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SCOPE, AMBIT AND CONTRACTUAL OBLIGATIONS OF A COMPANY'S CONSTITUTION

Choong Kwai Fatt*

Yap Sze Yinn**

INTRODUCTION

The incorporation of a company under the Companies Act 2016 creates a separate legal entity on the company, distinct from its members or directors of company. The governing rules between members and the company are spelt out in the constitution of a company under the CA 2016 regime and in the Articles of Association of a company under the Companies Act 1965 which has since been repealed.

THE CONSTITUTION

The Companies Act 2016 (CA 2016) came into force on 31 January 2017. Under the CA 2016, the Memorandum and Articles of Association of a company incorporated under the Companies Act 1965 (CA 1965) will form its constitution as clearly provided by Section 34(c) of CA 2016:

Section 34 provides:

'34. Form of constitution

The constitution of a company:

(c) in the case of a company registered under the corresponding previous written law, is the memorandum and articles of association as originally registered or as altered in accordance with the corresponding previous written law,

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and includes any alteration or amendment made under sections 36 or 37, if any, as the case may be.'

Whilst the Memorandum of Association states the objectives and structure of the company, setting up the parameters of its business activities, the Articles of Association on the other hand regulates the conduct of the members' affairs, whether it be amongst themselves or with the company.

Section 33 of CA 2016 lays down the legal effects of the constitution by providing that the constitution, once adopted, would be binding upon the company and its members.

Section 33 provides:

'33. Effect of constitution

1. The constitution shall, when adopted, bind the company and the members to the same extent as if the constitution had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the constitution.
2. All moneys payable by any member to the company under the constitution shall be a debt due from such member to the company.'

Contractual Relationship Conferred upon by the Constitution

The notional signing and sealing of the constitution create a contractual relationship between the company and the members. However, it does not extend to, nor govern, professionals dealing with the company such as auditors, lawyers or consultants.

In *Eley* v *Positive Government Security Life Assurance Co Ltd.*,[1] the plaintiff, being a solicitor who drafted the articles of association of the defendant company had purportedly incorporated the mandatory engagement of his services in the said articles of association.

Article 118 of the articles of association in question provided:

'Mr William Eley, of No 27, New Broad Street, in the city of London, shall be the solicitor to the company, and shall

1 (1876) 1 Ex D 88.

> transact all the legal business of the company, including Parliamentary business, for the usual and accustomed fees and charges, and shall not be removed from his office except for misconduct.'

The company acted on the article for some years but subsequently chose to cease their engagement of the plaintiff's services. The plaintiff sued the company for breach of the article, and for its enforcement as a contract. The court of first instance held that the articles of association did not create any contract between the plaintiff and the company, following which the plaintiff then appealed to the Court of Appeal.

The Court of Appeal affirmed the decision and equally held that the substratum of the Articles of Association only binds the members. It has no application to non-members. The said articles of association did not create any contract between the solicitor and the company. Article 118 was invalid to begin with as there can be no contractual rights conferred to persons other than the shareholders.

Lord Cairns LC, with whom Lord Coleridge CJ and Mellish LJ concurred, held at p 90:

> "This case was first rested on the 118th article. Articles of association, as is well known, follow the memorandum, which states that objects of the company, while the articles state the arrangement between the members. They are an agreement *inter socios*, and in that view, if the introductory words are applied to article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now, so far as that is concerned, it is *res inter alios acta*, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against the company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a mandate to the directors, in either case it is a matter between the directors and shareholders, and not between them and the plaintiff…"

The Court of Appeal's decision in *Eley* emphasised the trite proposition of law that the constitution confers rights only on members. It is trite principle that no article can form a contract between the company and a third party, such as a solicitor, director, auditor etc.

MEMBERS' RIGHTS

In *Hickman* v *Kent or Romney Marsh Sheep-Breeders' Association*,[2] a provision in the articles provided that disputes between the association and any of its members should be referred to arbitration. The plaintiff, Hickman, initiated an action complaining of various irregularities in the affairs of the association, including the refusal to register his sheep in its published flock book and he sought an injunction to restrain the company from expelling him. In response, the defendant company countered with proceedings to stay the plaintiff's action and to refer the dispute to arbitration in accordance with its articles of association. The court held that the articles as a contract compelled Hickman to take the matter to arbitration.

The Chancery Division further emphasised that the contractual rights within the articles of association is jealously guarded for members exclusively and such rights do not extend to non-members, even if such non- members become members subsequently.

Astbury J held at p 897 and 900, 897 and 900 respectively:

> "… An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist alike by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose favour such an article is inserted does not enable him to sue the company on such an article to enforce rights which are *res inter alios acta* and not part of the general rights of the corporators as such ..."

A Member's Right to Enforcement of the Articles

A member that wishes to enforce a right in the Articles of Association must demonstrate that the enforcement of a right which is common to

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2 [1915] 1 Ch 881.

himself and all other members. It would not be applied in a dispute between the company and the appellant in the capacity as a director.

In *Beattie* v *E & F Beattie Ltd.*,[3] the English Court of Appeal held that the articles of association bind members of a company in their capacity as members. In this case, the individual being a member and also the director attempted to enforce the arbitration clause contained in the articles of association, when he was sued by the company for the return of certain sums of money which was alleged had been improperly paid to him. The Court of Appeal ruled that since he was being sued in his capacity as a director and not that of a member, he could not rely on the argument that the Articles of Association had conferred the right to him.

CONTRACTUAL RIGHTS OF MEMBERS

The Articles of Association constitute a contract between the members and the company which is also enforceable as a contract among the members inter se.

In *Rayfield* v *Hands,*[4] the plaintiff being a member of Field Davis Ltd, sought to enforce Article 11 of the company's articles of association to compel the directors of the company to acquire his shares by claiming that Article 11 created a contractual relationship between the members of the company as vendor and the directors as purchasers.

Article 11 provided that:

> 'Every member who intends to transfer shares shall inform the directors who will take the said shares equally between them at fair value…'

The High Court held that the directors are bound by Article 11 as it governs the contractual rights between members. The article governs not the relationship of the members and the directors but the contractual relationship between members and such directors as members.

Vaise,y J. held at p 6:

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3 [1938] Ch 708.
4 [1960] Ch 1.

> "Now the question arises at the outset whether the terms of Article 11 relates to the rights and of members inter se, or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that, in my judgement, the relationship here is between the plaintiff as member and the defendants not as directors but as members."

In *Malayan Banking Ltd* v *Raffles Hotel Ltd.*,[5] the Federal Court of Singapore held that the Articles of Association does not in any circumstances constitute a contract between the company and non-members. The Court refused to allow *Malayan Banking Ltd* to enforce the provisions in the articles of association.

In this case, Raffles Hotel Ltd assigned the reversion of the lease on 'Raffles Hotel Singapore' to Malayan Banking Ltd. Raffles Hotel Ltd had a provision in its articles of association that the lessor may appoint a director of the company. Relying on this provision, Malayan Banking Ltd being a lessor of a property acted on its own directors' resolution unilaterally to be appointed as a director of Raffles Hotel Ltd, relying on Article 77 of the plaintiff's articles of association which empowers the lessor to appoint a director of the plaintiff's company.

The High Court held that Article 77 of the Articles of Association did not confer any contractual rights on Malayan Banking Ltd to appoint itself as a director of Raffles Hotel Ltd. As Malayan Banking Ltd was not a shareholder of Raffles Hotel Ltd, the lessor is an outsider with no legal standing to enforce the article as it strictly only applies to the relationship between the members and the company. This was upheld by the Federal Court.

JWD Ambrose, J. in his leading remarks in the Federal Court's decision opined at p 165:

> "it is, however, suggested that Article 77 constitutes an offer capable of acceptance and that nothing beyond mere nomination of a director is required by the article. I am unable to accede to this suggestion. It is further suggested that as the defendant company is in the position of a defendant and not of a plaintiff it can rely on Article 77 without depending on a contractual right. I am unable to accept this suggestion for the

5 [1965 – 1967] SLR(R) 161.

> reason that the defendant company cannot, even as a defendant, take advantage of the power purporting to be given by Article 77 without having recourse to some contract between the defendant company and the plaintiff company conferring on the former a right to appoint a director of the latter."

The Federal Court concluded that the reliance on Article 77 for the appointment of Malayan Banking Ltd as a director of the company was invalid and flawed with no legal effect.

The Federal Court laid down the prerequisites that for any outsider to rely on the articles of association, firstly, there must be a contractual right which must first be conferred to the outsider by reference to the said article in the articles of association, which would then allow the outsider to enforce such a contractual right.

Ambrose J reiterated the proposition of law firmly at p 166:

> "For the above reasons I come to the conclusion that Article 77 of the plaintiff's articles of association is not binding on the plaintiff company as between the plaintiff company and an outsider; that without having recourse to a contractual right the defendant company, being an outsider, cannot take advantage of a power purporting to be given by Article 77; and that the defendant company's appointment of itself as a director of the plaintiff company in exercise of the power purporting to be given to it by Article 77 is invalid, that is, has no legal effect. In the result, I would dismiss this appeal with costs."

THE MALAYSIAN APPLICATION

In *Perdana Petroleum Berhad* v *Tengku Dato' Ibrahim Petra & 3 Ors*[6], the four individuals were previous directors of the plaintiff company who attempted to seek recourse from the company for legal cost incurred in defending lawsuits commenced against the directors by the company on various allegations of breach of directors' duties. The

6 [2022] 1 AMR 136.

plaintiffs relied on Article 170 of the of the company's Articles of Association, which provided as such:

> '170. Indemnity Every director, managing director, agent, auditor, secretary, and other officer for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgement is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust.'

The Court of Appeal held that the articles of association related to the rights of members inter se which constitutes a contract between the members and the company and among the members inter se. The articles of association are not terms in a contract between a company and a third party whether it be the directors or otherwise.

Darryl Goon JCA opined at p 159:

> "In our view, without more, the articles of association do not become terms in a contract between a company and third party (i.e. person or persons other than its members qua members), whether it be officers of the company or otherwise."

Likewise, the High Court in *John & Ors* v *PriceWaterhouse (a firm) & Anor*[7] reiterated the well-established strict principle of law that the articles of association only bind the company and its members inter se and not third parties including the auditors.

Ferris J opined at p 960:

> "The articles of association of a company constitute a contract between the members of the company *inter se* and between each of them and the company but they do not, without more, constitute a contract between the company and its directors or auditors."

In *Globalink Telecommunications Ltd* v *Wilmbury Ltd & Ors.*,[8] the third defendant Mr Hall, a director of a company, sought an indemnity against the company in respect of his liability for his own

7 [2002] 1 WLR 953.
8 [2003] 1 BCLC 145.

costs which were incurred in an action against him that was struck out upon his application. The indemnity sought was based on Article 18 of the company's articles of association which provided that:

> a, "director ... shall be indemnified out of the assets of the company against all losses or liabilities which he may sustain or incur in or about execution of the duties of his office or otherwise in relation thereto, including any liability incurred by him defending any proceedings ... in which judgment is given in his favour ...".

Stanley Burton J then stated as follows at p 154:

"The articles of association of a company are as a result of statute a contract between the members of a company and the company in relation to their membership. The articles are not automatically binding as between a company and its officers as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and a director. They will be so incorporated if the director accepts appointment "on the footing of the Articles," and relatively little may be required to incorporate the articles by implication."

Similarly, in *Perdana Petroleum Berhad*, the Court of Appeal noted that the said Article 170 was not incorporated into the contract of appointment of the directors. The directors have failed to present any binding contract incorporating the article on which basis they rely upon to claim indemnity from the company.

Daryl Goon JCA insightfully remarked at pp 165-166 as follows:

> "The question that arises in the current case is therefore, was article 170 incorporated, either expressly or impliedly, as a term in the respondents' appointment as directors of the appellant?

The Respondents and Article 170

It is significant in this case that nothing pertaining to the circumstances of the respondents' appointment as directors of the appellant was alluded to or given in evidence.

There was no mention made in the evidence of the respondents of their appointment as directors, no evidence as to whether there was any written or oral contract of appointment or employment, no evidence whether their appointments were in writing or evidenced in writing. There was also no evidence led on record as to whether the respondents were all shareholders of the appellant.

In short there was no reliance on any contractual basis, or how article 170 might have been incorporated as a term of any such contract in the respondents' attempt to enforce article 170, save for the fact of its existence, and that they were former directors of the appellant.

The affidavits filed in respect of the respondents' application were focused only on the indemnities claimed and the suits in respect of which the indemnities were sought."

The Court of Appeal concluded that these directors could not enforce the provision in the Articles of Association as there was no contractual basis for such enforcement without a binding contract between the directors and the company incorporating the article.

In *Perdana Petroleum Berhad*, the Court of Appeal held that the legal status of the Articles of Association of a company be it under the purview of CA 2016 or CA 1965, remains the same – the articles of association is a contract between members inter se, and that between the members and the company.

THE ROLE OF THE COMPANY SECRETARY

The presumption and misconception that the directors as officers of the company could rely on the articles in the Articles of Association to enforce its provisions has now been clarified in the Court of Appeal's decision of *Perdana Petroleum Berhad*. Directors in Malaysia have more reason to look for other means to ensure that they are sufficiently protected from pitfalls and liabilities since merely having indemnity provisions in a company's constitution does not suffice.

As the company secretary is the officer ensuring that the company is compliant with statutory and regulatory requirements, the company secretary has to be well aware of the effects of a company's constitution on the relationships it governs. The articles in the Articles of Association concerning the directors' rights and benefits have to be

incorporated into the contract of employment or the appointment letter of the director as the mere appointment of a director does not allow him to enforce the articles against the company he owes such duties to. This is especially so when the courts have deemed it little to no effort to incorporate the articles into a contract of employment as enunciated in the Court of Appeal in *Perdana Petroleum Berhad* at p 159:

> "In our view, without more, the articles of association do not become terms in a contract between a company and a third party (i.e. person or persons other than its members qua members), whether it be officers of the company or otherwise. However, the articles may be incorporated into such contracts, expressly or impliedly. It is also the case that courts take the view that comparatively little is required for the incorporation of a term in the article that provides indemnity to an auditor or director who is appointed. However, it remains necessary that there be an incorporation of the particular article in question."

The company secretary is a key advisor of the company and the role's importance and significance in navigating compliance in a challenging business environment has been acknowledged by the Ministry of Finance, thus allowing specified tax deduction of company secretary fees of RM5,000 which has taken effect in 2015 [PU(A) 336/2014] but later diluted to the new aggregate tax deduction of company secretary and tax fees to RM15,000 in 2020 [PU(A) 162/2020].

CONCLUSION

Whilst it may be understandable for directors, or any other officer of a company, to presume that the provisions of the constitution of a company and its ensuing protection and indemnities, would extend to them, the Malaysian position at law echoes those of other jurisdictions have asserted otherwise. Directors and such other officers of the company would be well advised to incorporate indemnification terms into their contracts of employment with the company or to set out such terms clearly in a separate contract in order to avoid ambiguity when conflict arises.

SELECTING OUR JUDGES: DOES MALAYSIA NEED A CHANGE?

Jenita Kanapathy *

Nadhratul Wardah Salman **

ABSTRACT

Around the world, the judicial selection method can be divided into four categories: selection of judges by the Head of State on advice of the executive, selection of judges by the Parliament or Legislative Assembly, selection of judges by public election and selection of judges by the judicial council or commission. The most common type of judicial selection in the world is by the Head of State on advice of the executive. Most Commonwealth countries, including Malaysia, have selected judges through this method. In 1988, Malaysia witnessed a controversial event in the history of its judiciary which later infamously became known as the 1988 Constitutional Crisis. The Malaysian Parliament was eventually forced to establish the Judicial Appointments Commission to assuage public distrust in the Malaysian courts following the VK Lingam Video Clip Scandal in 2009. However, the legislators fell short of amending the Federal Constitution to dilute the powers of the Prime Minister in the selection of the higher court judges and as a consequence the powers of judicial selection vested in the Judicial Appointments Commission are practically limited to provision of candidates to the Prime Minister for his discretion. This article provides an overview of the different types of methods of judicial selection of judges in the higher courts adopted worldwide and discusses the best-fit method for Malaysia to emulate in the selection of judges to the higher courts.

Keywords: judicial selection method, higher courts, judges, Malaysia

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INTRODUCTION

There are four main selection methods of judges in the higher courts which are selection made by the Head of State or Executive, selection via the Parliament or Legislative Assembly, selection by way of election and selection by a judicial council or commission.[9] The most widely practiced method of judicial selection around the world is the selection by the Head of State. Most Commonwealth states adhere to this method but the selection mechanism in terms of consultation, recommendation and final affirmation of the judges differ from state to state.[10] Figure 1 below depicts the different types of judicial selection method around the world.

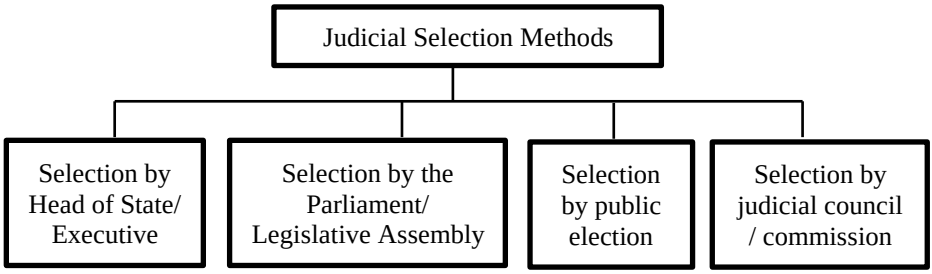

Figure I: Types of Judicial Selection Method of Higher Courts around the World

SELECTION OF JUDGES BY THE HEAD OF STATE

Historically, the selection method of judges by the Head of State finds its root in the Westminster system from the United Kingdom before the passage of the Constitutional Reform Act in 2005.[11] In this type of judicial selection method, the Head of Country or State usually

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9 Bari, M. Ehteshamul, "The Substantive Independence of the Judiciary Under the Constitutions of Bangladesh and Malaysia: A Comparative Study" (Masters Dissertation: University Malaya, 2011).

10 Hale, Lady. "Judges, Power and Accountability, Constitutional Implications of Judicial Selection." Speech given at the Constitutional Law Summer School, Belfast, (2017).

