and secessionists movements such as in the Southern Philippines and Aceh, or majoritarian oppression over minorities such as the Rohingya's plight. In general, Malaysia does not turn refugees away.

The communist was the victor in 1975 in the war of the former French colonies of Indochina, namely Vietnam, Cambodia and Laos. It was a continuous war from 1945, causing immense suffering, and exacerbated by the rivalries of the United States of America, the Soviet Union and China. During the following two decades, a mass exodus of over three million people fleeing the region, took place. It was reported that the total annual expenditure of UNHCR from 1975 to 1980 increased from USD80 million to USD500 million.[48]

Refugees from Vietnam started arriving in the east coast of Peninsular Malaysia after the war. Malaysia had accepted more than 250,000 refugees. The main settlement for the Vietnamese "boat people" was in Pulau Bidong, originally an uninhabited island situated off the coast of Terengganu, with the last refugee departure from Malaysia in 2005. The UNHCR had assisted in the

---

47 Leon Comber, *13 May 1969*, (Singapore: Marshall Cavendish, 2009). See also Kua Kia Soong, *May 13: Declassified Documents on the Malaysian Riots of 1969* (Petaling Jaya: SUARAM, 2007); Kusuma Snitwongse & W Scott Thompson ed., *Ethnic Conflicts in Southeast Asia* (Singapore: ISEAS, 2005).

48 UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 79.

resettlement of 240,000 Vietnamese refugees from Malaysia to third countries and the return of some 9,000 to Vietnam.[49] The Malaysian Red Crescent Society had also supported the humanitarian assistance of the Vietnamese Boat People for over 20 years, from the 1970s to the 1990s.

It is interesting to note that the Indochina refugee episode introduced the concept of "first asylum". According to this concept, a country's agreement or readiness to receive refugees is dependent upon another country's offer of resettlement.[50] This is the combination of the ideas of international burden-sharing and temporary asylum.

Another consequence of the Indochina war is the persecution of Cambodians, including the Chams or Malay Chams who are Muslims, between 1975 and 1979 during the Khmer Rouge regime. Malay Cham villagers and religious leaders were executed.[51] From 1975 to 1985, Malaysia had accepted around 10,000 Malay Chams for resettlement in Malaysia. The local resettlement is considered an exception as most refugees from Indochina were assisted to be resettled in third countries. The local resettlement was made because of the historical connection and religious affinity between the Malay Cham and the local Malay community in states such as Kelantan and Terengganu.[52] The first temporary refugee resettlement camp was opened in Kelantan and known as Taman Putra. It

---

49 UNHCR Malaysia, "Last Vietnamese boat refugee leaves Malaysia", (August 30, 2005), accessed July 31, 2021, https://www.unhcr.org/news/latest/2005/8/43141e9d4/vietnamese-boat-refugee-leaves-malaysia.html.

50 UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 102.

51 Federico Sabeone, *The Fate of the Cham Muslims* (np.: European Institute of Asian Studies, 2017).

52 Mohamad Zain bin Musa, "Perpindahan dan Hubungan Semasa Orang Cam", *Sari* 26 (2008): 257.

was officially opened by the former first Prime Minister of Malaysia, Tunku Abdul Rahman Putra Al-Haj ibni Almarhum Sultan Abdul Hamid Halim Shah in 1976, who was then the Secretary General of the Organisation of Islamic Conference (OIC), and involved the Federal and State governments together with the Muslim Welfare Organisation of Malaysia (PERKIM).

Another armed conflict in the region that caused forced migration is the conflict in Mindanao and the Sulu Archipelago in Southern Philippines. The Muslim minority was demonised as "Moros" by the Spanish colonial regime in their efforts of evangelisation and expansion of colonial rule, together with their anti-Islamic prejudices brought from Spain's post-*Reconquista*.[53] By the 15th century, the *Bangsa Moro* had established an independent Islamic Sultanate in Mindanao and Sulu.[54] After the independence of the Philippines in 1946, the Muslim minority areas continued to be subordinated politically and economically. The declaration of martial law by President Ferdinand Marcos in 1972 ran parallel with the call for Moro's independence for the Muslim minority. This, coupled with the transplantation of Christian settlers in Mindanao, resulted in conflict between the Muslims and the Christian settlers, and politicians and businessmen over land rights and other resources which escalated into armed conflict.[55]

---

53 Eva-Lotta E Hedman, *The Philippines: Conflict and Internal Displacement in Mindanao and the Sulu Archipelago*, (np: United Nations High Commissioner for Refugees, Emergency and Technical Support Service, 2009).

54 Ikuya Tokoro, "The Re-emergence of Islam in the Context of Muslim Separatism in the Philippines" in Ikuya Tokoro (Ed.), *Islam and Cultural Diversity in Southeast Asia,* (Tokyo: Research Institute for Languages and Cultures of Asia and Africa (ILCAA), 2015).

55 Ikuya Tokoro, "The Re-emergence of Islam in the Context of Muslim Separatism in the Philippines" in Ikuya Tokoro (Ed.), *Islam and*

The Moro National Liberation Front (MNLF) was formed challenging the martial-law regime. In the 1970's, 75 percent of the Armed Forces of the Philippines (AFP) was deployed to Mindanao and the Sulu Archipelago. Thus far, the cost of the conflict is 150,000 casualties and one million refugees and Internally Displaced Persons (IDPs).

The inflow of refugees from the Mindanao and Sulu Archipelago's conflict into Sabah increased in 1972 until 1984. The Sabah government, that has the authority on immigration matters under the Federal Constitution, permitted them to remain in Sabah — about 100,000 refugees in the early 1970s — on humanitarian, social, economic and political grounds.[56] The refugees were granted the permission to stay and work in Malaysia. The UNHCR closed their office in Sabah in 1987 following the Malaysian Government's decision to issue residency visas to them.[57]

Another group of refugees that Malaysia has assisted is the Acehnese who fled to Malaysia during the counter-insurgency operations in Aceh between 1990 and 1993 and the military offensive between 1999 and 2005. Aceh has had a long history of being an independent Islamic Sultanate, and from their perspective, they were unceremoniously lumped together with other provinces to form the independent Republic of Indonesia on 17th August

---

Cultural Diversity in Southeast Asia, (Tokyo: Research Institute for Languages and Cultures of Asia and Africa (ILCAA), 2015).

56 Azizah Kassim, "Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma Over Their Future," *Southeast Asian Studies* 47, no. 1 (2009): 52.

57 UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report — 17th Universal Periodic Review: Malaysia*, n.d, accessed January 3, 2022, https://www.refworld.org/pdfid/513d9a0e2.pdf.

1945. Aceh is a province of Indonesia in the northern tip of the island of Sumatra, parallel to Penang Island in Malaysia over the Straits of Malacca. Despite the fact that it is rich in natural gas, Aceh was still one of the poorest provinces in Indonesia then. This dissatisfaction contributed to the call for Aceh's independence in the 1970s.[58] The late Hasan Di Tiro formed the Free Aceh Movement (GAM) in 1976 and GAM spearheaded the secessionist rebellion. The Indonesian Government imposed a Military Operations Zone (DOM) in Aceh from 1989 to 1998 as a platform for severe counter-insurgency measures taken against the Acehnese.[59] Another round of military operations and martial law commenced in 2003, including patrols and "sweepings" to identify separatists or their supporters. Some of the Acehnese integrated into the Malaysian community, while others settled in other third countries. There were also those who were forced to, or voluntarily, returned home.[60]

The accounts above indicate that Malaysia does recognise the need for identifying the humanitarian needs of refugees and offering assistance to them by making Malaysia a "temporary asylum" and a transit country for their resettlement. Those accounts also provide examples where Malaysia resettled groups of refugees inside Malaysia. Thus, although Malaysia had not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, as well as its chequered history of treating refugees and asylum-seekers, Malaysia still provides assistance to refugees.

---

58 Anthony Reid (Ed.), *Verandah of Violence: The Background to the Aceh Problem* (Singapore: Singapore University Press, 2006).

59 Kamarulzaman Askandar, "Aceh Refugees and Conflict Transformation", *Accord* 22 (2011): 63.

60 UNHCR, "Malaysia deports asylum seekers to Aceh despite UNHCR appeal", September 5, 2003, accessed August 29, 2021, https://www.unhcr.org/news/latest/2003/9/3f58b05a4/malaysia-deports-asylum-seekers-aceh-despite-unhcr-appeal.html.

State Sovereignty and the Legal Treatment of Refugees

Sovereignty provides authority with the right to command and the right to be obeyed. Sovereignty is legitimate when it is supported by law, tradition, and consent or endorsement. Power is required to support the sovereign authority's claim to legitimacy. Legitimacy which conjures allegiance and respect could by itself support the sovereign claims.[61]

The traditional view of state sovereignty includes the absolute supremacy to govern the internal affairs within its territory, the absolute right to govern the people, and freedom from external interference.[62] The emphasis on the territorial integrity can be traced back to the Westphalian notion of state sovereignty. The historical revolutions of the Peace of Westphalia in 1618 that ended the Thirty Years' War and the Eighty Years' War and the decolonisation process after the World War II brought with it the notion of legitimate political authority over a defined population and territory, and recognition of interaction between equally sovereign states. This territorially based body politic exerts its right for self-determination, the power and responsibility over population within the territory claimed. This includes the right and power to control the movement of people into the territory.

The concept of right and power does not only encompass the topic of territorial integrity and security. It also encompasses the responsibility over those who enters into its territory. This requires the use of available resources – be it administration, enforcement, and services and resources to provide for the living such as food, accommodation, education and livelihood. Under the

---

61 Daniel Philpott, "Sovereignty: An Introduction and Brief History," *Journal of International Affairs 48* (1995): 353.

62 Guiguo Wang, "The Impact of Globalization on State Sovereignty", *Chinese Journal of International Law* 3, no. 2 (2004): 473.

Westphalian notion of sovereignty, the state is under the responsibility to consider the fate and the interest of its citizen over that of the migrants. In confronting the dynamic of international and domestic economic and social factors, the state cherishes its agility in setting policies and regulations in dealing with non-citizens which it may not has if its hands are tied after ratifying or acceding to a treaty. The state is reluctant to surrender its right to lay down the required policies and regulations that is needed in governing using its limited resources.

However, in the age of globalisation, such idea of state sovereignty is being challenged by the growing power of non-state actors such as the International Monetary Fund and the World Bank which directly or indirectly dictate the economic and fiscal policy of states; treaty bodies such as the Human Rights Committee under the International Convention for Civil and Political Rights (ICCPR) and the Committee on the Elimination of Discrimination against Women (CEDAW) which determine compliance of states with international norms; and transnational corporations that influence state policies or even cause states to become bankrupt. The social media giants of the world — the likes of Facebook and Google — are the gatekeepers or the ones who decide whether to man the gate that may cause detriment to the social fabric of societies.

One may even say that the language of sovereignty is appealing to states without much might — state that are without adequate resources to protect their territorial integrity or domestic tranquillity, and are under

constant challenges over their territory and domestic polity.[63]

Thus, the language of sovereignty is still relevant for a small country such as Malaysia to assert control over its territory and domestic polity. The concept of sovereignty is expressed through its continual refusal to adopt the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. This is one of the reasons that Malaysia does not want to legally recognise refugees as a special group of migrants.

However, the absence of ratification or accession to relevant treaties does not mean that Malaysia has no responsibility to refugees. As discussed earlier, the principle of *non-refoulement* in international law is a customary international law that every state, including Malaysia is subjected to. The principle of *non-refoulement* forbids the host country of refugees or asylum-seekers from returning them to a country in which they would be in likely danger of persecution based on race, religion, nationality, and membership of a particular social group or political opinion. Policy-wise, Malaysia is resolute that "illegal immigrants and refugees" may have negative impact on the social, economic, and security of the nation.[64]

The Immigration Act 1959/63 is the primary pillar for immigration legislation in Malaysia. It does not mention anything about refugees. The Act provides that a person's entry into and departure from Malaysia need to be in accordance with the prescribed routes, immigration

---

63 Hans Morgenthau, Kenneth Thomson, and David Clinton, *Politics Among Nations: The Struggle for Power and Peace*, *7th Ed*., (New York: McGraw-Hill Education, 2005).

64 National Security Council, *National Security Policy* (np.: National Security Council, nd.), para 4.1.3.

control posts, or points of entry.[65] To enter Malaysia, a non-citizen must possess an entry permit or pass.[66] A non-citizen who fails to abide by this requirement may be fined, imprisoned, or whipped. Additionally, under the Passports Act 1966, it is a requirement for non-citizens to produce a passport with the necessary visa upon entering or leaving Malaysia.[67] Non-conformance with the requirement may result with the person being removed from Malaysia.[68] Those without permit or pass, or with expired permit or pass, may also be removed.[69]

From the above two legislations, refugees who enter Malaysia through regular means — namely through the prescribed routes and processes as non-citizens — would be treated as non-citizens with valid entry permit or pass. With the expiry of permit or pass, they must leave Malaysia. Those who enter Malaysia irregularly are treated as illegal immigrants who may be subjected to prosecution and deportation.

Such regulation may be harsh for those who had left their country without a choice and to escape persecution. However, the law is of general application to regular and irregular migrants who are largely not refugees. For regular and irregular migrants that the authority decides should be given exception to the general rule, the legislation allows for exceptions to be made. For regular and irregular migrants, the requirement of ordinary entry permit or pass or visa may be waived. They may be given permission to remain in Malaysia. The authority has the power to consider some circumstances as an exception to the rule.

---

65 Immigration Act 1959/63 (Act 155), section 5.
66 Immigration Act 1959/63 (Act 155), section 6.
67 Passports Act 1966 (Act 150), section 2.
68 Passports Act 1966 (Act 150), section 5.
69 Immigration Act 1959/63 (Act 155), sections 32 and 33.

In other words, the legal framework in Malaysia does allow for special treatment to be given to refugees and asylum-seekers. Such special treatment, including that of entry without pass and permit and the permission to stay after the expiration of such pass or permit, may be provided to specific persons or group of persons. For instance, an entry permit may be given upon application,[70] an exemption to the requirement of a valid entry permit or pass for non-citizens to enter Malaysia,[71] and their wives or children may be included in the permit or pass.[72]

What seems to be lacking is a law mandating special treatment to refugees and asylum-seekers, and the setting up of institutions and mechanism dealing with refugees as required under the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. In this regard, the hesitancy of Malaysia perhaps may be based on the inability to rely on concrete assistance from international institutions and other wealthier countries in dealing with the influx of irregular migrants who may be claiming themselves to be refugees. A Malaysian Foreign Minister shared the apprehension that the Convention will compel Malaysia to provide facilities to refugees that may exceed facilities given to its own citizens.[73] The Malaysian Government also seems to have the concern that ratifying the Convention will enable and encourage migrants to seek asylum in the country.[74] As commented earlier, the Indochina refugee episode introduced the concept of "first asylum", where a country's agreement to receive refugees is

---

70 Immigration Act 1959/63 (Act 155), section 10.

71 Immigration Act 1959/63 (Act 155), section 6.

72 Immigration Act 1959/63 (Act 155), section 12.

73 "Malaysian finds 'conflict' in UN Refugee Convention", *Australia Network News*, 12 November 2012.

74 "Malaysia will not sign UN convention on refugees, says Minister", *Malay Mail*, 12 March 2015.

dependent upon another country's offer of resettlement.[75] Although this principle of international equitable burden-sharing is sometime practised, it is not found in the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol.

Current Treatment of Refugees and Asylum-Seekers

Although Malaysia has not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol and does not provide any legal framework or mechanism for refugees and asylum-seekers, Malaysia is still a favourite destination for regular and irregular migrants, including refugees and asylum-seekers. UNHCR Malaysia reported that there are 179,550 refugees and asylum-seekers registered with them at the end June 2021, including refugees who have stayed for decades in Malaysia.[76] Comparatively, amongst ASEAN countries, Malaysia is the highest net recipient of refugees.[77]

One of the pulling factors for the relatively large number of refugees in Malaysia is the relaxed visa requirement, including for ASEAN and Muslim-majority countries.[78] Thus, migrants could easily and lawfully enter Malaysia by flights using visa on arrival, for instance.

---

75 UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 102.

76 UNHCR Malaysia, "Figures at a Glance in Malaysia," accessed August 8, 2021, https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html?query=statistic%20malaysia.

77 A. A. Ahmad, Z. Rahim, and A. M. H. Mohamed, "The Refugee Crisis in Southeast Asia: The Malaysian Experience", *International Journal of Novel Research in Humanity and Social Sciences* 3, no. 6 (2016): 80.

78 Katrina Munir-Asen, "(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management", Econstor. Discussion Paper, no. 29 (2018).

Additionally, for refugees from ASEAN and Muslim countries, because of the long history of Malaysian hospitality to migrant communities, the extensive networks of family relations and countrymen, and promises by non-governmental organisations (NGOs) of providing refugees or migrants with welcoming platforms for them to start a new home, either within or outside the Malaysian legal framework. The community groups among the refugees are systematic and coordinated among each other to cater to some of the basic humanitarian needs of the refugee's community. Such informal support systems provide links to the immigration authorities, the UNHCR, and employment or business opportunities.[79]

The relatively secure environment in Malaysia in comparison to other ASEAN or Muslim-majority countries is another pull factor for refugees. Malaysia's governmental institutions provide better access for migrants in comparison to some other countries. For instance, refugees prefer to stay in Kuala Lumpur rather than in Bangkok because the UNHCR has better access to the detention centre in Kuala Lumpur, should they be detained under the immigration law and wish to be released.[80]

Today, Malaysia does not place refugees and asylum-seekers in camps. This is in comparison with the practice in the 1970s when dealing with the influx of the "boat people", as described earlier. They may live among the host communities and different refugee groups in urban areas. For some, as a transit country, this is more attractive than living in camps or prescribed accommodations such as in Indonesia where they are housed in the International

[79] Katrina Munir-Asen, "(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management", Econstor. Discussion Paper, no. 29 (2018).

[80] P. Palmgren, "Irregular Networks: Bangkok Refugees in the City and Region", *Journal of Refugee Studies* 27 no. 1 (2013): 21.

Organisation for Migration residences, as this enables them to live on their own and earn a living, albeit in irregular employment status and informal economy.[81]

Be that as it may, since Malaysia has not ratified or acceded to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, Malaysia does not put in place an institutionalised protection mechanism for refugees. As an international body mandated to safeguard the rights of refugees, the UNHCR in Malaysia provides the machinery for the protection of refugees, including the reception, registration, documentation, and determination of refugee status of asylum-seekers.[82] Some may regard this arrangement as less than satisfactory, but this is because Malaysia is not a party to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol and is therefore unwilling to take up the responsibility of determining the status of refugees for asylum-seekers.[83]

The Government of Malaysia cooperates with the UNHCR in providing better identification for refugees. In April 2017, for the purposes of keeping track of refugees and for gathering statistics, Malaysia put in place the Tracking Refugees Information System (TRIS), which stores the personal information and biometric data of refugees and works additionally to the identification system for refugees in the form of the UNHCR card issued by the UNHCR. By using TRIS, the Government hoped to obtain

---

81 Katrina Munir-Asen, "(Re)Negotiating Refugee Protection in Malaysia: Implications for Future Policy in Refugee Management", Econstor. Discussion Paper, no. 29 (2018).

82 UNHCR Malaysia, "Protection in Malaysia", accessed August 8, 2021, https://www.unhcr.org/en-my/protection-in-malaysia-591401344.html.

83 Rohaida Nordin, Norilyani Hj Md Nor, and Rosmainie Rofiee, "Ineffective Refugee Status Determination Process: Hindrance to Durable Solution for Refugees Rights and Protection", *Indonesia Law Review* 1 (2021): 73.

data on refugees in the country, and registered refugees and asylum-seekers would be given an identity card (MyRC).[84] The take-up of this system was however, lacklustre at first; in August 2017, only 291 of the total 150,000 migrants listed with the UNHCR in Malaysia were registered under TRIS.[85]

The UNHCR card is issued by the UNHCR for those claiming to be refugees; refugees are required to be registered with the UNHCR, in order for their status to be determined. This card does not have any legal value in Malaysia, and only acts as an identity document that may assist the holder by stating that he/she is under the protection of the UNHCR, thereby enabling him/her to obtain access to health and other support services.[86] However, the Malaysian Government has tacitly recognised the UNHCR card in administering and managing what it refers to as "illegal immigrants".[87] The body responsible for coordinating the implementation mechanism to manage refugees and asylum-seekers is the National Security Council.[88]

As a non-citizen and without a special refugee legal framework, refugees and asylum-seekers in Malaysia generally do not have access to public education and health services. The UNHCR provides some assistance to fill in the gap for those essential services, but is under limited resources that does not keep up with expanding numbers of

---

84 "MYRC Malaysia," Facebook, accessed August 10, 2021, https://www.facebook.com/trismalaysia/.

85 Aina Nasa, "Gov't introduces Tracking Refugee Information System to update, gather data on refugees", *New Straits Times,* August 2, 2017.

86 UNHCR Malaysia, "Registering with UNHCR", accessed August 10, 2021, https://refugeemalaysia.org/support/registering-with-unhcr/.

87 See for instance the Ministers of the Federal Government (No. 2) Order 2013.

88 Ministers of the Federal Government (No. 2) Order 2013.

refugees and asylum-seekers.[89] For example, the UNHCR facilitates limited education for pre-primary, primary and secondary education for refugees and asylum seekers.[90]

Although Malaysia is known for its generally accessible and successful public health care sector, the public-funded healthcare system treats non-citizens differently from Malaysian citizens. Non-Malaysians pay slightly higher fees for the public health services,[91] while Malaysian citizens pays highly subsidised fees for public health services (in comparison with private health services). Thus, refugees and asylum-seekers, as non-citizens, face heavy financial constraints in accessing private or public health services.[92] Nonetheless, in addition to assistance offered by NGOs and the private sector, the Government offers non-citizen UNHCR card holders with a 50% discount of the rate of primary care services.[93]

During the early period of the COVID-19 pandemic, the treatment of migrants, including UNHCR card holders, was beset with controversies when they were rounded up and ferried to detention centres. The policy of

---

89 Jeff Crisp, Naoko Obi, Liz Umlas, *But When Will Our Turn Come? A Review of the Implementation of UNHCR's Urban Refugee Policy in Malaysia* (UNHCR: Geneva, Switzerland, 2012).

90 UNHCR Malaysia, "Education Services", accessed August 10, 2021, https://refugeemalaysia.org/support/education-services/.

91 Ministry of Health Malaysia. *Garis Panduan Pelaksanaan Perintah Fi (Perubatan) (Kos Perkhidmatan)* (Ministry of Health Malaysia: Putrajaya, Malaysia, 2014).

92 Fiona Leh Hoon Chuah, Sok Teng Tan, Jason Yeo, and Helena Legido-Quigley, "Health System Responses to the Health Needs of Refugees and Asylum-seekers in Malaysia: A Qualitative Study", *International Journal of Environmental Research and Public Health*, (2019).

93 Ministry of Health Malaysia. *Garis Panduan Pelaksanaan Perintah Fi (Perubatan) (Kos Perkhidmatan)* (Ministry of Health Malaysia: Putrajaya, Malaysia, 2014); UNHCR Malaysia, "Health Services", accessed August 10, 2021, https://refugeemalaysia.org/support/health-services/; *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 *MLJ* 628.

the Government in extending free COVID-19 vaccination to everyone, including "legal or illegal immigrants", had lessened the criticism against the Government in its treatment of immigrants — including refugees and asylum-seekers — during the pandemic.[94]

Even though, as indicated above, the government does offer some recognition to refugees and asylum-seekers processed by the UNHCR, the recognition is not based on any legal provisions, and thus, may be disregarded by the authorities. The Courts may still convict a person registered with the UNHCR under the immigration law,[95] and sentence him/her to imprisonment and whipping irrespective of his/her status as a UNHCR card holder.[96] However, in other circumstances, the Courts have considered the status of the UNHCR card holder by excluding certain punishment such as whipping, for offences under the immigration law including for not possessing a valid pass.[97]

However, there are cases where possessing the UNHCR card proved to be more helpful than escaping whipping. In a case involving an underage asylum-seeker, the Court allowed intervention from the UNHCR and

---

94 UNHCR Malaysia, "UNHCR continues supporting Malaysia's national vaccination programme, including in sharing refugee population figures", (June 15, 2021), accessed August 21, 2021, https://www.unhcr.org/en-my/news/latest/2021/6/60c84d714/unhcr-continues-supporting-malaysias-national-vaccination-programme-including.html; "IIUM becomes first higher learning institution to join state vaccination programme", *Selangor Journal*, (August 18, 2021), accessed August 21, 2021, https://selangorjournal.my/2021/08/iium-becomes-first-higher-learning-institution-to-join-state-vaccination-programme/.

95 Immigration Act 1959/63 (Act 155), section 6(1)(c), "for not possessing a valid pass to be in Malaysia".

96 *Subramaniam Subakaran v PP* [2007] 1 *CLJ* 470.