11 Go, Julian. "Chapter Four. A globalizing constitutionalism? Views from the Postcolony, 1945–2000." In Constitutionalism and Political Reconstruction, pp. 89-114. Brill, 2007.

appoints the judges on advice of the elected Head of the Executive. The Head of the Executive is typically empowered to advise on the selection of judges either for all levels of the court system or only the highest courts or only on the selection of the Chief Justice who is highest ranking judge in the court system. In some jurisdictions, the Head of State is given unilateral powers to select judges. This type of method is practiced by Brunei Darussalam whereas the judicial appointment by the Head of State in jurisdictions such as in India and South Korea requires that the Chief Justice be consulted. In countries in the British West Indies such as Guyana, Bahamas, and Belize, agreement of the leader of the opposition is mandated before appointment of judges. The judicial selection in Israel by the Head of State adheres to a commission-based method. The commission that recommends the candidates comprises of representatives from different groups of interest such as senior judges, members of the legislature, the government, and the members of the bar. A similar approach is also adopted in Nigeria where a Judicial Council provides advice to the Head of State on the selection of judges. In Chile, the Head of State acts on the proposal by the panel of nominees from the Supreme Court whereas in the United States, the President appoints based on the consent of the Senate.

Presently, it is uncommon for nations to legally confer the powers of selection of judges exclusively in the hands of the Head of the Executive. Statistics showed that only 19% of the Commonwealth nations have a judicial selection system which confers exclusive powers to appoint judges to all levels of the court system whereas 23% of the Commonwealth nations confine executive power of judicial selections to mere selection of the Chief Justice and 8% of Commonwealth nations empower the executive to select judges of the highest court.[12] Figure 2 below depicts the different types of selection of judges by the executive in Commonwealth nations.

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4 Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (Report of Research Undertaken by Bingham Centre for the Rule of Law). London: The British Institute of International and Comparative Law, (2015).

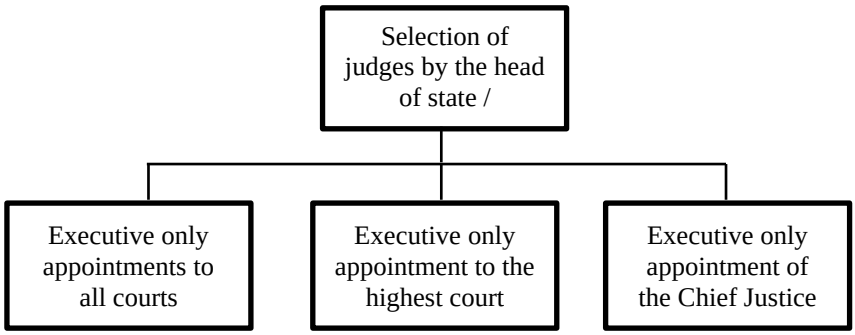

Figure II: Types of Selection of Judges by the Head of State / Executive

It is also observed that over time, the Commonwealth jurisdictions have established judicial commissions or councils in their judicial selection system and this system is now practiced in post-apartheid South Africa and Namibia. Malaysia embraced the judicial commission-based system by the enactment of the Judicial Appointment Commission Act in 2009 as the Malaysian Government was forced to establish the Judicial Appointments Commission to assuage public distrust in the Malaysian courts following the VK Lingam Video Clip Scandal. The current trend especially in Commonwealth nations exhibits an inclination to adopt a selection method which is commission-based with exceptions to countries such as Australia, Bangladesh, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore, and Tuvalu that still adhere to a judicial selection system by the Head of State on advice from the executive.

According to the Universal Declaration on the Independence of Justice, participation in judicial appointments by the executive is consistent with judicial independence as long as decisions are made in consultation with members of the legal profession and the judiciary, or by a body in which both members participate.[13] Judiciary should also be involved in the selection process to ensure that the best candidates

[13] Article 2.14(b) of the Montreal Declaration 1983 which was adopted at the first World Conference on the Independence of Justice held at Montreal on 10 June 1983.

are selected for the judicial positions.[14] By this way, the independence of the judiciary is further strengthened. Furthermore, seeking the views of the bar may aid in the selection of suitable candidates for judicial office as they can provide valuable insights for the evaluation of the character and ability of lawyers nominated as candidates.[15]

SELECTION OF JUDGES BY PUBLIC ELECTION

The election of federal judges in Switzerland, some states in the United States, and the selection of judges for the German Federal Constitutional Court are all examples of jurisdictions that practise judicial selection by way of public election.[16] Proponents of this method of judicial selection argue that because judges are required to submit themselves to the electorate on a regular basis, they become more accountable for their performance while in office. This also provides direct access to the public for the selection the judges, and the elected judges would directly reflect the character of the society which the judges serve.[17] On the other hand, critics of this election method contend that the members of the public are not sufficiently knowledgeable to assess the qualification and competence of candidates which could lead to the selection of incapable judges.[18] This selection method also compromises the independence of judges as they would be more concerned of portraying a more populous stance that would appeal to the masses rather than being accountable to the rule of law and dispensation of justice, to ensure better likelihood of victory in re-elections. Judges would also need to finance their election campaigns which would entail substantial amount of sponsorship from external sources such as local lawyers. This would lead to conflict of

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14 Baar, Carl, and Ontario Law Commission. "Comparative Perspectives on Judicial Selection Processes." Appointing Judges: Philosophy, Politics and Practice, edited by Ontario Law Commission 140 (1991).

15 Gibbs, Sir Harry. "The Appointment and Removal of Judges." Federal Law Review 17, no. 3 (1987): 141-150.

16 Shetreet, Shimon. Who Will Judge: Reflections on the Process and Standards of Judicial Selection. 1986.

17 Webster, Peter D. "Selection and retention of judges: is there one Best Method." Fla. St. UL Rev. 23 (1995): 1.

18 Baar, Carl, and Ontario Law Commission. "Comparative Perspectives on Judicial Selection Processes." Appointing Judges: Philosophy, Politics and Practice, edited by Ontario Law Commission 140 (1991).

interest and gives the appearance of impartiality when such sponsors appear before the elected judges in court. A research on 54 non-unanimous decisions in the Illinois Supreme Court showed that judges who were elected frequently made predictable partisan decisions.[19]

SELECTION OF JUDGES BY THE PARLIAMENT OR LEGISLATIVE ASSEMBLY

In one out of five commonwealth nations, there is involvement from the Parliament or Legislative Assembly in the affirmation of candidates selected for judicial positions by a judicial appointments commission or council.[20] This was observed mostly in Commonwealth nations from Africa and South Asia such as Ghana, Kenya, Malawi, Maldives, Nigeria, Pakistan, Rwanda, Sierra Leone, Uganda, and Zambia. This method of selection allows the government to first choose the candidates of their choice who are then presented to the Parliament or Legislative Assembly for approval.[21] This type of selection method assures check and balance as well as transparency as it is open to the public eye.[22] However, some scholars disagree with this method of appointment by an assembly of politicians. They believe that this kind of judicial selection method would create avenues for political considerations in the selection process.[23] Professor Stephen believes that there is a risk of partisan politics and cronyism in the legislative

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19 Presser, Stephen B. "The Case for Judicial Appointments." University of Toledo Law Review 33 (2002): 353-392.

20 Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (Report of Research Undertaken by Bingham Centre for the Rule of Law). London: The British Institute of International and Comparative Law, (2015).

21 Akkas, Sarkar Ali. "Appointment of judges: A key issue of judicial independence." Bond L. Rev. 16 (2004): i.

22 Devlin, Richard, A. Wayne MacKay, and Natasha Kim. "Reducing the democratic deficit: representation, diversity and the Canadian judiciary, or towards a triple P judiciary." Alta. L. Rev. 38 (2000): 734.

23 Kirby, Michael. "Modes Of Appointment And Training Of Judges: A Common Law Perspective." Journal of the Indian Law Institute 41, no. 2 (1999): 147-159.

selection method.[24] One school of thought holds that even the selection of judges should not be subjected to parliamentary approval at all because it threatens the judiciary's independence.[25] What is most dreaded is the way that political inclination of judges may be the central consideration to select judges especially when the political party of the executive enjoys majority control in the Parliament or Legislative Assembly.[26]

In 2003, the Constitutional Affairs Committee of the United Kingdom proposed in their report that the principal objective to improve judicial independence from political interference would not be achievable if Parliament is empowered to directly influence the selections of judges.[27] Although judicial selection through Parliament approval may promote an emphasis on the selection criteria of judges, the Venice Commission, a Council of Europe advisory body on constitutional matters, has emphasised that this type of judicial selection method poses a risk of political consideration which can outweigh the merits of the judicial candidates.[28] Past confirmation proceedings before the US Senate have also seen several Supreme Court candidates being subjected to intrusive enquiries of their personal lives, as well as intense pressure to reveal their opinions on substantive legal issues.[29] Ronald Dworkin, a leading constitutional scholar, alleged that these Senate hearings of judicial candidates are

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24 Presser, Stephen B. "The Case for Judicial Appointments." University of Toledo Law Review 33 (2002): 353-392.

25 Chibesakunda, Lombe Phyllis, "Judicial Independence: The Challenges of the Modern Era". Conference Report, (2014).

26 Devlin, Richard, A. Wayne MacKay, and Natasha Kim. "Reducing the democratic deficit: representation, diversity and the Canadian judiciary, or towards a triple P judiciary." Alta. L. Rev. 38 (2000): 734.

27 Constitutional Affairs Committee, Judicial Appointments, and a Supreme Court (final court of appeal), First Report Session 2003-4, HC 48-I: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf.

28 Ahrens, Helen, Horst Fischer, Verónica Gómez, and Manfred Nowak, eds. Equal Access to Justice for All and Goal 16 of the Sustainable Development Agenda: Challenges for Latin America and Europe. Vol. 22. LIT Verlag Münster, 2019.

29 Wittes, Benjamin. Confirmation Wars: Preserving Independent Courts in Angry Times. Rowman & Littlefield Publishers, 2009.

futile exercises and a parade of missed chances.[30] Therefore, it would be right to say that this sort of judicial selection method may be paradoxical as judges are not lawmakers and ought not to be treated in a manner as being equivalent to legislators.

Notwithstanding this, several Commonwealth nations have adopted this method of parliamentary affirmation in their judicial selection system. In Uganda, for example, a parliamentary committee is tasked with the responsibility for the assessment of candidates and is required to submit a report for the consideration to the Parliament which usually does not question the proposal of the parliamentary committee.[31] In some countries, specific safeguards were constitutionalised to ensure that political considerations are not taken into account during the selection of candidates. The selection method in Pakistan also adopted a Parliamentary affirmation method. However, in Pakistan, the Parliamentary committee is responsible to affirm the proposal presented to them by an independent Judicial Commission. The Judicial Commission in Pakistan consists of a balanced representation from the members of the government and the opposition. Article 175A of the Constitution of Pakistan allows non-acceptance or disapproval of any judicial candidate if 75% of the Pakistan Parliamentary Committee do not support the selected judicial candidate. The Constitution in Pakistan introduced this safeguard to ensure that the recommendation of the independent Judicial Commission is not easily overturned by the members of Parliament or Legislative Assembly. Also, in Zambia Article 140 of Zambian Constitution states that judges are appointed by the President based on recommendation of the Judicial Service Commission and subject to ratification by the National Assembly. Figure 3 below depicts the safety measures implemented by some states adopting the judicial selection method by the legislature.

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30 Dworkin, R. (2010, August 19);"The Temptation of Elena Kagan" The New York Review.

31 Parliamentary Rules of Procedure 2012 requires the membership of the Committee to be representative of the political-party composition of Parliament (rule 151). The Committee may also summon candidates to appear before it to gather more information (rule 156 (7)– (8)). Importantly, once the Committee reaches a decision, Parliament as a whole does not debate it (rule 158).

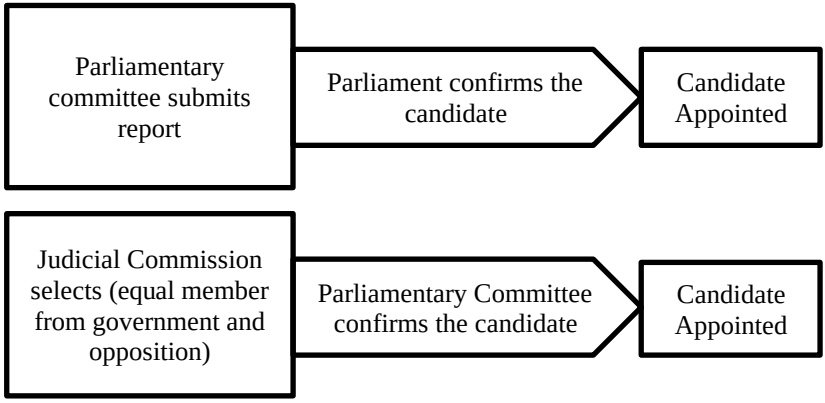

Figure III: Types of Safety Measures Implemented in Countries Adopting Judicial Selection Method by the Legislature

The selection of judges with Parliamentary affirmations proffers the legitimacy to the courts with the assurance that the best candidates have been selected to occupy this institution of justice through a rigorous process of assessment but appropriate safeguards in the Constitution must be expressly and carefully crafted to avert politicisation and deadlock in this selection method amongst legislators.

SELECTION BY A JUDICIAL COUNCIL OR COMMISSION

The utilisation of an autonomous body such as the Judicial Service or Appointment Commission in selecting judges is the most popular framework amongst the commentators of the contemporary world.[32] A commission-based body is the method adopted to shortlist and select judges in 81% of Commonwealth nations.[33] Some examples of Commonwealth nations that practise this commission-based judicial

[32] Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." Bond L. Rev. 16 (2004): i.

[33] Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (Report of Research Undertaken by Bingham Centre for the Rule of Law). London: The British Institute of International and Comparative Law, (2015).

selection method are Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organization of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia. This method of judicial selection is found to be working well in many states in the United States.[34] Many non-Commonwealth countries like the Netherlands and Israel also adopt the commission-based system in their judicial selection mechanisms. Judicial commissions are usually entrusted to shortlist and recommend shortlisted candidates.[35] This type of judicial selection method also mitigates the influence of executive interference in the selection of judges and also would preserve public trust in the commission as long as the selections remain fair and non-discriminatory.[36] The commission-based method is the most effective judicial selection method to assure public trust in the courts as compared to other types of judicial selection method particularly in the selection of higher court judges.[37] However, the effectiveness and public trust in this type of commission-based judicial selection system relies very much on the make-up and also the authority given to such commission.[38]

JUDICIAL SELECTION METHOD IN MALAYSIA

Under Article 122B, the Malaysian Federal Constitution confers the constitutional power on the Prime Minister to advise the Yang di-Pertuan Agong ("YDPA") on the selection of all judges of the higher courts. This includes the selection of the Chief Justice, who is the highest-ranking judicial officer in Malaysia, the President of the Court

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34 Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." Bond L. Rev. 16 (2004): i.

35 Lavarch, Michael. Judicial Appointments: Procedure and Criteria. 1993.

36 Malleson, Kate. The new judiciary: The effects of expansion and activism. Routledge, 2016.

37 Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." Bond L. Rev. 16 (2004): i.

38 Malleson, Kate. The New Judiciary: The Effects of Expansion and Activism. Routledge, 2016.

of Appeals, the Chief Judge of Malaya, and the Chief of the High Court of Sabah and Sarawak. The YDPA fulfils a perfunctory role in the appointment of the judges in Malaysia. The real power of selecting the top judges of the land is vested in the Prime Minister, notwithstanding, the requirements of Article 122B (4) of the Federal Constitution that mandates the Prime Minister to respectively consult the Chief Justice, the President of the Court of Appeal or the Chief Judges of the respective High Courts in the selection of the Malaysian higher court judges. Nevertheless, the Prime Minister is not obligated to follow the advice given by the top judges.

In 1988, Malaysia witnessed a controversial event in the history of its judiciary which later infamously became known as the 1988 Constitutional Crisis. In this event, the then Lord President, Tun Salleh Abas was subjected to a tribunal hearing for alleged misconducts and removed from his judicial office. Some articles refer to it as the "sacking" of Tun Salleh Abbas. The removal of Tun Salleh was purported to be a result of a fratricidal battle between two factions in the ruling party at that time which led to the courts declaring the party as unlawful. This was said to have sparked a series of judicial appointments that saw almost two decades of questionable impartiality in the Malaysian Court rulings.[39] The second controversy in the Malaysian judiciary was the uncovering of a video recording exposing the wheeling and dealing of judicial positions at the highest level of the Malaysian judiciary. This expose was very damaging to the already eroded trust of the Malaysian public towards the integrity of the Malaysian Courts. Following this, the Malaysian Parliament passed the Judicial Appointments Commission Act 2009 to form the Judicial Appointments Commission (JAC). The Judicial Appointments Commission Act of 2009, among other things, specifies the membership, duties, and operating procedures of the commission as well as the qualifications that applicants must meet before being recommended to the Prime Minister for consideration.

The formation of this commission was a progressive move by the Malaysian legislators to increase the level of independence in the

[39] Kevin YL Tan, "Judicial Appointments in Malaysia" In Securing Judicial Independence" in The Role of Commissions In Selecting Judges In The Commonwealth, edited by Hugh Corder and Jan Van Zyl Smit, 114-136. South Africa: Siber Ink, 2017.

selection process of higher court judges in Malaysia and consequentially to restore the public confidence in the judiciary. Instead of the traditional "tap on the shoulder" practice, the JAC provides an extra layer of safety measure to make sure that candidates are sufficiently vetted. The formation of the JAC also reduces the unethical involvement of outsiders or entities in the judicial selection process, as revealed by the VK Lingam Video Clip scandal. Prior to the implementation of the Judicial Appointments Commission Act 2009, , the Prime Minister was required by the Federal Constitution to consult with the quadrumvirate of the top judges concerning the appointment of the respective judges under their charge before tendering his advice to the YDPA. Subsequent to the Judicial Appointments Commission Act 2009, the Prime Minister is practically no longer required to consult the quadrumvirate of top judges individually, as they are all members of the JAC and are considered to have been consulted once the JAC submits its recommendations to the Prime Minister. However, the legislators fell short of amending the Malaysian Constitution to dilute the powers of the Prime Minister in the selection of the higher court judges and as a consequence the powers of judicial selection vested in the JAC are practically limited to provision of names of candidates to the Prime Minister for his discretion.

THE BEST WAY FORWARD

After considering the various types of judicial selection structures used throughout the world and in the Commonwealth countries, the question of whether Malaysia's judicial selection method should be retained or changed arises. Selection of higher court judges by way of election is a far cry from our intention to have a more independent judiciary, whereas the judicial selection by the legislature would also not be a viable option for Malaysia given the history of political consideration in the selection of judges in the Malaysian higher courts. Furthermore, the current political landscape and the suspension of Parliament during the pandemic by the Government do not augur well for the judicial selection method by the Parliament. Therefore, this type of judicial selection is also not viable in Malaysia.

The next question is whether the current appointment by YDPA on the advice of the Prime Minister with the JAC’s involvement pursuant to the Judicial Appointments Commission Act 2009 would be

the best selection method for Malaysia. The answer is a resounding – NO. As previously stated, the reality is that the selection of the judges of higher courts in Malaysia is purely vested in the Prime Minister. Therefore, this concentration of power in the executive can still pose as an inherent risk of abuse and the historical errors can still be repeated when the Prime Minister's position is challenged, be it within his own political party or in the Parliament.

Finally, the commission-based method appears to be the best method to guarantee a more independent method of selecting judges to the higher courts. However, the degree of independence of a commission is heavily dependent on the extent of executive involvement in the commission and the selection method both in terms of its administration and legal implications. The best way forward in Malaysian context is to amend the Federal Constitution to ensure that the real power of judicial selection is conferred to the commission as opposed to the Prime Minister or confined only to the top judges of the land. In the current system, the Prime Minister's discretion in having the final say in the appointment of higher court judges and requesting an unlimited number of standby candidates for selection would have to be reformed. 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 of the higher court judges.

CONCLUSION

The discussion and analysis of the various types of selection methods adopted by different countries above illuminates the benefits and inadequacies of various judicial selection models and can guide us in determining the most viable method in the selection of higher court judges in Malaysia. It is incumbent on the Legislature to create a suitable legal framework by way of constitutional amendment to implement the best practices and standards in the selection of higher court judges that can be free from interference from the executive in order to regain the public trust in the Malaysian judiciary like in the past era of Tun Mohamed Suffian and Tan Sri Eusoffe Abdoolcader.

ASSESSING THE LEGALITY OF SELLING LANDED PROPERTIES USING A DEBENTURE DESPITE A NATIONAL LAND CODE CHARGE

Mark Goh Wah Seng*

ABSTRACT

Debentures are commonly required by financial institutions as security for loans given to companies. In most cases, these debentures will take the form of a fixed and/or floating charge on all the company's assets; which may comprise either wholly of movable or immovable properties or a combination of both. Where immovable properties are secured, the financier may either sell the company's land as the agent of the company via the debenture or it may proceed with a judicial sale under the National Land Code 2020 (NLC). Between both these options, the financier will almost always opt for the faster route, which is to sell the charge property through a Receiver and Manager appointed under the debenture. Although the earlier method may seem an easier route and one which is also approved by the Federal Court in *Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor[2003] 2 MLJ 193*, it is argued that the legality of this process is questionable and is fraught with various legal issues, in particular the possibility of the sale breaching S24(b) and S24(e) of the Contracts Act 1950. This article explores and analyses the possible breaches which a debenture holder may commit if he proceeds to sell a charged property through the Receiver and Manager (even as attorneys for the company) despite the existence of a NLC charge and the consequences thereof. The approach taken by this article is a doctrinal analysis of judicial decisions, qualitative and legal doctrine approach.

Keywords: debenture, Receivers and Managers, illegality, public policy

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INTRODUCTION

The nature and purpose of a "security document" were clearly described by the Court of Appeal in *Malayan Banking Berhad v Worthy Builders Sdn Bhd & Ors*[1] in the following manner:

> "…a security document means a document that provides a security interest in the property or asset (whether tangible or intangible) that is pledged as collateral. In the event the borrower defaults, then the security document is acted upon at the discretion of the lender to salvage whatever losses incurred. In essence, the security document does not form the primary contractual relationship between the lender and the borrower. It only comes into effect when there is a default."

In short, a creditor is assured of some (or in certain situations the whole) payment of this money if he holds a security document of the debtor.[40]

Companies (unlike individuals) are privileged to obtain loans by issuing debentures. They may issue various types of debentures which are secured through various means. The securities include (but are not limited to mortgages, charge(s) over the company's assets, liens, and pledges.[41] Although a debenture, is nothing more than an express acknowledgment of a debt made by the company towards its creditors

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1 [2015] 3 MLJ 791 at para 11

40 "Speaking generally, security is anything that makes the money more assured in its payment or more readily recoverable as distinguished from eg. a mere IOU which is only evidence of a debt. The word is not confined to a document that gives a charge on specific property but includes personal securities for money." Chetumal v Noorbhoy 107 IC 213, AIR 1928 Sind 89.

41 "The types of debentures include debenture stock, convertible debentures, or the appointment of trustees (in cases where debentures are issued to the public),… In the context of company law, the term "charge has a broader meaning…it includes a mortgage or any agreement to give or execute a charge or mortgage and it also extends to other securities such as lien and pledges." Krishnan Arjunan and Low Chee Keong, Lipton & Herzberg's Understanding Company Law In Malaysia (LBC Information Services 1995) 176-178, 181-182.

(what we would call an 'IOU' in common parlance), it is also recognised as a security document.[42]

Although section 2[43](the definition section) of the Companies Act 2016 broadly defines a 'debenture' to include,

> "debenture stock, bonds, sukuk, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not.."

nowhere in the Companies Act 2016 is the word 'debenture' clearly defined.

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[42] "It is my considered opinion that the debenture is not a disposal of Chi Liung's undertaking or property as contemplated under s 132C(1). It is nothing more than a security for the repayment of the loan by Chi Liung which is a valid form of security within the realm of commercial transaction pertaining to loans granted by financial institutions to their borrowers." Liwa Holdings Sdn. Bhd v Chi Liung Holdings Sdn. Bhd & Ors [1998] 4 MLJ 465 at 472. See also Nasser Hamid, Company Directors & The Law (CLJ Publication 2013) 191.

[43] Companies Act 2016, s2 defines "debenture to include debenture stock, bonds, sukuk, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not." The term "Debenture" is defined more extensively in s 2(1) of the Capital Markets and Services Act 2007 (CMSA) as follows: "debenture includes debenture stock, bonds, notes and any other evidence of indebtedness of a corporation for borrowed monies, whether or not constituting a charge on the assets of the corporation, but shall not be construed as applying to any of the following: (a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray the consideration payable under, a contract for sale or supply of goods, property or services or any contract of hire in the ordinary course of business;(b) a cheque, banker's draft or any other bill of exchange or a letter of credit;(c) a banknote, guarantee or an insurance policy;(d) a statement, passbook or other document showing any balance in a current, deposit or savings account; (e) any agreement for a loan where the lender and borrower are signatories to the agreement and where the lending of money is in the ordinary course of business of the lender, and any promissory note issued under the terms of such an agreement; or (f) any instrument or product or class of instruments or products as the Minister may, on the recommendation of the Commission, prescribed by order published in the Gazette."

The exact definition of the term 'debenture' has eluded even the judges themselves. In *Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd. & Anor.,*[44] the then Justice James Foong, observed that:

> "As early as the 19th century, the English judges have found difficulty in defining this term 'debenture'. As observed by Lindley J in British India, etc Co v IRC 1, '… what the correct meaning of 'debenture' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures." [45]

Again, in *Levy v Abercorris Slate and Slab Co,* Chitty, J. expressed a similar view in the following manner:

> "I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art." [46]

In *Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd. & Anor.,*[47] his lordship Justice James Foong quoted Chitty J in the case of Edmonds v Blaina Co,[48] who had described a 'debenture' in the following manner:

> "The term itself imports a debt – an acknowledgment of a debt – and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used. I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security."

The same view was also held in the case of *Levy v. Abercorris Slate and Slab Company*[49] where the judge said,

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44 Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119.

45 Bensa Sdn. Bhd. (In Liquidation)(n 6) 124 para E.

46 Levy v Abercorris Slate and Slab Co. (1887) 37 Ch D 260, 264.

47 Bensa Sdn. Bhd. (In Liquidation)(n6), 124.

48 Edmonds v Blaina Co (1887) 36 Ch D 215.

49 Levy(n 8).

> "In my opinion, a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture."[50]

The term 'debenture' was extended by his lordship Justice James Foong in Bensa

> "…[to] also include besides debt, any obligation, covenant, undertaking or guarantee to pay or any acknowledgment thereof."[51]

Although the term 'debenture' is incapable of a precise definition, nevertheless, the courts have been able to identify the essential characteristics of a 'debenture.'

Besides creating a 'debt' or 'an obligation to pay, the debenture must also possess any one of these characteristics. They include the following:

a) that the debt was acknowledged under seal;

b) an instrument was utilised as security to charge the company's property;

c) the instrument restricts the company from providing any further charges.[52]

Looking at a debenture in totality, one can safely conclude that a debenture is essentially a type of security[53] that only companies may

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50 Levy(n 8) at 264.

51 Bensa Sdn. Bhd. (In Liquidation)(n 6) at 124 para H.

52 English and Scottish Mercantile Investment Co Ltd v Brunton (1892) 2 B1; Brown, Shipley & Co. v. Commissioners of Inland Revenue [1895] 2 Q.B. 240 1895 May 24, 245. See also Levy v. Aberorris Slate and Slab Company [1886 L. 2528.] 1887 Nov. 2, 3, 264 where it was held that the debenture can be "…secured on 'the goods, chattels and effects' of the company."

53 "A debenture has been broadly defined as 'a document issued by a company containing an acknowledgment of indebtedness on the part of the company." PN Pillai, Sourcebook of Singapore and Malaysian Company Law (2nd ed, Butterworths, Singapore, 1986), 734.

create. This view finds its support in *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [54]where the court thought that

> "In each of those cases… a debenture is the security for the money advanced, and is the evidence of title by which the holder is enabled to go upon the assets of the company at large."[55]

The same sentiment was expressed by the High Court in Bensa[56] which was affirmed by the decision of *NGV Tech Sdn. Bhd. (Receiver and Manager appointed) (in liquidation) v Ramsstech Ltd*.[57] The essence of a debenture was succinctly defined by SY Kok in the following words: "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders."[58]

Whilst the company's acknowledgment of debt towards its creditors with an obligation to pay creates a debenture, the debenture is always secured against various types of securities or a combination of securities.[59] Depending on the assets the company owns, the

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54 Brown, Shipley & Co. v. Commissioners of Inland Revenue [1895] 2 Q.B. 240.

55 Brown, Shipley & Co. (n 16), 244.

56 "In this respect, I find that LKC6 is a debenture. It contains the elements of an obligation, covenant, undertaking or guarantee to pay. It is a security granted by the company to the insurance company and as such is properly registered as a charge under para (a) of s 108(3) of the Act." Bensa Sdn. Bhd. (In Liquidation)(n 6),125.

57 NGV Tech Sdn. Bhd. (receiver and manager appointed) (in liquidation) v Ramsstech Ltd [2015] MLJU 671.

58 SY Kok, 'A Review of the Federal Court Case of Kimlin Housing Development Sdn. Bhd.' [1997] 3 MLJ ci, cxix.

59 "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders. Such contractual documents are, therefore, nothing more than just documentary evidence of the indebtedness of the company and to inform the world at large that that particular lender is a secured creditor over certain assets of the company, both moveable and immovable, present and future, which have been offered by the company as securities in return for loans. This statutory notification is achieved the moment the company's Forms 35 or 36 has been ritually filed with the Registrar of Companies within the time frame specified in s 108 of the Companies Act. The forms so filed in the Companies Registry will become public documents and are accessible for inspection by payment of a small search fee. They would then serve as written notices of such

securities may be secured against a company's charge (be it fix and/or floating), a charge created under the National Land Code (Act 828) or it could be found within the terms of the debenture itself; which is usually a clause which authorises a receiver and manager to be appointed.[60] In the article entitled "Automatic Crystallization And Reflotation Clauses: The Advent of a New 'Pouncing' Security?" [61] the term 'debenture' was described in the following manner:

> "While it is not necessarily always the case, securitization of a loan is normally embodied in a debenture under which the company creates a charge over its property in favour of the creditor. The transaction essentially allows the borrower or chargor to retain ownership of the property subject to such restrictions as may be imposed by the lender or chargee. The former provides the borrower with some degree of freedom in dealing with the charged assets while the latter protects the security of the lender."

CREATING A SECURITY FOR A COMPANY

Unlike individuals, a company's typical security will comprise of, amongst others, a fixed and/or floating charge on all the company's assets, a debenture, and a charge created under the National Land Code

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loan transactions to the world at large or, in particular, to any company searcher who, subsequently, may wish to do business with or lend money to the company notwithstanding the creations of such securities." SY Kok (n 20) cxx.

60 "The securities that have been created may take after the form of either Torrens registered charges or first fixed and floating charges over the moveable and immovable properties, both present and future, of the company." SY Kok (n 20), cxx. See also Handevel Pty Ltd v Comptroller of Stamps (Vic) (1985) 157 CLR 177 where it was held that "This definition echoes the common law definition of a debenture as an instrument which creates or acknowledge an obligation to pay a sum of money that may or may not be secured on property of the company." See also Robert P. Austin, Ian M. Ramsay, Ford's Principles of Corporations Law (15th edn, LexisNexis Butterworths, 2013), 1127–1128.

61 Low Chee Keong, 'Automatic Crystallization and Reflotation Clauses: The Advent of A New 'Pouncing' Security?' [1995] 3 MLJ xcvii, xcix.

(Act 828) ('NLC') , if the company's assets include land.[62] If the chargor company defaults on the loan, the lender (usually the financier) may either sell the chargor company's land via debenture or proceed with the process of enforcing the charge under the NLC. Between both these options, the financier will almost always take the easier route of selling the charged property through the lender's appointed Receiver and Manager rather than struggling through the cumbersome procedures of the NLC.

By choosing the easier path of selling the property through a Receiver and Manager, the legality of the financier's action comes into question. The remaining part of this article explores the issue of whether a debenture holder will be in breach of section 10 read together with section 24 of the Contracts Act 1950 if the debenture holder decides to sell the charged property through the Receiver and Manager (even as attorneys for the company) despite the existence of a charge under the NLC .

WHETHER A DEBENTURE IS AN AGREEMENT THAT DEFEATS THE LAW?

A debenture is essentially a contract between the borrower and the debenture holder (lender)[63] and is therefore regulated by the Contracts

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62 "The "charge to secure any issue of debentures" is registrable under section 108 (1) of the Companies Act, 1965 read with section 108 (3)(a) thereof. It is a requirement of the law that a National Land Code charge must be registered in accordance with the provisions of the National Land Code while the debenture is to be registered, like the present case, in accordance with the provisions of the Companies Act, 1965. Thus, when a charge is created by virtue of a debenture, it only has to be registered under the provisions of the Companies Act, 1965. A statutory charge under the National Land Code takes effect as a security only, enforceable by proceedings in a court of law by obtaining a judicial sale (Kimlin Housing Development Sdn Bhd [1998] MLJU 477 (Appointed receiver and manager) (In Liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 F.C.)." Malaysian International Merchant Bankers Bhd ["No: 2"] v Highland Chocolate And Confectionery Sdn Bhd & Anor [1998] MLJU 477 (HCt) 60-61.

63 "…a debenture is a contract…" Federal Court in Ali bin Tan Sri Abdul Kadir & Ors v Simpang Empat Plantation Sdn Bhd [2008] 4 MLJ 813, 824 and the High Court in See Teow Koon v Kian Joo Can Factory Berhad

Act 1950. Under section 24 of the Contracts Act 1950,[64] there are five (5) objects or considerations that will make an agreement illegal. Out of these five (5) objects listed in section 24, only two (2) are relevant to this article. They are section 24(b)(agreements where the consideration or object of the agreement is of such a nature that, if permitted, would defeat any law) and section 24(e)(agreements where the courts regard the consideration or object of the agreement is one which opposes public policy).

SECTION 24(B) OF THE CONTRACTS ACT 1950: AGREEMENTS WITH OBJECT THAT WOULD DEFEAT ANY LAW

Various case laws[65] have decided that agreements that aim to circumvent the law are illegal agreements under section 24(b) of the Contracts Act 1950 and are therefore void.

The meaning of the word 'circumvent' was considered by the Court of Appeal in *BK Fleet Management Sdn. Bhd. v Stanson Marketing Sdn Bhd*.[66] Here, the court referred to the Cambridge

& Ors [2016] MLJU 367 para 77. "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders. Such contractual documents are, therefore, nothing more than just documentary evidence of the indebtedness of the company and to inform the world at large that that particular lender is a secured creditor over certain assets of the company, both moveable and immovable,.." SY Kok (n 20) cxx.

64 Under s.24 of the Contracts Act, the object or consideration of an agreement is considered unlawful and therefore void if amongst others it is prohibited by law, or if allowed, will circumvent any law or if it contravenes public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful.

65 See for example Merong Mahawangsa Sdn. Bhd & Anor v Dato' Shazryl Eskay Bin Abdullah [2015] 5 MLJ 619 (FCt), Hee Cheng v Krishnan [1955] 1 MLJ 103, Menaka v Lum Kum Chum [1977] 1 MLJ 91, Chai Sau Yin v Liew Kwee Sam [1960] MLJ 122;[1962] MLJ 152, Hashim bin Adam v Daya Utama Sdn Bhd [1980]1 MLJ 125; [1982] 1 MLJ 255; Manang Lim Native Sdn. Bhd. v Manag Selaman [1986] 1 MLJ 379, Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356(SCt).

66 [2017] 5 MLJ 1145.

Dictionary and applied the literal meaning of the word "circumvent" to mean avoiding doing something, especially cleverly or illegally.[67]

The Supreme Court in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*,[68] had developed a test to determine how an agreement can defeat the law. The test is this: "…in any given transaction, what was the primary purpose of the transaction?"[69] The Supreme Court in *Lim Kar Bee* decided that the scheme was unlawful because the main aim of the scheme was to circumvent the payment of estate duty.