97 Immigration Act 1959/63 (Act 155), section 6(1)(c); *Tun Naing Oo v Public Prosecutor* [2009] 5 *MLJ* 680.

UNHCR representation at the Court. This subsequently led to the retraction of the charge.[98] The Court may also consider the status of a person as a UNHCR card holder when delivering judgment, by considering his/her employment status in awarding damages for his/her loss of income.[99]

Similar to the decisions of the Government, the decisions of the Courts also indicate inconsistency in handling matters pertaining to refugees and asylum-seekers. This is due to the non-existence of a legal framework for refugees and asylum-seekers. Unpredictable decisions may stem from the absence of a clear policy or an indeterminant policy put in place on purpose, which enables a greater extent of discretion in exercising powers by the authorities.

CONCLUDING REMARKS

The conclusion that could be made from the earlier discussion is that Malaysia is keen to provide assistance to refugees and asylum-seekers. However, Malaysia does not wish its hands to be tied under an obligation to provide protection to non-citizens at all times, under any circumstance. This could be considered as a "strategic ambiguity" on the part of Malaysia.[100] The experience from the Vietnamese "boat people" in the 1970s to the 1990s had shown the possibility of a drastic influx of migrants who admittedly were refugees. This may overwhelm the resources of a relatively small country which at one time

---

98 *Iskandar Abdul Hamid v PP* [2005] 6 *CLJ* 505.

99 *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 *MLJ* 628.

100 Compare the discussion on Indian "strategic ambiguity" in BS Chimni, "Status of Refugees in India: Strategic Ambiguity" in Ranabir Samaddar (ed), *Refugees and the State: Practices of Asylum and Care in India, 1947–2000* (SAGE Publications India 2003).

was left to fend for itself in dealing with the wave of the Vietnamese "boat people" by the international community.

Although Malaysia has been hosting refugees and asylum-seekers, more could be done to assist refugees on its land. There is a need to affirm the solidarity among humans and to assist the victims of war and persecution. Such affirmation could be expressed by the ratification or accession to the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, which the Pakatan Harapan government (May 2018–February 2020) had promised in its 2018 general election manifesto to ratify.[101] However, since the Convention comes with the imposition of responsibilities on the host country over refugees and asylum-seekers, the next question is: how to address, in the case of an influx of refugees, the ballooning financial, economic, security, and social cost. Turkey is currently being stretched to the breaking point in hosting 3.7 million refugees.[102] The European Union is expected to aid Turkey up to the amount of EUR 6 billion since European Union member countries will be directly impacted by the influx of refugees if Turkey pushes away these refugees and they head off to other parts of Europe instead.[103] Without any direct impact to developed countries if an influx of refugees happened in Malaysia, one could only guess the amount and speed of substantial aid to materialise.

We have also seen the conduct of signatories of the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol in facing the influx of refugees or the

---

101 Pakatan Harapan, *Buku Harapan: Rebuilding Our Nation, Fulfilling Our Hopes*, n.d., at 121.

102 UNHCR, "Refugee Data Finder", accessed August 11, 2021, https://www.unhcr.org/refugee-statistics/.

103 European Commission, "The EU Facility for Refugees in Turkey", accessed August 11, 2021, https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en.

arrival or near arrival of less-than-ideal refugees. The Australian law confer powers to intercept and detain non-citizens outside Australian territories, including to intercept and turn back refugee boats outside Australian waters, which is against the spirit of the Convention and the Protocol. Such measures may be considered in opposition to the treaty because the host state has an obligation to protect even refugees who arrive irregularly.[104] Sweden changed its generous refugee policies after facing what it described as a refugee crisis in 2015. This was when Sweden received 163,000 asylum applications, with 51,000 from Syria.[105] Those are some of the challenges faced and responses taken by developed countries that a developing country such as Malaysia may lack the wherewithal to muster.

Having seen the mass influx of refugees from the Middle East and North Africa (MENA) region in 2015–2016 to Turkey and Europe, among others, the United Nations recognises the need for an equitable international burden-sharing to address the needs of the refugees. The UN General Assembly adopted the New York Declaration for Refugees and Migrants in 2016 to reaffirm the international refugee regime and the commitment of the States to strengthen the mechanism to protect forced migrants. Resulting from this are two global commitments, namely a Global Compact on Refugees, and a Global Compact for Safe, Orderly, and Regular Migration. The Declaration includes a commitment to increase international burden-sharing. However, in contrast to the Convention Relating to

---

104 Daud Hassan, and Hassan Al Imran, "Boat Refugees, International Law and Australia's Commitment: An Analysis", *Journal of Maritime Law and Commerce* 51, no.3 (2020): 187, which refers to the Maritime Powers Act 2013.

105 Sayaka Osanami Torngren, and Henrik Emilson, *Measuring Refugee Integration Policies in Sweden: Results from National Integration Evaluation Mechanism (NIEM)* (np.: National Integration Evaluation Mechanism, 2020).

the Status of Refugees 1951 and its 1967 Protocol for the State parties, the compacts are non-binding.[106]

International human rights treaties, such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), impose obligations on State parties pertaining generally to its own citizens upon its own soil. On the other hand, the obligation under the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol relates to non-citizens whose fear and suffering are usually caused by their own governments and armed conflicts in lands foreign to the host country and outside the control of the host country. Thus, there is a hesitancy to shoulder the obligatory responsibility (if a State ratified or acceded to the Convention and its Protocol) of offering protection, including education and employment of non-citizens, which may be overwhelming to the host country. If such international obligation from the host country comes together with the obligation of equitable international burden-sharing, the hesitancy may be eased.

It is for this reason that there is the need of such burden to be equitably shared among the international community in an explicit and binding instrument. Rather than confining the discussion under the platform of the United Nations, the dialogue should also be extended to the International Conference of the Red Cross and Red Crescent, which are not only attended by the components of the International Red Cross and Red Crescent Movement, including 192 National Societies, the International Federation of the Red Cross and Red Crescent Societies (IFRC), and the International Committee of the Red Cross (ICRC), but also representatives from member states who

---

106 Randall Hansen, "The Comprehensive Refugee Response Framework: A Commentary", *Journal of Refugee Studies* 31, no. 2 (2018): 131.

are mostly signatories to the Geneva Conventions. Today, it is one of the very few international platforms for discussion on humanitarian issues, such as on refugees and asylum-seekers.[107]

Aside from ratifying the Convention and mandating the equitable international burden-sharing, Malaysia could take intermediate steps to improve the plight of refugees and asylum-seekers by establishing a clear policy framework. Such a framework could form a basis to provide administrative directive to relevant government agencies in ensuring that basic security and basic needs such as health and education of refugees and asylum-seekers, are met.[108]

ACKNOWLEDGEMENT

This is a revised paper presented by the first author in the "Dokuz Eylul University International Conference Migration: Projecting the Next Twenty Years and Beyond", organised by Dokuz Eylul University, Turkey on 22–23 February 2021. We would like to thank the Chair of the programme, Prof. Dr. Sibel Safi, fellow panellists and the anonymous reviewers for their comments. Thanks to Mr. Alaa Sakka for his assistance in preparing this article.

---

107 Michael Meyer, "The Importance of the International Conference of the Red Cross and Red Crescent to National Societies: Fundamental in Theory and Practice," *International Review of the Red Cross* 91, no. 876 (2009): 713.

108 See for instance the recommendations by the Bar Council Malaysia in Bar Council, *Roundtable on Developing a Comprehensive Policy Framework for Refugees & Asylum-Seekers* (n.p.: Bar Council, 2009); Bar Council, "Press Release: Implement Holistic Measures to Improve Treatment of Refugees and Asylum–Seekers," (June 20, 2019), accessed January 10, 2022, https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-implement-holistic-measures-to-improve-treatment-of-refugees-and-asylum-seekers.

RESOLVING JURISDICTIONAL DILEMMA IN RECENT RELIGIOUS DISPUTES BY LEGAL MECHANISMS

Yusfarizal Yussoff[*], Syaza Farzana Shahrul Ridhwan Shankeran[†], Syed Ahmed Khabir Abdul Rahman[‡]

ABSTRACT

The duality of the Malaysian legal system has resulted in an ongoing jurisdictional conflict between the Civil Court and Syariah Court throughout the years. Jurisdictional dilemma will usually occur when one of the parties initiates legal action in a Civil Court instead of a Syariah Court, which has jurisdictional power pertaining to Islamic law and religious matter. The objective of this paper is to study how to resolve jurisdictional friction between the two courts by discussing the development of juristic approaches when clashes of jurisdiction are involved. Specifically, the jurisdictional dilemma will be critically analysed based on selected court cases. Thus, the authors have adopted descriptive, analytical and doctrinal legal methods for the purpose of discussing the issue. The paper, suggests practical solutions to avoid further conflict in the future by using legal mechanisms available will also be appraised.

Keywords: conflict of jurisdiction, Syariah Court, Civil Court, precepts of Islam

[*] LL.B (Hons) IIUM, LLM (Business Law) IIUM. He is an advocate and solicitor of the High Court of Malaysia and the managing partner of Messrs Yusfarizal Aziz & Zaid. He is the co-author of "Civil Litigation in Malaysia: A practical guide to drafting pleadings", and a lead counsel in several public interest litigation including *SIS Forum Malaysia v Majlis Agama Islam Selangor*.

[†] LL.B (Hons), IIUM, MCL (Master of Comparative Law), IIUM.

[‡] LL.B (Hons), IIUM.

INTRODUCTION

Conflict of laws is not a new topic in the context of Malaysian legal parlance. Over the years, conflict of laws has become a debatable topic among scholars, legal practitioners and theologians. Clashes will occur when there is a predicament with volition to choose which law to apply if there are two or more antithetical legal disciplines having jurisdiction over the case; and usually the outcome to the issue will depend on the selection of law to be applied in deciding the matter.

It is significant to posit a preliminary question when discussing the issue of jurisdiction: under which law should the case at hand be decided in order to resolve the legal dispute?

The Malaysian legal system has been instituted with a unique juridical foundation[1] given the history of British colonisation of its Muslim majority community; and as such has resulted in the establishment of two legal systems, namely the English common law and Islamic law. Major problems arise when a subject matter that falls under Islamic law jurisdiction is brought before the Civil Courts, especially on religion-related conflict. As a result, discord between these courts will become more evident and it will certainly give impact to jurisdictional equilibration as promulgated in Article 121 of the Federal Constitution where, specifically in clause (1A) of the provision , which avers that the Civil Courts have no jurisdiction on matters falling under the jurisdiction of Syariah Courts. In this regard, this article will further examine how a dual legal system has developed the juristic approaches to determine jurisdictional conflict as well as analyse the appropriate

[1] Gerhard Hoffstaedter, "Asia-Pacific: From One Law to Many: Legal Pluralism and Islam in Malaysia", *Alternative Law Journal, Vol. 40, No. 2* (2015): 134.

principles applicable in decided cases concerning some recent religious conflicts, *viz*. *Iki Putra bin Mubarak v Government of Selangor*[2]*; Rosliza bt Ibrahim v Government of Selangor & Anor*[3]*; Jill Ireland Lawrence Bill v Minister of Home Affairs of Malaysia & Anor*[4]; and legal mechanisms to resolve jurisdictional friction practically.

Dual Legal System and Jurisdictional Conflict

Malaysia has a dual legal and judicial system, with two mainstream courts, namely the Civil Court and the Syariah Court. This is to ensure that both courts can exercise their own jurisdiction without interfering with one another. In order to avoid jurisdictional conflict, a constitutional amendment in 1988 was made by inserting clause (1A) into Article 121. This amendment is to prevent the High Court from exercising any jurisdiction on matters that fall within the ambit of the Syariah Court. In this section, the authors will lay down the court's position before and after the amendment, the jurisdictional approaches, and jurisdictional issues.

Before The Amendment

Prior to the introduction of clause (1A) into Article 121, several cases involving shariah issues and principles have been decided to be in the realm of the High Court, and not the Syariah Court, which subsequently brought about the idea on the need for amendment. In *Ainan bin Mahmud v Syed Abu Bakar bin Habib Yusoff & Ors*,[5] the court held that under Section 112 of the Evidence Enactment, presumption of legitimacy where a child is born during the

2 [2021] 2 MLJ 323
3 [2021] 2 MLJ 181
4 [2021] CLJ LT (7)
5 [1939] MLJ 209

continuance of a valid marriage overrides the Islamic law principle that a child born within six months of marriage is illegitimate., In *Nafsiah v Abdul Majid*,[6] the High Court held that they have jurisdiction over matters of Muslim marriage. In *Myriam v Mohamed Ariff*,[7] the court held that the High Court had jurisdiction in a Muslim custody case.

The approach taken by the High Court in pre-1971 cases caused discontent among Muslims, quietly or openly in public discourses. Hence, to overcome jurisdictional conflict, the introduction of a new clause (1A) into Article 121 of the Federal Constitution was proposed. The clause mentions that Civil Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. Some would argue that it gives exclusive jurisdiction to the Syariah Courts. Professor Ahmad Ibrahim mentioned in his article[8] about the inclusion of this amendment as follows:

> *"The important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases. For example, in Myriam v Ariff...."*

It is evident that before the amendment, Civil Courts have declared itself to have jurisdiction in hearing disputes relating to Islamic affairs. The amendment is therefore necessary in ensuring that cases relating to Muslims can be adjudicated according to the Islamic law, and to simmer down dissatisfaction in the Muslim community.

---

6 [1969] 2 MLJ 175

7 [1971] 1 MLJ 265

8 Ahmad Ibrahim, "The Amendment of Article 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law" [1989] 2 MLJ xvii.

Recent Attitude of the Court in Applying Jurisdictional Approaches

After the amendment of the Constitution, most of the cases that involved clashes of jurisdiction are interpreted in light of jurisdictional approaches. These approaches are meant to assist the Court in determining which Court has the power to hear the contended matter. The jurisdictional approaches consist of express, implied, 'remedy prayed for', subject-matter and 'pith and substance' approaches.

i) Express Jurisdiction Approach

The phrase "within the jurisdiction of Syariah Courts" in clause (1A) has raised problems of interpretation. The problem is on how the word "jurisdiction" should be interpreted. Under the express jurisdiction approach, Civil Courts are of the view that the word "jurisdiction" is limited to jurisdiction that is expressly conferred upon the Syariah Courts by the relevant state enactments, pursuant to power(s) given under Article 74(2) of the Federal Constitution.[9] This approach was tested in *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor*,[10] whereby the High Court decided that Syariah Courts only have jurisdiction to consider issues that were expressly conferred by State law in accordance with the Federal Constitution. Since there is no provision on the jurisdiction of the Syariah Court to determine the issue of whether a person is Muslim or not, hence, the High Court has jurisdiction to hear the matter.

---

9 Wan Arfah Hamzah, *A First Look At The Malaysian Legal System* (Selangor: Oxford Fajar Sdn. Bhd, 2009), 237.

10 [1991] 3 MLJ 487

Later, in *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib*,[11] the issue before the High Court was whether the High Court had jurisdiction to adjudicate the dispute as the appellant's action against her husband involved a matter which fell within the jurisdiction of the Syariah Court. Harun Hashim SCJ (as he then was) concluded that "there cannot be any doubt that the Syariah Court has been conferred with jurisdiction" as this was a matter of Islamic family law that was within the jurisdiction of the Syariah Court. The three Supreme Court judges allowed the appeal and held that the Civil Courts could be denied jurisdiction in shariah matters within the states' legislative competence only when, and in so far as, the Syariah Courts are by law expressly conferred with such a jurisdiction.

ii) Implied Jurisdiction Approach

Jurisdiction over all matters enumerated in Item 1, State List, Ninth Schedule of the Federal Constitution, regardless of whether or not the State Legislature has enacted legislation under Article 74 (2) to confer jurisdiction over the matters upon Syariah Courts, is called as the 'implied jurisdiction' approach. For instance, apostasy is not mentioned in the list to be categorised under Syariah Court jurisdiction. On top of that, many State laws provide for conversion to Islam, not out of Islam.[12] When there is no express provision in State law regarding this, will Syariah Courts have implied jurisdiction? This question was answered in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur*.[13] The Court stated that they

---

11 [1992] 2 MLJ 793

12 Yvonne Tew, "The Malaysian Legal System: A Tale of Two Courts", *Commonwealth Judicial Journal 19, no. 1* (2011): 3-7, https://search.informit.org/doi/10.3316/agispt.20113488.

13 [1998]1 MLJ 681

should look at the State List (List II, Ninth Schedule of the Federal Constitution) to see whether or not the Syariah Court has jurisdiction over a matter.. Later, in *Abdul Shaik bin Md Ibrahim v Hussein bin Ibrahim*,[14] the Court disagreed with *Md Hakim Lee* and said it was contrary to the case of *Habibullah*.

A clearer view regarding the implied jurisdiction approach can be found in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*.[15] The Federal Court in this case ruled that the jurisdiction of the Syariah Courts to deal with conversion out of Islam, although not expressly provided in the state enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. A wider view was taken in *Majlis Ugama Islam Pulau Pinang dan Seberang Prai v Shaik Zolkaffily bin Shaik Natar & Ors*.[16] This was an application made to the High Court by Muslim plaintiffs applying for a declaration concerning a piece of land which was the subject-matter of a will. The High Court and the Court of Appeal decided that the Civil Court had jurisdiction on the basis of the express jurisdiction approach and 'remedy prayed for' approach, and thus the declaration sought could not be granted by the Syariah Court. On appeal, the Federal Court ruled that the Syariah Court had jurisdiction if the subject-matter is in Item 1 of the State List, Ninth Schedule, even if the Syariah Court cannot grant the relief sought by the parties. The court also recognised that Article 121 (1A) discusses about jurisdiction and not the power of granting remedies. The decision approved the implied jurisdiction approach propounded in *Md Hakim Lee*.

[14] [1999] 5 MLJ 618
[15] [1999] 1 MLJ 489
[16] [2003] 3 MLJ 705

The approach slowly developed, and it was further reconfirmed in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain*.[17]The Federal Court affirmed the decision of *Soon Sing*h. Since apostasy relates to Islamic law and it falls under matters in Item 1 of the State List under Ninth Schedule, it was held that apostasy clearly falls within the jurisdiction of the Syariah Court. Thus, by virtue of Article 121 (1A), Civil Courts have no jurisdiction over this matter. The court also highlighted that forcing one to go to a Syariah Court does not infringe on constitutional rights because if a person professes Islam, he must follow the Islamic law which had laid down the way to embrace and convert out of Islam. A majority were of the view that the implied approach is the correct approach whereby the Syariah Court may derive powers directly from the State List without the need for any Enactment to confer power upon it.[18] This approach was further strengthened in *Hj. Raimi Abdullah v Siti Hasnah Vangarama Abdullah and Anor. Appeal*.[19] The Court stated that Article 121 of the Federal Constitution clearly provided that the Civil Court shall have no jurisdiction on any matter falling within the jurisdiction of the Syariah Court. Whether a person was a Muslim or not was a matter falling under the exclusive jurisdiction of the Syariah Court — it would be inappropriate for the Civil Court, which lacks jurisdiction pursuant to Article 121, to determine the validity of the conversion of any person to Islam as this is strictly a religious issue. In another recent case of *Syarifah Nooraffyzza bt Wan Hosen v Director of Jabatan Agama*

---

17 [2007] 4 MLJ 585

18 Lim Wei Jiet and Abraham Au Tian Hui, "*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545- From Conflict of Jurisdictions to Reaffirmation of Constitutional Supremacy", *Journal of Malaysian and Comparative Law Vol. 45 No. 1* (2019): 85.

19 [2014] 3 MLJ 757

Islam Sarawak & Ors,[20] the Court of Appeal decided that the apex court had consistently and repeatedly held that the jurisdiction of the Syariah Court regarding apostasy need not be expressly laid down in the state laws. The Court was satisfied that the learned trial judge did not err in law in holding that the High Court had no jurisdiction to hear apostasy matters.

iii) 'Remedy Prayed For' Approach

Remedy prayed for is basically what the parties pleaded at the end of the claim. If the remedy prayed for does not exist in one jurisdiction regardless the subject matter listed under it, the claim would not subsist. Thus, by using this approach, the Court would determine whether the remedy can be obtained in the Civil or Syariah Court. This approach was highlighted in *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu Yang Lain*.[21] The Supreme Court decided that High Court has jurisdiction over the case although the issue was *wakaf* The rationale was that the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunction and the Syariah Court did not have jurisdiction to issue an order of injunction prayed for in the suit. The remedy of injunction is provided by the Specific Relief Act 1950 and the rules were to be found in the Rules of the High Court 1980, in which power was given to the High Court to issue. Therefore, the claim for a perpetual injunction in that case could only be heard by the High Court, even though *wakaf* is within the jurisdiction of Syariah Court.

[20] [2018] 2 MLJ 354
[21] [1992] 2 MLJ 244

iv) Subject Matter Approach

This approach is straightforward as it looks into the matter enumerated in Item 1 in the State List of the Federal Constitution. In determining whether the matter before the Court falls under the jurisdiction of the Syariah Court or the Civil Court, the Court should look at the subject matter of the action and not the remedies prayed for. This was highlighted in the case of *Abdul Shaik Md Ibrahim & Anor v Hussein Ibrahim & Ors*[22]. The fact that the remedy prayed for in two of the prayers is a "declaration" does not remove the case from the jurisdiction of the Syariah Court. It cannot be said that the Syariah Court has no jurisdiction over the matter merely because the plaintiffs had prayed for the remedy of declarations. The Court was no longer bound by the decision of *Isa Abdul Rahman.*

It is also important to note that in *Soon Singh's* case the remedy sought was for a declaration. Yet, the Federal Court considered the question of jurisdiction purely on the subject matter approach. This case highlighted that the remedy prayed for approach is no longer the law.[23] Nevertheless, the correct approach is the subject matter approach where the only question to exclude Civil Court jurisdiction is to look at whether or not the subject matter falls under the jurisdiction of a Syariah Court. This approach was used in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*.[24] The appellant applied for a declaration that his son was not a Muslim at the time of his death and that he had renounced Islam and resumed the practice of the Sikh faith. The Court, in dismissing the

---

22 [1999] 3 CLJ 539

23 Farid Suffian Shuaib, "Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years On (1998-2008)", [2008] *Malayan Law Journal*, 5, xxxiii at xxxix.

24 [1992] 1 MLJ 1

appeal, stated that the question of whether or not the deceased had renounced Islam during his lifetime can be answered by the only forum qualified to do so, which is the Syariah Court. On this view, it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The judge also in his judgment mentioned that Islamic law involves a high level of interpretation in which judges of the secular courts do not have the requisite expertise.[25]

However, a different view was observed in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang*.[26] This is the case where the plaintiffs applied for a declaration that they had lawfully renounced their Islamic faith. The defendant challenged it by saying that the High Court, being a Civil Court, does not have jurisdiction to hear the matter as it fell within jurisdiction of Syariah Court. Justice Abdul Hamid Mohamed held that "Art 121(1A) does not automatically confer jurisdiction to the Syariah Court, even in respect of matters that fall under the State List of the Ninth Schedule. To confer the jurisdiction the State must first act upon the power given it by Article 74 and 77 of the State List, and accordingly enact laws conferring the jurisdiction. Only then will the matter come under the jurisdiction of the Syariah Court to the exclusion of the Civil Court." The learned judge added that to enable the Syariah Court to have jurisdiction over the matters raised by the plaintiffs in *Lim Chan Seng*, the State Legislature of Penang must first amend the Penang Administration of Muslim Law Enactment 1993, and "incorporate thereto, appropriate provisions to that effect."[27] The Court further decided that

---

25 Pawancheek Merican, "Murtad (Apostasy) and Article 121(1A) of the Federal Constitution", [1998] *Malayan Law Journal*, 2, lxxvii at lxxxiii.

26 [1996] 3 CLJ 231

27 Ibid, lxxxi.

there is no impediment for the Civil Court to hear the matter because there is no provision found in the Penang Enactment that empowered the Syariah Court to decide on the issue of apostasy.

A similar position was taken in *Mohd Hanif Farikullah v Bushra Chaudri & Another Appeal*'[28] where it was stated that Article 121(1A) does not overrule the general jurisdiction of the Civil Courts. Civil High Courts are also courts of inherent jurisdiction, while jurisdiction of the Syariah Court is determined by state laws; and if the legislature did not confer Syariah Court jurisdiction to deal with any matter in the State List, then the Syariah Court is precluded from dealing with that matter. This is called the "subject matter approach", which refers to provisions in state enactments in order to determine jurisdiction.[29] The subject matter approach was applied in the case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*[30] where the subject matter is in relation to *hibah* and therefore the Syariah Court was held to be the proper court to hear the matter. However, the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[31] rejected the subject matter approach. At the Court of Appeal, the majority decided based on the subject matter approach, whereby whether a person was a Muslim or not needed only to be decided by the Syariah Court. On appeal, the Federal Court decided that the Syariah Court are creatures of State legislation and possess no judicial power. Therefore, the jurisdiction of Syariah Courts must be expressly provided for by the State Legislature within the subject matter listed in Item 1 of the State List.

---

28 [2001] 2 CLJ 397

29 Ashgar Ali Ali Mohamed, *Malaysian Legal System* (Selangor: Malaysian Current Law Journal Sdn. Bhd., 2014), 343.

30 [2007] 5 MLJ 101

31 [2018] 1 MLJ 545

v) 'Pith and Substance' Approach

This approach looks at the disputed issue. The Court will look at the pith and substance in determining whether the Syariah or the Civil Court has jurisdiction to hear the case. Even while the subject matter is still within the jurisdiction of a Syariah Court, Ninth Schedule, List II, it does not automatically qualify a Syariah Court to hear the case.