In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors*,[70] the Federal Court through his Lordship Richard Malanjum (the then Chief Justice of Sabah &Sarawak) declared the purchase of the native land which was made through the native nominee illegal because the purchase was done, applying the words of the court "in order to circumvent a clear statutory prohibition."[71]

The Indian Supreme Court in Firm, *Pratapchand v Firm, Kotrike*[72] issued a warning that the court will not be sympathetic to a party who intentionally uses a contract to avoid the law. This view was referred by the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*.[73]

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67 BK Fleet Management Sdn. Bhd. (n 28) at para 29 "Now, what is circumvention? The CVLB Act does not define what is meant by circumvention. Indeed, there was no need for that as that word does not appear anywhere in the 1987 itself. Circumvention is a common word, but a word of significant ramifications, given the context it is being used. According to the Cambridge Dictionary, to circumvent means to avoid doing something, especially cleverly or illegally. As an illustration, it gave as an example, where ships were registered abroad to circumvent employment and safety regulations."

68 [1992] 2 MLJ 281.

69 See Lim Kar Bee (n 30) 291 para B.

70 [2017] 5 MLJ 180.

71 Malayan Banking Bhd (n 32) 189 para 22.

72 AIR 1975 SC 1223.

73 [1990] 1 MLJ 356, 364 para C-D.

In relation to the legality of the sale of immovable properties which are secured by a NLC charge, the first point of reference is the Supreme Court's decision in the case of *Kimlin.*[74]

One of the many issues which the Supreme Court in *Kimlin* had to consider was this: [Was] the scheme provided by the NLC concerning the powers of the statutory chargee 'exhaustive and exclusive'?[75] After listing out the rights of the chargee found in the NLC, the Supreme Court affirmatively answered the question and concluded that the

> "relevant portions of the Code to wit 254-265 (charge actions) conferring the rights upon the chargors…[were] designed for [the chargor's] protection"[76]

In *Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor*.[77] Carah Enterprise provided a debenture as security for banking facilities granted by the second respondent. An NLC charge was subsequently registered over the lease in favour of the second respondent. Upon default, the second respondent appointed a Receiver and Manager over all the assets, including Carah's land[78] pursuant to the debenture. The law report was silent on the reason for the appointment; presumably, it was triggered by an event of default caused by the chargor (Carah.)[79]

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74 Kimlin Housing Development Sdn. Bhd. (Appointed Receiver and Manager)(In liquidation) v Bank Bumiputra (M) Bhd v Ors [1997] 2 MLJ 805 (SCt)

75 Kimlin Housing Development Sdn. Bhd. (n 37) 818 para A.

76 Kimlin Housing Development Sdn. Bhd. (n 37) 820 para B.

77 Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor [2003] 2 MLJ 193 (FCt).

78 Melatrans Sdn. Bhd. (n 40) 197 para C-F.

79 "What amounts to an act of default will always be spelt out in great detail in the loan documents, either in the articulately worded charge annexure or in the loan agreement (including a debenture) or both. Legislature does not, in such a loan transaction, interfere with the contractual parties' freedom to contract as they please so long as public policy will not be infringed. Therefore, it is up to the parties to the loan transaction to decide what events will amount to defaults. The most obvious and common event of default will be the non-payment by the borrower of the principal sum plus accrued interest on due date." SY Kok, 'A Review of the Federal Court Case of Kimlin Housing Development Sdn. Bhd.' [1997] 3 MLJ ci, cxxiv.

The appellant challenged the sale on grounds that the Receiver & Manager (R&M) was not empowered to sell the said lease by private treaty. It failed in the Federal Court. Distinguishing *Kimlin*, the Federal Court in Melatrans was of the opinion that since

> "the sale was undertaken by the R&M on behalf of … the chargor of the said lease…the provisions of the NLC prescribing for judicial sale could not apply…in the instant appeal because the R&M was acting as agent[emphasis mine] of the chargor."[80]

The Federal Court also rejected the argument that the

> "debenture was an attempt to avoid the effect of and was… a means to contract out of the provisions of the NLC and [it] was therefore void."[81]

On the contrary, the Federal Court was "satisfied [that] the said power of attorney [had] complied with ss 3(2) and 4(1) of the Powers of Attorney Act 1949"; therefore "the Receiver & Manager could act and exercise the power under the debenture."[82] Based on this reasoning above, the Federal Court rejected the argument "that the power of attorney was a means to contract out of the provision of the NLC." [83]

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80 Melatrans Sdn. Bhd. (n 40) 201 para F. The same view was held by Dr. Samsar Kamar Bin Hj Ab Latif, 'Power of Sales by Receivers and Managers over Land under a Debenture.' [1998] 1 MLJ cxxix, cxliii.

81 Melatrans Sdn. Bhd. (n 40) 201 para G. "This would mean, however, that there would be no distinction at all between illegal and void contracts in Malaysia." Suhana, Sharifah, 'The Doctrine of Illegality Under Section 24 of the Malaysian Contracts Act, 1950. Laying A Spirit to Rest, Journal of Malaysian and Comparative Law, [S.l.], v. 18, 99. https://ejournal.um.edu.my/index.php/JMCL/article/view/16036 accessed 28 May 2022. See also Cheong May Fong, Contract Law in Malaysia (Sweet and Maxwell Asia 2010) 293-294.

82 Melatrans Sdn. Bhd. (n 40) 201 para G-H.

83 The Federal Court's view was followed in Suncast Sdn. Bhd. v Padang Indah Sdn.Bhd. [2007] MLJU 640; Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn.Bhd.) & Anor [2010] 4 MLJ 270; Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor [2011] 1 MLJ 486. See also Kuek Chee Ying, 'Receiver and Manager's Power of Sale over Charged Land: Development after the Kimlin Decision' [2012] 3 MLJ lxxxix.

With respect, it is argued that the view of the Federal Court in *Melatrans* was misguided, probably because the argument was centered on the wrong issue of "contracting out of the NLC."[84] It is humbly submitted that the debenture is unlawful under the Contracts Act 1950 because what the lender essentially intended to do was to utilise the debenture as an instrument to circumvent and defeat the laborious foreclosure procedures which were set up by the NLC. This view can be supported by the following explanation.

Depending on the assets of the company, a lender may secure its loans granted to the company against a company charge (be it fix and/or floating), a NLC charge and/or the security may be found within the terms of the debenture itself; which usually authorises the appointment of a Receiver and Manager.

In *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor.*,[85] one of the issues which the Federal Court had to consider was this:

> "was the principle enunciated by the Supreme Court in Kimlin restricted only to the powers of a Receiver and Manager appointed under a power contained in an instrument, to dispose of a parcel of land on which a legal charge was created under the National Land Code 1965 or does the principle apply to all the assets of the company, be it movable or immovable that is under liquidation where a liquidator had been appointed?"

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84 "Mr. Ng Chew Hor, for the appellant, also submitted that the power of attorney given to the R&M under the debenture was an attempt to avoid the effect of and was but a means to contract out of the provisions of the NLC and was therefore void. Looking at the debenture in the appeal record, we are satisfied the said power of attorney complied with ss 3(2)and 4(1) of the Powers of Attorney Act 1949. In our view, the R&M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of the NLC." Melatrans Sdn. Bhd. (n 40) 201 para G-H.

85 K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor [2005] 2 MLJ 201 (FCt)

Her ladyship Siti Norma Yaakob FCJ, speaking on behalf of the Federal Court distinguished *Kimlin* on grounds that the Federal Court in *K Balasubramaniam* was dealing with "an equitable charge over movable property (emphasis mine) which [was] entirely different from subject matter from *Kimlin*"[86] which was related to a land charged under the NLC.[87]

Based on the Federal Court's decision in *K Balasubramaniam* it can be concluded that if the security that the borrower company provides comprises wholly or even partly of land, a NLC charge must be entered and it cannot be circumvented by any means whatsoever.

PRIORITY OF A CHARGE UNDER THE NLC

Since a debenture that is secured against the immovable property of the company via a NLC charge must be realised through a sale under the NLC following the Federal Court's decisions of *Kimlin* and *K Balasubramaniam*, selling the property through any other method (including those by a Receiver and Manager) will contravene the NLC and is illegal under S24(b) of the Contracts Act 1950.

The law on this issue should remain the same even though the Receivers and Managers were duly appointed under a valid power of attorney according to the debenture.[88] In *Lim Eng Chuan*, the sale of

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86 K Balasubramaniam (n 48), para 35.

87 K Balasubramaniam (n 48), para 34.

88 "The crucial point is whether that 'agency theory' offends the system of land law in our country when it comes to the sale of charged land otherwise than by following the governing provisions of the NLC. With further respect, for the purpose of the NLC, it does not matter one bit that the receiver and manager is styled as or is deemed to be the agent of the chargor company when he sells the charged land comprised in a debenture by way of private treaty pursuant to the terms of a debenture. The sting in the indirect means is the deemed contractual 'agency' of a receiver and manager. Testing the principle laterally, would it make any difference if the chargor was a natural person instead of a company? Could such a chargor contract with a chargee that, in the event of default, a

the property by the Receivers and Managers was validated by the Court of Appeal on grounds that the Receivers and Managers were acting for and on behalf of the chargor under the power of attorney.[89] It is humbly submitted that the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* should not have examined the validity of the power of attorney superficially in relation to the Power of Attorney Act 1949 and independently of the debenture.[90] Instead, the Federal Court in Melatrans and Court of Appeal in *Lim Eng Chuan* should have read the power of attorney in a deeper context i.e. it should have applied the equitable principle that "equity looks at the intent rather than the form" and read the power of attorney following the spirit and intent of the debenture as a whole.[91] Although the debenture usually provides that the Receiver and Managers are "exercising the power on the company's

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third party would be automatically empowered to sell the charged land by private treaty and in so doing, be deemed to be the agent of the individual chargor? The agency of a receiver and manager may be 'real' in relation to land mortgages under the common law and equity in other jurisdictions. However, in our country, one is dealing with the law as set out in the NLC and the effect of s 24 of the Contracts Act. It will, with respect, be quite inappropriate to temper our statutory land system with the law of mortgages and equity relating to land as applied elsewhere, or corrupt our statutory land system dealing with land charges with those principles." Loh Siew Cheang, 'Eyes For Us To See: The Kimlin Decision [1998]' 2 MLJ xxxix, xli.

89 See (n 46)

90 "Looking at the debenture in the appeal record, we are satisfied the said power of attorney complied with ss 3(2)and 4(1) of the Powers of Attorney Act 1949. In our view, the R&M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of the NLC." Melatrans Sdn. Bhd. (n 40), 201.

91 Also known as "Equity looks to the substance rather than the form, this maxim looks at the form of the subject matter, rather than allowing the intention to dissolve in favour of caveats(or provisions) that work against common law; and obstruct a proper outcome" The Black Letter Law <https://theblackletter.co.uk/tag/equity-looks-to-the-substance-rather-than-the-form> (accessed 2 June 2022).

behalf and the appointment is considered as having been made by the company itself," in reality, the Receivers and Managers are acting for the debenture holder's benefit (i.e financial institution).[92] In his article entitled, "Receivership, Liquidation, and Torrens Land: Mapping the Boundaries. *Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra' Malaysia Bhd*." published in the *Singapore Academy of Law Journal*, Lee Eng Beng asserts that:

> "the Receiver and Manager is not an ordinary agent [as] his 'primary duty is owed to the debenture holder…and this duty is to realize the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company."[93]

It is respectfully submitted that if both the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* had applied the cases and opinions mentioned above and had looked at the context and purpose in which the power of attorney was used equitably instead of merely looking at the procedural requirement of the power of attorney,

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[92] See Rigby LJ in Gaskell v Gosling [1896] 1 QB 669, 692. This dissenting judgment was later approved by the House of Lords allowing the appeal: Gosling v Gaskell [1897] AC 575. See also United Malayan Banking Corporation Bhd v Roland Choong (1991) 1MSCLC 90,697. 'The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver and manager; the company thus agrees to commit, for valuable consideration, the management of its property to an attorney whose appointment it cannot interfere with.' Lee Eng Beng, 'Receivership, Liquidation and Torrens Land: Mapping the Boundaries. Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra Malaysia Bhd.' (1997) 9 S.Ac.L.J. 1, 417.

[93] "Thus, the receiver and manager has all of the powers of an agent of the company, including the power to carry on business and enter into obligations on behalf of the company, but is under very few of the usual obligations of such an agent,17 as the company has irrevocably undertaken to allow its own interests to be subordinated to those of the debenture holder. He is a peculiar creature whose legal status as an agent of the company bears little resemblance to his real function.'' Lee Eng Beng (n 55), 417-418.

the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* would have concluded that the power of attorney was inserted in the debenture to circumvent the procedures of the NLC.

As Loh Siew Cheang has rightly concluded in his article entitled "Eyes For Us To See: The Kimlin Decision":

> "…arming receivers and managers with private contractual powers to sell charged lands under the terms of a debenture by private treaty is an indirect means employed to achieve something which is contrary to the very legal idea of a system of land law which is exclusive and exhaustive."[94]

It is irrelevant that a power of attorney was created following the Power of Attorney Act 1949.[95] The legality of a debenture cannot and should not be separated from the power of attorney that is linked to or embodied in the debenture. The legal effect of both these documents should be taken in totality. In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors*[96] the Federal Court declared that "subsequent instruments and documents, including the third party first legal charge" security for the term loan which was linked to or had arisen out of a sale that was found to be illegal, was "tainted with illegality" as well.[97] The decision of *Neway Development Sdn Bhd* was reaffirmed by the High Court in *Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn Bhd &Ors*[98] where the court decided the three separate

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94 See Loh Siew Cheang, 'Eyes For Us To See: The Kimlin Decision' [1998] 2 MLJ xxxix at xli.

95 Act 424.

96 Malayan Banking Bhd (n 32).

97 See Malayan Banking Bhd)v Neway Development Sdn.Bhd.& Ors [2017] 5 MLJ 180 where it was held in para 22 that "…As such the purchase the native land itself was illegal ab initio. Section 24(a) and (b) [CA] is clear. In our view no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality." This view was followed by the High Court in Dr. H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn.Bhd.& Ors [2018] MLJU 682.

98 Neway Development Sdn Bhd was reaffirmed by the High Court in Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn. Bhd.&Ors [2018] 11 MLJ 701, para 42.

documents as constituting 'a single composite transaction.' The High Court's decision was later affirmed by the Court of Appeal.[99] In *Firm Pratapchand v Firm Kotrike,*[100]Justice Beg, J. had decided that:

> "If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void, is not in itself prohibited within the meaning of s 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, [emphasis mine] the courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by s 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a 'void contract.' A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or '*mala in se*."

Based on the cases above, it is argued that the debenture and the power of attorney should be considered as a 'single composite transaction' or security in this case. Once the debenture is found to be illegal, all instruments and documents that are linked to or which arise out of the debenture (including the power of attorney in this case) should also be void since it is tainted with illegality.

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99 'We are of the view that the finding of the learned judge that the three documents 'form a single composite transaction' falls within the purview of the ratio of the Federal Court in Malayan Banking that ' ... any subsequent and documentation that linked to or arose out of the purchase would have been tainted with such illegality'. Thus, we agree with the learned judge's finding that the illegality of the MLA 2013 will consequently taint the guarantee and the power of attorney. Further, by parity of reasoning, we also agreed the guarantee and the power of attorney will likewise be void in their entirety under s 24(a) and/or 24(b) of the CA 1950.' Court of Appeal in Dr. HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn. Bhd. & Ors [2021] 1 MLJ 549 at 573.

100 Firm Pratapchand v Firm Kotrike AIR 1975 SC 1223, 1228.

BREACHING SECTION 24(E) OF THE CONTRACTS ACT: AGREEMENTS WITH OBJECT WHICH THE COURT REGARD AS OPPOSED TO PUBLIC POLICY

In *Kimlin*, the Supreme Court decided that the sale by the Receiver and Manager contravened public policy and was therefore void because the parties intended to contract out of the procedures in the NLC 1965.[101] *Kimlin*'s decision was subsequently distinguished by the Federal Court in *Melatrans*[102] and *Lim Eng Chuan*[103] for the reason that provisions of the NLC are inapplicable to Receivers and Managers who had sold the chargor's land under a duly constituted power of attorney since the Receivers and Managers were effectively selling the chargor's property as agents of the chargor.[104]

It is respectfully submitted that besides 'contracting out,' the Supreme Court in *Kimlin* could have also applied two (2) stronger arguments: they are (a) "unconscionability" and (b) that the terms of the contract had "effectively ousted the jurisdiction of the courts." Had the Supreme Court in *Kimlin* applied these reasonings, it is argued that the decision of *Melatrans* and *Lim Eng Chuan* may be decided per incuram because it will be caught by *Kimlin*'s decision. This means that Receivers and Managers will still be in breach of public policy even if they had sold the chargor's land under a properly constituted power of attorney.

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101 Kimlin Housing Development Sdn. Bhd. (n37), 824 para D, "In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy." See also Rabindra S Nathan, 'Company Receiver Can Now Sell Land by Private Treaty' where the author stated that "In Kimlin, the Supreme Court also held that a debenture holder could not contract out of the provisions of the code by means of a power of attorney conferred on itself or the receivers" at https://www.lexology.com/commentary/insolvency-restructuring/malaysia/shearn-delamore-co/company-receiver-can-now-sell-land-by-private-treaty (accessed 4 July 2022).

102 Melatrans Sdn. Bhd. (n 40), 201 para H.

103 Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor [2011] 503 para 40.

104 Melatrans Sdn. Bhd. (n 40), 201 para G-H.

UNCONSCIONABILITY:THE CONCEPT AND TEST OF "UNCONSCIONABILITY"

The terms "unconscionable", "unconscionable bargain", "unconscionable conduct" and their similar variations are not defined in the Contracts Act 1950. However, one could argue that the concept of "unconscionability" is implicit in section 10 of the Contracts Act 1950 which states that "all contracts must be made with the free consent of the parties, (emphasis mine) besides having a lawful consideration and object."[105] There may arise different circumstances (which will be explained later), that may impede the consent of the weaker party. Due to these circumstances, the weaker party is forced to accept any terms (including unconscionable terms) which are imposed by the stronger party.