This approach was introduced in *Mamat bin Daud v Government of Malaysia*[32] where the Supreme Court held that section 298A of the Penal Code was in "pith and substance" a law on the subject matter of the religion of Islam, veiled under the pretence of it being a law on public order. As such, it is a law on a subject matter that Parliament had no competency to legislate, as the power to make laws on religion is bequeathed only to the State Legislative Assemblies under Articles 74 and 75 of the Federal Constitution. The impugned section was therefore found to be a colourable legislation and was declared to be constitutionally invalid. This case requires us to look at the pith and substance in overcoming the overlapping legislative powers between the federation and states.[33]

The approach was developed in *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors*[34]. The pith and substance approach to the case according to counsel was that any alleged offence against the precepts of Islamic law is not a criminal offence as was upheld in the case of *Sulaiman Takrib*. It was argued by the counsel that as Shariah law is personal law, it should apply to Muslims only and not to non-Muslims such as the second

---

32 [1988] 1 MLJ 119

33 Farid Suffian Shuaib, "Administration of Shariah Criminal Justice under the Malaysian Constitutional Framework: Issues and Suggestions", [2011] *Malayan Law Journal*, 6, i at vi.

34 [2015] 3 MLJ 65

respondent in this instance, when he was examined by officers of the first appellant under the provisions of the Shariah Criminal Offences (Federal Territories) Act 1997. The pith and substance approach would not be confined to Shariah issues and to sections of the law but importantly would consider the breach of constitutional rights of the respondents occasioned by the search and seizure of the books and its examination. The Court was of the view that the proper approach to be taken in adjudicating the matter would be the pith and substance approach as contended by the respondents. The authors are of the view that the pith and substance approach is the correct approach as it will be wide enough to include the consideration of both the subject matter of the case and the reliefs sought.

Based on the aforementioned approaches, the Court has been consistent in adopting two approaches, namely the subject matter approach and pith and substance approach. In arriving to that point, the Court decides based on the facts of the case, parties involved, and whether such subject matters are provided in the Lists either, Federal or State. However, this did not solve the whole dilemma of the conflict at hand. Jurisdictional issues have continued to emerge in several matters below that are still unsettled until today.

Jurisdictional Issues

Religious Status Concerning Non-Muslims

This issue is regarding the situation of a non-Muslim party who seeks for a declaration that at the time of death, the deceased was not a Muslim, thus the Civil Court has jurisdiction. This can be illustrated in the case of *Kaliammal a/p Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (Jawi) & 2 Yg Lain*[35] where M Moorthy's

[35] [2006] 1 AMR 498

widow was informed of her spouse's conversion to Islam only after his death. She then applied to the High Court for a declaration that the deceased died as a Hindu . The Court held that Syariah Court had jurisdiction to determine the validity of the deceased's conversion to Islam because the legislation had expressly conferred upon such court jurisdiction over the matter.

Unilateral Conversion of One Spouse

This issue concerns parties who were married under civil law and one of the spouses subsequently converts to Islam, who then seeks f for dissolution of the marriage in a Syariah Court. Additionally, the converted spouse converts their children to Islam without the consent of their non-converted spouse.

The case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*[36] will shed some light about this issue. The wife being the non-converted spouse went to the Civil Courts and asked for a declaration that the Civil Court has jurisdiction in regard to the dissolution of marriage and custody of the children. On the other hand, the husband objected to the application by claiming that the Syariah Court has the locus to hear the dispute. The High Court decided that the custody order of the two children given by the Syariah High Court does not bind the plaintiff, a non-Muslim; and the Syariah Court has no jurisdiction to enforce the order on non-Muslims.[37] However, the High Court held that the unilateral conversion of the two children to Islam without the consent of the other spouse was valid.

---

[36] [2004] 2 MLJ 648

[37] Kerstin Steiner, "The Case Continues? The High Courts in Malaysia and Unilateral Conversion of a Child to Islam By One Parent", *Australian Journal of Asian Law Vol. 14 No. 2* (2013): 384.

A similar approach was taken in *Subashini Rajasingham v Saravanan Thangathoray & Ors*[38] The Court of Appeal decided that the Civil Court could not prevent a Muslim convert from seeking the dissolution of his marriage to a non-Muslim wife from the Syariah Court. Later, the Federal Court remarked on the term "parent" in the Federal Constitution which can be construed as either one of the parents, to convert a child to Islam without the consent of another spouse. A distinctive approach can be seen in the Federal Court case of *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeal*,[39] where the Court decided that the conversion of an underage child to Islam must obtained both of the parents' consent. Hence, conversion without another spouse's consent is rendered unconstitutional.

The question is which Court has the jurisdiction to determine the validity of the conversion of the children? Zainun Ali FCJ in *Indira Gandhi* set a clear view on this matter. The learned judge was of the view that section 50 (3) of the Administration of the Religion of Islam (Perak) Enactment 2004 did not confer jurisdiction to the Syariah Court as it does not deal with the validity of the conversion of children to Islam. On top of that, the non-Muslim parent does not have any locus to present before the Syariah Court. Hence, this renders the Civil Court to have exclusive jurisdiction to hear this matter.

Apostasy

The matter relating to conversion to Islam or out of Islam would lie squarely within the jurisdiction of the Syariah Court. A plethora of cases as mentioned above have decided

---

38 [2007] 2 MLJ 705

39 [2018] 3 CLJ 145

by way of implication of the conversion to Islam; thus, conversion out of Islam is also within the jurisdictional spectrum of the Syariah Court. With respect to that, it is incorrect and not suitable to apply the express jurisdiction approach as decided in *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*[40]; instead, the implied jurisdiction approach has been consistently used by the courts in determining cases concerning apostasy.

Judicial Review on Fatwa

A *fatwa* is a scholastic opinion, edict or ruling on a point of Islamic law which is to be issued by a recognised community. A scholar who has authority to issue a *fatwa* is called a *mufti*. In light of section 34 (1) of the Administration of Islamic Law (Federal Territories) Act 1993, the role of a mufti has been stated as follows:

> *"The Mufi shall, on the direction of the Yang di-Pertuan Agong, and may, on his own initiative, or on the request of any person made by letter addressed to the Mufti, make and publish in the Gazette, a fatwa or ruling on any unsettled or controversial question of or relating to Islamic law."*

A *fatwa* is binding upon the Muslim community and it must be issued systematically and appropriately.[41] But to what extent is a *fatwa* legally binding? In general, a *fatwa* is accepted by the Syariah Court in making a decision by way of referring to a *fatwa* issued by its own State.[42] It was found that *fatwa* has become an authority of the Syariah Court and it is recognised as a reliable source by all states Islamic religious administration enactments except for

---

40 [2007] 5 MLJ 101

41 Othman Ishak, "The Making of Fatwa in Malaysia", *Islamic Studies vol. 28, no. 4* (1989) 415.

42 Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments* (Kuala Lumpur: Ilmiah Publishers, 2000): 157.

Kelantan.[43] Be that as it may, the binding power of *fatwa* in the Civil Court is not discussed.

Judicial review is the power vested upon a court of law to examine the conduct of a body in order to establish whether or not the body has acted lawfully by acting within the scope of its lawful powers.[44] It examines the manner of a public body in exercising law-making and adjudicatory powers as conferred in statute or by common law.[45] In relation to this issue, it raises a question as to whether judicial review on *fatwas* should be done in the Syariah Court or Civil Court. An answer to the question can be seen in *SIS Forum (M) & Ors v Jawatankuasa Fatwa Negeri Selangor & Ors*[46] where the applicant had filed an application for judicial review on the *fatwa* issued by the Fatwa Committee. It was claimed by the applicant that the *fatwa* labelling the ideology of liberalism and pluralism adopted by the first appellant as deviant from the teachings of Islam had contravened the Federal Constitution. The High Court dismissed the application of judicial review as it is not the jurisdiction of the Civil Court to review on the matter of *fatwa*. Even so, the contrary was decided in the case of *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors,*[47] whereby the application of judicial review on the constitutionality of section 66 of the Syariah Criminal Enactment 1992 (Negeri

---

43 Nur Sarah Tajul Urus and Alias Azhar, "The Application of Fatwa in Court Decision Making", *International Journal of Law, Government and Communication, Vol.3, No.9* (2018), 88.

44 Irving Stevens, *Constitutional and Administrative Law, (3rd Ed)*, (London: M & E Pitman Publishing, 1996), 221.

45 Ahmad Masum, "The Doctrine of Judicial Review: A Cornerstone of Good Governance in Malaysia" [2010] *Malayan Law Journal*, 6, cxiv at cxv.

46 [2018] 3 MLJ 706

47 [2015] 3 MLJ 513

Sembilan), which specifically prescribed the offence of a male person posing as a woman, was granted by the Court.

SIS Forum later in 2020 submitted leave to commence legal action to challenge the constitutionality of the provision in section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, which stated that Syariah High Courts in Selangor have the jurisdiction to hear applications for judicial review, in order to challenge the *fatwa* labelling the group as deviant. As stipulated in section 66A, judicial review to challenge a *fatwa* ought to be under the jurisdiction of the Syariah Court, and thus another important question to be raised is whether the Syariah Court has power to hear a judicial review against a *fatwa* issued by a religious council and committee. In the case of Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal,[48] the court stated that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the constitution."[49] Conversely, judicial review is also available under the Islamic legal system. A Syariah Court judge, when making any decision, must refer to the Quran and Sunnah. When the rulings cannot be found in the Quran or Sunnah, it must be deduced from *ijtihad*[50] to derive the Syariah ruling from the two sources.[51]

---

48 [2019] 3 MLJ 443

49 Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 44, para 81.

50 *Ijtihad* is an effort made by qualified Islamic jurists to infer the rules *(hukm)* of Syariah through the interpretation of the Quran and Sunnah of the Prophet.

51 Nayel Musa Shaker Al-Omran, "Historical and Political Background of Judicial Review in Islamic Legal System", [2015] *Malayan Law Journal*, 2, xliv at lx.

Although it is clear from the discussion above that *fatwa* is the *corpus juris* of the Islamic legal system in Malaysia, as it is a subset of *ijtihad* and Islamic jurisprudence, to date this issue is still pending final adjudication before the apex court.

Analysis of Jurisdictional Dilemma in Recent Court Cases

Before the amendment, Syariah Courts have limited power and jurisdiction as it was subordinate to the Civil Court. Previously also, judges who presided on the bench to decide cases concerning Islamic law were non-Muslim judges.[52] Although the proviso on the separation of jurisdiction was inserted in the Constitution years ago, the issue still persists when a party subject to Islamic law brings the case before the Civil Court. In this section, the authors will discuss the jurisdictional dilemma in recent cases on religious disputes and critically appraise the principles which have been discussed and relevant to be applied when jurisdictional conflict happens.

i) *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323

The petitioner was charged in the Selangor Syariah High Court under section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the 1995 Enactment') for an attempt to commit sexual intercourse against the order of nature, read together with section 52 of the Enactment.

The petitioner was granted leave to file a petition to challenge the competency of the Selangor State Legislature

---

[52] Farid Suffian Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia (2nd Edition)*, (Malaysia: LexisNexis Malaysia Sdn. Bhd., 2008): 155.

(SSL) to enact section 28 of the Enactment. The petitioner contended that section 377 of the Penal Code on buggery and section 377A of the Penal Code on carnal intercourse against the order of nature comprised in Federal law already govern the very subject matter of Section 28 of the Enactment. Hence, it was argued that SSL was incompetent to pass section 28 by virtue of the words "except in regard to matters included in the Federal List" in item 1 of the State List.

The issue for determination of the Court was the interpretation of the words "except in regard to matters included in the Federal List" contained in Item 1, List II, Ninth Schedule of the Federal Constitution (State List); vis-à-vis the power of State Legislatures to make laws under the said item. A few considerations were made by the Court before decision; firstly, the precepts of Islam and the Federal criminal jurisdiction. The Court referred to the case of *Sulaiman Takrib* where Chief Justice Abdul Hamid had detailed out the limitations of the State Legislatures powers to enact laws in respect of offences against the precepts of Islam. One of these was the creation and punishment of offences not in regard to matters included in the Federal List. *Liwat* under section 28 is clearly against the precepts of Islam. But the question is whether the SSL is competent to enact on it in light of the preclusion clause. Secondly, construing the preclusion clause in Item 1 of the State List. The words employed by Item 1 are "except in regard to matters included in the Federal List". The words are not: "except in regard to matters included in the Federal law." Analysing the constitutional validity of state-legislated law on the basis of whether the same subject matter has already been included in the Federal law would render the words "Federal List" in the preclusion clause to item 1 nugatory. In absence of any party challenging the Parliamentary power to enact the Penal Code provisions, the said provisions were competently enacted by Parliament within the meaning of

Items 3 and 4 of the Federal List. Thirdly, the co-existence of Federal and State laws. The Court disagreed with the authority of *Sukma Darmawan*, where Federal and State provisions may co-exist. The *Sukma Darmawan* case was not in relation to a petition filed in the original jurisdiction of the Court where the competency of a State Legislature to make such law was challenged. *Sukma Darmawan* was in relation to which court has jurisdiction to hear the case. The general power of Parliament to enact criminal law is provided for in items 3 and 4 of the Federal List. Articles 74(3), 75 and 77 of the Constitution indicate that the primary power of legislation in criminal law resides in Parliament. This is further borne out by the State List in terms of the powers of the State Legislatures to enact criminal laws, namely the powers are subjected to the preclusion clause in Item 1 of the State List and Item 9 of the State List. In pith and substance, Section 28 of the 1995 Enactment relates to a matter that falls under the Federal List. It can be postulated that in regards to the preclusion clause in item 1 of the State List, when the two Legislatures (Federal and State) legislate a law concerning the subject matter of criminal law, and the two laws touch on the same matter, the said laws cannot co-exist even if it is said to be against the precepts of Islam. Fourthly, the constitutional validity of section 28 of the 1995 Enactment. Since the subject matter of section 28 of the 1995 Enactment falls within the preclusion clause of Item 1 of the State List, it contravenes the very Item 1 of the State List which provides that the State Legislature has no power to make law in regard to matters included in the Federal List. Thus, section 28 is inconsistent with Federal Constitution and is therefore void.

An important point to infer from this case is that the ourt was of the view that even though there was no law at the Federal level, the State Legislature cannot legislate any law pertaining to criminal law. This can be distinguished with

the case of *Sulaiman Takrib* where the Court has stated that if there is law enacted by the Parliament, the State Legislature cannot enact the same law. Nevertheless, in *Iki Putra*, even if there is no law enacted by Parliament at the Federal level, the State cannot enact the law if it involves criminal law.[53] This will result in too many Syariah laws to be challenged in the future. For instance, gambling under the Betting Act 1953 and Syariah Criminal Offences Act. This would render Islamic criminal law otiose. Apart from that, the Court should not adopt the pith and substance approach in dealing with section 28. Though both provisions share the same subject matter, the Court should look at the objective behind the inclusion of the provisions. The punishments, evidence and burden of proof is distinctive in nature between the provision in the Penal Code and Syariah criminal offence. Hence, with due respect, a more harmonised approach should be weighed by the Court so as to ensure both Civil and Syariah Courts can co-exist. Such an approach is illustrated in the case of *Sukma Darmawan* where the court applied section 59 of the Interpretation Acts 1948 and 1967, as follows:

> *[56]"So that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the Civil Court or a Syariah Court, he may be prosecuted in either of those courts."*

Additionally, the Court agreed that *liwat* is one of the offences that are against the precepts of Islam. The only issue is whether SSL is competent to enact such law.[54] The Court also referred to the case of *Sulaiman Takrib*, where

---

53 Sulaiman Bin Takrib v Kerajaan Negeri Terengganu [2008] MLJU 815, para 52.

54 Ibid., para 42

the phrase "precepts of Islam" can be accorded with widest possible construction, but to disregard the preclusion clause will render the preclusion clause otiose.[55] The case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*. [2007] 5 MLJ 101 was used to support the petitioner's case, as judge Abdul Hamid Mohamad FCJ held that:

> *[47] "So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included in the Federal List' ie criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative."*

In contrast, the judgement of Abdul Hamid Mohamad FCJ in *Sulaiman Takrib* on the definition of criminal law should be taken into consideration:

> *[49] "I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'.*
>
> *[50] In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover Muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution."*

---

55 Ibid., para 46

In this case, a Shariah criminal offence did not fall within the ambit of criminal law because it is only applicable to Muslims as envisaged through Article 121 (1A) of the Federal Constitution. Instead of using the pith and substance approach, the Court should have applied a subject matter approach as *liwat* falls under the State List and it is an offence against the precepts of Islam. The pith and substance approach should not only be limited to the area of law *per se*, which is criminal law, but must also include the nature of the punishments, evidence and burden of proof.

ii) *Jill Ireland Lawrence Bill v Minister of Home Affairs of Malaysia & Anor* [2021] [CLJ LT (7)

The conflict was on the matter of using the word "Allah" in the Malay Bible, the Al-Kitab, whereby an application of judicial review was made to the High Court.. The applicant in this case, a Bumiputera from the Melanau community in Sarawak, had been using the Malay language as a medium to practise her religion such as praying, worshipping and receiving religious instruction. In practising her faith, the applicant and her family have been relying on religious instruction in the Indonesian language. In connection with this fact, on the day when the applicant had landed at the Low-Cost Carrier Terminal (LLCT) at Sepang, custom officers confiscated 8 CDs carrying the word "Allah" in her possession. Consequently, the items were also confiscated by the Ministry of Home Affairs pursuant to section 9 of the Printing Presses and Publications Act 1984 [Act 301]. The grounds of confiscation were based on "Istilah Larangan, Ketenteraman Awam dan Melanggar Garis Panduan JAKIM".

The main issue raised in this case was on the validity of the impugned directive issued in 1986 from the Ministry of Home Affairs, where the name of Allah was

prohibited from being used in the Al-Kitab. It had then inevitably led to legal questions on the constitutional rights of the applicant's fundamental liberty to obtain education and to practise the religion of Christianity in pursuant to Articles 3, 8, 11 and 12 of the Federal Constitution.

Before the case was brought to the High Court for judicial review, it was held by the Court of Appeal on the applicant's cross appeal for her prayer to use the name of Allah for the purpose of practising her religion. The judgment of the Court of Appeal is as follows:

> *[39] "With respect, we agree with her, partially. We agree with her that any prayer that had sought to challenge the prohibition of the use of the word 'Allah', following the decision of the majority in the Federal Court in the Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 6 CLJ 541, must not be done in a collateral manner. The Enactment which had contained those prohibition on the use of the word 'Allah' has to be challenged specifically for want of jurisdiction. The impugned provisions in the Enactment cannot be challenged in isolation, as was done in this case. To that extent we would agree with the learned judge's decision on the applicant's prayers that were not granted.*
>
> *[40] However, we noted that there were prayers that were not inextricably tied down specifically with the use of the word 'Allah' especially those which were predicated upon the deprivation of freedom of religion [art. 11] and the right to equality or freedom from discrimination [art. 8] which we believe, could and ought to have been dealt with by the learned judge, but were not. That would relate to the declarations that were sought for as contained in prayer in prayers (c) and (d) of the application. …."*

In comparison with *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri &*

Ors,[56] the constitutionality of section 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 in the subsequent case was challenged. The applicant had challenged the constitutionality of the aforesaid provision, that the State Legislature had no power to enact the impugned provision. The applicant additionally sought *certiorari* to quash the decision by the respondent that the applicant was prohibited to use "Allah" in its "Herald – The Catholic Weekly". The Court of Appeal had set aside the decision of the High Court in *Titular Roman Catholic's* case and decided that the decision of the respondent in prohibiting the applicant from using the word "Allah" in the publication was *intra vires* of the Federal Constitution and Act 301, as it was within the prerogative of the Minister in accordance with his function and statutory power. The majority of judges on the Bench in the Federal Court held that the High Court judge ought not to have entertained the issue of the validity and constitutionality of the impugned provision on the grounds of procedural non-compliance and want of jurisdiction. In the recent case of *Jill Ireland*, it has been expressed by YA Datuk Nor Bee Ariffin that:

> *[33] "….It is not for this Court to decide on issues that had sought to challenge the prohibition on the use of the word "Allah" as the same could not be done in a collateral manner. That was the reason for not remitting prayers (e) and (f) because the Enactments which contained those prohibition on the use of the word "Allah" had to be challenged specifically for want of jurisdiction and the impugned provision in the Enactment could not be challenged in isolation. This Court would not descend into the controversy.*
>
> *[34] This in my view will necessarily exclude this Court from canvassing the theological issues. I am guided by the*

[56] [2014] 6 CLJ 541

majority decision in the Federal Court in the Titular Roman Catholic Archbishop of Kuala Lumpur, supra, which did not proceed with the question in Part C that relate to theology issues as the facts show that the Minister's decision was never premised on theological consideration and found that the views expressed by the learned judges of the Court of Appeal on those issues were mere obiter…"

Given the instant discussion on the jurisdictional dilemma, it is safe to say that the conflict of jurisdiction was naught to occur although this case was *apropos* of religious disputes. It was not stated in the Enactment that such a case shall be under the jurisdiction of the Syariah Court since the party in the application scope of the Enactment involved persons of non-Islamic religion. This is pursuant to Item 1 in List II of the Federal Constitution which explicitly asserts that the jurisdiction of the Syariah Court shall confer only upon persons professing the religion of Islam. Hence, not all religious disputes will deal with the challenges of jurisdictional rivalry.

iii) *Rosliza bt Ibrahim v Government of Selangor & Anor* [2021] 2 MLJ 181

The case concerns the dispute between the appellant, Rosliza bt Ibrahim and the respondent, the Government of Selangor. The religious status of the appellant was the highlight of this case. According to the facts, the appellant was born illegitimate and raised by her Buddhist mother. The appellant in this case filed an originating summons seeking the Federal Court to declare her as (a) an illegitimate child and her biological mother a Buddhist; (b) that the word "parents" as stated in section 2 of the Administration of Religion of Islam (Selangor Enactment) 2003 does not include the putative father of an illegitimate child; and (c) that she is not a person professing the religion of Islam, and not be subjected to the state legislation under the Ninth Schedule, List II, Item 1 of the Federal

Constitution and the jurisdiction of the Syariah Courts in Selangor.

There were two issues in this case. The first was whether the High Court, being a Civil Court, has exclusive jurisdiction to hear and determine whether a person is or is not a Muslim, and the second was whether the contents or the information in the identity card can be considered as conclusive proof for the declaration of religion status under section 41 of the Specific Relief Act 1950. However, in deciding the case, the opinion from Islamic law experts was absent. Since the first issue has nexus with the topic of this article, the authors will focus specifically on it only. In this respect, the Federal Court held that it has jurisdiction to hear the claim from the appellant since it is not a renouncement case but an *ab initio* case where the appellant from the very beginning was never a Muslim.

The Court, in answering the question of whether the High Court has exclusive jurisdiction to hear the matter, required determination of whether a person is or not a Muslim rather than whether a person is no longer a Muslim. The decision of the High Court and the Court of Appeal was erroneous as it was made on the premise that the appellant was originally a Muslim who was seeking for renouncement from Islam. The court below in their respective judgments dismissed the prayers sought by the appellant on the ground that it was bound by the previous Federal Court decision in *Lina Joy's* case. It was critically examined by the Court in this case that there is a fundamental distinction between "no longer a Muslim" and "never was a Muslim". The Court distinguished the case of *Director General of the Registration Department v Azmi bin Muhammad Azam @ Rooney*[57], where it was decided by the Chief Syarie Judge that the matter is not under the jurisdiction of the Syariah

[57] [Court of Appeal Civil Appeal No. Q-01-159-05/2016]

Court since he is a non-Muslim *ab initio*. The former signifies that the case of renouncement clearly falls within the jurisdiction of the Syariah Court. The latter is an *ab initio* case and it cannot fall within Syariah jurisdiction.

Additionally, the conflict of jurisdiction between the two tribunals emerged when the appellant in her prayer sought a declaration that she is not a person professing the religion of Islam and shall not be the subject of Syariah law and jurisdiction. The Court, in deciding the matter, discussed the meaning of "professing religion" in the Federal Constitution. The term "profess and practice" in Article 11 (1) of the Federal Constitution extends to how one may be identified with a religion and the level of devotion to their beliefs, while Item 1 of the State List excluded the word "practice". In settling the clash between the two tribunals, the relevant principles to be applied is based on the two approaches laid down by the Civil Court as mentioned earlier in *Majlis Ugama Islam Pulau Pinang and Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors*,[58] namely the remedy prayed for and subject matter approaches. One of the reliefs sought was to declare the appellant not to be the subject of Syariah law and jurisdiction as she is not a person professing the religion of Islam. Since she has never been a Muslim, the relief she prayed for was rightfully brought before the jurisdiction of the Civil Court based on the former approach.

Nonetheless, although Item 1 of the State List did not expressly mention that persons who were never Muslim are to be under Syariah court jurisdiction following the implied approach, it is not an enabler as per the assumption that the Syariah Court would be a suitable forum to decide the matter. The authors are in accord with the conditions set in the present case — to determine whether or

---

58 [2003] 3 MLJ 305

not the matter falls under the purview of Syariah court jurisdiction, there must be jurisdiction of *ratione personae* (by reason of the person) and *ratione materia* (subject matter) and it must be conjunctive. The absence of both conditions will render the inability to exercise the power and if so, it will be *ultra vires* the Federal Constitution.

Legal Mechanisms in Settling Religious Disputes

Despite acknowledging the fact that religious disputes have been ignited and are ongoing in Malaysia for decades, we must come to realise that this issue should be resolved effectively. The resolution of religious conflict is significant to ensure that an individual's fundamental right to freedom of religion is not deprived. As religious matters are within the realm of constitutional law, there are several legal mechanisms available as a practical tool in assisting to settle the continuing religious conflict and to avoid any conflict to be raised in the future. The legal mechanisms are to amend the wordings in the constitution; harmonisation of legal bifurcation by the alteration of terms in the scripture; and allowing the issue on Islamic law to be under its own jurisdiction without interference from the Civil Court. The discussion will be dealt respectively below.

Amendment to the Constitution

When there is an issue on the interpretation of wordings in the Constitution which might further lead to a never-ending legal tug-of-war, a substantial constitutional amendment in resolving the dispute in fact should be taken into consideration. The process of the amendment to change a specific part of the existing Constitution is done without having to entirely substitute the Constitution. Due to the overlap and clash of jurisdictional power between Syariah and Civil Courts, it has resulted in recent controversial legal

issues on the subject of constitutional interpretation, where the constitutionality of provisions in the Syariah State Legislature was contested. This can be seen in the newer case of *Iki Putra bin Mubarak v Government of Selangor*, where the constitutionality of section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 was upheaved.

The inconsistency seems to materialise when the petitioner posited that the State Legislature was incompetent to enact such provisions. It was avouched in Item 1 of State List in the Ninth Schedule of the Federal Constitution that the State Legislature had no power to enact any matter which came under the Federal List. Such clause is called a "preclusion clause". Even when there are two Legislatures, be it Federal or State, enacting laws pertaining to similar subject matters of criminal law, the two laws on the same subject matter cannot co-exist although one of the laws concerns the offence against the precepts of Islam. So as to avoid future conflict or more so of challenges raised consequently, constitutional amendments on the "preclusion clause" should be initiated to ensure that the two Legislatures will not strife against one another.

The formula of the amendment as embodied in the Federal Constitution are that there are four modes to make constitutional amendments effective.[59] These modes are by requiring a simple majority; by an Act which has been passed by a two-thirds majority in each House of Parliament on second and third readings; by an Act which has commanded the support of a two-thirds majority in each House of Parliament on second and third readings, together with the consent of the Conference of Rulers; and by an Act supported by two-thirds majority in each House of

[59] Lionel Aster Sheridan and Harry E. Groves, *The Constitution of Malaysia* (New York: Oceana Publications, 1967), 14-15.

Parliament on second and third readings, together with the concurrence of the Governor of Borneo states concerned.[60] With respect to the modes mentioned, the alteration of the preclusion clause in Item 1 in the State List of the Ninth Schedule can be done by the requirement of two-thirds majority from members of Parliament before presenting the bill of amendment to the Yang Di-Pertuan Agong for his assent, by which such mode of amendment is generally executed. Since the amendment of the preclusion clause is linked to state legislation specifically section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995, amendments shall be made in presence of support by two-thirds majority from the House of Parliament.

Alteration of Term in the Malay Bible

While the directive from the Ministry of Home Affairs issued in 1986 was held illegal and unlawful, it was also claimed that the minister did not take theological consideration pertaining to the usage of the word Allah in the Bible, as it was only based on public consideration. It was first proclaimed in the Internal Security (Prohibition Documents) No.3 Order 1982 that absolute prohibition of publication and circulation of the Al-Kitab was imposed..[61] Be that as it may, the Internal Security (Prohibition Publication) No.4 Order 1982 still retained the prohibition but with exclusion that the Al-Kitab is confined to the usage of churches only.[62] There seemed to be a discrepancy in the Cabinet's policy decision in 1986. Initially, the name of

---

60 Hoong Phun Lee, "The Amendment Process Under the Malaysian Constitution", *Journal of Malaysian and Comparative Law Vol.1, No.2* (1974): 186.

61 Kementerian Hal Ehwal Dalam Negeri : 0 59/3/9/Jld 4; PN (PU2) 24 Pt. 11

62 Kementerian Hal Ehwal Dalam Negeri: 0 59/3/9/A; PN (PU2) 24 Pt. 11

Allah was allowed to be used in Christian publications. Not long after the countenance, the Publication Control Department of the Ministry of Home Affairs sent out letters to Christian publishers obtruding the usage of four words, namely "Allah", "Kaabah", "Baitullah" and "solat" from being used in any biblical publications, in order to prevent misapprehension and confusion among Christians and Muslims.[63] Imputable to the juxtaposition of these regulations and policy, such prohibition was imposed to prevent detriment to security and public interest.

There are ample evidences to suggest that Bumiputera Christians in Sabah and Sarawak have been using the word "Allah" to refer to the God whom they worshipped as professed in their evangelical scripture for centuries. In fact, the term had been used even before Malaysia existed as the version of the bible that they use was originally from Indonesia.[64] Being that the justification given by the government that the usage of *"*Allah" in Christian publications will cause confusion to Muslims; we must find solutions to the conundrum of the restriction concerning the usage of the term "Allah" as God, to ensure that freedom of religion is practiced without any discrimination. Given the long history of usage and uncontroverted evidences of established practice, the authors concur with the proposition that the four words which is claimed to be associated with Islam can be considered to be permitted to be used in the Al-Kitab (for Bumiputera Christians in Sabah and Sarawak only) so long as the words are defined in its proper religious context (for example, "Allah" in Islam is a term of endearment and

---

63 Letter KDN : S.59/3/9/A Klt. 2 – (17) and dated 5 December 1986

64 Abd Hakim Mohad, et al., "Understanding the Christian's Community Stance towards the Muslim Community in Sabah: After the Ban on the Usage of the term Allah", *International Journal of Academic Research in Business and Social Science, Vol. 7, No. 8* (2017): 453.

signifies the concept of oneness (*tawheed*) of God, while in Christianity, the concept of God revolves around the belief in trinity). For example, the usage of those words must also be in a controlled environment and comply with strict restrictions; it must carry a disclaimer on the cover page of the publication, along with the Christian cross symbol, that the Al-Kitab is exclusively confined to the usage of Christians (in Sabah and Sarawak). Another practical solution that can be taken into account in allowing the term "Allah" in the Al-Kitab for Christians in West Malaysia is by amending the term by changing the spelling of "Allah". For instance, instead of using "Allah", the term may be replaced and spelled with similar etymology locution such as "Eloh" or "Alah" or "Elah". The reason to put in such terms in a different spelling is purely to avoid turmoil among both Muslim and Christian communities which may affect peace and tranquillity in a multi-religious society. This proposition must be carefully studied and endorsed by the relevant authority such as Dewan Bahasa dan Pustaka.

Generally in Islam, the act of using the name of Allah by non-Muslims is not inherently unlawful. Besides, it is also constitutionally guaranteed under the Federal Constitution that any religion may be practiced in peace and harmony.[65] However, if there is a tendency that such acts may jeopardise the sanctity of Islam causing discomfort and confusion in the Muslim community, it is necessary to find solutions to prevent it from happening, without causing prejudice to the right of non-Muslims to practice their religion fairly.

[65] See Article 3 (1) of the Malaysian Federal Constitution

Islamic Law under Its Own Jurisdiction

The dispute in determining a religious status of a person will be convoluted if the party seeking the declaration brings a claim before the Civil Court instead of the Syariah Court. Even though Rosliza bt Ibrahim v Government of Selangor & Anor.,[66] was decided by the Federal Court as a non-renouncement case, the Court did not consider the Islamic jurisprudence perspective in the matter of determining the lineage of the appellant. As regards this matter, there are three practical solutions the authors would suggest, scilicet, the establishment of a special tribunal; direct reference to the Syariah Court to decide on Islamic law issues; and admitting the opinion of experts in Islamic jurisprudence.

i) Establishment of Special Tribunal

The authors sincerely believe that any case involving religious status must be adjudicated by judges on the Bench who possess excellent knowledge in Islamic law, and not merely to decide the controversial question based on the interpretation of statutory provisions and civil cases. This idea tallies with the opinion expressed by Farid Suffian Shuaib, Tajul Aris Bustami & Mohd Hisham Mohd Kamal, that:

> *"Application of Islamic Law in Civil Court may also create problem of proper interpretation of Islamic Law. In the absence of any expert on Islamic Law on the Bench, there appears to be the problem of identifying relevant principles of Islamic Law and applying such principle…Civil Court judges would unavoidably expand hukum syarak based on civil cases and statutory provisions.*

---

66 [2021] 2 MLJ 181

> *No reference would be made to the authoritative sources of Islamic Law".*[67]

From the above findings, conventionally Civil Courts have no jurisdiction in respect of matters that fall under the jurisdiction of the Syariah Court.[68] The authors are of the view that the issue will be easily resolved if it comes under the jurisdiction of the same forum. Hence, there must be some kind of unification in the polarity of legal systems between Civil and Syariah to decide on religious disputes. This can be done by way of recognising the position of a special tribunal. This is in line with the judgment from Tun Abdul Hamid in the case of *Abdul Shaik Md. Ibrahim & Anor v Hussein Ibrahim & Ors*[69], quoted verbatim as follows:

> *"…my suggestion in Lim Chan Seng on unification (or merger) of the Syariah and Civil Courts is worth considering. It is heartening to note that former Supreme Court judge, Harun Hashim, has expressed a similar view in his article "Merge legal system to avoid injustice".*

Thus, instead of striving for jurisdictional power, the authors are of the opinion that the two disciplines of the Courts must be made to harmonise and complement each other.

ii) Direct Reference to the Syariah Court

Apart from that, former Chief Justice, Tun Abdul Hamid Mohammad was of the view that in civil matters, a case will become enormously intricate when the question in dispute

---

67 Farid Suffian Shuaib, Tajul Aris Bustami and Mohd Hisham Mohd Kamal, *Administration of Islamic Law in Malaysia: Texts and Material* (Kuala Lumpur: Malayan Law Journal Sdn. Bhd, 2001): 81.

68 See Article 121 (1A) of the Malaysian Federal Constitution

69 [1999] 3 CLJ 539

involves the jurisdiction of the Syariah Court and comprises a non-Muslim party who is not subject to Islamic law. It has also been expounded by Mohamed Yusof S.C.J in *Dalip Kaur v Ketua Pegawai Polis Daerah, Bukit Mertajam & Anor*[70] that:

> *"It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law…The present question in my view cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and the relevancy of the civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic Jurisprudence."*

In such an instance, it was suggested by the learned Tun Abdul Hamid that in resolving the jurisdictional dilemma, the Bench must incorporate judges from each discipline of both Civil and Syariah Courts. Regardless of whether the party is bound or not to Islamic law, when there is an issue falling under the subject matter of Islamic law it must be adjudged by judges from the Syariah Court. The judges from the Civil Court will decide all other issues and cases. The final judgment subsequently will be given collectively by the Bench.[71]

The position of Syarie judges are only open to those who have obtained LL.B in Syariah or professional qualification in Islamic studies from recognised universities

---

70 [1992] 1 MLJ 1

71 Datuk Abdul Hamid bin Haji Mohamad, "Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions" [2002] *Malayan Law Journal*, 1, cxxx at cxxxix.

either in Malaysia or abroad.[72] It may be said that academic qualification in the field of Islamic law and jurisprudence is *sine qua non* to be a judge in the Syariah Court. Hence, the authors are in accord with the suggestion that any question in issue in the sphere of Islamic law should be directly referred to the Syariah Court to decide.

iii) Admission of Expert Opinion

The issue within the quintessence of Islamic law must also be considered by a qualified person in the field of Islamic jurisprudence. In light of section 45 of the Evidence Act 1950, the opinion of an expert in a particular area is required when the Court has to form an opinion on a point of foreign law or of science or art. To quote Tun Abdul Hamid in Syed Abu Bakar v Public Prosecutor,[73] he expressed that:

> *"There are however cases in which the court is not in a position to form a correct judgment without the help of persons who have acquire special skill or experience on a particular subject, when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of the experts is required"*

In determining the legitimacy status which falls within the context of Islamic science of law, the court must be furnished with such expertise and not neglect the opinion of an expert in the subject of Islamic jurisprudence, such as the States' Fatwa Committee members with the faculty to

---

[72] Najibah Mohd Zin., "The Training, Appointment, and Supervision of Islamic Judges in Malaysia*", Pacific Rim Law & Policy Journal 21, No. 1* (2012): 118

[73] [1984] 2 MLJ 19

unravel complexities concerning the establishment of *nasab* (lineage). A testimony of one who possesses expertise in analysing and determining the legitimacy status of a child born in accordance with the Syariah principles must be anticipated by the Court. In *Sulaiman Takrib*, the question of interpretation of the term "precepts of Islam" according to the Federal Constitution emerged. Zaki Tun Azmi PCA (as he then was) in his judgment clearly said:

> *"If the precepts of Islam, as contended by the petitioner, are only the five pillars of Islam, then all the other previous arguments by the respondent will all crumble. This court is not an expert in Islamic Law. It therefore has to rely on opinions given by experts in this field".*

When there is any question in relation to Islamic law; for instance, the religious status of one at the time of birth, it requires critical observation, serious deliberation and proper interpretation of the law. Verily, the Court without appreciation and apprehension specifically on Islamic jurisprudence should not merely decide on the terminology of the provision and should acquire the opinion from experts in the subject matter instead.

CONCLUSION

The reason behind the inclusion of Article 121 (1A) is to prevent jurisdictional conflict and to oust the jurisdiction of Civil Court in matters that fall within the exclusive jurisdiction of the Syariah Court. In fact, the Courts have been consistent in dealing with matters relating to religious status and apostasy where the jurisdiction belongs to the Syariah Court. The Courts should be guided by the approaches and decide accordingly. The duality of the legal system in Malaysia must co-exist and complement each other. The integration of both Syariah law and

Civil law can be observed in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd*[74] where the Court held that the Syariah Advisory Council (SAC) is the sole authoritative body on Syariah matters pertaining to Islamic banking and finance; and the ruling made by the SAC bind the Civil High Court although the SAC is not a judicial body. The majority allowed Bank Negara SAC to make a final determination on Syariah matters that bind the Civil Court and is constitutional.[75] This case indicates that Civil Courts must refer to expert opinions such as the SAC to determine Syariah matters, and banking which falls under Federal List. It is not persuasive, but the opinion binds the Civil Court. It reflects the unity of both legal systems in Malaysia which must be celebrated.

[74] [2019] 3 MLJ 561

[75] Shad Saleem Faruqi, "Between Two Shores, Courts, the Constitution and the Shariah" [2020] *Singapore Academy of Law Journal*, 32, 414 at 452

OFFENCES BY PERSONS PROFESSING THE RELIGION OF ISLAM AGAINST PRECEPTS OF THAT RELIGION

Aston Paiva[*1]

ABSTRACT

This article analyses laws for Muslims under the Malaysian legal system by outlining its historical and legal developments in British Malaya and Malaysia. It is primarily concerned with the matter of offences by persons professing the religion of Islam against precepts of that religion. It has the dual objective of providing readers with a solid account of the historical context in which these offences were developed, and analyses the approach taken by the Judiciary of today with respect to these offences since their re-enacting after Merdeka. It argues that the Judiciary has failed to preserve the Constitution as envisaged in 1957. Recent decisions of the Federal Court have disregarded the reasoning of the Supreme Court in *Mamat Daud*, misinterpreted the common noun 'precepts' for the proper noun 'Precepts of Islam' while favouring the opinions of contemporary experts on religion when interpreting the Constitution. This article finds that Parliament must remedy this continued failure by the Judiciary by engaging with interested persons, and in doing so, preserve the protections of the Constitution of 1957, and allow the subject matter – laws for Muslims in Malaysia – to be subject to 21st century democratic deliberation.

Keywords: precepts, Islam, offences, State List, Muslim courts

* Barrister-at-Law (Grays), Advocate & Solicitor (Malaysia) practising at Messrs Vazeer Akbar Majid & Co. The author was counsel in *Muhamad Juzaili* [2015] 1 CLJ 954, CA; [2015] 6 MLJ 736, FC; *Maqsood Ahmad* [2019] 9 MLJ 596, HC; [2021] 1 MLJ 120, CA; and *Indira Gandhi* [2015] 9 MLJ 301, HC; [2016] 5 CLJ 353, FC.

THE HISTORY OF ANGLO-MUHAMMADAN LAWS IN MALAYA

British Administration was established in Perak with the Pangkor Treaty of 1874. Subsequent agreements with respective Rulers saw the Peninsula brought under British dominion by 1919. A reiteration in these agreements was Clause VI of the Pangkor Treaty; stipulating that "the *Sultan* receive and provide a suitable residence for a British Officer to be called Resident who shall be accredited to his Court and whose advice must be asked and acted upon in all questions other than those touching Malay religion and custom". This marked the introduction of indirect rule, through the Residential System, into the Malay States.

Fundamentally, these treaties reflected British awareness that religion and custom were two expressions of Malay life in which interference would likely arouse resentment and even unrest. Colonial religious policy avoided meddling in such matters and sought to assure the Malays that their traditional way of life was not threatened. But while that was official British policy, in effect - interference was inescapable - all laws, even those dealing with matters of religion, were drafted by British personnel, and its passage in the State Councils a formality. In fact, British intervention in religious matters often had Malay consent, and, at times, responded to the wish of the Malay Rulers.

British tolerance of Islam indirectly assisted in the expansion of laws, by conferring doctrinal and administrative authority on officials dependent on the *Sultans* for their power. The Rulers and their State Councils began to assume a wider responsibility for religious affairs. The enacting of written systems of civil and criminal law generated pressure to establish a more formal system of Islamic law; courts were set up and procedures laid down.

Muslim courts established in each State to enforce Muslim law and *adat* saw a *kathi* appointed for every district. These courts had jurisdiction over Muslims only, and their

primary responsibility was to distribute property after death or divorce. In most States, the British intervened directly in tasks such as nominating *kathis* and religious teachers, considering points of Islamic law and practice, considering appeals from lower religious courts, supervising religious publications, and dealing with religious legislation.

Through institutionalisation and bureaucratisation using statutory enactments, administrative reforms and rules, there was now organized religious officialdom in British Malaya. But this was not the outcome of any preconceived process or deliberate planning, but emerged of itself out of British colonial policy and the general philosophy of it. Therein lies the paradox; that Islam and Islamic institutions in Malaya had the benefit of far-reaching development because of British rule.

In 1885, Perak enacted Order in Council 1885 "Muhammadans to Pray in Mosques on Friday"; a law which made Friday prayer in the mosque compulsory. Muslims who disobeyed were liable to a small fine and the proceeds were applied to the upkeep of mosques.

In 1887 and 1893, Sungei Ujong and Negri Sembilan (old) enacted similar laws; State Council Order of August 9, 1887 "Mosque Attendance" and State Council Order of May 25 1893 "Mosque Attendance" respectively.

In 1894, Perak enacted Order in Council No. 1 of 1894 "Adultery by Muhammadans"; a law which made adultery an offence. Where a Muslim man had consensual sexual intercourse with the wife of another man, they were guilty of adultery and liable to punishment.

Within a few days, Selangor enacted a similar law – Regulation XI of 1894 "Prevention of Adultery Regulation" - adding that the court could act only when the complaint was made by the husband of the woman or her guardian.

Between 1895 and 1899, the State Councils of Perak and Negri Sembilan discussed the need to establish a comprehensive 'Muhammadan Code' of behavior and studied drafts of codification of 'Muhammadan Law'.

In July 1897, the *Durbar* had its first meeting in Kuala Lumpur where the major issue was the compilation of a Code of Muhammadan Laws and Customs to penalize moral offences which did not come within the scope of English criminal law.

In 1898, the Sultan of Pahang, in the State Council, complained that all crimes committed in Pahang against Islamic law went unpunished and as a Ruler of a Muslim State he felt himself personally responsible for all such misdeeds, and steps should be taken for the British Governor to assume the burden of punishing offenders.

By 1900, the State Council of Selangor had resolved for the drafting of an enactment with proposed amendments by the State Council of Negri Sembilan and the Sultan of Perak to be communicated to the Resident-General.

In January and July 1902, discussions took place at the conference of Residents in Selangor, and thereafter the legal adviser T.H. Kershaw drafted a Muhammadan Laws Enactment, which would only cover cases in which both parties were Muslims. Consultations were held between the sultanates, State Councils and British Residents on the draft's details.

The draft enactment aroused some opposition in the press, especially on the clause on compulsory mosque attendance on Fridays and the clauses dealing with the morals of women. The two noted concerns were: How would this obligatory worship affect all Government servants of whom the majority were Muslims? And why doesn't the legislation exclude Indians and other Muslims because religious liberties were not interfered with in their native countries?

In 1904, and despite valid concerns, the enactment was enacted in all the Federated Malay States; titled The Muhammadan Laws Enactment[1]. Subsequent amendments introduced the offence of Prohibition of Sale of Cooked Food in

[1] Enactment No. 6 of 1904 (Negri Sembilan), Enactment No. 3 of 1904 (Selangor), Enactment No. 2 of 1904 (Pahang) and Enactment No. 20 of 1904 (Perak)

the month of Ramadan, Prohibition of Cohabitation between Divorced Persons and Incest[2] respectively. There were 9 offences.

Table 1. Overview of offences in the Muhammadan Laws Enactment 1904

Section	Offence	Punishment
3	Failure to attend prayers at Mosque every Friday.	Fine not exceeding 50 cents before a Court of Penghulu (or a Court of a Kathi in Negri Sembilan and Pahang).
4	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up to twice the amount of "mas kahwin" payable for a marriage of a girl of her class.
5	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
6	Adultery with a wife of another man.	Imprisonment not exceeding 1 year and fine not exceeding $250 for the man, and imprisonment not exceeding 6 months for the woman.
7	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men. Incest by reason of affinity: imprisonment not exceeding 6 months for men, or fine not exceeding $250.

[2] Enactment No. 1 of 1917 (Negri Sembilan), Enactment No. 1 of 1917 (Selangor) and Enactment No. 1 of 1917 (Perak); Enactment No. 1 of 1918 (Negri Sembilan), Enactment No. 1 of 1918 (Selangor) and Enactment No. 1 of 1918 (Perak); Enactment No. 2 of 1915 (Negri Sembilan), Enactment No. 1 of 1915 (Selangor) and Enactment No. 1 of 1915 (Perak)

7A	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully married another man and divorced subsequently.	Fine not exceeding $250 and for subsequent offences, fine not exceeding $500 or imprisonment not exceeding 6 months.
8	Betrothal (breach of promise to marry).	Pay the value of the "mas kahwin" which would have been paid if marriage took place.
9	Teaching religious doctrine in public place without written permission of Sultan or teaching false doctrines.	Fine not exceeding $25.
9A	Prohibition on shopkeepers or retail traders from selling during Ramadhan between 6 a.m. and 6 p.m. to Muslim persons cooked food for immediate consumption.	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.

Source: Muhammadan Laws Enactment 1904

Only persons professing the Muhammadan religion were subject to the enactment (s. 2). These offences were triable before a Magistrate's Court. However, when trying such offences, the courts had to cause two (2) Muhammadans of standing to be summoned from a list of persons nominated in that behalf by the Ruler to sit with the court as assessors (s. 10). The courts were however not bound by the opinion of the assessors (s. 11). All fines recovered from the offenders must be paid to a fund called the "Muhammadan Religious Fund" (s. 12).

In 1933, the Federated Malay States began to prepare a new Muhammadan Laws Enactment.

When the draft of the Bill was made public in October 1935, its critics argued that prohibitions touching on personal morality interfered with individual discretion to a high degree. The editor of the Singapore monthly Voice of Islam thought that the Bill was contrary to the principles of Islam; it was obligatory on Muslims to pray five times daily and to attend mosque on Friday, but they should attend of their own accord; and not be compelled as that engendered hypocrisy. Similar objections were raised by Malays, who regarded the Bill as archaic i.e. it was impossible to obey the Qur'an to the letter, and hundreds of Malays would be fined or imprisoned every day for not going to the mosque. The Warta Malaya, a Singaporean Malay daily, declared the Bill dangerous as complete criminal, civil and social laws were presented in the Qur'an and the provisions of the Bill conflicted with Islamic law. The Straits Budget added that no such legislation existed in Islamic Egypt, Turkey or Persia, the Muslim States of India or in the Netherlands East Indies with their vast Muslim populations.

On the other hand, the Bill was defended by many who believed that this compulsion was accepted as right and natural by the Malays themselves. Religion and State were inextricably joined together in the eyes of the Malays that the duty of the *Sultans* to regulate the religious lives of their subjects was not questioned. Muslim rulers in the Malay States were always entitled to use their laws, courts and police to ensure orthodoxy. It was argued that state control of sermons, religious matters and publication of religious books provided many benefits including the prevention of unqualified persons from teaching and propagating.