As the Contracts Act 1950 is silent on the definition of an 'unconscionable' term in a contract, case laws have proven to be helpful in defining the concept of 'unconscionability'[106] and stipulating the principles which govern it.

According to the Privy Council case of *Hart v O'Connor*,[107]a contact may be 'unconscionable'[108] in two ways. Firstly, the contract may be unconscionable in the manner in which it was brought into existence.[109] For example, the contract may be induced by undue influence or a party may be suffering from a 'bargaining impairment' or 'serious disadvantage' which affects the relative bargaining strength

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105 "Contracts must be made by the free consent of competent parties, for a lawful consideration and with a lawful object." Contracts Act 1950, s10(1).

106 On a discussion of this doctrine in Singapore, see Rick Bigwood, 'Knocking Down the Straw Man: Reflections on Bom v Bok and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore' (2019) Sing. J. Legal Stud. 29.

107 Hart v O'Connor 1985 AC 1000.

108 In Hart's case (n 70) his lordship Lord Brightman used the term 'unfair' at p. 1017. It is submitted that the effect is identical to the word 'unconscionable'.

109 Hart (n 70) 1017.

of the parties.[110] The unfairness of this sort is categorised as 'procedural unfairness'[111] which was referred to by the Singapore Court of Appeal as the 'narrow doctrine of unconscionability.'[112] What amounts to a 'bargaining impairment' or a 'serious disadvantage' is potentially varied.[113] There is no pre-determined categorisation.[114] In *BOM v BOK* the Court of Appeal of Singapore included the impairment (or 'infirmities' in the court's words) to encompass physical, mental, and/or emotional infirmities.[115] The degree of impairment that makes a contract 'unconscionable' in specific cases is by and large contingent upon the material facts of each case.[116] The circumstances which impair the party may include poverty, sickness, ignorance, lack of assistance,

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110 "The crucial term, 'unconscionable,' is not defined, but the law has clearly established that the term has both a procedural and a substantive element. The former takes into consideration the parties' relative bargaining strength and the extent to which a provision is 'hidden' or unexpected, while the substantive element requires terms that 'shock the conscience' or at the least may be described as 'harsh or oppressive.'" Trend Homes, Inc. v. Superior Court of Fresno County 131 Cal.App.4th 950; 32 Cal.Rptr.3d 411,951.(US).

111 Hart (n 70) 1017.

112 BOM v BOK [2018] SGCA 83 (CA), [para 130]. The CA in BOM v BOK cited Cresswell v Potter [1978] 1 WLR 255 (HC)as indicative of the contemporary form of the narrow doctrine of unconscionability.

113 Hugh Beale, ed., Chitty on Contracts (30th ed. London: Sweet & Maxwell, 2008) 662-663; Mindy Chen-Wishart, Contract Law (2nd ed. Oxford: Oxford University Press, 2008) 370-371.

114 See Dauphin Offshore Engineering and Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan [2000] 1 SLR (R) 117; Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia [2010] 2 SLR 329 referred to by the CA in Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd (Civil Appeal No W–02 (IM)(NCC)–3223 of 2010)and affirmed by the Federal Court in Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1 at p11.

115 BOM (n 75) para 141.

116 Court of Appeal in Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd (Civil Appeal No W–02 (IM)(NCC)–3223 of 2010) and affirmed by the Federal Court in Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1,11.

lack of advice, or need of any kind.[117] In *Cresswell v Potter*[118] the High Court presented "three requirements" which must be considered before deciding whether such unconscionability exists. They are "whether the plaintiff is poor and ignorant"; secondly, "whether the sale was at a considerable undervalue"; and thirdly, "whether the vendor had independent advice." [119]

The second type of 'unfairness' (or 'unconscionability') which is described as 'contractual imbalance'[120] relates to the terms of the contract. This 'unconscionability' was referred to by the Court of Appeal in Singapore as the 'broad doctrine of unconscionability.[121] Where contractual terms largely favours one party, it may also produce an 'unfair' or 'unconscionable' contract. Unlike 'procedural unfairness', challenges against contractual imbalances are harder to prove. This is because the courts are tasked with the duty to achieve a delicate balance between the contractual freedom of the parties on one hand and keeping a vigilant eye in protecting the rights of the weaker party on the other. To succeed in proving the unconscionability of the latter type, the party must prove that the terms "shock the conscience" or at the least, the terms were 'harsh or oppressive.'[122] In *BOM v BOK* the Court of Appeal of Singapore thought that to determine the existence of broad unconscionability, the following conditions must be present. They are as follows:

> "(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he had procured, or accept, the weaker

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117 Blomley v. Ryan (1956), 99 C.L.R. 362, 405 (H.C.A.); Alec Lobb Ltd. v. Total Oil (Great Britain) Ltd.[1983] 1 All E.R. 944, 961, affirmed on this point but reversed on a different point in [1985] 1 All E.R. 303 (CA).

118 Cresswell v Potter [1978] 1 WLR 255 (Ch)

119 Cresswell (n 81) 255, 257.

120 Hart (n 70) 1017.

121 BOM (n 75) para 132.

122 Trend Homes, Inc. v. Superior Court of Fresno County 131 Cal.App.4th 950; 32 Cal.Rptr.3d 411,951.

> party's assent to the impugned transaction in the circumstances in which he procured or accepted it." [123]

It is common for both these types of 'unconscionability' to overlap.[124] Sometimes, contractual imbalances are so extreme that the presumption of "procedural unfairness is triggered, such as undue inference or some other form of victimisation",[125] hence making the contract 'unconscionable.' Due to the many common factors which appear in both these types of 'unconscionability', the Singapore Court of Appeal's attempt to create a third category of 'unconscionability'[126] in *BOM v BOK* was unsuccessful. The attempt resulted instead in a broad type of 'unconscionability.'[127]

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123 BOM (n 75) para 132.

124 The overlap was highlighted by the CA in BOM v BOK (n75) at para 179 of the judgment. "Put simply, the legal criteria just mentioned could not, ex hypothesi, be utilised as legal criteria for the broad doctrine of unconscionability; these legal criteria, if applied to the broad doctrine of unconscionability, would, instead, cause the broad doctrine of unconscionability to collapse back into the narrow doctrine of unconscionability."

125 Hart (n 70) 1017.

126 "In BOM v BOK, the Singapore Court of Appeal settled a three-pronged test for unconscionable transactions… is intended to represent a 'middle-ground' doctrine of unconscionability, in the sense that it is broader than the original 'narrow doctrine' of unconscionability from such cases as Fry v Lane and Cresswell v Potter in England, but 'much narrower' than the 'broad doctrine' of unconscionability in such cases as Commercial Bank of Australia Ltd v Amadio in Australia." Rick Bigwood, 'Knocking Down the Straw Man: Reflections on Bom v Bok and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore', 2019 Sing. J. Legal Stud. 29.

127 "Indeed, I would go even further and suggest that the Amadio formulation, both in its form and in its actual applications in subsequent cases, is narrower than the Court's (modified) 'narrow' formulation of unconscionability in BOK (CA). What is described as being a 'broad doctrine' of unconscionability is actually, at least on closer inspection, a rather 'narrow doctrine' of unconscionability, and what has been formulated as a 'middle-ground narrow doctrine' of unconscionability is actually a rather broad doctrine of unconscionability. In my opinion, the distance between the Amadio and BOK (CA) formulations of unconscionability is much smaller than their Honors' judgment implies." see Rick Bigwood (n 69), 40.

Where unconscionability is discovered, it is often hard to pinpoint the specific wrong that the defendant has committed and why the claimant requires special protection. In contrast, the extreme injustice that the claimant suffers is usually obvious.[128] Nevertheless, whichever type of unconscionability is raised, it would seem that an unconscionable bargain essentially requires one party to be under a bargaining impairment that puts him at a serious disadvantage and this is then "exploited by the other party in a morally culpable manner; all of which results in a manifestly unfair transaction." [129] 'Unconscionable' contracts encompass all cases where a stronger party has gained an unfair advantage by using unethical ways against a weaker side.[130]

Because unconscionability is "fact-specific", the courts must examine each claim based on its own facts by assessing the surrounding circumstances in totality, bearing in mind that the underlying principle in the doctrine of unconscionability aims to prevent hardship and inequitable conduct. [131] In the Singaporean case of *Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor*,[132] (a case cited with approval at both the Federal Court and Court of Appeal in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd*[133]) his lordship Lai Kew Chai, J. believed that:

> "the concept of unconscionability involves unfairness [emphasis mine], as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court

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128 Mindy Chen-Wishart, 'Consideration and Serious Intention', 2009 Sing. J. Legal Stud. 434, Dec 2009, 448.

129 Hugh Beale, (ed), Chitty on Contracts (30th edn. Sweet & Maxwell: London 2008), 662-663; Mindy Chen-Wishart, Contract Law (2nd ed. Oxford University Press: Oxford 2008), 370-371.

130 Halsbury's Laws of England, (3rd edn, 1956), vol 17 p 682. Referred to by the Court of Appeal in Sumatec (n 79) 10.

131 High Court's view in Focal Asia Sdn. Bhd. & Anor v Raja Noraini Bt Raja Datuk Nong Chik & Anor [2009] MLJU 1688; [2009] 1 LNS 913 which was endorsed in Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1 [FCt], 18.

132 Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor [1999] 2 SLR 368.

133 Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn. Bhd. [2012] 4 MLJ 1 [FCt],

> of conscience would either restrain the party or refuse to assist the party."

A useful guide in deciding whether 'unconscionability' exists in a contract can be taken from the Singapore case of BOM v BOK.[134] In this case, the Court of Appeal provided a 3-pronged test to determine "unconscionable transactions". They are:

> "(1) the plaintiff's 'infirmity', (2) the defendant's 'exploitation' of the plaintiff's infirmity, and (3) the evidential burden on the defendant to show the challenged transaction to be fair, just, and reasonable."[135]

In *Hart v O'Connor*[136] the Privy Council, speaking through Lord Brightman had decided that:

> "…Contractual imbalance may be so extreme [that]… [e]quity will [be compelled to] relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing."[137]

ARE STANDARD FORM CONTRACTS UNCONSCIONABLE?

Unconscionable contracts which affect the freedom of choice or consent of the contracting parties violate public policy. This is particularly true concerning Standard Form Contracts which are found in commercial contracts[138] but not those which are imposed by the legislature as these contracts are drafted to protect the weaker party. [139]

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134 BOM (n 75).

135 BOM (n 75) para 142. See Rick Bigwood (n 83) 29.

136 [1985] 1 AC 1000.

137 Hart (n 70) 1017.

138 In Chairman, Sarawak Housing Developers' s Association v Malayan Banking Berhad [2009] MLJU 259 his lordship Justice David Wong Dak Wah observed that 'standard form contracts… have practically become the norm in most commercial transactions.'

139 Examples include standard form contracts under the Housing Developers (Control and Licensing) Act 1966 or the PAM 2006 for Standard Form of Building Contracts and contracts imposed by the Construction Industry

Standard Form Contracts may seem to embody the principles of freedom of contract outwardly since the individual can still decide whether he wants to enter into the contract or not.[140] On the contrary, however, one can argue that Standard Form Contracts (which include loan agreements and debentures) have essentially taken that freedom away from the weaker party. Standard Form Contracts (sometimes known as 'contracts of adhesion') are different from the ubiquitous contracts which are negotiated in one important aspect- "they are offered on a take-it-or-leave-it basis."[141] Hence, the weaker party almost always "enters into [these contracts] without knowing and [voluntarily consenting] to all their terms."[142] Critics have argued that the terms in Standard Form Contracts are objectionable because it undermines the individual autonomy of the contracting party in the sense that the party is compelled to accept the terms to which that party

Payment And Adjudication Act 2012. In PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals [2021] 2 MLJ 60, 62 the Federal Court held that "The HDA and its subsidiary legislation were social legislation enacted for the protection of buyers. In interpreting social legislation, the State having statutorily intervened, the courts had to give effect to the intention of Parliament and not to the intention of the parties. Otherwise, the Legislature's attempt to level the playing field by mitigating the inequality in bargaining power would be rendered nugatory and illusory."

140 "Modern iterations of libertarianism view 'freedom of contract' as the expression of a 'minimal state', in which people pursue their interests by themselves only. In some sense, SFCs are the fullest embodiment of this expression, in one sense, with 'the ceremony necessary to vouch for the deliberate nature of a transaction' effectively 'reduced to the absolute minimum' to oblige the business community and efficient transactional activity." Cornelius, Kristin, 'Smart Contracts and the Freedom of Contract Doctrine' (2018), Journal of Internet Law 2.

141 "In a contract of adhesion, the contract is drawn up by the seller and the purchaser, who merely 'adheres' to it, has little choice as to its terms." Todd D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' 96 Harv. L. Rev. (1983) 1173.

142 Andrew Tutt, 'On the Invalidation of Terms in Contracts of Adhesion', 30 Yale J. on Reg. (2013) <http://digitalcommons.law.yale.edu/yjreg/vol30/iss2/5> accessed 9 August 2019. See also Todd D. Rakoff (n 98) 1173, 1179-80.

did not voluntarily agree.[143] This will result in a case where the stronger party (the financial institution in this case) can push the weaker party (borrower) against the wall by imposing unconscionable terms on the borrower.

DEBENTURES AS STANDARD FORM CONTRACTS

A debenture (with a power of attorney) is arguably a particular type of Standard Form Contract.[144] Borrowers are generally unable to dictate the terms in the loan agreements and debentures. Since consistency, predictability, and certainty are essential elements in Standard Form Contracts,[145] the borrower company is forced to accept the 'terms and conditions of the loan agreements and debentures' which have been set by the financial institutions, failing which the company will not be able to obtain the loan from the financial institution. These 'standard' terms which are found in the debentures will almost always favour the financial institutions.[146]

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143 "Freedom of contract demands freedom from contract, and just as no party has the ability to force another into a contract, no party should have the ability to force another party to accept specific terms." Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability', University of Chicago Law Review Vol. 70 (2003), Issue. 4, 1203, 1205.

144 "There is no hard and fast rule about what constitutes a contract of adhesion. Courts generally use a variety of criteria for determining when a contract possesses adhesive qualities. Even if there is ambiguity at the edges, however, there is consensus that insurance policies, real estate contracts, cell phone contracts, cable contracts, consumer products contracts, software licenses, and 'clickwrap' and 'browsewrap' agreements are firmly in the 'adhesion' category." See Robert L. Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts', 42 Hous. L. Rev. 1041, 1053 (2005) and sources cited therein which describe the characteristics of contracts of adhesion, for example; presentation in a standard form, its application in consumer transactions, where the terms of the contract is of a general application instead of a specific commercial agreement and whether it is presented on a "take-it-or-leave-it basis".

145 LSREF III Wight Ltd v Millvalley Ltd, [2016] EWHC 466 (Comm) para 42.

146 "The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with

Common terms which are found in the loan agreements and debentures include terms where the borrower has expressly agreed to grant the financier the right to sell its property via the power of attorney in the event the borrower fails to repay the loan or where the borrower goes into liquidation. These terms effectively eliminate the statutory protection which is given to the borrower by the NLC. If the borrowers disagree with the terms of the debenture, they will be told that their loan application will be rejected by the financial institution. The argument that the borrowers can always apply for their loan from another financial institution if they are unhappy with the terms which are offered by the present financial institution does not hold water because all the other financial institutions will impose identical or similar terms in their contracts. This has resulted in an unconscionable bargaining position that favours the financial institution on one hand whilst the borrower is pushed into a 'take it-or-leave-it' corner[147] i.e., the borrower either accepts the unconscionable terms in the loan and debenture or the borrower goes without obtaining any loan.

This view was supported in the Federal Court in *CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor*[148] where the court decided that borrowers who had entered into loan agreements with financial institutions have unequal bargaining power.[149] Agreeing with

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powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers." Per Evershed M.R. in the Court of Appeal decision of In re B. Johnson & Co. (Builders) LD. [Manchester, 1948 B. No. 2. Liverpool, 1948 B. No. 5710.], [1955] Ch. 634, 661.

147 Denning LJ in John Lee & Son (Grantham) Ltd and Others v Railway Executive [1949] 2 All ER 581, 584 decided that "Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused."

148 CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor [2019] 1 MLRA 599 (FCt).

149 "Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to that agreement are different and never equal. The parties seldom deal on equal terms. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain services, he has to accept the terms and condition of a standard contract prepared by the other party. The plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the defendant." CIMB Bank Berhad (n 111), para 65.

the House of Lords in Suisse Atlantique,[150] the Federal Court in *CIMB Bank Berhad* proceeded to quote the decision which states as follows:

> "In an ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining."[151]

It is argued that though this statement was made in reference to exclusion clauses that were inserted by the bank in the loan agreement the decision equally applies to all clauses in loan agreements and/or debentures particularly clauses that aim to nullify the statutory protection which is given to the borrower by the NLC.

CONTRACTS SEEKING TO REMOVE THE COURT'S JURISDICTION

Unlike common law,[152] S24 of the Contracts Act 1950 does not seek to differentiate between illegal and void contacts.[153] Both these types of

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150 Suisse Atlantique Societe D'armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61.

151 CIMB Bank Berhad (n 111), para 65.

152 "The common law has divided contracts into illegal contracts and void contracts and the law treats illegal contracts stricter than they do void contracts." See A.G. Guest (ed), Anson's Law of Contract (26th edn, Oxford University Press 1984), 292. See also M. P. Furmston, Cheshire, Fifoot & Furmston's Law of Contract (11th edn, Butterworths 1986), 342.

153 See Contracts Act 1950, s24 which states: "The consideration or object of an agreement is lawful, unless—
(a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral, or opposed to public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

contracts (including contracts that are against public policy) are considered illegal contracts and are therefore void.[154]

In *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor*.[155] the Federal Court quoting from the Halsbury's Law of England[156] decided that the concept of "public policy is not static and that the question of whether a particular agreement is contrary to public policy is a question of law." The court also noted that although:

> "new heads of public policy will not be invented by the courts for the following reasons, nevertheless, the application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise."

The Federal Court decided that "[though] the rule of public policy remains, its application, however, varies with the principles which for the time being [is] guide public opinion."