The Bill, drafted by a committee of legal officials in consultation with Muslim dignitaries of all four Federated Malay States, was passed in Pahang in 1937 titled Muslim (Offences) Enactment 1938, in Negri Sembilan and Selangor in 1938 titled Muhammadan (Offences) Order in Council 1938 and Muhammadan (Offences) Enactment 1938 respectively and

in Perak in 1939 titled Mohamedan (Offences) Enactment 1939; overruling the resistance and controversy that it had aroused.

Taking Negri Sembilan's Muhammadan (Offences) Order in Council 1938 as an example, there were 13 offences.

Table 2. Overview of offences in Negri Sembilan's Muhammadan (Offences) Order in Council 1938

Section	Offence	Punishment
3	Failure to attend Prayers at Mosque every Friday.	Fine not exceeding $5 before a Court of Penghulu.
6	Non-attendance of children at Koran School.	Fine not exceeding $5 before a Court of Magistrate or a Court of Penghulu.
7	Enticing any unmarried girl out of the keeping of her parents or guardians.	Imprisonment not exceeding 6 months and fine up twice the amount of "mas kahwin" payable for a marriage of a girl of her class.
8	Absconding to lead an immoral life (unmarried girls).	Imprisonment not exceeding 1 month (3 months for subsequent offences).
9(i)	Adultery with a wife of another man.	Imprisonment not exceeding 1 year and fine not exceeding $500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding $250 for the woman.
9(ii)	Khalwat for men: in retirement alone with and in suspicious proximity to any Muhammadan woman whom he is not forbidden to marry.	Imprisonment not exceeding 1 year and fine not exceeding $500 for the man, and imprisonment not exceeding 6 months or and fine not exceeding $250 for the woman as participator.
9(iii)	Khalwat for women: in retirement alone with and in suspicious proximity to any male not being a Muhammadan.	Imprisonment not exceeding 6 months or fine not exceeding $250.

10	Incest.	Incest by reason of consanguinity or fosterage: imprisonment not exceeding 5 years for men. Incest by reason of affinity: imprisonment not exceeding 6 months for men, or fine not exceeding $250.
11	Prohibition to cohabit as a man and wife (after three pronouncements of divorces) unless the woman has lawfully married another man and divorced subsequently.	Fine not exceeding $250 and for subsequent offences, fine not exceeding $500 or imprisonment not exceeding 6 months.
12	Teaching religious doctrine in public place without written permission of Sultan or teaching false doctrines.	Fine not exceeding $100.
13	Prohibition on shopkeepers or retail traders from supplying cooked food, drink, tobacco or cigarettes for immediate consumption during Ramadhan between half an hour before sunrise and the hour of sunset to Muslim persons.	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.
14	Printing or publishing publications concerning the Muhammadan religion containing precepts of the said religion which are contrary to the opinion of the Religious Committee appointed by the Ruler.	Fine not exceeding $200 or imprisonment not more than 1 year, and such book or document shall be liable to forfeiture.

15	Breaches of fasting rules in the month of Ramadhan.	Fine not exceeding $2 and fine not exceeding $10 for subsequent offences before Court of Kathi, Court of Penghulu or Court of Magistrate.

Source: Muhammadan (Offences) Order in Council 1938

Only persons professing the Muhammadan religion were subject to the enactment (s. 2). These offences were triable before a Magistrate's Court and the Supreme Court. However, when trying such offences, the courts had to cause two (2) Muhammadans of standing to be summoned from a list of persons nominated in that behalf by the *Majlis Meshuarat Ka'adilan dan Undang* to sit with the court as assessors (s. 16). The courts were however not bound by the opinion of the assessors (s. 17). All fines recovered from the offenders must be paid to a fund called the "Muhammadan Religious Fund" (s. 18).

In the Unfederated Malay States, the situation followed the development in the Federated Malay States.

In 1919, Johor enacted the Offences by Mohammedans Enactment (Enactment No. 25 of 1919); a replica of the Muhammadan Laws Enactment 1904, but more rigorous in its treatment of prostitution.

In 1911, Kedah enacted a Religious Observance Enactment; it closely followed the Muhammadan Laws Enactment 1904, and dealt with marriage and divorce, mosque attendance, observance of *Ramadhan*, enticing, leading an immoral life, adultery, betrothal, incest, inspection by the *shaikh-al-Islam* of books and documents to do with Islam and unauthorized teaching of religion.

Circa 1923, Terengganu enacted the Punishment for non-observance of Friday Prayers Enactment (Ishtihar 29/1341) and Prohibition of Improper Intercourse Enactment (No. 3/1342) to make non-observance of Friday prayers an offence and to prohibit adultery respectively.

In 1938, Kelantan enacted the Muhammadan Offences Enactment 1938 which consolidated existing Muslim offences and followed the formula of the Federated Malay States with some modifications; there were penalties for inciting others against attending mosque or taking religious instructions, slandering any *pegawai masjid*, teaching religion without permission of the *Majlis Ugama Islam* and making *fatwas* on Islamic law. The Majlis also controlled the printing, publishing or importing of any book or document on religious topics, the Qur'an may not be used in a theatrical performance, and the purchase, sale or consumption (in a shop or other public place) of intoxicating liquors was forbidden.[3]

Besides offences, Anglo-Muhammadan Laws in British Malaya included matters with respect to *Wakaf*[4], mosques[5], *Zakat*[6], *Baitulmal*[7], *Haj*[8], religious education for Malay children[9] and the creation of religious authorities i.e. the

---

3 Moshe Yegar, *Islam and Islamic Institutions in British Malaya: Policies and Implementation* (The Magnes Press, The Hebrew University, 1979), 5 – 270

4 *Wakaf* Prohibition Enactment 1911 (Johor), Sultan Idris Estate Enactment 1917 (Perak), Sultan Idris Religious and Charitable Trust Enactment 1917 (Perak) and *Wakaf* Enactment 1951 (No. 8 of 1951) (Perak)

5 Mosques and Suraus Enactment 1916 (No. 10 of 1916) (Kelantan) and Mosques Enactment (No. 24 of 1938) (Kelantan)

6 *Zakat* and *Fitrah* Enactment 1949 (No. 2 of 1949) (Perlis), *Bait-ul-mal, Zakat* and *Fitrah* Enactment 1951 (No. 7 of 1951) (Perak) and *Zakat* Enactment 1955 (No. 4 of 1955) (Kedah)

7 *Baitulmal* Enactment (No. 18 of 1934) (Johor) and *Baitulmal* Enactment (No. 37 of 1937) (Terengganu)

8 Ordinance to Make Better Provisions for the Regulation of Pilgrim Ships (No. XVI of 1897) (Straits Settlements), Ordinance to provide for the Regulation and Control of Pilgrim Brokers (No. XVII of 1906) (Straits Settlements) and Enactment to provide for the Regulation and Control of Pilgrim Ships and Pilgrims (Enactment No. 7 of 1930) (Federated Malay States)

9 School Attendance Regulation 1891, Regulation V of 1891 (Sungei Ujong), School Attendance Enactment 1900 (III of 1900) (Negeri Sembilan), School Attendance Enactment 1908 (No. 7 of 1908)

Registrar of Marriages and Divorces[10], the *Majlis Ugama Islam*[11] and the *Mufti*[12]. Muslim courts or *Kathi* courts were often constituted together with other non-religious courts.[13]

(Pahang), Enactment No. 10 of 1914 (Kedah), Enactment No. 8 of 1915 (Johor), School Attendance Enactment 1916 (No. 2 of 1916) (Perak), Enactment No. 2 of 1923 (Terengganu) and Enactment No. 14 of 1931 (Kedah)

10 Ordinance No. 26 (Mahomedans) 1880 (Straits Settlements), Muhammadans Marriage and Divorce Registration Enactment 1900; No. 2/1900 (Perak), No. 8/1900 (Selangor), No. 5/1900 (Negeri Sembilan) and No. 13/1900 (Pahang), Muslim Marriage and Divorce Enactment 1911 (Kelantan), Mohammadan Marriages (Separations) Enactment 1913 (Kedah), Muhammadan Marriage and Divorce (Registration) Enactment 1913 (Perlis), Muhammadan Marriage (Separation) Enactment 1913 (Perlis), Muhammadan Marriage and Divorce Registration Enactment 1914 (Johor) and Registration of Muhammadan Marriage and Divorce Enactment 1922 (Terengganu). In Kelantan, amendments were made in 1917, 1919 and 1926 before a new law was passed i.e. Moslem Marriages and Divorces Enactment (No. 22/1938). In Johor, amendments were made through Enactments Nos. 11/1935, 17/1935 and 2/1950. In Terengganu, a new law was passed i.e. Muhammadan Marriage and Divorce Registration Enactment 1938

11 *Undang-Undang Anggota Majlis Agama Islam dan Istiadat Melayu Kelantan* No. 14/1916 (Kelantan), *Majlis Ugama Islam dan Istiadat Melayu* Enactment (No. 23 of 1938) (Kelantan), Council of Religion Enactment 1949 (Johor), Council of Religion and Malay Custom Enactment 1948 (Kedah), Council of Religion and Malay Custom and Kadzis Courts Enactment 1953 (Kelantan), Council of Religion Enactment 1949 (reconstituted by the Council of Muslim Religion Enactment 1957) (Negeri Sembilan), Council of Religion and Malay Custom Enactment 1949 (Pahang), Council of Religion and Malay Custom Enactment 1949 (reconstituted by the Majlis Ugama Islam dan Adat Melayu Enactment 1951) (Perak), Council of Religion and Malay Custom Enactment 1949 (Perlis), Council of Religion and Malay Custom Enactment 1949 (Selangor) and Council of Religion and Malay Customs Enactment 1949 (Terengganu)

12 Muhammadan Law Determination Enactment No.27/1919; 'to provide for the determination of questions of Muhammadan Law' (Johor) and Council of Religion and Malay Custom Enactment 1949 (Perlis), ss. 5 and 10. See also: Muhammadan Law and Malay Custom (Determination) Enactment 1930 (Federated Malay States)

From 1952, Anglo-Muhammadan Laws including offences were consolidated into a single enactment in all States.[14] Taking the first of these, Selangor's Administration of Muslim Law Enactment 1952, as an example, there were 27 offences.

Table 3. Overview of offences in Selangor's Administration of Muslim Law Enactment 1952

Section	Offence	Punishment
150	Compulsory attendance for Friday prayers at mosque	Fine up to $25
151	Purchase, sale or consumption of intoxicating liquor	Fine up to $25, for subsequent offences, up to $50
152	Purchase or sale, for immediate consumption, or consumption of food, drink or tobacco during daylight in Ramadhan	Fine up to $25, for subsequent offences, up to $50

[13] Order in Council No. 11 of 1890 (Perak), Order in Council No. 1 of 1893 (Negeri Sembilan), Enactment No. 5 of 1900 (Perak), Enactment No. III of 1900 (Selangor), Enactment No. VIII of 1900 (Pahang), Enactment No. 14 of 1901 (Negeri Sembilan), Court Enactment of 1911 (Perlis), Courts Enactment II of 1911 (Johor), Enactment No. 16 of 1914 (Johor), Courts Enactment No. 4 of 1921 (Terengganu), Courts Enactment No. 7 of 1934 (Kedah) and Courts Enactment No. 31 of 1938 (Kelantan)

[14] Council of Religion and Malay Custom and Kadzis Courts Enactment 1953 (Kelantan), Administration of Muslim Law Enactment 1955 (Terengganu), Administration of the Law of the Religion of Islam Enactment 1956 (Pahang), Administration of Muslim Law Enactment 1959 (Penang), Administration of Muslim Law Enactment 1959 (Malacca), Administration of Muslim Law Enactment 1960 (Negeri Sembilan), Administration of Muslim Law Enactment 1962 (Kedah), Administration of Muslim Law Enactment 1963 (Perlis), Administration of Muslim Law Enactment 1965 (Perak) and Administration of Islamic Law Enactment 1978 (Johor)

153	Disobeying Sultan's lawful orders during Ramadhan, Hari Raya Haji or Hari Raya Fitrah	Fine up to $25
155(1)	Desertion of wife pursuant to court order	Imprisonment up to 14 days or fine up to $50 or both
155(2)	Ill-treatment of wife	Imprisonment up to 14 days or fine up to $50 or both
156	Willfully disobeying husband's lawful order	Fine up to $10, for subsequent offences, imprisonment up to 7 days or fine up to $50
157(1)	Khalwat for men	Imprisonment up to 14 days or fine up to $50, for subsequent offences, imprisonment up to 1 month or fine up to $100
157(2)	Khalwat for women (including with non-Muslim men)	Imprisonment up to 14 days or fine up to $50, for subsequent offences, imprisonment up to 1 month or fine up to $100
158	Illicit intercourse between divorced persons	For man, imprisonment up to 1 month or fine up to $100 For women, imprisonment up to 7 days and fine up to $25
159	Unlawful solemnization of marriage	Imprisonment up to 1 month or fine up to $100
160	Failure to report marriage or divorce	Fine up to $25
161	Failure to report conversions	Fine up to $25
162	Improper retention of funds by pegawai masjid	Imprisonment up to 3 months or fine up to $250
163	Willful neglect of statutory duty	Imprisonment up to 3 months or fine up to $250
164	Breach of secrecy	Imprisonment up to 3 months or fine

		up to $250
165	Erecting mosques without written permission of the Majlis Ugama	Fine up to $1000
166	Religious teaching, save in own residence, without written permission of Kathi	Imprisonment up to 1 month or fine up to $100
167	Teaching of false religious doctrine publicly	Imprisonment up to 3 months or fine up to $250
168	Issuance of fatwa on any question of Muslim law, doctrine and Malay customary law by persons not authorized under the enactment	Imprisonment up to 3 months or fine up to $250
169	Printing or publishing of books contrary to Muslim law, doctrine or a fetua	Imprisonment up to 6 months or fine up to $500
170	Misuse of Qur'an for entertainment or derision	Imprisonment up to 1 month or fine up to $100
171	Contempt of any religious authority	Imprisonment up to 1 month or fine up to $100
172	Contempt of the Muslim religion	Imprisonment up to 6 months or fine up to $500
173	Non-payment of zakat or fitrah	Imprisonment up to 7 days or fine up to $100
174	Inciting Muslims to refrain from attending mosque or religious instructions	Imprisonment up to 14 days or fine up to $50
175	Abetment	Same punishment as if he had

		committed offence

Source: Administration of Muslim Law Enactment 1952

These offences only applied to persons professing the Muslim religion, and can only be prosecuted in the Court of the *Kathi Besar* or a Court of a *Kathi* (s. 149).

On 31st August 1957 i.e. Merdeka Day, the Federal Constitution ("the Constitution") came into effect. Article 162(1) of the Constitution preserves the continuity of Anglo-Muhammadan Laws made *before* Merdeka Day while Article 74(2) (read together with Item 1 of the State List in the Ninth Schedule) confirms the State Legislatures' powers to make such laws *after* Merdeka Day. The said Item 1 then read:

> *"List II – State List*
>
> *Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;*
>
> *Muslim Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Muslim religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;*
>
> *Malay custom;*
>
> *Zakat, Fitrah and Baitulmal or similar Muslim revenue;*
>
> *mosques or any Muslim public places of worship, creation and punishment of*

> *offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List;*
>
> *the constitution, organization and procedure of Muslim courts, which shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law;*
>
> *the control of propagating doctrines and beliefs among persons professing the Muslim religion;*
>
> *the determination of matters of Muslim Law and doctrine and Malay custom." [Space after semicolons added] "*[15]

In 1965, the Muslim Courts (Criminal Jurisdiction) Act 1965 (Act 23 of 1965) was enacted by Parliament to confer the Muslim courts with jurisdiction in respect of "offences", specifically, "in respect of offences against precepts of the Muslim religion by persons professing that religion" (s. 2), and to validate "offences" tried by the said courts between 1957 to 1965 (s. 3).

In 1976, a constitutional amendment was passed by Parliament substituting the expressions "Muslim", "Muslim religion" and "Muslim court" wherever it appears in the Constitution with the word "Islamic", "religion of Islam" and "Syariah court" respectively.[16] This is the first time the

---

[15] *Constitutional Proposals for the Federation of Malaya 1957* (London: Her Majesty's Stationery Office), 134

[16] Sections 44 and 45, Constitution (Amendment) Act 1976 (Act A354) (w.e.f. 27-8-1976)

undefined non-English word "*Syariah*" appears in our Constitution. For that reason alone, the author submits that this amendment is cosmetic if not purely political. As explicated by Professor Tamir Moustafa:

> *"In addition to codification and increased specificity in the law, there was an important shift in the way that Anglo-Muslim law was presented to the Malaysian public beginning in the 1970s. Until that time, Anglo-Muslim family law was understood as being grounded in some substantive aspects of custom and fiqh (Islamic jurisprudence), but there was no formal pretence that the laws themselves constituted 'shariah' [(God's law)]. The 1957 Federal Constitution, for example, outlined a role for the states in administering 'Muslim law' as did the state level statutes that regulated family law. However, a constitutional amendment in 1976 replaced each iteration of 'Muslim law' with 'Islamic law'. Likewise, every mention of 'Muslim courts' was amended to read 'Syariah courts'. The same semantic shift soon appeared in statutory law: the Muslim Family Law Act became the Islamic Family Law Act; the Administration of Muslim Law Act became the Administration of Islamic Law Act; the Muslim Criminal Law Offenses Act became the Syariah Criminal Offenses Act; the Muslim Criminal Procedure Act became the Syariah Criminal Procedure Act and so on.*
>
> *Why is this important? In all of these amendments, the shift in terminology*

exchanged the object of the law (Muslims) for the purported essence of the law (as 'Islamic'). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls 'the invention of tradition'. The authenticity of the Malaysian 'shariah' courts is premised on fidelity to the Islamic legal tradition. Yet, ironically, the Malaysian government reconstituted Islamic law in ways that are better understood as a subversion of the Islamic legal tradition. That distinct form of Anglo-Muslim law, it must be remembered, is little more than a century old. But every reference to state 'fatwas' or the 'shariah courts' serves to strengthen the state's claim to embrace the Islamic legal tradition. Indeed, the power of this semantic construction is underlined by the fact that even in a critique such as this, the author finds is difficult, if not impossible, to avoid using these symbolically laden terms. It is with the aid of such semantic shifts that the government presents the syariah courts as a faithful rendering of the Islamic legal tradition, rather than as a subversion of that tradition. In this regard, a parallel may be drawn to nationalism. Just as nationalism requires a collective forgetting of the historical record in order to embrace a sense of nation, so too does shariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.

This semantic shift was likely an effort to endow Muslim family law and Muslim

> *courts with a religious personality in order to brandish the government's religious credentials. The shift in terminology came during a period when the dakwah (religious revival) movement was picking up considerable steam in Malaysian political life. The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s. The Malaysian Islamic Youth Movement (Angkatan Belia Islam Malaysia—more popularly known by its acronym, ABIM) also formed in August 1971, heralding a new era of grassroots opposition. UMNO's central political challenge was to defend itself against the constant charge that the government was not doing enough to advance Islam."*[17]

In the 1982 State Election of Kelantan and the 1982 General Election, the National Front (*Barisan Nasional*) retained a majority in the Kelantan Legislative Assembly and Parliament respectively.

In 1984, Parliament amended Act 23 of 1965; extending its jurisdiction in respect of "offences" punishable with "imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or with both" to "imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof".[18]

---

[17] Professor Tamir Moustafa, "Judging in God's Name: State Power, Secularism, and the Politics of Islamic law in Malaysia", *Oxford Journal of Law and Religion,* Vol. 3, No. 1 (2014): 159

[18] Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 (Act A612)

A year later, in 1985, Kelantan enacted the Syariah Criminal Code 1985 (Enactment No. 2 of 1985) solely for Muslim offences. There were now 28 offences.

Table 4. Overview of offences in Kelantan's Syariah Criminal Code 1985

Section	Offence	Punishment
5	Indecent act or behavior contrary to Hukum Syarak in any public place or any person found making love with a person other than one's spouse	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
6	Utterance of any word which is contrary to Hukum Syarak in any place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
7	*Pondan*: male person wearing a woman's attire and posing as a woman in any public place	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 4 months or to both.
8	Instigating married woman or man to be divorced or neglect duties and responsibilities	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
9	*Khalwat*: any person living with or cohabiting with or in retirement with or hiding with any person of the opposite sex who is not his mahram other than his spouse	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
10	Incest: an act or a series of act, which is presumed to be contrary to Hukum Syarak between a man and a woman who are prohibited from marrying	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.

	each other	
11	Adultery/*Zina*: sexual intercourse between a man and a woman who are not husband and wife other than rape and persetubuhan syubhat	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both and to 6 strokes of whipping.
12	An act preparatory to the commission of *Zina*	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both and to whipping not exceeding 3 strokes.
13	Abetment of the commission of the offence of *zina*	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
14	*Liwat*: sexual relations between male persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to 6 strokes of whipping.
15	*Musahakah*: sexual relations between female persons	Fine not exceeding RM5000 or to imprisonment for a term not exceeding 4 months or to both.
16	Pregnancy outside marriage	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
17	Enticing other person's wife	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
18	Prostituting wife or child	Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
19	Prostituting (woman)	Fine not exceeding RM4000 or to imprisonment for a term not exceeding 2 years or to both.
20	Enticing a woman to run away from the custody of	Fine not exceeding RM2000 or to imprisonment for a term not

	her parents or guardian	exceeding 1 year or to both.
21	Selling or giving away child to a non-Muslim	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.
22	Becoming a *muncikari*/pimp (a person who acts as a procurer between a female and a male for a purpose which is contrary to *Hukum Syarak*)	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
23	Encouraging *maksiat*	Fine not exceeding RM500 or to imprisonment for a term not exceeding 6 months or to both.
24	*Takfir*: uttering or implying that a person is not a Muslim	Imprisonment for a term not exceeding 3 years or to a fine not exceeding RM5000 or to both.
25	Intoxicating drinks: (i) Drinking liquor or any intoxicating drinks. (ii) Making, selling, exhibiting or buying any intoxicating drinks.	 (i) Fine not exceeding RM5000 or to imprisonment for a term not exceeding 3 years or to both and to whipping not more than six strokes. (ii) Fine not exceeding RM3000 or to imprisonment for a term not exceeding 2 years or to both.
26	Consuming food or drink or smokes any tobacco in the hours of daylight in the month of Ramadan	Fine not exceeding RM500 or imprisonment for a term not exceeding 3 months and for a second and subsequent offence to a fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
27	Failing to comply with, contravening, objecting to or deriding any *Qadhi* or	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.

	Pegawai Ugama Islam Negeri or *Penyelia Ugama* in the discharge of his duties	
28	Deriding or despising any law in force in the Syariah courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 6 months or to both.
29	Abetment	Same punishment as if he had committed offence.
30	Attempts	Punishment not exceeding one-half of the punishment provided for the offence.
31	Failing to comply with, contravening, objecting to, deriding or refusing to obey any order of the Syariah courts	Fine not exceeding RM1000 or to imprisonment for a term not exceeding 1 year or to both.
32	Failing to comply with an order of His Royal Highness the Sultan on any specific matter which is contrary to Hukum Syarak	Fine not exceeding RM2000 or to imprisonment for a term not exceeding 1 year or to both.

Source: Syariah Criminal Code 1985 of Kelantan

These offences only applied to persons professing the religion of Islam (who have attained puberty (*akil baligh*) and are in the state of Kelantan), and can only be prosecuted in the Court of *Qadhi Besar*, Court of *Qadhi Khas* or Court of *Qadhi Jajahan* (ss. 3, 9(1), 10(1) and 11(1)) i.e. the Muslim or "*Syariah*" courts in Kelantan.

In 1988, Act 23 of 1965 was revised, and was renamed the *Syariah* Courts (Criminal Jurisdiction) Act 1965 (Act 355).

All States then began adopting Kelantan's template of offences with minor differences between the offences, and many additional offences.[19]

Judiciary: A Failure to Preserve the Constitution

The relevant matter in Item 1 of the State List reads:

> *"creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List"*

From 1985 to 1987, the Supreme Court in *Mamat Daud v. Government of Malaysia*[20] was moved to determine whether a Federal law was invalid on the ground that it makes provision with respect to a matter to which Parliament has no power to make, pursuant to article 4(3) of the Constitution. The petitioners contended that the said law was on 'religion' which Parliament is not competent to legislate except with regard to the Federal Territories, and the sole right to legislate on the Islamic religion is given to the State Legislatures under Item 1 of the State List. The petitioners succeeded by a majority.

---

[19] Syariah Criminal Offences Enactment 1997 (Johore), Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014, Enakmen Kesalahan Syariah (Negeri Melaka) 1991, Syariah Criminal (Negeri Sembilan) Enactment 1992, Syariah Criminal Offences Enactment 2013 (Pahang), Syariah Criminal Offences (State of Penang) Enactment 1996, Crimes (Syariah) Enactment 1992 (Perak), Criminal Offences in the Syarak Enactment 1991 (Perlis), Syariah Criminal Offences Enactment 1995 (Sabah), Syariah Criminal Offences Ordinance 2001 (Sarawak), Syariah Criminal Offences (Selangor) Enactment 1995, Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 and Syariah Criminal Offences (Federal Territories) Act 1997.