In *Anthony Lawrence Bourke & Anor*, the Federal Court also distinguished between a contractual term that seeks to limit or restrict access to justice as opposed to a term that seeks to prohibit or prevent access to the courts[157] (which it is argued effectively ousts the courts' jurisdiction). Warning that the courts have always been vigilant to protect the right of access to themselves under the common law, the Federal Court in Anthony Lawrence Burke affirmed the principle that

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154 "What about the second category of contracts which are void at common law on grounds of public policy? Upon a reading of section 24, it would appear that section 24, in particular section 24(e) is wide enough to encompass these contracts. It may be argued quite easily that a contract to oust the jurisdiction of the courts, a contract that tends to prejudice the status of marriage and a contract in restraint of trade are all against public policy and are therefore void." Sharifah Suhana Ahmad, (n44), 99.

155 CIMB Bank Berhad (n 111), para 42, quoting and confirming the decision of the Federal Court in Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619.

156 Halsbury's Laws of England, (5th edn, Vol 22 at para 430).

157 CIMB Bank Berhad (n 111), para 70 and para 71.

clauses which seek to prevent the courts from hearing the case are void.[158]

The same view was also expressed by the Federal Court in *Safety Insurance Company Sdn Bhd v Chow Soon Tat*[159] where it was held that whilst the parties can agree that:

> "no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator, they cannot by contract oust the jurisdiction of the courts." [160]

In *Baker v Jones & Ors*[161] Lynskey, J. held that:

> "…although parties to a contract may in general, make any contract they like, there are certain limitations imposed by public policy and one of those limitations may be that parties cannot, by contract, oust the ordinary courts from their jurisdiction." [162]

In *Sababumi (Sandakan) v Datuk Yap Pak Leong*,[163] the Federal Court through his lordship Peh Swee Chin FCJ held that contracts against public policy encompass contracts that interfere with the administration of justice.[164]

Based on the cases above, it can be argued that the power of attorney in the debenture which allows the lender to sell the chargor's property without going through the proper procedures under the NLC interferes with the administration of justice because not only does it prevent the Chargor from exercising his right of access to justice, the

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158 Citing R. A. Buckley, Illegality and Public Policy (3rd ed, Sweet & Maxwell 2013) at para 8.02 and para 68 of the judgment.

159 [1975] 1 MLJ 193 (FC).

160 Other cases which have expressed the same view include the Court of Appeals' decision in Dancom Telecommunication (M) Sdn Bhd v Uniasia General Insurance Bhd [2008] 6 MLJ 52 (CA); Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 329.

161 [1954] 2 All ER 553, QBD.

162 [1954] 2 All ER 553 at 558.

163 [1998] 3 MLJ 151 (FCt).

164 Sababumi (Sandakan)(n 126), 175.

court is also prevented from hearing and determining the rights of the Chargor.

The House of Lords in *Johnson and another v Moreton*[165] clearly describes why contracting out of a legislation contravenes public policy. According to the House of Lords:

> "…The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. Such acts are not necessarily to be treated as simply 'jus pro se introductum', a 'private remedy and a private right' which an individual member of the class may simply bargain away because of this freedom of contract. It is precisely his weakness as a negotiating party from which Parliament wishes to protect him."

In respect of the charge, it is submitted that the NLC was passed to protect the interest of the chargor. This view is backed by the Supreme Court in *Kimlin*.[166] In most cases, the chargor will not be negotiating from a position of equal bargaining power vis a vis the lender (usually the bank) but a weaker position. In these situations, the lender can dictate the terms of the contract, thus causing the borrower and/or chargor, to 'bargain away' his rights. Since the NLC was passed to prevent the lender from taking advantage of the borrower, it is argued that the lender should not be allowed to contract out of the NLC.

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165 [1978] 3 All ER 37, 49.

166 "It is obvious that the relevant portions of the Code – to wit, ss 254–265 – conferring the rights upon chargors aforesaid are designed for their protection. In the case of land held under a Land Office title, the form of title corresponding to Land Office title or subsidiary title, the chargee makes his application for order for sale to the Land Administrator in accordance with the procedure laid down in s 260…of the Code and these are also designed for the protection of the chargor." Kimlin (n 37), 820 at para B.

THE EFFECT OF AN UNCONSCIONABLE TERM AND A TERM WHICH SEEKS TO OUST THE JURISDICTION OF THE COURTS: WHAT APPROACH SHOULD THE COURT TAKE?

Once it is proven that the power of attorney contravenes public policy, the courts, it is argued, should not declare the entire debenture to be unlawful and void. Instead, the courts should only declare the said power of attorney and any clauses which effectively allow the chargee to circumvent the provisions of the NLC to be unlawful and void under S24(b) of the Contracts Act 1950.

This is because by declaring the entire debenture void, the chargor will be unjustly enriched since its property will be effectively free from encumbrances.[167] The result of such declarations will likely "deter potential lenders from lending money on security which might be held to contravene the Act." [168] To avoid the negative effect of the court's declaration, the courts should apply the doctrine of severance (found in section 29 of the Contracts Act 1950) by severing the unlawful provisions from the remaining provisions of the debenture. The said provision states as follows:

> "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary

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[167] See Selangor United Rubber v Craddock (No 3) (1968) 2 All ER 1073, 1154 where the court held as follows: "This is a common well-recognized consequence accepted by the courts in cases of transactions being made unlawful and participants being subjected to relatively light criminal punishment. That such provisions might prove a positive boon to the principal offenders has been similarly accepted on the well-accepted ground of public policy that the courts will not aid unlawful transactions but let the consequences fall where they lie…"

[168] Heald v O'Connor [1971] 2 All ER 1105, 1109 per Fisher J "The apparent injustice which is the common result of the statutory prohibition of these particular kinds of transaction is not sufficient warranty for declining to apply the well-settled principle of law. The application of this principle in such circumstances as the present is likely to deter potential lenders from lending money on security which might be held to contravene the Act …"

> tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent (emphasis mine)."[169]

The courts should take into account two conditions before it proceeds to sever the unlawful provisions: first, they should deal with each case following the particular facts of the case. There are no standard rules which apply to all cases. At some point in time, each case will have to rely on its own situation and the type of illegality that is suitable to its own facts. Public policy is also an important factor that the court must consider.[170]

ASSESSING THE COMMON LAW POSITION IN LIGHT OF SECTION 375(2)(A) OF THE COMPANIES ACT 2016

Section 375(2)(a) of the Companies Act 2016, inter alia, states that:

> "Unless the instrument [which confers on the debenture holder the power to appoint a Receiver or Receiver and Manager] expressly provides otherwise- (a) a Receiver or Receiver and Manager is the agent of the company."[171]

This section is a codification of the decision of the Federal Court in Melatrans where the Federal Court had decided that

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169 "The legal effect of this provision [s 29] is similar to section 28, that is, the entire agreement is not void ab initio; it is void only 'to that extent.' Further section 29 applies to an agreement whereby a party is 'restricted absolutely' from enforcing his rights. Therefore, the provision itself inherently provides the exception where an agreement to oust the jurisdiction of the court may be valid." Sharifah Suhana Ahmad (n 20), 100.

170 Chung Khiaw Bank Ltd (n 35), 363 para E.

171 Companies Act 2016, s 375(2) "Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company; (b) a person appointed as a receiver may act as receiver and manager; or (c) a power conferred to appoint a receiver or receiver and manager includes the power to appoint— (i) two or more receivers or receiver and managers; (ii) a receiver or receiver and manager additional to a receiver or receiver and manager in office; and (iii) a receiver or receiver and manager to replace a receiver or receiver and manager whose office has become vacant."

> "….the provisions of the NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R&M was acting as an agent of the chargor."[172]

It can be argued that as a general provision governing the position of Receivers and Managers in relation to debentures, S375(2)(a) of the Companies Act 2016 must be read subject to the NLC if the security which the lender holds consists solely or partially of real property. In such situations, the borrower company is required to register 2 types of charges: they are charges under the Companies Act 2016 and the NLC. Three reasons are provided in support of this opinion.

Firstly, in *Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors*,[173] the Federal Court held that:

> "where there are two conflicting provisions of the legislature and the question arises which of the two should govern the case, the court must see which terms of the provisions are more appropriate to apply in the circumstance of the case."

The Federal Court in *Abdul Samad* applied the principles of statutory interpretation, particularly the maxim of 'generalia specialibus non-derogant' – general statements or provisions do not derogate from special statements or provisions, or conversely, 'specialia derogant generalibus' – special provisions derogate from the general.

In *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation)*,[174] the Supreme Court had to consider "whether the sales tax had priority of payment over preferential payments and the claims of the debentures holders," under the relevant provisions in the (then) Companies Act 1965, the Sales Tax Act 1972[175] and the Government Proceedings Act 1956.[176]

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172 Melatrans (n 40), 210.

173 Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors [1996] 3 MLJ 581, 590.

174 Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation) [1995] 2 MLJ 600 (FCt)

175 Sales Tax Act 1972ss 6(a), s22(2),s23, s69(1) and 70.

176 Government Proceedings Act 1956 s 10(1),(2).

Applying the maxim of specialia generalibus derogant the Federal Court decided that the (then) Companies Act of 1965 which specifically dealt with companies prevailed over the general provisions of the Government Proceedings Act 1956.[177]

Applying the rationale of the Supreme Court in *Ler Cheng Chye* above, it can be argued that where the security of the debenture consists of land, the specific legislation of the NLC should prevail over s.375 (2)(a) of the Companies Act 2016 which is a section which governs the position of Receivers and Managers concerning debentures generally.

Secondly, this opinion also finds its support in the Federal Court decision of *K Balasubramaniam*.[178] The Federal Court in K Balasubramaniam distinguished *Kimlin* on grounds that Kimlin was dealing with land that was charged under the then National Land Code 1965 ('the Code') whereas the security in K Balasubramaniam only had movable property.[179] Following the ratio of *K Balasubramaniam*, it is argued that if the security involve includes immovable property, the sale should be conducted by way of the NLC.

This view was reiterated by the Court of Appeal *in Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor*.[180] where his lordship Justice Low Hop Bing decided that the sale which was conducted by the Chargee via the power of attorney in the debenture was invalid because it did not go through a judicial sale which was mandated by the NLC. To quote his lordship:

> "In the present case the power of attorney is a security and the donee/chargee, as agent, had used the authority under the power of attorney not for the benefit of their principal, the donor/chargor, but for their own benefit to achieve the objective of the debenture arrangement between the

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177 "s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956." Director of Customs, Federal Territory (n 137), 611.

178 [2005] 2 MLJ 201 (FCt).

179 "Kimlin did not consider the effect of ss 233(1) and 277(5) of the Act and there was no necessity for Kimlin to do so, as the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale." K Balasubramaniam (n 48),para 36

180 Lim Eng Chuan Sdn Bhd (n 46).

> donor/chargor and the donee/chargee. Therefore, in fact, and in law the sale must be deemed to have been effected or undertaken by the chargee rather than by the chargor. It was only a legal formality that the chargor was named as the vendor in the sale and purchase agreement as the sale was made pursuant to the power of attorney. Since the sale was undertaken or effected by the chargee and not by the chargor then legally it should have been effected in accordance with the provisions of the National Land Code pertaining to the charges. In other words, there should have been a judicial sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid."[181]

The final argument in support of this opinion is found in the rules of construction, particularly the rule on harmonious constructions of statutes which requires, amongst others, different statutes which relate to the same issue to be interpreted harmoniously.

In *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)*,[182] the Court of Appeal held that:

> "This concept of harmonious construction of statutes has two parts, one is harmonious construction in relation to the various provisions of the statute itself and the other part is in relation to other statutes."[183]

This doctrine, according to the Court of Appeal is invoked when a conflict arises between the parts or provisions of the statute or between two or more statutes.(emphasis mine) The Court of Appeal in *Tebin bin Mostapa* imposed a caveat on the application of harmonious construction, saying that "a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not harmonious construction."[184]

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181 Lim Eng Chuan (n 46), 521.

182 Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2017] 5 MLJ 771 (CA)

183 Tebin bin Mostapa (n145) 796.

184 Tebin bin Mostapa (n145) 797.

According to the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar*,[185] the doctrine of harmonious construction requires legislation to be construed in a way that would achieve a harmonious result, which method should result in coherence in the law.

Applying the rule of harmonious construction on both s.375 (2)(a) of the Companies Act 2016 and the NLC, it is submitted that the provisions of the NLC (including the requirement of judicial sale) should apply only where the security of the lender involves land. Any other interpretation will make the NLC a 'useless lumber' or 'dead letter', to quote the Court of Appeal decision in *Tebin bin Mustapha*.

CONCLUSION

This article has revealed that a debenture holder who fails to follow the provisions of the NLC may be in breach of section 10 read with section 24 of the Contracts Act 1950 which, if proven will nullify any sale of any landed property that the Receiver and Manager may have conducted on behalf of the chargee. When it comes to the sale of landed properties via debentures, it is argued that the decision of *Kimlin* should be the guiding light for courts and litigants alike. *Kimlin's* decision has rightly struck a proper balance between the interest of debenture holders and chargors. Any attempt to tilt this balance would be inequitable.

Debenture holders are therefore advised sell their landed security through a judicial sale according to the NLC, lest they risk exposing themselves to the various possible challenges that have been raised in this article. It is better to adopt a longer but safer method, particularly for lenders who are financial institutions.

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[185] Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar [2020] 1 CLJ 123,para 79. This principle was affirmed by the subsequent Federal Court decision in Majlis Perbandaran Seremban v Tenaga Nasional Berhad [2020] MLJU 1680.

FLOOD DISASTERS AT HOUSING AREAS IN MALAYSIA: A PLANNING LAW PERSPECTIVE

Nuarrual Hilal Md Dahlan*

ABSTRACT

Floods in housing areas are typical in Malaysia, particularly during monsoon and tropical wet seasons. There are various causes for it. These include heavy monsoon rain, flawed drainage systems, an insufficient planning system, an inadequate flood risk management strategy, exorbitant rainfall, rapid melting snow and ice, dams or levees breaking, and rising ocean storm surge and sea levels. The catastrophe has resulted in pecuniary and non-pecuniary losses to purchaser residents. Flood is one of the important matters that developers must address during the development planning stage. The developer should obtain views and approvals from relevant technical agencies, including the agencies responsible for regulating safety and security against flood disasters, for instance, the Department of Irrigation and Drainage (JPS). This article aims to analyse the legal issues relating to floods and examines the related planning law in housing areas. It also provides suggestions for improving the current planning law in dealing with this catastrophe. This study uses legal and qualitative research methodologies, particularly eliciting information through available literature and interviewing the data sources from relevant departmental technical agencies in order to study the problem. The study finds that lacunae in the planning law have contributed to flooding occurrences in housing areas. Specific suggestions are provided to deal with the flood disaster problems. The findings can improve the current policy and planning law in housing development, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: flood disasters, housing areas, planning law

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INTRODUCTION

It is indeed a trite fact that housing development areas are mushrooming in Malaysia due to the multifarious means provided by the government. The government aims to provide adequate housing accommodation to all its citizens as possible. Before housing estates can be provided, there are laws and procedures that the developers need to follow, including the planning law, building law, housing development law and the land law through various federal and states' legislations. The purpose of these laws is to ensure that housing development would be sustainable for the benefit of the public and the residents.

These laws require that the housing estates' locations be suitable and are not prone to flood and its disasters. Why are there still many housing estates that have been given legal approval for development being subject to flood disasters? Are the laws inadequate to face the issues of flood disasters? Or otherwise?

One of the reasons leading to flood disasters and mismanagement is inadequate coordination and insufficient integrated policies and practices (legal and administrative) between the State Authority, the Planning Authority, the Building Authority, the technical agencies, and the housing authority on housing development projects which can contribute to floods occurring in the housing estates. These agencies have separate jurisdictions and powers, and thus the issue of inadequate coordination arises. The conditions and requirements between these agencies are not similar and may be contradictory to each other. For instance, even if there is a view from technical agencies (Department of Environment ('JAS') and Department of Minerals and Geoscience ('JMGS')) that a certain location of the housing development project is not suitable for development and is prone to flood, this view may not be adhered to by the land authority if the land authority wishes to alienate the land for housing development projects.[186]

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[1] Sharifah Zubaidah Syed Abdul Kader Aljunid, "Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility," in Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends, ed. Hunud Abia Kadouf & Sharifah Zubaidah Syed Abdul Kader Aljunid. (Kuala Lumpur: International Islamic University Malaysia, 2006), 252; Nuarrual Hilal Md Dahlan,

Table 1: Flood Occurrences in Malaysia for 2019[187]

State	Floods by District	Highest Daily Average (mm)	Max Flood Period (Days)	No. of Evacuees	Loss Assessment (RM)	Max Flood Depth (m)
Perlis	7	91	1	146	-	0.6
Kedah	53	82	1	1,114	2,840,000.00	1.5
Pulau Pinang	31	111	1	388	-	2.9
Perak	65	91	1	2,279	-	1.2
Kelantan	18	82	7	18,683	18,290,400.00	2.0
Terengganu	9	180	8	11,384	2,305,000.00	3.0
Pahang	28	119	1	904	-	1.1
Selangor	93	85	1	537	-	1.0
Melaka	12	124	1	1,131	-	0.9
Negeri Sembilan	16	90	1.5	50	3,145,000.00	1.2
Johor	30	152	3	3,562	-	1.5
Sabah	39	143	8	7,443	5,000.00	2.8
Sarawak	118	117	20	1,328	-	3.7
WP Kuala Lumpur	10	99	1	212	-	0.9
WP Labuan	6	122	1	0	-	1.5
Total	**535**		**Total**	**49,161**	**26,585,400.00**	

"Alienation of Land for Housing Development Projects in Malaysia and New South Wales, Australia: A Comparative Legal Analysis". Malayan Law Journal, 1(2006): xi; Nuarrual Hilal Md Dahlan, "Legal Issues in the alienation of lands for housing development projects in Malaysia," Malayan Law Journal, 6 (2012): I & lvii; Nuarrual Hilal Md Dahlan, "Extent of Liability and Responsibility of the State Authority in the Alienation of Lands for Housing Development Projects in Malaysia: A Case Study of Abandoned Housing Projects," Malayan Law Journal, 2 (2014): ix, x, xii, & xxiii.

187 National Flood Forecasting and Warning Centre (PRABN): Water Resources Management and Hydrology Division, Department of Irrigation and Drainage (JPS).

As illustrated in Table 1 above, flood occurrences in Malaysia have caused substantial losses to property and lives in many states. Many reasons have caused flood disasters. One of them is the mismanagement of forests and lands, which have caused an imbalance of environmental elements, resulting in damaging floods.[188] Other reasons are the act of God which is beyond human control, for instance, heavy rainfalls and high sea tide. Nonetheless, as humans, we should strive our efforts to control flood disasters and their consequences. These efforts include the legal and regulatory framework that can manage the human behaviours and conduct that ensure orderly manner in the management of environment, which can protect all stakeholders' rights and interests who may be affected by flood disasters.[189]

RESEARCH METHODOLOGY

The research methodology used in this paper is a mixture of legal and qualitative social research methodologies. Legal research aims to explain, find, and analyse the law and the event related to the law.[190] The legal research process includes gathering laws, analysing the law, analysing and interpreting certain events, phenomenon issues, ambiguities, and legal weaknesses, identifying the relevant laws to settle and solve the issues, and disseminating the legal findings to others for information, advice, and judgment.[191] The primary sources are the statutory provisions and case law relating to housing development, planning, environment, constitution, land, and building laws which involve relevant statutes such as the Housing Development (Control & Licensing) Act 1966 (Act 118), City of Kuala Lumpur (Planning) Act 1973, Environment Quality Act 1974 (Act 127), Federal Constitution, and National Land Code 1965. While case law are the courts' judgments of legal cases reported in the Malayan Law Journal (MLJ), Current Law Journal (CLJ) and All Malaysia Reports (AMR).

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188 "High deforestation rates in Malaysian states hit by flooding," Mongabay, News & Inspiration from nature's frontline, accessed November 28, 2022, https://news.mongabay.com/2015/01/high-deforestation-rates-in-malaysian-states-hit-by-flooding/.

189 Jabatan Pengairan dan Saliran. Laporan Banjir Tahunan 2019 (n.p.: Jabatan Pengairan dan Saliran Malaysia, 2020).

190 Iedunote, accessed December 13, 2021. https://www.iedunote.com/legal-research.

191 Iedunote.

These cases are available from internet subscription. The purpose of these sources is to provide the relevant laws regarding floods at housing areas and their issues. The secondary sources include legal literature, journal articles, and other non-legal materials. In analysing these sources, the author used textual legal analysis of the primary and secondary legal and non-legal sources to explain and analyse the law and the legal issues.

Qualitative research methodology is used as the author wishes to do in-depth research on the issues of flooding at housing areas. The reason why qualitative is chosen rather than quantitative research methodology is that this type of research (qualitative) and selection will allow more access to details, due to convenience and time factor, geographic proximity, getting more intensive analysis and in-depth study about the facts, problems, issues, legal phenomena and legal analysis in term of the procurement process of the chosen project.[192]

As this writing involves qualitative research, it concerns exploring people's life histories or everyday behaviour, which quantitative research cannot grasp. Qualitative features involve soft, flexible, subjective, political, case study, speculative and grounded. On the other hand, quantitative research involves hard, fixed, objective, value-free surveys, hypothesis testing and abstracts. It limits the information that certain sources could offer. Using the qualitative method, the information gathered will be more enriching as it involves an in-depth study of certain phenomena.[193]

Because this research writing is qualitative, the data are often derived from a few cases, and it is unlikely that these cases have been selected on a random basis. The selective cases are purposive. Very often, a few cases will be chosen simply because of their accessibility. Qualitative research involves a few understudies because one of its philosophies is avoiding unfocused and exorbitant data to preclude intensive analysis. The approach and sample selection of this research are in line with the concept and belief of qualitative research--where it

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192 Robert K. Yin, Case Study Research, Design and Methods, (London: Sage Publication London, 2nd edn., 1994), 75; Robert K. Yin, Case Study Research, Design and Methods, (London: Sage Publication, London, 3rd edn., 2003), 79; David Silverman, Doing Qualitative Research, A Practical Handbook, (London: Sage Publications, 2000), 105; David Silverman, Doing Qualitative Research, A Practical Handbook, (London: Sage Publications, 2nd edn., 2005), 6, 8, 9, 10 & 14.

193 Silverman, (2000), 105; Silverman, (2005), 6, 8, 9, 10 & 14.

employs purposive, not random, sampling methods. The phenomena of flooding in housing areas that involve selected housing development projects may not be uncommon, with the same aspect in other housing development projects elsewhere in Malaysia. In other words, this writing is designed to provide a close-up, detailed or meticulous view of flooding in some housing development projects in respect of its legal aspects and legal issues that have occurred which are relevant to or appear within the broader similar phenomena that have been experienced by other housing development projects in Malaysia.[194]

The data sources of qualitative research that this writing entails are the relevant government technical agencies, for example, the Department of Drainage and Irrigation (JPS), the Department of Public Works (JKR) and the Department of Mineral and Geo Science (JMGS). The method of eliciting the data is through direct interviews with relevant respondents. The respondents in the interviews are the officers at BDB Land Sdn Bhd, Jitra, Kedah, Department of Drainage and Irrigation (Jabatan Pengairan dan Saliran ('JPS') at Alor Setar, **Department of Mineral and Geoscience (Jabatan Mineral dan Geo-Sains ('JMGS') at Alor Setar, Department of Public Works (Jabatan Kerjaya ('JKR') at Kuala Lumpur,** Majlis Bandaraya Alor Setar (MBAS), Department of Environment (Jabatan Alam Sekitar ('JAS') and Plan Malaysia (Department of Town and Country Planning) at Alor Setar. The information given by these data sources are supported by primary and secondary documentary evidence such as official reports, statistics, internet sources, books, journal articles and other relevant data sources.[195] This can ensure triangulations of data and data sources, data corroboration, chain of evidence of data and multiple evidence of data and data sources.[196] The data collected from the interviews with respondents were recorded and then transcribed. This method increases the reliability of the data.[197]

Through the above research approach and method, this research writing process, analysis and findings can become comprehensive, trustworthy, credible, valid, rigorous, and reliable. [198]

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194 Silverman, (2000); Silverman, (2005).
195 Silverman, (2005), 177.
196 Silverman, (2005).
197 Silverman, (2000), 186, 188, 290.
198 Yin, (2003), 165.

The interviews with officers in the above departments were real and true. The data collected from the interviews were recorded and then transcribed. This ensures that false and incorrect data from the data sources can be avoided. Using anonymity is undesirable as this can eliminate some important background information relating to the data sources.[199]

PLANNING LEGAL ISSUES IN FLOOD DISASTERS – A DISCUSSION

It is opined that the inadequacy is due to the separate constitutional jurisdictions possessed by the Federal Government agencies and the states' agencies in approving housing development projects. For instance, the federal government, through the Department of Irrigation and Drainage ('JPS'), adopts policies against floods in housing estates, but these policies are not binding on the states' agencies. Thus, even though there are federal laws and policies, the states may not implement these laws and policies, as states are not duty-bound. For example, the JPS, being a federal agency, may require developers to provide certain retention ponds at every housing unit, but this may not be required for the issuance of Planning Permission and Certificate of Completion and Compliance (CCC) by the local planning authority (an agency of the state government).[200]

Further, there is no legal provision in the National Land Code 1965 (Act no. 56 of 1965) ('NLC') that requires the State Authority to refer to and be bound by the views of the technical agencies and the planning authority, including the policies against floods in housing

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199 Yin, (2003), 158.

200 Adibah Awang, "Land Conversion, Subdivision and Amalgamation", Bulletin Geoinformasi, Penerbitan Akademik Fakulti Kejuruteraan & Sains Geoinformasi, Jld 1, No. 1 (1997): 38, 43, 44, http://eprints.utm.My/4851/land_conversion.pdf.April 1997; Nuarrual Hilal Md Dahlan, "Alienation of Land for Housing Development Projects in Malaysia and New South Wales, Australia: A Comparative Legal Analysis," xi, xix, xx, & xxi; Nuarrual Hilal Md Dahlan, "Extent of Liability and Responsibility of the State Authority in the Alienation of Lands for Housing Development Projects in Malaysia: A Case Study of Abandoned Housing Projects," ix, x, xii, & xxiii; Nuarrual Hilal Md Dahlan, "Legal Issues in the Alienation of Lands for Housing Development Projects in Malaysia," l & lvii.

estates. For example, section 108 of the NLC undermines the function of the planning authority. Thus, in the exercise of alienation of lands, subdivision and partition of lands and imposition of conditions and restrictions in interests, disposal of lands etc., for housing development projects, views, by-laws and restrictions of the planning authority on floods prevention may not be adhered to by the land authority. There may be views, by-laws and restrictions from the planning authority that certain preventive and curative measures against floods must be complied with by the developers before the purported housing development projects can be implemented. However, the views, by-laws and restrictions are not binding on the land authority or the State Authority. Likewise, currently, there is **no mandatory** provision in the Town and Country Planning Act 1976 (Act 172), the States' Planning Control Rules and the planning guidelines of the local planning authority in dealing with applications for planning permission to refer to the relevant technical agencies for comments and views for instance views in the face of flood disasters.[201]

In addition, as town and country planning falls under the concurrent list of the Ninth Schedule to the Federal Constitution (FC), except with respect to the federal capital, any circulars, guidelines, and

[201] Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework" (PhD Diss., International Islamic University, 2009), 222, 350, 360 & 361; Nuarrual Hilal Md Dahlan, Seeni Mohamed Mohamed Nafees, and Muhamad Hassan Ahmad, (2019) "A Planning Law Perspective on Abandoned Housing Projects In Malaysia", in Selected Legal Issues in Indonesia and Malaysia, ed. Dr. Anis Mashdurohatun, Dr. Sri Endah Wahyuningsih, Assoc. Prof. Dr. Mohammad Azam Hussain, Dr. Asmar Abdul Rahim (Semarang, Indonesia: Unissula PRESS, Universitas Islam Sultan Agung), 113; Nuarrual Hilal Md Dahlan, "Planning Case Law and Legal Issues in Abandoned Housing Projects in Malaysia", 4th International Conference on Education, Islamic Studies and Social Science Research and International Conference on Science and Technology (ICEISR & ICOST),2019-Research Education: Opportunities and Challenges for Fourth Industrial Revolution, 2-3 September 2019, Hotel Madani, Medan, Indonesia, 10; Nuarrual Hilal Md Dahlan, "Alienation of Land for Housing Development Projects in Malaysia and New South Wales, Australia: A Comparative Legal Analysis," xi & xx; Nuarrual Hilal Md Dahlan, "Legal Issues in the Alienation of Lands for Housing Development Projects in Malaysia," I & lvii.

directives of the federal authority must get consent and agreement of the states. Otherwise, the federal circulars, guidelines and directives are not applicable in the states.

Given that the highest authority in every state in Malaysia is the State Authority ('SA'), the SA is armed with jurisdictions and powers on vast matters, including lands and housing, pursuant to the provisions under the Federal Constitution and the States' Constitutions. According to section 5 NLC, 'State Authority' *inter alia* means the Ruler or Governor of the State, as the case may be. See also section 3 of the Street, Drainage and Building Act 1984 (Act 133) ('SDBA') and section 2 of the Local Government Act 1976 (Act 171) ('LGA'). However, in section 2 of the LGA, 'State Authority' is defined as, *inter alia*, the Ruler in-Council or Governor-in-Council. In *Lebbey Sdn. Bhd v. Chong Wooi Leong & Anor & other Applications*[202], Abdul Wahab J stated that: 'State Authority…is defined…as the Ruler. For practical purposes, this means the Ruler acting upon the recommendation of the Exco of the State'. Exco means the members of the State's Meeting Council. This is also the meaning given in *Honan Plantations Sdn. Bhd v. Kerajaan Negeri Johor*[203], and *Yee Seng Plantations Sdn. Bhd v. Kerajaan Negeri Terengganu & 3 Ors*[204]. In the practical sense, the meaning of SA is the members of the State Executive Council (Majlis Mesyuarat Negeri or EXCO). The Menteri Besar or Chief Minister may highly influence EXCO's decisions. Usually, a large number of the members of the EXCO are from the same political party.[205]

The composition of members of the State Executive Council may also pose a certain degree of problem. Usually, a substantial number of members in the SA are from the same political party. The Chief Minister and his dominant political party control the SA. Any decision made by the SA may be restricted according to the wishes of the political party. Thus, decisions made may, in most probability, be influenced by political considerations, not by the professional agencies'

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202 [1998] 5 MLJ 364 at p. 374 (High Court of Malaya at Shah Alam).

203 [1998] 5 MLJ 129 at 150-151 (High Court of Malaya at Johor Bahru).

204 [2000] 3 AMR 3208; [2000] 3 MLJ 699 (Court of Appeal at Putrajaya).

205 Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework", 214 & 215.

views, be it the Federal nor states' agencies. These decisions may also affect the approaches and measures for flood control and mitigation.[206]

Land use control and planning against flood disasters can also be effective with the introduction of land digital data available in the land authority office. This data is statutorily provided in the National Land Code 1965 (16th Schedule and section 5D). This provision requires comprehensive data on lands to be recorded into land databases by an electronic technology containing land titles, images, documents, or spatial and textual data. The digital data can facilitate the authority in making decisions relating to the relevant lands, including measures against floods and their consequences. Nonetheless, where there exists inadequate cooperation and coordination among the federal and states' agencies in regard to land use and planning control, the pool data may be incomplete and thus incapable of providing accurate information on the land in question. Thus, this will lessen its effectiveness.[207]

Further, the lack of proper planning for housing development in Malaysia is also due to the absence of multi-criteria evaluation, multi-

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206 Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework", 213, 214, 215, 293 & 406. See for examples the Perak State Authority at Portal Rasmi Negeri Perak, accessed November 28, 2022 at https://direktori.perak.gov.my/dp/politik/exco.php; where the State Executive Council members are from Pakatan Harapan (PH-DAP) and Barisan Nasional (BN-UMNO); Perlis State Authority at Laman Web Rasmi Kerajaan Negeri Perlis, accessed November 28, 2022 at https://www.perlis.gov.my/where the State Executive Council members are from Perikatan Nasional (PN-PAS); the Pulau Pinang State Authority, accessed November 28, 2022 at https://www.penang.gov.my/index.php/kerajaan/info-negeri/ahli-mmk, where the State Executive Council members are from Pakatan Harapan (PH-DAP); Mongabay, News & Inspiration from nature's frontline, "High deforestation rates in Malaysian states hit by flooding"; Sharifah Zubaidah Aljunid, "Power to Decide on Development Applications Under the National Land Code 1965: The Position of Selangor," IIUM Law Journal Volume 12 (2004): 85, 86, 91 & 92.

207 Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework", 217, 291, 340, 359, 420 & 421; Nuarrual Hilal Md Dahlan, "Alienation of land for housing development projects in Malaysia and New South Wales, Australia: A comparative legal analysis," 1, xii & xiii.

criteria decision when making development plans, absence of comprehensive criteria or multi factors affecting housing development projects and spatial multi-criteria evaluation method during the process of approval for alienation of the land and planning permission to face flood disasters in housing estates and providing counter-measures to resolve them on part of the land and planning authorities.[208]

The above methods are to aid the land and planning authorities in the evaluation process for better decision-making and enhance the participatory process to leverage the decision-making context, thereby moving closer to transparency in decision-making processes in plan-making to prevent, eliminate, or mitigate flood disasters. For instance, the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (PU (A) 362/87) does not require the housing developer to provide an EIA (Environmental Impact Assessment) report if the housing development project covers less than 50 hectares in area. It is opined that if an EIA report is required regardless of the size of the housing development project, the consequential problems and causes leading to flood disasters might have been discovered earlier. The developer would have taken certain measures to prevent and mitigate flood problems.

Despite section 22(2)(a) of the Town and Country Planning 1976 (Act 172), which requires the local planning authority to comply with the development plans (local and structure plans), if any, in considering applications for planning permission, the development plans need not be followed slavishly. This was the result of the judicial findings in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* and in *Chong Co Sdn. Bhd v Majlis Perbandaran Pulau Pinang*[209]. The decisions of these cases have marginalised the importance of development plans. Thus, even if there may be certain provisions in the development plans that the applicant developer shall have to comply with, such as provisions for flood control and its mitigation in housing estates, these provisions are not mandatory following the decision of the above case law. Nonetheless, the decisions in *Majlis Perbandaran Pulau Pinang v. Syarikat*

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208 Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework," 211, 224, 296, 341, 350, 359, 360 & 421.

209 [2000] 5 MLJ 130 (Appeal Board (Penang).

Bekerjasama-Sama Serbaguna Sungai Gelugor[210] and *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and Another Appeal*[211] that the Local Planning Authority is not duty-bound by the Development Plan may no more be applicable following the latest decision of the Court of Appeal in *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors*[212]. *In Perbadanan Pengurusan Trellises,* the Court of Appeal held that the Local Planning Authority is duty-bound to comply with the development plan.

The current establishment of One Stop Centre (OSC) at the local planning authority level and the local planning authority level to coordinate and expedite the approval process of land development applications at the land authority and the local planning authority offices, including the applications for planning permission and plans' approval (building, infrastructure etc. plans), in the opinion of the author, is still insufficient to solve the problems of flood disasters. This is because even when there are guidelines (for example, "Guideline for Erosion and Sediment Control in Malaysia" and "Urban Stormwater Management Manual for Malaysia") against flood disasters and policies relating to flood mitigation and elimination are provided for the administration and operation of the OSC issued by the Ministry of Housing and Local Government (MHLG), these guidelines and policies **shall not** bind the State Authority and the local planning authority. Thus, it is opined that the prevailing circumstances, such as insufficient coordination and inefficient administration of the State Authorities and the local authorities in dealing with the applications for land development in their respective states, would continue.

Further, based on the latest guidelines issued by the MHLG, it is not a requirement for the OSC to refer to MHLG as one of the relevant technical agencies to provide views, suggestions and comments on flood control and mitigation in housing development. This lacuna, it is opined, may become a factor that could render the OSC ineffective in dealing with flood disasters' possible problems.[213]

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210 [1999] 3 MLJ 1 (Federal Court).

211 [1992] 2 MLJ 393 (Supreme Court at Kuala Lumpur).