[20] *Mamat Daud & Ors. v. Government of Malaysia* [1986] 2 MLJ 192; *Mamat Daud & Ors. v. The Government of Malaysia* [1988] 1 CLJ (Rep) 197.

There were two critical matters in the Supreme Court's decision; first, on interpreting Item 1 of the State List, and second, on the applicable legal rule in such determinations i.e. 'the pith and substance rule.'

On the first matter, Mohd. Azmi SCJ elucidates:

> *"As far as Islamic religion is concerned, they come under the classification of either the general subject of Islamic law, or the specific subjects of creation and punishments of offences by persons professing the religion of Islam against precepts of that religion, or the control of propagating doctrines and beliefs amongst persons professing the religion of Islam, or the determination of matters of Islamic law and doctrines, all of which are reserved expressly for legislation by the State Legislatures.*
>
> *...*
>
> *Article 74 confers legislative power only to the State Legislatures to deal with Islamic law and the determination of Islamic law and doctrine amongst Muslims. State law on such subjects can for example, be found in s. 21(1) of the Terengganu Administration of Islamic Law Enactment (State Enactment No. 4 of 1955) (State Enactment No. 4 of 1955) which provides:*
>
> *In making and issuing any ruling upon any point of Islamic Law or a doctrine in the manner hereinbefore provided the Mufti,*

> *shall ordinarily follow the orthodox tenets of the Shafeite Sect:"*[21] [Emphasis added]

Thus, Item 1 of the State List must be read as disjunctive classes of matters with respect to the Islamic religion. The author submits that this interpretation also reveals a consistency in the text of Item 1 of the State List and the Anglo-Muhammadan Laws of British Malaya.

On the second matter, Mohd. Azmi SCJ and Eusoffe Abdoolcader SCJ (dissenting) explained:-

> *"Mohd. Azmi SCJ: ...In determining whether s. 298A in pith and substance falls within the class of subject matter of "religion" or "public order", it is the substance and not the form or outward appearance of the impugned legislation which must be considered. ...The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs.*
>
> *...*
>
> *Eusoffe Abdoolcader SCJ: ...This rule envisages the examination of the legislation in question as a whole to ascertain its true nature and character in order to determine into what List it falls."*[22] [Emphasis added]

Thus, the pith and substance rule requires the court to first, examine the impugned law as a whole i.e. investigate its

---

21 [1988] 1 CLJ (Rep) 197 at 202h and 203f – f.

22 [1988] 1 CLJ (Rep) 197 at 200b – d and 209i – 210a.

object, purpose and design, second, to ascertain the impugned law's true nature, character and substance, and third, to determine the class of subject matter of legislation the impugned law really belongs to.

In 2008, the Federal Court decided *Sulaiman Takrib v. Kerajaan Negeri Terengganu*, pursuant to article 4(3) of the Constitution, where it held that State law offences which penalised defiance or disobedience of a *fatwa* are "offences regarding the 'precepts of Islam'", and that the State Legislatures have the power to make such laws.[23]

To the author, *Sulaiman Takrib*, while correct in outcome, suffers from an infirmity in reasoning. The State Legislatures do have the power to make such offences, only that these offences are not "precepts". Defiance or disobedience of a *fatwa* is not a precept of the religion of Islam because under Islamic legal tradition a *fatwa* is a *non-binding* opinion.[24]

This infirmity was the result of the court's failure to apply the pith and substance rule, and to interpret the English word "precept" according to an English dictionary (on the meaning of *text*) and in light of the history of Anglo-Muhammadan Laws in British Malaya (on the *context* of the classes in Item 1 of the State List).

Instead, the court merely adopted the opinions of *contemporary* expert witnesses on the religion of Islam on what the phrase "Precepts of Islam" meant,[25] and affixed that meaning to the word "precepts" in Item 1 of the State List in the Constitution.

In doing so, the court failed to *preserve* the Constitution; to give the relevant matter in Item 1 of the State List its plain and ordinary meaning as envisaged by its drafters; who specifically used the common noun "precepts", and not the proper noun "Precepts of Islam".

---

23 [2009] 2 CLJ 54 at [65].
24 Moustafa, "*Judging*," 152 (*n.* 3).
25 [2009] 2 CLJ 54 at [53] – [64].

Curiously, just 15 years prior, the Supreme Court in *Nordin Salleh v. Kerajaan Negeri Kelantan* saw another expert witness ascribe a different meaning to that same phrase.[26]

To emphasise, a written constitution falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made.[27] Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.[28] In this regard, it bears recollection that the Constitution was drafted in February 1957 by a commission of jurists[29] and subsequently revised and amended by June 1957 by a Working Party and legal draftsmen.[30] Their fundamental aids to drafting would have necessarily been English dictionaries (in ascertaining the meaning of *text*) *and* existing laws in Malaya (in ascertaining the *context* of matters in the legislative lists).

Thus, in interpreting the relevant *text* of the Constitution, it is to these aids that the Judiciary must have regard to, not the opinions of *contemporary* expert witnesses on religion. Contemporary expert witnesses on religion are no authority for the interpretation of a secular legal document drafted in 1957.

A *textual* analysis of the relevant matter in Item 1 of the State List demonstrates:

---

26 [1993] 4 CLJ 215 at 218f (right) – 291c (left).

27 *Hinds v The Queen* [1976] 2 WLR 366 at 371G, PC.

28 *Minister of Home Affairs v Fisher* [1979] 2 WLR 889 at 895E – F, PC.

29 *Report of the Federation of Malaya Constitutional Commission 1957* (London: Her Majesty's Stationery Office), 5, para 2. The Commission consisted of Lord William Reid (a Lord of Appeal), Sir Ivor Jennings (a Cambridge jurist), Sir William McKell (a former Governer-General of Australia), B. Malik (a former Chief Justice in India) and Abdul Hamid (a Judge in Pakistan).

30 *Constitutional Proposals for the Federation of Malaya 1957* (London: Her Majesty's Stationery Office), 3 – 4, paras 1 – 4. The Working Party consisted of the High Commissioner for the Federation of Malaya, four representatives of the Rulers, four representatives of the Government of the Federation, the Chief Secretary and the Attorney General.

Table 5. Textual analysis of 'Offences by persons professing the religion of Islam against precepts of that religion'

Text	Meaning
"offences"	"a violation of the law" (*Black's Law Dictionary* (Thomson West, 8th Ed., 2004), 1110: "offense")
"by persons professing the religion of Islam against"	"by Muslims against"
"precepts"	"1. An order to do a particular act; a command. 2. A general instruction or rule for action, a maxim; esp. an injunction (freq. a divine command) regarding moral conduct." (*The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press Oxford, 1993), 2324: "precept") "a standard or rule of conduct; a command or principle" (*Black's Law Dictionary* (Thomson West, 8th Ed., 2004), 1215: "precept")
"of that religion"	"of the religion professed by Muslims"

Source: Federal Constitution

Thus, *textually*, what the relevant matter in Item 1 of the State List envisages is that State Legislatures may create, and stipulate the punishments for, "offences" in respect of conduct

by Muslims which are against rules of conduct, commands or injunctions ordained by the religion of Islam.

Indeed, the word "precepts" is being interpreted *widely*. And in the context of the religion of Islam, will include matters beyond the Five Pillars, but the width of the said matter must necessarily be limited given the preclusion clause that follows i.e. "except in regard to matters included in the Federal List"; the effect of which is to preclude State Legislatures from creating "precepts" offences in regard to matters in the Federal List or dealt with by federal law (e.g. public order, commerce and health).[31]

The preclusion clause – "except in regard to matters included in the Federal List" – would be necessary, if not expected, given that Islam is not just a mere collection of dogmas and rituals but covers human activities relating to the legal, political, economic, social, cultural, moral and judicial.[32]

Thus, the preclusion clause conditions the extent of the States' legislative powers with respect to creating "precepts" offences.

A *contextual* comparison between the impugned laws in successive Federal Court decisions and the relevant Anglo-Muhammadan Laws of British Malaya only reinforces the textual conclusion above.

In *Fathul Bari v Majlis Agama Islam Negeri Sembilan*, the court held that the State law offence which penalised teaching religious matters without a *tauliah* (accreditation) was "an offence against the precepts of Islam", following a religious anecdote.[33] But this secular offence can be traced to section 9 of the Muhammadan Enactment 1904 [TABLE 1] which read:

> *"No person shall, except in his own house and in the presence of members of his own*

---

31 [1988] 1 CLJ (Rep) 197 at 212e

32 *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56C – D (left), SC.

33 [2012] 4 CLJ 717 at [17], [24] – [26].

> *family only, teach any religious doctrine, unless he shall previously have obtained written permission to do so from His Highness the Sultan; and any person who shall teach any religious doctrine without having obtained such permission, or who, having obtained such permission, shall teach any false doctrine, shall be liable, on conviction before a competent Court, to a fine not exceeding twenty-five dollars."*

In *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor*, the court held that the State law offence which penalised publishing a publication contrary to Islamic law is also an "offence against the precepts of Islam". [34] But this secular offence can be traced to section 14 of the Muhammadan (Offences) Order in Council 1938 of Negri Sembilan for instance [TABLE 2] which read:

> *"Any person who prints or publishes any book or document concerning the Muhammadan religion, whether such book or document is an original composition or a compilation from existing documents or both, without the written permission of the Majlis Meshuarat Ka'adilan dan Undang, or any person who sells, offers for sale, distributes or circulates any book, which, in the opinion of the Religious Committee appointed by His Highness the Yang-di-pertuan Besar in that behalf, contains precepts of the Muhammadan religion which are contrary to the recognized principles thereof shall be guilty of an offence and shall be liable on conviction to*

[34] [2016] 1 MLJ 153 at [27].

> *a fine not exceeding two hundred dollars or to imprisonment of either description for not more than one year, and such book or document shall be liable to forfeiture."*

In reality, the impugned laws in *Fathul Bari* and *ZI Publications* are not offences derived from precepts of the religion of Islam, but are offences with respect to 'religious teaching' and 'publications concerning the religion of Islam' respectively. On Merdeka Day, these matters came to be reflected in that class of Item 1 of the State List titled "the control of propagating doctrines and beliefs among persons professing the religion of Islam", and the State Legislatures do have the power to create "offences" in respect of this class of matter because *Item 9 of the State List* reads:

> *"Creation of offences in respect of any of the matter included in the State List or dealt with by State law, proofs of State law and of things done thereunder, and proof of any matter for purposes of State law."* [Emphasis added]

These are meant to be general State law offences, not specific "precepts" offences which could only be committed by Muslims.

To illustrate, consider the offences in sections 151 and 152 of Selangor's Administration of Muslim Law Enactment 1952 titled 'Intoxicating liquor' and 'Food in Ramadhan' respectively:

> *"**151.** Whoever shall in any shop or other public place purchase or sell or consume any intoxicating liquor shall be punishable with a fine not exceeding twenty-five dollars, or, in the case of a second or subsequent offence, not exceeding fifty dollars:*
>
> *Provided that it shall not be an offence for any person so to purchase or sell as agent*

for a principal who does not profess the Muslim religion.

152. *Whoever shall during the hours of daylight in the month of Ramadan purchase for immediate consumption, or sell to a person professing the Muslim religion for immediate consumption, or consume, any food, drink or tobacco shall be punishable with a fine not exceeding twenty-five dollars, or, in the case of a second or subsequent offence, not exceeding fifty dollars."*

These offences are derived from rules of conduct, commands or injunctions ordained by the primary religious text of the religion of Islam, the Qur'an, and which read:

"Chapter 2:219: They ask thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit." They ask thee how much they are to spend; say, "What is beyond your needs." Thus God make clear to you His Signs: in order that ye may consider -

Chapter 2:185: Ramadhan is the (month) in which was sent down the Qur-an, as a guide to mankind, also clear (Signs) for guidance and judgment (between right and wrong) so every one of you who is present (at his home) during that month should spend it in fasting, but if any one is ill, or on a journey, the prescribed period (should be made up) by days later. God intends every facility for you; He does not want to put you to difficulties. (He wants you) to complete the prescribed period,

> *and to glorify Him in that He has guided you; and perchance ye shall be grateful."*
> [Abdullah Yusuf Ali Translation]

On the other hand, some of the offences in Selangor's Administration of Muslim Law Enactment 1952 [TABLE 3] are certainly *not* offences in respect of "precepts" given there being, to the author's knowledge, no derivation from any rules of conduct, commands or injunctions ordained by the religion of Islam. One evident example would be section 163 of Selangor's Administration of Muslim Law Enactment 1952 titled 'Willful neglect of statutory duty' and which reads:

> *"**163.** Whoever, being charged by this Enactment with the duty of registering any matter or proceeding, or of making, preparing, keeping or maintaining any assessment list, report, book of account, estimate, register, counterfoil book, minute book, or subscription list, or of issuing any certificate, receipt or certified copy, refuses or willfully neglects or fails to perform such duty, or willfully performs the same in an unlawful or improper manner, shall be punishable with imprisonment for a term not exceeding three months or with fine not exceeding two hundred and fifty dollars."*

In that regard and for its failure to preserve the Constitution, the Federal Court decisions of *Sulaiman Takrib*, *Fathul Bari* and *ZI Publications* are fragile precedents; monoliths for misdirection to successive cases. More forcefully

stated by a prominent commentator earlier this year; *Sulaiman Takrib* and *Fathul Bari* "are not useful as precedents."[35]

Significantly, and remaining elusive to the legal consciousness of the Malaysian public, is the dissonance these Federal Court decisions create with respect to the powers of Parliament to confer the Muslim courts or *Syariah* courts within the States with jurisdiction in respect of "offences". This is significant because it was the intention of the drafters of the Constitution to limit the jurisdiction of the Muslim courts in matters of offences.[36]

Given that the impugned laws in *Sulaiman Takrib*, *Fathul Bari* and *ZI Publications* are not derived from rules of conduct, commands or injunctions ordained by the religion of Islam, but are merely in 'pith and substance' general State law "offences" in respect of "the determination of matters of Islamic law and doctrine and Malay custom" or "the control of propagating doctrines and beliefs among persons professing the religion of Islam" as included in Item 1 of the State List, these "offences" remain to be tried by the Subordinate Courts and not the *Syariah* courts.[37]

It would accordingly follow that prosecution for these general State law "offences" can only be instituted by the Attorney General,[38] and not the Chief Syarie Prosecutor of the State.[39] And most disturbingly, prosecutions under those

---

35 Dato' Seri Mohd Hishamudin Yunus, "Some Thoughts on the Federal Constitution in Relation to Offences Against the Precepts Of The Religion Of Islam", *Current Law Journal*, [2021] 1 CLJ i.

36 *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 at 90E – F (right), SC.

37 Sections 3(2), 85, 76, 82 and 87, Subordinate Courts Act 1948; Hishamudin, "Some Thoughts," viii.

38 Pursuant to Article 145(3) of the Constitution, the Attorney General has the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

39 *E.g.* Pursuant to section 78(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, the Chief Syarie Prosecutor

impugned laws in the *Syariah* courts within the States in Malaysia *presently* would arguably be void.[40]

Only with Parliamentary validation, through amendment of the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355), can this 56-year state of ultra vires[41] be remedied.

Parliament: A Call to Amend the Syariah Courts (Criminal Jurisdiction) Act 1965, and Uniform Laws

Parliament must be moved to have oversight over this matter through Select Committees, pursuant to Order 76 and 81 of the Standing Orders of the Dewan Rakyat. Similar procedures exist for the Dewan Negara. These Committees can be empowered to conduct inquiries and to request and demand written evidence or call people to testify at hearings in Parliament. Their findings are published in reports and can be debated in Parliament.

Given the breadth of the task of amending Act 355 and, it is the author's hope, the introduction of uniform laws for the administration of the religion of Islam,[42] Parliamentary Select

---

has the power exercisable at his discretion to institute, conduct or discontinue any proceeding for an offence before any Syariah court.

40 *Public Prosecutor v Mohd Noor bin Jaafar* [2005] 6 MLJ 745 at [36] – [41], HC.

41 *Black's Law Dictionary* (Thomson West, 8th Ed., 2004): "ultra vires": Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.

42 Pursuant to Article 76(1)(b) of the Constitution, Parliament may make laws with respect to the Muslim religion and Malay custom as enumerated in Item 1 of the State List; the said laws can come into operation in the States once adopted by a law made by the respective State Legislatures pursuant to Article 76(3) of the Constitution. The author submits that reform on Anglo-Muhammadan Laws is best achieved by introducing three uniform laws: (i) Muslim religious affairs (including doctrines and offences), (ii) Muslim personal law, and (iii) Muslim courts (including procedures and evidence). Conceptually, this would be similar to the National Land Code 1965 or the Local Government Act 1976 i.e. laws enacted for the purposes of promoting

Committees would ensure that the proposed amendments and uniform laws would be consistent with the Constitution and reflective of the necessity and expediency required by the Malaysian public and its Muslim majority in the 21st century.

These Committees may call expert witnesses (historians, lawyers, representatives of the Conference of Rulers, academicians on religion and representatives of civil society), provide a draft of the proposed amendments to Act 355 and uniform laws, and publish them in reports to inform the public and gather criticisms or comments from stakeholders. Parliamentary oversight over this matter would promote openness in government and in the administration of laws for Muslims in Malaysia, while preventing aspersions being cast that intended reforms to Anglo-Muhammadan Laws are partial, collusive or tainted with an ulterior motive.

The Committees must consider the public concerns and criticisms preceding the Muhammadan Offences Enactment 1904 and its 1938 re-enacting; the compulsion for mosque attendance on Fridays, clauses affecting the morals of women, the application to immigrants, the conflict with substantive Islamic law, the necessity to ensure orthodoxy, the control of sermons, religious matters and publication of religious books, and the prevention of unqualified persons from teaching and propagating. Additionally, the Committees must ascertain consensus on Muslim religious precepts, the enforceability of such precepts in 21st century Malaysia including proportionate punishments, and the effects of its enforceability on Malaysia's diverse communities of religion, race, place of birth, descent and gender. Finally, the Committees must consider the consistency of these precepts with Malaysia's constitutional framework, the application of general State law offences to persons who are not Muslims or minorities, and the moral concerns of dignity and privacy in enforcement.

---

uniformity of the laws between the States with respect to land and local government respectively.

Given the status of the respective Rulers as the Heads of the religion of Islam within each State[43] and the effect of the proposed amendments and uniform laws to the administration of the religion of Islam in the States, the author submits that there is a political duty on part of the Prime Minister and the Menteri-Menteri Besar or Chief Ministers to consult the Conference of Rulers before the relevant Bills are tabled in Parliament. More than anything, this consultation is the cornerstone for the co-ordination required in the adoption of the proposed uniform laws by the State Legislatures, and its subsequent execution by the State Executive Councils.[44]

All in, the author regards this legislative course of action as the minimum necessary to preserve Malaysia's democratic way of life with respect to the administration of the religion of Islam. More tellingly, it would reveal the commitment of our democratic institutions to the Rule of Law, in this case, to reforming the legal heritage that is the Anglo-Muhammadan Laws of British Malaya. And overwhelmingly, it would exemplify Malaysia as a Muslim nation of grace, wisdom and mercy.

---

[43] Preserved by Article 3(2) of the Constitution which provides that "[i]n every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him".

[44] Regulations of the National Council for Religious Affairs Malaysia 1968.

ENTITLEMENT OF NEPHEWS AND NIECES IN PARENTS' SIBLING'S INTESTATE ESTATE – AN OVERVIEW

S. V. Namasoo[*]

ABSTRACT

There is a dearth of case law whether the nephews and nieces are lawful beneficiaries of their uncle's and aunt's intestate estate. Probably because more often than not such matters might have been resolved amicably within the family circle. That is, of course, until the reported decision of the Court of Appeal in the case of *Gan Cheng Khuan v. Gan Kah Yang & 2 Ors* not so long ago, which held that nephews and nieces are not entitled to the estate of their late uncle on the grounds that their father had passed away before the intestate uncle. However, in the case of *Pulogasingam a/l Veerasingam v. Paralogavathy & 8 Ors* which was heard a few days before the aforesaid case, the Court of Appeal, on similar facts had held otherwise but unfortunately no reasons were given and neither is the case reported. In the light of the aforesaid, this article intends to explore the state of law of intestate succession involving parents' sibling's intestate estate vis-a-vis the nephews and nieces based on the provisions in the Distribution Act 1958 [Act 300 as modified by Act 1004A], the legal position in other jurisdictions and whether there is a need for legislative reform. Henceforth, all references to the words 'section' and 'the Act' refer to the Distribution Act 1958 unless stated otherwise.

Keywords: Malaysia, India, nephews, nieces, parents' intestate, estate

[*] Advocate and Solicitor (Malaysia), practising at Messrs S V Namasoo & Co. B Econs (Hons) (University of Malaya), LLB (Hons) (University of London), CLP.

INTRODUCTION

The Distribution Act 1958 (Revised 1983) is the governing law on the distribution of the intestate estate in Malaysia, in particular section 6 and to a certain extent section 7.

However, before looking at the scope of section 6, the parameters of its applicability in our country must be understood. It is stated in section 2 that section 6 only applies to the intestate estate of a non – Muslim in West Malaysia from 1st May 1958 and the State of Sarawak (except for the natives of Sarawak) from 12th December 1986.[1] The Federal Territories are included under West Malaysia by virtue of the meaning assigned thereto under section 3 of the Interpretation Acts 1948 and 1967. In the case of Sabah, intestate succession is solely governed by the Intestate Succession Ordinance 1960, which differs in material particularly when it comes to the rights of nephews and nieces vis-à-vis their parents' sibling's intestate estate which will be explored later herein.

If a deceased intestate's estate falls within the ambit of section 2 then section 6 dictates the scheme of distribution as stated in the heading thereto provided the domicile requirement as set out in section 4 is satisfied. In section 4(1), the distribution of movable property will be regulated by the law of the country in which the deceased person was domiciled at the time of death whereas in respect of immovable property it is stated in section 4(2) that distribution of immovable property will be regulated by the Act irrespective of where the deceased person was domiciled.

---

1 [P.U. 446/1998]

Comparative Perspective

Before analysing sections 6 and 7 of the Act as regards the legal position of the nephews and nieces *vis - a - vis* their intestate uncle‘s estate in Malaysia (except Sabah), a comparative look at other jurisdictions as regards the law in this area may help to shed some light on the discussion in hand. A look at some of these jurisdictions, including that of Sabah and some of the Commonwealth countries reveal that they have expressly provided in their legislations that issues of brothers and sisters are lawful beneficiaries of the uncle’s and aunt’s intestate estate unlike under the Act. The relevant sections from the respective jurisdictions are set out below for ease of understanding.

Sabah

In the land below the wind, section 7 Rule 6 of the Intestate Succession Ordinance 1960 of the State of Sabah (ISO 1960) reads as follows:

> If there are neither surviving spouse, descendants, nor parents, the brothers and sisters, or **children of brothers and sisters of the intestate** shall share the estate in equal portions between the brothers and sisters and the children of any brother and sister shall take according to their stock the share which he or she would have taken.

In the case of an intestate domiciled in Sabah or not domiciled in Sabah but left behind immovable properties, it is crystal clear that not only brothers and sisters living at the time of the death of the intestate but also the children of predeceased brothers and sisters can inherit a share of their late uncle’s and aunt’s intestate estate. It is further provided that according to section 6(a) ISO 1960 those related to the deceased by half-blood shall rank immediately after those of full blood like in England and Wales and therefore brothers and sister of half-blood and their children can also inherit.

Singapore

In Singapore, sections 5 and 7 of the Intestate Succession Act 1967 reads as follows:

Section 5. If a person dies intestate after 2nd June 1967, he being at the time of his death –

> (a)domiciled in Singapore and possessed beneficially of property, whether movable or immovable, or both, situated in Singapore: or domiciled outside Singapore and possessed beneficially of immovable property situated in Singapore,that property or the proceeds thereof, after payments thereout of the expenses of due administration as prescribed by the Probate and Administration Act (Cap. 251), shall be distributed among the persons entitled to succeed beneficially to that property of the proceeds thereof.

Section 7. In effecting such distribution, the following rules shall be observed:

Rule 6

If there are no surviving spouse, descendants or parents, the brothers and sisters and **children of deceased brothers and sisters of the intestate** shall share the estate in equal shares portion between the brothers and sisters and the children of any deceased brother or sister shall take according to their stocks and share which the deceased brother or sister would have taken.

Therefore, in Singapore the nephews and nieces can inherit their late uncle's and aunt's intestate estate.

Victoria, Australia

Section 52 of the Administration and Probate Act 1958 states as follows:

(1)Where a person in respect of his or her residuary estate **dies intestate** then subject to the provisions of section 51 and 51A the following provisions shall have effect with respect to such estate:

(f) (iii) No representation shall be admitted among collaterals after **brothers' and sisters' children.**

(v) Brothers or sisters or when they take as representatives of **brothers' or sisters' children shall take in priority to grandparents**;

(vi) where brothers' or sisters' children are entitled and all the brothers or sisters of the intestate have died before him or her such children shall not take as representatives and all such children shall take in equal shares.

Again, in Victoria, Australia the nephews and nieces are lawful beneficiaries of their late uncle's and aunt's intestate estate and clearly stated in priority to grandparents.

India

In India, section 47 of the Indian Succession Act 1925 expressly provides as follows:

Where intestate has left neither lineal descendant, nor father, nor mother. –

Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his **brothers and sisters and the child or children of such of them as may have died before him**, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration

(iv) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of

> kindred to him. They will each take one-eleventh of the property.

In India, again it is expressly provided with an illustration that nephews and nieces are entitled an equal share of their parents' sibling's intestate's estate.

In the above Ordinance and Acts, there is evinced a clear and express intention that nephews and nieces are beneficiaries of their late uncle's and aunt's intestate estate as opposed to our Act where there is conspicuous silence. Further in section 6, the phrase "living at the death of the intestate" exists. This all leads to the irresistible conclusion that nephews and nieces are not lawful beneficiaries of the uncle's and aunt's intestate estate under the Act.

Sections 6 and 7 of the Act

Before analysis, for ease of reference the entire section 6(1) is set out below and the relevant parts are highlighted in bold and for emphasis underlined. Similarly, section 7 has been set out in full because reliance is placed on it when mounting an argument that nephews and nieces are rightful beneficiaries of their uncle's and aunt's intestate estate even though the heading merely reads "Trusts In Favour of Issue and Other Classes Of Relatives Of Intestate":

Section 6 reads as follows -

> 1) After the commencement of this Act, **if any person shall die intestate as to any property to which he is beneficially entitled** for an interest which does not cease on his death, such property or the proceeds thereof after payment thereout of the expenses of due administration shall, subject to the provisions of section 4, **be distributed in the manner or be held on the trusts mentioned in this section**, namely –

(a) if an intestate dies leaving a spouse and no issue and no parent or parents, the surviving spouse shall be entitled to the whole of the estate;

(b) if an intestate dies leaving no issue but a spouse and a parent or parents, the surviving spouse shall be entitled to one-half of the estate and the parent or parents shall be entitled to the remaining one-half;

(c) if an intestate dies leaving issue but no spouse and no parent or parents, the surviving issue shall be entitled to the whole of the estate;

(d) if an intestate dies leaving no spouse and no issue but a parent or parents, the surviving parent or parents shall be entitled to the whole of the estate;

(e) if an intestate dies leaving a spouse and issue but no parents or parents, the surviving spouse shall be entitled to one-third of the estate and the issues the remaining two-thirds;

(f) if an intestate dies leaving no spouse but issue and a parent or parents, the surviving issue shall be entitled to two-thirds of the estate and the parent or parents the remaining one-third;

(g) if an intestate dies leaving a spouse, issue and parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter.

(h) subject to the rights of a surviving spouse or a parent or parents, as the case may be, the estate of an intestate who leaves issue shall be held on the trust`s set out in section 7 for the issue;

(i) if an intestate dies leaving no spouse, issue, parents or parents, the whole of the estate of the intestate shall be held on trust for the following persons living at the

death of the intestate and in the following order and manner, namely:

Firstly, on the trust set out in section 7 **for the brothers and sisters** of the intestate in equal shares; but if no person takes an absolutely vested interest under such trusts, then

Secondly, for the grandparents of the intestate, and if more than one survive the intestate in equal shares absolutely; but if there are no grandparents surviving, then

Thirdly, on the trusts set out in section 7 for the uncles and aunts of the intestate in equal shares; but if no person takes an absolutely vested interest under such trusts, then

Fourthly, for the great grandparents of the intestate and if more than one survive the intestate in equal shares absolutely; but if there are no such great grandparents surviving, then

Fifthly, on the trust set out in section 7 for the great grand uncles and great grand aunts of the intestate in equal shares.

(j) In default of any person taking an absolute interest under the foregoing provisions the Government shall be entitled to the whole of the estate except insofar as the same consists of land.

Section 7 reads as follows –

(1) Where **under the provisions of section 6**, the estate of an intestate or any part thereof is directed **to be held on the trusts** set out in this section for the **issue of the intestate**, the same shall be held in trust in equal shares if more than one for all or any of the **children** or **child** of the intestate living at the death of the intestate, who

attain the age of majority or marry under that age, **and** for all or any of the **issue** living at the death of the intestate, who attain the age of majority or marry under that age, of any **child** of the intestate who predecease the intestate, such issue to take through all degrees according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is still living at the death of the intestate and so capable of taking.

(2) Where **under the provisions of section 6** the estate of an intestate or any part thereof is directed to be held on the trusts set out in this section **for any class of relatives of the deceased other than issue** of the intestate, **the same shall be held on trusts corresponding to the trusts set out in subsection (1) of this section** for the issue of the intestate **as if such trusts were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.**

From the above, the following are clear about section 6. Firstly, it sets out the order of the beneficiaries and the manner of the distribution of an intestate's estate. Secondly, it is also very clear that brothers and sisters (siblings) are only beneficiaries if the intestate sibling has not left behind wife, issue or parent or parents at the time of his/her demise. Thirdly, there is also no express mention anywhere of nephews and nieces being beneficiaries unlike that for children of predeceased children, that is grandchildren because in section 3 "issue" is defined to mean "children and descendants of deceased children".

Then how does this argument that nephews and nieces are lawful beneficiaries of their uncle's and aunt's intestate estate come about? As will be seen in the case of *Gan Cheng Khuan*

and also in the unreported case of *Pulogasingam a/l Veerasingam* the arguments were premised on the wordings found in section 7 solely rather than on section 6.

The Case of Gan Cheng Khuan

In this case, the Appellant / Applicant was the administrator of the estate of Gan Cheng Keong (deceased) pursuant to Letters of Administration dated 2.6.2016. The deceased had passed away on 27.3.2009. The Respondents are the children of the late Gan Cheng Yee who was the eldest brother of the deceased and he had predeceased the deceased on 27.1.1979. The Appellant as Administrator filed an application in the High Court for determination, *inter alia*, whether only the brothers and sisters of the deceased **who were living at the time of the death of the deceased** were entitled to the deceased's intestate estate. The learned Judicial Commissioner (JC) ruled that the children of the predeceased brother, in other words the nephews, are entitled to a share of their late uncle's estate. On appeal, the Court of Appeal surmised the reasoning of the learned JC as follows,

> ….. that the applicable provision is subsection 7(1) of the Act and the pertinent words in subsection 7(1) to his mind are *"the share which their parent would have taken if living at the death of the intestate. He said these wordings would entitle the three interveners to their late father's share in the estate of the deceased".*

According to the Court of Appeal, the learned JC found support for his decision in an article entitled "The Distribution (Amendment) Act 1997 – Amendments to section 6 of the

Distribution Act 1958[2] and also the case of *Lim Geik Hoon v. Yap Bon Keat*[3] which held that the interest of a child who predeceased the intestate and who leaves issues is not forfeited by virtue of subsection 7(1) of the Act. Basically, the learned JC by reading together subsections (1) and (2) of section 7 found that the rights of inheritance of nephews and nieces should be the same as that of the grandchildren of an intestate deceased.

However, the appeal against the decision of the learned JC was allowed by the Court of Appeal and the grounds can be found in the following paragraphs of the judgment which due to their significance, are reproduced in its entirety as follows,

> [21] Now coming to the provisions of the Act itself, under subsection 6(1)(i) of the Act, if an intestate dies leaving no spouse, issue parents or a parent, the whole of the estate of the intestate shall be held on trust for the following persons living at the death of the intestate and in the following order and manner, namely: firstly for the brothers and sisters of the intestate in equal shares, then for the grandparents and so on. The emphasis is on the words **"living at the death of the intestate"**. (emphasis is mine)
>
> [22] In this appeal, the father of the Respondents died on 27 January 1979 and was no longer living on 27 March 2009, at the death of the intestate. Their late father did not qualify under 'the brothers and sisters of the intestate who were living at the death of the intestate' pursuant to subsection 6(1)(i) of the Act. Therefore, the Respondents cannot take under their late

---

2 [2004] JMCL 6
3 [2012] MLRHU 297

> father's share in the estate of the intestate under subsection 6(1)(i).
>
> [23] The Respondents had tried to come under subsection 7(1). Subsection (1) deal with trusts to be held for the issue of the intestate whereas subsection 7(2) provides for trusts in favour of other classes of relatives of the intestate. Both subsections of section 7 specifically refer to section 6 of the Act which means that both sections 6 and 7 must be read together. It is not in dispute that the Respondents are not the issue of the intestate but are the nephews of the intestate which come within 'other classes of relatives' of the intestate. If they are taking a share under their late father's entitlement in the estate of the intestate under section 7 of the Act, they are caught by subsection 6(1)(i).

So, according to the Court of Appeal the paramount requirement for a sibling to inherit the whole or part of the estate of a deceased sibling is, the said sibling must be alive at the time of the death of the intestate sibling because it is clearly stated so in section 6 of the Act. Nephews and nieces cannot stake a claim by mere reliance on the wordings in section 7 as the said section is subject to section 6 of the Act. Therefore, if the sibling had predeceased the intestate sibling, then his or her children, that is, the nephews and nieces are not entitled to a share of their uncle's or aunt's estate.

The Court of Appeal decision in *Gan Cheng Khuan* has certainly not only brought about clarity in this area of the law but seems to be in accord when viewed from accepted canons of statutory interpretation and the legislation it was modelled from.

Canons of Statutory Interpretation

It is clearly stated in section 6(1)(i) that if there is no spouse, issue, parent or parents, the whole of the intestate's estate shall be held on trust under section 7 for the **following persons living at the death of the intestate** (the phrase) and the first in line after the phrase are brothers and sisters.

Can the phrase be ignored in arriving at a decision? His Lordship Abdoocader SCJ in *Foo Loke & Anor v Television Broadcast Ltd & Ors*[4], said and I quote,

> *"The court ……. is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded …"*

Since the phrase cannot be ignored because it must have been put there by Parliament for a purpose.

That being the case, it is also an established principle, that legislative intent must primarily be ascertained by reference to the words used in the Act. This was clearly stated by the Federal Court In the case of *Krishnadas Achutan Nair & Ors. V. Maniyam Samykano*[5] as follows,

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to

---

4 [1985] 2 MLJ 35
5 [1997] 1 CLJ 636

> ascertain legislative intent *primarily by reference to the words appearing in the particular enactment.*

Also, if the words are plain and unambiguous the courts must give effect to its plain meaning as stated by His Lordship Vernon Ong Lam Kiat in *Jayakumar a/l Rajoo Mohamad v. CIMB Aviva Takaful Berhad*[6], as follows,

> Therefore in construing any statutes, the court will firstly, look at the words in the legislation and *apply the plain and ordinary meaning of the words in the statute*. If there is any ambiguity to the words used, the court is duly bound to accept it even it even if it may lead to mischief. But *where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way it considers reasonable*.

If the words are precise and unambiguous, as the phrase under consideration is, the literal rule of interpretation is best suited to determine the meaning. This was also stated with clarity in the case of *Dato' Seri Anwar Ibrahim v. PP*[7] as follows,

> *Prima facie*, the meaning of any piece of legislation is to be given a literal or grammatical meaning where the meaning is plain and clear. And this can be arrived at without consideration of other interpretative criteria. Parliament must be taken to mean what it says. The courts in interpreting statutes must not be seen to be splitting hairs or producing any inconsistency or absurdity.

More importantly, if there is reference to another provision in the same statute or even if there is none,

---

[6] [2015] 4 AMR 329
[7] [2010] 4 CLJ 265

interpretation of any provision in a statute must be done in a harmonious fashion so that there is consistency relating to the subject matter as a whole as stated by Lord Devey in *Canada Sugar Refining Co. v The Queen*[8]:

> Every clause of a statute *should be construed with reference to the context and other clauses in the Act*, so far as, possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

Therefore, if one views from the aforesaid canons of statutory interpretation the irrefutable conclusion is that the phrase cannot be ignored and it is susceptible to only one meaning as decided in *Gan Cheng Khuan* that brothers and sisters must be alive to claim their share of the deceased sibling's inheritance. That being the case how can their children acquire a right of inheritance.

Despite the clarity of the phrase in section 6, arguments in favour of nephews and nieces as lawful beneficiaries are usually mounted via section 7 *per se* and not section 6. The proponents argue, according to subsection 7(2), when a trust arises under section 6 for any class of relatives other than issues, such as brothers and sisters, then the estate of an intestate shall be held on trust **c**orresponding to that for issues as stated in subsection 7(1). This is done by substituting the words "children or child" that appears in subsection 7(1) with the words "members or member of a class of relatives of the deceased other than the issue", for instance brothers and sisters as stated in subsection 7(2). Let's see if this argument holds water when section 7 is read in the light of all the other relevant provisions in the Act, as stated in *Canada Sugar Refining Co. v The Queen.*

---

[8] [1898] AC 735

Let's start with the heading to section 7. The law permits looking at the heading to a section if it can aid in interpretation of provisions in an enactment. In *Public Prosecutor v Huntsman*[9], McIntyre referred to the judgment of Lord Goddard CJ in *Rex v Surrey (Northern Eastern Area) Assessment Committee*[10] and stated that the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have to ambiguous words. The heading to section 7 merely reads, "Trusts In Favour of Issue and Other Classes Of Relatives Of Intestate". Therefore, one can safely conclude that it only deals with the situation of a trust arising as directed under section 6 and that there is no indication that new category of beneficiaries can be created other than as directed under section 6.

Furthermore, subsection 7(1) is closely intertwined with subsection 6(1)(h) as the latter clearly states that "the estate of an intestate who leaves issue shall be held on trusts set out in section 7 for the issue". The trust envisaged under subsection 7(1) is only for minors unless they get married before attaining the age of majority and only for 2 categories of beneficiaries, namely *children* and *grandchildren*, as follows –

> i) The *first part* that says, "the same shall be held in trust in equal shares if more than one for all or any of the *children or child* of the intestate living at the death of the intestate".
>
> This part refers to the intestate deceased's own children who are alive at the time of his death.
>
> ii) The *second part* that says, "… and for all or any of the *issue* living at the death of the intestate, ……., of any *child* of the intestate who predeceases

---

[9] [1966] 1 MLJ 93
[10] [1948] 1 KB

> the intestate, *such issue to take* through all degrees according to their stock, in equal shares if more than one, the share *which their parent would have taken if living at the death of the intestate*…".
>
> This part refers to the grandchildren (from the word issue) of the deceased intestate who are alive at the time of his death.

As explained earlier since the word "issue' is expressly defined in section 3 to include "children and the descendants of deceased children" there is clear provision entitling grandchildren to inherit their grandparent's intestate estate and the law is clear as to their rights. See the cases of *Lim Geik Hoon v Yap Boon Keat*[11] and *Kamalah Devi Mukan lwn Amakumar G Sumarian & Yang Lain*[12].

However, proponents of the view that nephews and nieces are lawful beneficiaries of their uncle's and aunt's intestate estate rest their argument **solely** by reference to the second part of subsection 7(1) by substituting the words "issue" and "child" with nephews/nieces and brothers/sisters respectively. In fact, the learned JC in arriving at the decision in *Gan Cheng Khuan*, as pointed out by the Court of Appeal, must have fallen into such an error when considering that the pertinent words to his mind was "the share which their parents would have taken if living at the death of the intestate."

However, the fallacy of the above proposition, lies in the fact that the word "issue" is already defined to mean "children and the descendants of deceased children" in section 3 and consequently there cannot be room for it to also mean "the descendants of the deceased brothers and sisters". Further, as quite rightly pointed out by the Court of Appeal in *Gan Cheng Khuan* any trust that arises under section 7 is as directed under section 6.

---

[11] [2012] MLHRU 297

[12] [2020] MLRHU 1197

Also, if nephews and nieces are allowed, as submitted by the Appellant's Solicitor in *Gan Cheng Khuan* then in the event all the brothers and sisters of the intestate had predeceased the intestate and only left behind their issues than they will take in priority over the grandparents and that could not have been the intention of Parliament in the absence of any express provision to that effect.

Historical Perspective

The section 6 and subsections 7(1) and (2) is modelled to a great extent on the laws of England and Wales as found in subsections 46(1)(v) and 47(1)(i) and (3) of the Administration of Estates Act 1925 (AEA 1925). Although the relevant sections in both the aforesaid Acts are not *in pari materia* but the similarities are striking (as embolden) and reproduced below:

> 46(1) The residuary estate of an intestate shall be distributed in the manner or be held in trusts mentioned in this section, namely:-
>
> (v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall **be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely:-**
>
> **First, on the statutory trusts for the brothers and sisters of the whole blood** of the intestate; but if no person takes an absolutely vested interest under such trusts; then
>
> **Secondly, on the statutory trusts for the brothers and sisters of the half blood** of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survives the intestate, in equal shares; but if there is no member of the class; then and so on.

47 (1) Where under this Part of this Act the **residuary estate of an intestate**, or any part thereof, **is directed to be held under statutory trusts for the issue of the estate of the intestate**, **the same shall be held upon the following trusts**, namely: -

(i) In trust, **in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestates, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;**

(3) Where under this Part of this Act **the residuary estate of an intestate or any part thereof is directed to be held on statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate** (other than the provision for bringing any money or property into account) **as if such trusts** (other than as aforesaid) **were repeated with the substitution of references to the member or member of that class for references to the children or child of the intestate.**

In England and Wales, the aforesaid sections are with reference to residuary estate of the deceased but our Act deals with the entire estate of the intestate deceased, except in the case of partial intestacy.

However, on **30th October 1952** the entire subsection 46(1)(i) was amended and replaced by the provisions in the First Schedule of the Intestates Estates' Act 1952 [IEA 1952] and a new subsection 47(4) was inserted. The relevant parts of the IEA 1952 are set out in full as an **ADDENDUM.**

It is interesting to note that, when amendments were done to subsections 46(1)(i) and 47 of the AEA 1925 by way of IEA 1952, the **issues of brothers and sisters of whole blood** were specifically inserted as beneficiaries into subsections 46 & 47 AEA 1925. By such insertions the inference is that before the amendments the children of brothers and sisters of whole blood were definitely not considered beneficiaries of their uncle's or aunt's intestate estate. Otherwise, why would such amendments be necessary?

Our Act was enacted in 1958 but quite strangely, our Parliament elected to choose the provisions from the AEA 1925 only without the amendments done by IEA 1952. From the aforesaid election, one may infer that our Parliament had no intention of including the issues of brothers and sisters as beneficiaries of their uncle's or aunt's intestate estate. Further, in our Act we do not have a section similar to the subsection 47(4) inserted into AEA 1925 via IEA 1952.

CONCLUSION

In Malaysia, it is obvious that the right of nephews and nieces to inherit their intestate uncle's and aunt's estate would be dependent on whether the provisions of the Act or ISO 1960 applies. If it is the former, the nephews and nieces are not entitled but if it is the latter, they would be entitled. Imagine a non – Muslim bachelor (parents have predeceased him) domiciled in Sabah and has left behind immovable properties in

Sarawak and Sabah. The nephews and nieces cannot inherit the properties in Sarawak but can inherit the properties in Sabah. This anomalous situation should not be allowed to exist and must be rectified forthwith by legislative intervention as it is tantamount to discrimination and runs afoul of the equality before the law provision in Article 8 of the Federal Constitution of Malaysia. This anomaly can be easily rectified by defining brothers and sisters in section 3 to include "descendants of deceased brothers and sister" or to insert where relevant the words "children or child of the brothers and sisters". A further amendment needed to standardise the law of succession on intestacy between Sabah and the rest of Malaysia would be to cater for the rights of brothers and sisters of half-blood and their issues because such rights are accorded under section 6 ISO 1960.

ADDENDUM

The relevant amendments to AEA 1925 by way of IEA 1952 are set out below -

(2) For **paragraph (i) of subsection (1) of the said section forty-six** (which relates to the disposition of the residuary estate of an intestate leaving a surviving spouse) **there shall be substituted the following paragraphs** –

"(i) If the intestate leaves a husband or wife, then in accordance with the following Table:

TABLE

If the intestate –

(1)leaves - the residuary estate shall be held in trust for

(a)no issue, and the surviving husband or wife absolutely.

(b)No parent, or brother or sister of the whole blood, or **issue of a brother or sister of the whole blood**

(2)– not relevant –

(3)Leaves one or more not relevant of the following,

that is say, a parent, a brother or sister of the whole blood, or **issue of a brother or sister the whole blood**, but leaves no issue

(a) -not relevant-

(b) as to the other half –

(i) where the intestate leaves one parent or both the parents (whether or not **brothers or sisters of the intestate or their issue** also survive in trust for the parents absolutely or, as the case may be for the two parents in equal shares

(3) In accordance with subsection (2) of this section -

(c) at the **end of section forty-seven** of the principal Act there shall be added the following subsections –

"(4) References in paragraph (i) of subsection (1) of the last foregoing section to the intestate leaving, or not leaving, a member of the class consisting of brothers or sisters of the whole blood of the intestate and the **issue of brothers or sisters of the whole blood of the intestate** shall be construed as references to the intestate leaving, or not leaving, a member of that class who attains an absolutely vested interest.

MINORITY OPPRESSION AND REMEDY: A REVIEW OF *AUSPICIOUS JOURNEY SDN BHD V EBONY RITZ SDN BHD*

Choong Kwai Fatt[*]

Yap Sze Yinn[†]

ABSTRACT

An analysis on the law and relief for minority oppression as provided by Section 346 of the Companies Act 2016 as recently propounded in the decisive landmark case of the Federal Court in *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & 5 Ors* [2021] 3 AMR 777 wherein the court ruled that the imposition of liability on directors and third parties ultimately depends on the circumstances of the case.

Keywords: minority oppression, section 346 Companies Act 2016, majority rule

[*] Dr Choong Kwai Fatt is currently practising as an advocate and solicitor at Kwai Fatt & Associates. He holds a Bachelor degree in law (honours) from the University of London; a Master degree in Comparative Law and a Doctorate (PhD) in Taxation Law both from the International Islamic University of Malaysia

[†] Yap Sze Yinn is a Legal Assistant at Albar & Partners.

INTRODUCTION

Corporate sovereignty allows majority shareholders to chart the business direction of a company without prejudicing the interests of the minority shareholders. The Companies Act 2016 ("**CA 2016**") provides a statutory remedy for minority oppression in section 346 (previously Section 181 in the repealed Companies Act 1965 ("**CA 1965**")), allowing shareholders to dispose their shares to exit from a company or to wind up the company on just and equitable grounds.

However, in order to do so, minority shareholders bear the burden of proving that their interests have been compromised, adversely affected, abused or unduly prejudiced by the decisions and actions of the majority shareholders.

Section 346 CA 2016 confers upon the Court wide powers of discretion, and in exercising such powers, the Court would review and examine the factual matrix of the case before deciding on the appropriate remedy.

The Case of *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & 5 Ors*[1]

Auspicious Journey Sdn Bhd v *Ebony Ritz Sdn Bhd & 5 Ors*[2] was a landmark decision on minority remedy. It was decided by the Federal Court with a panel comprising Azahar Mohamed CJ (Malaya), Nallini Pathmanathan, Abdul Rahman Sebli, Zaleha Yusof and Zabariah Mohd Yusof FCJJ. The judgment was delivered by Nallini Pathmanathan FCJ on 9 March 2021.

In *Auspicious Journey Sdn Bhd*, the plaintiff (AJSB) and a Singaporean company, Hoe Leong Corporation Ltd (HLCL) incorporated Ebony Ritz Sdn Bhd (Ebony Ritz) as a joint venture company to acquire 49% of Semua International Sdn

---

1 [2021] 3 AMR 777
2 [2021] 3 AMR 777

Bhd (SISB), a company involved in the tanker chartering business for over 20 years at a consideration of RM44.1 million from Sumatec Resources Bhd (Sumatec).

The acquisition accorded Ebony Ritz, an irrevocable option to acquire not less than 2% of the shares in SISB, and AJSB an irrevocable option to acquire not less than 49% shares in SISB.

The directors of Ebony Ritz were Andy Kuek (nominated by AJSB) and Paul Kuah and James Kuah (Kuah brothers), nominated by HLCL.

To the unawareness of AJSB and Andy Kuek, HLCL entered into conditional sale with Sumatec to acquire 51% equity interest in SISB, unilaterally waived the 2% option of Ebony and disregarded the 49% share option which was supposed to be exercised by AJSB.

AJSB, being the minority shareholder, then filed a minority oppression claim that both AJSB and Ebony had been undermined and caused detriment due to the following:

(a) Ebony Ritz's 2% call option was expropriated by HLCL at Ebony Ritz's expense;

(b) AJSB's 49% call option was expropriated by HLCL and its nominee which caused detriment and was prejudicial to AJSB;

(c) In order to achieve the foregoing, HLCL and the Kuah brothers had utilised HLCL's majority powers to waive Ebony Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option; and

(d) HLCL and the Kuah brothers had also furnished an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a re-assignment of dividends previously payable such that all previous conditions were waived. This was clearly to the detriment of Ebony Ritz.

In summary, AJSB sought a declaration that HLCL as the majority shareholder, and the Kuah brothers as directors:

(a) Conducted the affairs of Ebony Ritz in a manner that was oppressive to AJSB and in disregard of its interests as a member of Ebony Ritz; and

(b) Had procured and/or caused to be done and/or threatened to procure or cause to be done to Ebony Ritz an event(s) which unfairly discriminated against, or which was or is prejudicial to AJSB as a member of Ebony Ritz.

The High Court made findings of facts that the matters set out in (a) – (d) were proven. This resulted in a finding in law that the affairs of Ebony Ritz were conducted in a manner oppressive to, and which discriminated against or prejudiced AJSB, the minority shareholder.

The High Court also decided that the most appropriate course of action was to wind up Ebony Ritz, having regard to the financial situation of Ebony Ritz and disagreement between the shareholders, it was not viable to keep it as a going concern. The relationship between the shareholders had broken down completely and it was neither just nor equitable for the company to proceed. Moreover, the ultimate purpose for the joint venture had not been and could no longer be met.

Significantly, the High Court took into account the fact that if a buy-out of AJSB's shares was ordered, SISB would be in breach of the provisions of the Merchant Shipping Ordinance 1952 ("**the MSO**") which requires that any company involved in the oil tanker industry to be a majority-Malaysian company.

The Court of Appeal held that to order a buy-out would unjustly enrich AJSB, and that it should not be allowed to use these proceedings to divest itself of a bad bargain. Further, the buy-out would alter Ebony Ritz's position because SISB would be a wholly-owned subsidiary of HLCL, a Singaporean entity, thus violating section 11 of the MSO.

The Court of Appeal also concurred with the High Court that the breakdown in the relationship between the parties was a factor that was relevant and correctly applied by the High Court to order that Ebony Ritz be wound up. The Court of Appeal additionally expressed the view that it would not be appropriate for the court to make a buy-out order when such an order would not be meaningful because the company was no longer a going concern.

The issue left determined by the Federal Court was whether the Kuah brothers in their capacity as directors of Ebony Ritz and the other two third parties ought to be made personally liable for their oppressive, detrimental and/or prejudicial conduct vis-à-vis the minority shareholder, AJSB.

The High Court and the Court of Appeal were of the opinion that the directors i.e. Kuah brothers had acted in the best interest of the company despite being in breach and in infringement of minority rights.

The background facts revealed that AJSB did not want to extend any further monies for the joint venture and even expressly refused to do so. This is to be contrasted with the conduct of HLCL in injecting no less than RM38 million into SISB in order to keep it afloat. It is an unavoidable inference that AJSB did not wish to throw good money after bad, in the sense that it was not prepared to come up with the requisite funds to purchase either its share of the 2% call option available to Ebony Ritz, far less the 49% call option in its own favour. The latter particularly would have required a considerable capital investment which it refused to make. It was a finding of fact that HLCL had injected RM50 million into SISB while AJSB did not make any corresponding contribution.

The Federal Court took into consideration and concurred with the finding of these facts by the High Court in determining whether liability ought to be attributed to the directors.

Nallini Pathmanathan FCJ concluded at p 826:

"(h) It follows from the foregoing that the acts of the majority shareholder and its nominated directors in Ebony Ritz were directed towards a salvage and warehousing situation as Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. While the acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to the minority shareholder Auspicious Journey, it remains an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighs in favour of a non-attribution of liability as the court is bound to consider what is "fair and just" in all the circumstances of the case.

(i) Taking into account therefore, the entirety of the circumstances as set out above, I am of the view that the High Court and the Court of Appeal concluded correctly that liability ought not be visited upon the directors or third parties."

Court's Action and Decision

In every suit involving minority oppression, the relationship between shareholders inevitably has soured due to differences in perspectives and opinion, disagreements and conflicts of interests. However, the Courts have maintained the view that winding up is considered a drastic and extreme remedy for oppression, as expounded by Lord Wilberforce in the cases of

Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd[3] and *Re Kong Thai Saw Mill (Miri) Sdn Bhd*[4].

In *Auspicious Journey Sdn Bhd,* the Federal Court upheld both the decisions of the Court of Appeal and High Court to wind up the company and held that although a buy-out may be efficient and practical, winding up should not be precluded as a remedy given the unique factual matrix of the case, which include:

(a) the requirement for compliance with the MSO;

(b) the subject company Ebony Ritz was insolvent;

(c) the complete breakdown of the parties' relationship; and

(d) Ebony Ritz being a failed joint venture and insolvent, a buy-out would lead to further disagreement on valuation, both in terms of the basis and the valuer and a buy-out would not yield a fair price.

Nallini Pathmanathan FCJ held at p 829:

> *"The courts have ordered a winding up where there is a deadlock between the parties such that the business cannot effectively continue. This signifies a breakdown in the relationship between the parties which is the case here. Coupled with the potential statutory contravention and Ebony Ritz's insolvent state, winding up is justified."*

Most importantly, the Federal Court held that minority oppression as a statutory remedy provided by the CA 2016 should not be used to salvage a bad investment, as would be the result if a buy-out was given in favour of AJSB.

Nallini Pathmanathan FCJ held at p 829:

---

3 (1977) 2 ACLR 307

4 [1978] 2 MLJ 227

> *"In asking for a buy-out of its shareholding in Ebony Ritz, it appears that Auspicious Journey is seeking, in effect, to escape from a bad bargain, or to recoup its investment in the joint-venture with Hoe Leong. The risk factor ancillary to an investment cannot be ignored. There is always a risk that an investment may not pan out in the way it was intended. In our view, ordering a share buy-out would be tantamount to insulating Auspicious Journey from the risk that their capital was subject to. This is certainly not what s 346 was meant to protect against."*

It is also trite that the essential remedy that is sought by the minority shareholders must never result in double recovery or prejudice the creditors or stakeholders of the company.

The Federal Court affirmed both the decisions of the Courts below in refusing to grant the relief of a buy-out order as sought by AJSB, as winding up of Ebony Ritz was the most appropriate remedy, taking into account the circumstances of the case prevailing at the time of the hearing and not at the start of the proceedings.

Legislation

Section 346 of CA 2016 provides for the statutory remedy on oppression. An act of oppression features both a personal wrong against the minority shareholder and corporate wrong against the company.

Section 346 of CA 2016 was legislated to ensure that the behaviour, actions and business decisions of the majority shareholders do not impute, cause or result in oppression, unfair dealings or unduly prejudicial results adversely affecting the interests of minority shareholders.

The predecessor of section 346 is Section 181 of the repealed CA 1965. They are identical in form. The Federal Court in *Auspicious Journey Sdn Bhd* acknowledged that

section 346 (then section 181) comprises one of the broadest and most comprehensive statutory shareholders remedies available in the common law world. It equips the Court with wide powers to provide the equitable relief to achieve a just and fair result.

Nallini Pathmanathan FCJ held at p 789:

> *"... Section 181 (now s 346) provides for the broad involvement of the courts in fashioning a wide-ranging series of remedies for the beleaguered shareholder/s who are able to establish oppression, prejudice or discriminatory acts or omissions by those in control, generally the majority."*

The Federal Court has also assessed the function and utilisation of the equivalents of section 346 of other jurisdictions, namely the United Kingdom, Canada and Hong Kong, and noted that these jurisdictions have interpreted and construed this section to confer wide powers of discretion upon the courts, empowering the courts to grant relief in ways which allow liability against directors in respect of their conduct of the affairs of the company or their acts or omissions in relation thereto.

The Federal Court then turned to the provisions of section 181(1) of CA 1965 (now section 346 of CA 2016) and noted that it has two limbs, which allow redress against majority shareholders, directors of the company in question, and also third parties who have occasioned, been instrumental or closely connected with the course of the oppressive conduct which disregarded or unfairly discriminated against the interests of the minority.

1.1 Section 181(1)(a)(Section 346(1)(a))

The wordings 'affairs of the company are being conducted' and 'the powers of the directors are being exercised in a manner oppressive' in section 181(1)(a)

indicate that directors who are entrusted with the management of affairs of the company could be held personally liable for oppressive conduct or disregard of the interests of the minority shareholders.

The Federal Court in *Auspicious Journey Sdn Bhd* firmly held that the construction of Sections 181(1)(a) and (2) gave the Court a wide discretion and freedom to impose personal liability on directors when such directors exercised their powers in such a way that oppressed the minority or disregarded the minority interests.

Section 181(1)(a) operates on two levels - against the board of directors and the majority shareholders, respectively. The 'affairs of the company' involves the company and its directors; whilst 'the power of directors' implicates the directors alone.

1.2 Section 181(1)(b)(Section 346(1)(b))

Section 181(1)(b) refers to an act of the company or a resolution of its members which unfairly discriminates against or is otherwise prejudicial to one or more of its members.

1.3 Section 181(2)(Section 346(2))

Section 181(2) provides for the powers of the Court in providing relief. The phrase 'without prejudice to the generality of subsection (1)' in section 181(2) denotes that it is not an exhaustive provision circumscribing the powers of the Court in providing relief. It allows a wide discretion on the Court to formulate a remedy that is just and equitable based on the factual matrix of the case. This would include placing liability on third parties such as directors who have participated in the act giving rise to minority oppression.

The Court may make an order as to:

(a) direct or prohibit any actor cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

In *Auspicious Journey Sdn Bhd*, Nallini Pathmanathan FCJ held at p 807:

> *"... Oppression, it should be borne in mind, is a minority shareholder remedy against those controlling the company. That will naturally include the directors who manage the company at the behest of the majority, as well as the majority itself. Therefore, relief against the directors is a natural and logical consequence, if they have indeed behaved oppressively to the minority. This is so by reason of the express provisions of s 181."*

The Federal Court held that section 346 is unique and worded distinctively. It is necessary to construe it as it reads, and not so as to be consonant with the legislation in any other jurisdiction particularly.

Nallini Pathmanathan FCJ held at pp. 807-808:

> *"... The Legislature saw fit to word s 181 (now s 346) as it states, and accordingly judicial construction must accord the provision the intention Parliament sought fit to enact, namely a wide and broad remedy encompassing not only the majority, or the*

> *company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it."*

In conclusion, section 346 is wide in scope and requires a liberal and broad interpretation to protect the interests of the minority shareholders with the adequate, just and equitable remedy depending on the circumstances of the case. Considering the demands of commercial and business realities, the Court in deciding the appropriate remedy, has to approach with discretion that is consistent with the intent of the legislature.

Principle of Majority Rule

A company is a legal construct created by legislation. Upon its incorporation, it has a legal identity, which is distinct and separate from its members and management. While the company is a separate legal entity, it comprises of two distinct organs, namely the shareholders and board of directors.

A company is managed by the board of directors, who are appointed by the shareholders to manage, operate and run the company. As decisions made in a company are based on the majority vote of its members, the company is controlled by its majority shareholders. The Federal Court in *Auspicious Journey Sdn Bhd* acknowledged the principle of majority rule and that it is not for the Court to interfere with the decisions of the majority.

In this regard, Nallini Pathmanathan FCJ observed at p 803:

> *"Majority rule supports the position that it is legitimate for a majority of the shareholders to control the company through the appointment of directors, who in turn, have the responsibility of running the business of the company. If the majority are unhappy with the directors then they oust them. If they are*

> *prepared to overlook the wrong, then the majority principle dictates that it is not for the court to interfere with that decision of the majority..."*

The Federal Court emphasised that the operation of the separate legal entity principle and majority rule would mean that the company has every legal capacity to sue and address or overlook any wrongdoings of the company, and it is not for the Court to interfere with the company, which includes also the majority shareholders' decisions, so as to not jeopardise the company's independence as a separate legal entity with its own business decisions and concerns.

Nallini Pathmanathan FCJ opined at p 803:

> *"The second principle of a company being a separate legal entity, separate from its members and its management, further insulated the conduct of the affairs of a company from being scrutinised by the Judiciary. The concern was that the courts were not equipped to deal with, or assess business decisions, and interference would jeopardise the company's independent status and business. Therefore, if the company itself chose not to sue, then it was generally not appropriate for others to sue on its behalf..."*

Minority Protection

CA 2016 accords minority protection as stated in section 346. However, minority shareholders always face an uphill task in demonstrating that the acts of the majority have been oppressive or detrimental to the interests of the minority shareholders.

Section 346 offers minority shareholders remedy against those controlling the company, i.e. majority shareholders and directors of the company. The activities or conducts of the

directors would be scrutinized by the Court for oppressive acts which are unfairly prejudicial to minority shareholders.

The common examples would be:

(a) dilution of the minority shareholder's shareholding through allotment of new shares to the majority shareholders;

(b) failure to obtain shareholders' approval for disposal of company property to the majority shareholders; and

(c) a scheme engineered to hive up the assets of the company at substantial undervalues.

In order to establish oppression, the occurrences of events have to tantamount to oppression which is detrimental to or prejudicial to the interests of minority shareholders.

The success of the claim premised upon minority oppression requires the minority shareholders to demonstrate that the majority shareholders have acted discriminatively or the affairs of the business have been carried out in a manner prejudicial to the minority shareholders. This is a question of fact which varies in every circumstance and is peculiar to each case.

Directors are Agents

CA 2016 recognises

a limited set of circumstances where a director of a company can be held personally liable, which include:

(a) the actions of a director prohibited by the statute;

(b) where a director breaches the fiduciary duty owed to the company;

(c) where a director is directly and personally involved in a wrongful act; and

(d) where a director has acted beyond the role as an agent of the company and personally benefited from the act.

The Federal Court in *Auspicious Journey Sdn Bhd* held that in relation to oppression matters, where the dispute is between shareholders, directors may be implicated to be personally liable for acts of oppression in situations that warrant the imposition of such liability as provided in section 346(1)(a) as it makes reference to the company itself as well as the directors' personal exercise of their powers which expressly provides for liability to devolve to directors themselves.

Furthermore, as section 346 involves internal disputes within the company which involves the directors and shareholders, section 346 would naturally implicate the directors who have actively participated or brought about decisions and acts which are deemed oppressive.

In this regard, the Federal Court in *Auspicious Journey Sdn Bhd* drew a sharp distinction between the concept of a director being an agent of the company in relation to contractual or tortious claims against the company, and the position of a director in the context of an oppression suit. Oppression claims can implicate the directors personally as they involve the acts of such directors in the conduct of the affairs of the company.

Extension of Liability

The net cast by section 346 is wide and comprehensive as it captures the acts of directors and third parties connected with oppressive acts.

In determining whether to extend personal liability to a director, the degree of the directors' involvement and participation in the alleged prejudicial acts, the knowledge of

impugned transactions, the unjust enrichment from the conduct will be considered.

In *Wilson* v *Alharayeri,*[5] the Supreme Court of Canada propounded a two-fold test in attributing personal liability to the errant director, which is as follows:

(a) the oppressive conduct must be properly attributable to the direction because of his or her implication in the oppression; and

(b) the imposition of personal liability must be fit in all the circumstances.

In respect of the second limb, the Canadian Supreme Court fashioned four instructive indicia as guidance:

(a) the oppression remedy request must in itself be a fair way of dealing with the situation;
(b) any order should go no further than necessary to rectify the oppression;
(c) any order may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders; and
(d) a Court should consider the general corporate law context in exercising its remedial discretion.

The Supreme Court concluded that the directors' liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances. It depends on the peculiar facts of each case.

In *Auspicious Journey Sdn Bhd*, Nallini Pathmanathan FCJ held at p 817 and 818:

---

5 [2017] 1 SCR 1037

> *"From the liberal construction accorded to s 181 CA 1965 (now s 346 CA 2016) above, and a detailed consideration of the jurisprudence from other jurisdictions, all of which seek to achieve the same underlying purpose of achieving fairness for minority shareholders where there has been abuse by the majority vide directors or third parties, it may be concluded that it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties."*

The legal test of attribution of liability to the directors enunciated by the Federal Court was succinctly explained as follows:

(a) Firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct alleged by the minority, to warrant the attribution of liability to a director or third party.

(b) The imposition of liability should be fair or just in all the circumstances of the particular case.

(c) In assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders. However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately

the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis.

(d) The attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct.

(e) Such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question.

(f) In exercising its powers under Section 181 CA 1965 (now Section 346 CA 2016) the court should bear in mind general corporate law principles, such that imposition of liability on directors does not become a substitute for other statutory or common law relief.

(g) In summary, the question for the court is whether in the context of Section 181 CA 1965, the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

The Federal Court affirmed that the ambit of Section 346 allows the imposition of personal liability on directors and third parties and emphasised with great length in the judgment that such attribution must be sparingly used and must be fair and just in accordance with the facts and circumstances of each case.

Nallini Pathmanathan FCJ opined at p 824:

> *"While s 181 CA 1965 (now s 346 CA 2016) permits the imposition of personal liability on directors and/or third parties, such imposition of liability must be fair and just in accordance with the facts and circumstances of the case."*

The Federal Court then applied the legal test based on the facts of the case and concluded that no liability should be imposed upon the directors or third parties as it would not be just and fair. The acts of the Kuah brothers may have been

prejudicial and detrimental to AJSB, but it was done to salvage the company. This is also in stark contrast to AJSB's reluctance to inject further monies to do the same and the Kuah brother's actions, though prejudicial, were viewed as justifiable.

CONCLUSION

The landmark decision of *Auspicious Journey Sdn Bhd* in acknowledging the legislature's intention and objective for CA 2016 to promote fair dealing and good corporate governance, set out the ambit of section 346 which provides for the wide discretion conferred upon the courts to provide for remedies against directors and third parties in cases of minority oppression. However, the Federal Court is also careful in exercising its discretion and emphasised that the imposition of liability on directors and third parties ultimately depends on the circumstances of each particular case and whether it is fair and just to allow for the devolvement of such liability onto directors and third parties who would otherwise be protected by the principles of the majority rule and separate legal entity.

LADD V MARSHALL: RELEVANT OR REDUNDANT?

Joshua Wu Kai-Ming

ABSTRACT

Ladd v Marshall [1954] 3 All ER 745, an English Court of Appeal decision, is a landmark decision on the introduction, admission of fresh and further evidence in a case where judgment has been delivered. Ladd v Marshall has been adopted by the Malaysian superior courts, including the Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70. However, subsequently, the Rules Committee introduced Rule 7(3A) of the Rules of the Court of Appeal 1994, Order 55, Rule 5A of the Rules of the High Court 1980, and Order 55, Rule 7 of the ROC 2012 with regard to the introduction/admission of fresh/further evidence at the hearing of an appeal. Notwithstanding that, some courts appear to still apply the principles in Ladd v Marshall rather than the requirements found in the relevant legal provisions. This paper seeks to argue that Ladd v Marshall is now redundant (at least in relation to introduction/admission of fresh/further evidence in the Court of Appeal and below) in light of the abovementioned legal provisions.

Keywords: fresh evidence, further evidence, court rules

INTRODUCTION

Ladd v Marshall [1954] 3 All ER 745 ("*Ladd v Marshall*"), an English Court of Appeal decision, is a landmark decision on the introduction/admission of fresh/further evidence in a case where judgment has been delivered.

Such is the impact of *Ladd v Marshall* that the Federal Court of Malaysia in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 ("*Lau Foo Soon*") adopted the test enunciated by Denning L.J. therein.[1]

Essentially, according to *Ladd v Marshall*, in order for the Court to introduce/admit fresh/further evidence, the Applicant must show:

> i. the evidence could not have been obtained with reasonable diligence for use at the trial ("Reasonable Diligence");
>
> ii. the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive ("Important Influence"); and
>
> iii. the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible ("Credibility").

The principles in Ladd v Marshall continued to be authoritative and applicable in Malaysian jurisprudence, some would argue even up to this day.

Notwithstanding the above, it is submitted that *Ladd v Marshall* is redundant (at least in relation to introduction/admission of fresh/further evidence in the Court of Appeal and below)[2] in light of the relevant legal provisions

---

1 *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70, at p. 71; see also *Chai Yen v. Bank of America National Trust & Savings Association* [1980] 2 MLJ 142

2 A case could be made that *Ladd v Marshall* [1954] 3 All ER 745 is still relevant with regard to the introduction/admission of fresh/further

which have been introduced *vis-a-vis* the introduction, admission of fresh and further evidence at the hearing of an appeal.

In 1998, through PU(A) 380/1998, Rule 7(3A) of the Rules of the Court of Appeal 1994 ("RCA 1994") was introduced and laid out the test for the introduction/admission of fresh/further evidence in appeals in the Court of Appeal:

> "(3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that—
>
> a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it ["Availability"], or that reasonable diligence would not have made it so available; and
> b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court ["Determining Influence"], as the case may be." (emphasis mine)

For the High Court, PU(A) 342/2000 introduced Order 55, Rule 5A of the Rules of the High Court 1980 ("RHC 1980") which mirrors the requirements in Rule 7(3) of the RCA 1994.

Although the RHC 1980 has been repealed and replaced by the Rules of Court 2012 ("ROC 2012"), Order 55, Rule 5A of the RHC 1980 can still be found in Order 55, Rule 7 of the ROC 2012.

For the introduction/admission of fresh/further evidence in appeals from decisions of Registrars of the High Court, a similar test is laid down as seen in Order 56, Rule 1(3A) of the ROC 2012.

---

evidence in the Federal Court as the Rules of the Federal Court 1995 does not contain any legal provision on the same (see e.g. *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2016] 3 MLJ 277, at paragraph 21)

Codification of *Ladd v Marshall*?

At first glance, the above legal provisions appear to have codified the test in Ladd v Marshall.

This was the position of the Court of Appeal in *Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176[3] where Low Hop Bing JCA (as His Lordship then was) held:

> *"The governing principles enunciated in Ladd v Marshall [1954] 3 All ER 745 have been accorded statutory recognition in r 7(1) and (3A)(a) of the Rules of the Court of Appeal 1994."*[4]

However, upon further inspection, it is evident that the test in the RCA 1994 differs from the test in *Ladd v Marshall* in the following aspects:

i. the RCA 1994 test introduced the Availability requirement as an alternative requirement to the Reasonable Diligence requirement (as seen from the use of the word "or");
ii. the RCA 1994 test raised the bar by introducing the Determining Influence requirement rather than sticking to Ladd v Marshall's Important Influence requirement; and
iii. the RCA 1994 test does not have the Credibility requirement.

(collectively referred to as the "Three Differences")

As such, it would only be accurate to say that the above legal provisions selectively codified a part of Ladd v Marshall namely the Reasonable Diligence requirement.

---

3 See also *Hong Leong Bank Berhad v Hsui Fong Machinery (M) Sdn Bhd and Others* [2009] MLJU 1387; and *Samsuri bin Baharuddin & Anor v Borneo Samudera Sdn Bhd* [2017] MLJU 1917, at paragraph 14

4 *Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176, at paragraph 7

Do the Legal Provisions Complement Ladd V Marshall?

In his dissenting decision in *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, Abdul Malik Ishak JCA had the occasion to say "... that rule 7 of the Rules of the Court of Appeal 1994 and Order 55 rule 5A of the RHC complement the three conditions of *Ladd v. Marshall*."[5]

His Lordship, however, did not take the time to explain how they could be complementary when the Determining Influence requirement has a higher threshold than the Important Influence requirement.

Additionally, taking His Lordship's remarks on face value, this would mean that the Credibility requirement applies today notwithstanding the Rules Committee's explicit refusal to incorporate the same into the relevant legal provisions.

Ironically, in the same dissenting judgement, His Lordship also said:

> *"We now have rule 7(3A) of the Rules of the Court of Appeal 1994 and we should vigorously apply it to the present appeal at hand instead of resorting wholesale to Ladd v. Marshall."*[6]

In view of the Three Differences, it would be more prudent to take the position that only the requirements found in the relevant legal provisions should be considered in applications for the introduction/admission of fresh/further evidence.

---

5 *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, at paragraph 83

6 *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, at paragraph 52

What is the Legal Position Today?

Abang Iskandar JCA (now CJSS) in *Ting Sieh Chung @ Ting Sie Chung v Hock Peng Realty Sdn Bhd* [2016] 5 MLJ 342 ["Ting Sieh Chung"] remarked that *Ladd v Marshall* still represents the legal position on the matter to this day:

> *"The principle to be applied in admission of fresh evidence during the pendency of an appeal is clearly stated in the English case of Ladd v Marshall [1954] 3 All ER 745. Our very own apex court in the case of Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 had embraced the same principle which still represents the legal position on the matter till to this day."*[7] (emphasis is mine)

With all due respect to Abang Iskandar JCA (now CJSS), *Lau Foo Soon* and *Ladd v Marshall* should only be recognised as being the correct legal position pre-selective codification.

Even up until recently, some Court of Appeal judges are applying *Ladd v Marshall* and *Lau Foo Soon* in absentia Rule 7(3A) of the RCA 1994.[8]

With the introduction of Rule 7(3A) of the RCA 1994, Order 55, Rule 5A of the RHC 1980, and Order 55, Rule 7 of the ROC 2012, especially in light of the Three Differences, the Courts should be prioritising and applying the test found therein.

---

7 *Ting Sieh Chung @ Ting Sie Chung v Hock Peng Realty Sdn Bhd* [2016] 5 MLJ 342, at paragraph 24

8 E.g. see *Tan Ah Thong v Che Pee @ Che Hanapi bin Saad and Anor* [2009] MLJU 984; *Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors* [2018] 1 MLJ 346, at paragraph 14; *Yahya bin Timbon & Ors v Kumpulan Parabena Sdn Bhd* [2020] 5 MLJ 774, at paragraph 6