212 [2021] 2 CLJ 808 (Court of Appeal at Putrajaya).

213 Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia, Legal and Regulatory Framework," 217 & 304.

According to Ruhaina Ibrahim, an officer at BDB Land Sdn Bhd, Jitra, Kedah, as long as the developer complies with the comments of the Department of Irrigation and Drainage ('JPS'), in particular the drainage design, in accordance with MSMA – Manual Saliran Mesra Alam (Urban Stormwater Management Manual for Malaysia), there will not be any possibility of flood occurrences at housing development projects. This manual serves as a best practice guide in dealing with contemporary stormwater management and issues. Among the contents covered by MSMA are rainwater harvesting, detention pond, erosion and sediment control, culvert and maintenance. Apart from this guideline, the Environmental Impact Assessment Report (EIA) provided by the developers may help the local planning authority examine the suitability of the project locations and provide appropriate measures and conditions to prevent any occurrences of flood and consequential losses.[214]

It is noteworthy that drainage and irrigation falls under the Concurrent List (No. 8 List III) to the Ninth Schedule of the FC. Thus, any legislative directives of the JPS **shall** require the agreement of the State Authority and Federal Authority. In this respect, consultation and agreement between the State Authority and Federal Authority are required before the JPS legislative directives can be made enforceable both at the state and federal levels pursuant to Article 79 of the Federal Constitution (FC). Otherwise, these matters are **not mandatory** for the states or the Federal Authority to implement. Further water supply services are under the states' exclusive power pursuant to the List States to the Ninth Schedule of the FC.

On a dismal note, the developer's liability is only up to the expiry of the defect liability period, i.e., 24 months after delivery of vacant possession. Thus, if flooding occurs at housing development areas during the defect liability period, and this flood caused losses to resident purchasers, the developer will be liable. However, if the floods occurred after the defect liability period, unless the purchaser resident subscribes to insurance policy coverage against flood disasters, any liability for losses to the house residents may not be on the shoulders of developers.[215]

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[214] Md Radzi Othman, Personal Communication, February 22, 2018; Ruhaina Ibrahim, personal communication, March 8, 2018.

[215] Ruhaina Ibrahim, personal communication.

PERSPECTIVE OF THE DEPARTMENT OF DRAINAGE AND IRRIGATION (*JABATAN PENGAIRAN DAN SALIRAN* ('JPS'))

To Affrizal Amran, being a JPS officer, floods in housing development areas may happen due to the failure of the developer to comply with the conditions and guidelines as stipulated by Department of Drainage and Irrigation ('JPS') and Manual Saliran Mesra Alam (MSMA)(Urban Stormwater Management Manual for Malaysia), in that the drainage does not comply with the required size and no retention pond has been built. JPS acts as an advisory body and technical advisor to the local planning authority only, and their views are not binding on the local planning authority. Further political interference may also be a factor where the views of JPS are set aside.[216]

Affrizal Amran said:[217]

> "JPS has also carried out many joint inspections with developers. The inspections were done for JPS to inform the developers on how JPS controls and manages the groundwater movement. Nevertheless, when JPS checked and verified, JPS did not provide any supporting letter to the developers to proceed with the proposed projects. This is one of the aspects that I observe that can be made applicable to all developers. However, JPS was blamed when flood happens as people see that had JPS not supported the development proposal, flood would not happen. This is one of the challenges that JPS has to face. JPS provides the normal drainage development standard requirements to prevent flooding, but the developers do not comply with the requirements."

He further said:[218]

> "The Ministry of Natural Resources and Environment might not have approved the EIA report. Nonetheless, the local planning authority can still approve the proposed project. Similarly, the Department of Environment (Jabatan Alam Sekitar, hereinafter referred to as 'JAS') might not have

[216] Affrizal Amran, personal communication, January 23, 2018
[217] Affrizal Amran, personal communication.
[218] Affrizal Amran, personal communication.

> approved the proposed project, yet the proposed project can still obtain the green light from the local planning authority. JPS only gives comments and advice regarding the developers' application, either JPS supports or not supports. However, the approval of the planning permission application is ultimately in the hands of the local planning authority. With the support of the State Authority and local authority, the local planning authority can overrule JAS's comments or disapproval if they wish to. The approval is partly political".

Additionally, he said:[219]

> **"People must realise that when the authority opens a new housing area, indirectly, it has opened that area to a new greater plan area. Thus, how could we control and manage that enlarged area? We should allocate and identify certain shared responsibilities among the responsible parties to deal with flood problems. For example, in a housing development project estate, we have JPS to advise the local planning authority to manage and reduce the damage and losses to the people, their belongings, and property due to the flood. Therefore, there are various requests from JPS imposed on the applicant developers in the face of future floods. JPS requests the applicant developers to provide retention ponds and underground retention ponds, for example. All these are made to prevent floods. There must be cooperation between the local planning authority and the JPS. The local planning authority should also abide by the advice of the JPS."**

Issues of possible corruption in the planning permission process were also highlighted.

PERSPECTIVE OF THE DEPARTMENT OF MINERAL AND GEOSCIENCE (*JABATAN MINERAL DAN GEO-SAINS* ('JMGS')

[219] Affrizal Amran, personal communication.

According to Wan Salmi Wan Harun, being an officer at the Department of Mineral and Geoscience (hereinafter referred to as 'JMGS'), Alor Setar, Kedah, the comments of JMGS are based on outdated guidelines that are inadequate to deal with climate changes and current issues in housing development areas, for example, flood disasters. JMGS also does not have comprehensive big data information and data analytics[220] on location suitability for housing development projects in Malaysia. This big data and data analytics include information on rock, sediment, soil fitness, soil suitability, soil issues, strengths, weaknesses, and other geologic specimens useful for ensuring sustainable housing development. The big data should contain information on the risk locations and factors that can cause development risks, including flood disasters. This may also involve Geographic Information System (GIS). This big data requires a current modern apparatus system and a suitable platform to store the data. One of the platforms developed by JMGS is the National Geospatial, Terrain and Slope Information System (NATSIS). This data can reveal risk areas, landslide areas, land erosion areas, slope areas, limestone areas, peat areas and sensitive geological areas. NATSIS involves two key elements:

a) Geospatial Information Systems Application Development Terrain and Slopes Country (National Geospatial Terrain and Slope Information System – NATSIS)

b) Geospatial Information Infrastructure Development Center terrain and slope (PMGTC), including the acquisition of hardware and software.[221]

While information and communication technology (ICT) projects are under project components, Hazard, Risk and Slope Map

[220] 'Data analytics' means the science of analysing raw data in order to make conclusions about that information. See Data Analytics: What It Is, How It's Used, and 4 Basic Techniques, Investopedia, accessed on November 25, 2022, at https://www.investopedia.com/terms/d/data-analytics.asp#:~:text=Data%20analytics%20is%20the%20science,raw%20data%20for%20human%20consumption.

[221] "Portal NATSIS, National Geospatial, Terrain and Slope Information System", accessed August 13, 2021, https://www.natsis.jmg.gov.my/en/FAQ2.jsp#.

(PBRC) are a part of the requirements of the National Slope Master Plan (2009-2023).[222]

The data from the above sources are incorporated into the National Slope Master Plan 2009-2023 (PICN). Nonetheless, this special data is only available for certain locations such as Gombak, Selayang, Rawang, Batang Kali, Cheras Selatan, Kajang, Bangi, Ipoh, Cameron Highlands, Kundasang and Kota Kinabalu, not for all districts in Malaysia. This project is called PBRC (Peta Bahaya, Risiko dan Cerun - Hazard, Risk and Slope Map).[223] Currently, JMGS only have data on slope hazard and risk mapping. JMGS also has a geology map that contains data on types of rock materials. JMGS can know the sensitive areas, limestone areas, geological process, areas' height, and geological situations of certain locations through this geology map. This geology map is currently the main reference for JMGS in providing views and comments for land development as the authorities require, including the local planning authority. The data in the PBRC are continuously updated. In short, currently, the geological big data available as references are NATSIS, PBRC and National Slope Master Plan (Pelan Induk Cerun Negara). However, the guidelines on PBRC for public and industry information are not yet available.[224]

In another development, JMGS is monitoring a project known as the 'North East Monsoon Project'. The monsoon disasters have caused many flood disasters, geological hazards, and soil problems. JMGS is currently monitoring critical slopes and ensuring adequate maintenance works are periodically done. This project commenced in 2020.[225]

Be that as it may, JMGS faces insufficient human resources, logistics and budget to carry out detailed investigation and assessments. As a result, the comments made may not be comprehensive and detailed to meet the current challenges in

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[222] "Portal NATSIS, National Geospatial, Terrain and Slope Information System".

[223] Personal communication, Wan Salmi Wan Haron, January 10, 2021, & January 18, 2021.

[224] Personal communication, Wan Salmi Wan Haron; "Portal NaTSIS, National Geospatial, Terrain and Slope Information System", accessed August 13, 2021, https://www.natsis.jmg.gov.my/en/FAQ2.jsp

[225] Personal communication, Wan Salmi Wan Haron.

housing development projects, including measures to prevent occurrences of flood disasters.[226]

ROLES OF OTHER RELEVANT TECHNICAL AGENCY DEPARTMENTS

In addition, it is submitted that other relevant technical agencies such as the Department of Drainage and Irrigation ('JPS'), Department of Public Works ('JKR') and Department of Environment ('JAS') should also provide their respective big data and data analytics relating to their expertise and relevant information within their job scope on every district in Malaysia insofar as prescribed by government policies and the written laws. For example, JPS should provide updated big data information and data analytics for each district in Malaysia relating to River Basin Management and Coastal Zone, Water Resources Management and Hydrology, Special Projects, Flood Management and Eco-friendly Drainage. The data should provide the nature, features, issues, problems and measures to deal with the challenges in these respective matters. The data accumulated will help the planning authority to formulate comprehensive development plans and provide inclusive and practical conditions for the issuance of Planning Permission for housing development, particularly measures to prevent and deal with flood disasters that might happen.[227]

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[226] Personal communication, Wan Salmi Wan Haron. Nuarrual Hilal Md Dahlan, "Alienation of land for housing development projects in Malaysia and New South Wales, Australia: A comparative legal analysis," l, xii; Nuarrual Hilal Md Dahlan, Legal Issues in the Rehabilitation of Abandoned Housing Projects (UUM Sintok: UUM Press, 2011), 140.

[227] "Official Portal for Department of Irrigation and Drainage, Ministry of Environment and Water," accessed August 13, 2021, https://www.water.gov.my/ 2021; Jabatan Kerajaan Tempatan Kementerian Perumahan dan Kerajaan Tempatan, Manual OSC 3.0 Plus Proses Dan Prosedur Cadangan Pemajuan Serta Pelaksanaan Pusat Setempat (OSC), (Putrajaya: Kementerian Perumahan dan Kerajaan Tempatan, 2019); Department of Irrigation & Drainage, Guideline for Erosion and Sediment Control in Malaysia, (Putrajaya: Ministry of Natural Resources and Environment Department or Irrigation and Drainage Malaysia, 2010).

Similarly, JKR should provide updated big data information and data analytics on their job scope and jurisdiction relating to road, building, infrastructure, highway and hill slope for each and every district in Malaysia. They also need to provide data on land geology insofar as relevant to their jurisdiction and power.[228]

Likewise, JAS will need to provide updated big data information and data analytics, for example, on soil, water, and atmospheric pollution.[229]

It is evident that there is no statutory requirement imposing on the Local Authority, Local Planning Authority and the technical agencies to provide comprehensive big data and data analytics as a preventive way to avoid any occurrences of flood disasters in the future.[230] **The only method is *ad hoc* planning, i.e. if certain areas are affected by flood disasters, only then will the Local Planning Authority and the technical agencies make the development planning conditions and requirements more stringent.**

Even the Geological Survey Act 1974 (Act 129), pursuant to Section 6 of Act 129, reads:

a) "**Whenever it appears to the Minister** that a geological survey should be made of any area he may, **with the concurrence of the State Authority**, by notification in the Gazette, designate the area to be surveyed (hereinafter referred to as "the designated area") by the Director-General." (Emphasis added).

(a)

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228 "Portal Rasmi Kerajaan Malaysia, Kementerian Kerja Raya," accessed August 13, 2021; Jabatan Kerajaan Tempatan Kementerian Perumahan dan Kerajaan Tempatan, Manual OSC 3.0 Plus Proses Dan Prosedur Cadangan Pemajuan Serta Pelaksanaan Pusat Setempat (OSC); Jabatan Kerjaraya, Pelan Induk Cerun Negara 2009-2023,(Kuala Lumpur: Kementerian Kerjaraya, 2009); personal communication, Su Faizah Sukor & Bakhtiar Affandi Othman, February 8, 2021.

229 "Portal Rasmi Jabatan Alam Sekitar, Kementerian Alam Sekitar dan Air," accessed August 13, 2021; personal communication, Norazizi Adinan, January 31, 2021.

230 Personal communication, Ahmad Sujairi Md Hassan & Ramziah Abd. Rahman, February 15, 2021.

(b) While section 2 of the Geologist Act 2008 (Act 689) defines 'geological services' as follows:

(c)

(d) "The provision of geological advice and services pertaining to all or any of the following: (a) feasibility studies; (b) planning; (c) geological surveying; (d) implementation, commissioning, operation, maintenance and management of geological survey works or projects; and (e) any other services approved by the Board."

On the above basis, only if it **appears** to the Minister responsible for JMGS to request a geological survey be conducted for a particular area subject to the concurrence of the State Authority, that the JMGS shall conduct a particular geological survey, including it is submitted, over the flood disaster-affected areas. It follows that if the Minister does not become aware of any possible problem to any geographical area, no geological survey will be conducted by the JMGS. This shows that the survey will only be conducted on an *ad hoc* basis, not preventive. In another respect, if the State Authority does not concur with the proposed survey be conducted, the Minister cannot proceed with the intended survey.

Similarly, suppose the Minister disagrees with the request of the State Authority to have a survey conducted. In that case, the State Authority does not have any power and authority to force the Minister and the JMGS to conduct the survey. In respect of the duty and responsibility of the Local planning authority to carry out maintenance work over relevant locations to prevent occurrences of natural catastrophes due to flood disasters, it is doubtful that the Local planning authority has the means and capability.[231]

According to Mohd Izham Abdul Hamid, being the Planning Officer at the Development Planning Department, Majlis Bandaraya Alor Setar (MBAS), changes to the conditions of the planning permission are inevitable to comply with the latest requirements of the technical agencies in accordance with the current changing needs and issues of the public, for example, flood, soil problems etc. In short, he explained that the new conditions might be imposed by the technical agencies such as the water authority, electric authority, and agriculture

[231] Yeoh Su Guan, personal communication, February 4, 2021; Sukor & Othman, personal communication, February 8, 2021.

authority because new circumstances might have rendered new reasonable conditions to be imposed on the Planning Permission.[232]

The new conditions also include the duty to provide Demographic Study Report, Economic Study Report, Traffic Audit report, Traffic Impact Assessment, Road Safety Audit, Social Impact Study Report and Environmental Impact Assessment report (EIA).[233]

These reports will be studied by the technical agencies and Planning Authority, who may comment and request amendments to the proposed projects, if necessary, according to the requirements of their respective guidelines. The applicant developer must also comply with requirements under the Local Plan and Structure Plan (Development Plans). Only when all the conditions and requirements imposed by the technical agencies and the Planning Authority have been complied with will the Planning Permission be issued and granted.

According to Ruhaina Ibrahim, an officer in BDB Land Sdn Bhd in Jitra, developers must carry out several feasibility and estimate studies and several contingency budget provisions to lessen the impact of flood disasters and by accommodating the changing requirements. This also requires prudent financial management and planning of the developers.[234]

It is trite fact that the Local Planning Authority, through its One Stop Centre ('OSC') can overrule the views of the technical agencies; for example, the Department of Environment (JAS) and Department of Irrigation and Drainage (JPS) are not binding over the Local Planning Authority. Johaimin Johari, an officer at JAS, Alor Setar, Kedah, said:[235]

> "I can give an example that a paddy factory must follow JAS's guideline in respect of the buffer zone that the zone must measure 200 meters from the proposed housing project. Nevertheless, when JAS provided the views to the Local Planning Authority that the proposed housing project encroaches the buffer zone, the Local Planning Authority

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232 Mohd Izham Abdul Hamid, personal communication, February 6, 2018.

233 Mohd Izham Abdul Hamid, personal communication.

234 Ruhaina Ibrahim, personal communication, March 8, 2018.

235 Johaimin Johari, personal communication, March 1, 2018; Abd Talip Abd Rahman, personal communication, January 4, 2018.

> rejected JAS's view. Similarly, this was the case that happened to a project that involved a landslide in Penang. In this project, the EIA report was rejected by JAS, but still, the Local Planning Authority wished the project to proceed."

Further, Johaimin Johari said:[236]

> "In respect of soil erosion, landslide… at the earliest point we (JAS) had provided conditions for the purported development, for example, we said that such an area was risky for such a development, like hill slopes, we provided with views that the purported development was not compatible with development. So, what can we do if they (the local planning authority) do not obey us?'

Thus, the above point supports the eauthor's earlier contention that the above problems might also be due to the absence of a specific provision in the Town and Country Planning Act 1976 (Act 172) ('TCPA'), particularly section 22(2) of the TCPA, to require the local planning authority to consider the views from the relevant technical agencies in dealing with an application for planning permission.[237] Due to the absence of such a specific provision, even though in practice there are planning rules and the current states' planning rules and guidelines to refer to the technical agencies for views, the local planning authority may conduct *ad hoc* investigations. It may not seek any view from the technical agencies, or if there is any, only a limited and insufficient number of technical agencies are consulted. This is because the duty to refer to these agencies or parties is not mandatory but is a mere direction, i.e., it is subject to the planning authority's discretion, either to refer or not to refer to them.[238] Hence, the judicial decisions in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* and *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and Another Appeal* gives the local planning authority flexibility in exercising planning control. This would also give the local planning authority

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236 Johaimin Johari, personal communication; Abd Talip Abd Rahman, personal communication.

237 Nuarrual Hilal Md Dahlan, Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework, 222, 350, 360 & 361.

238 Nuarrual Hilal Md Dahlan, Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework.

more flexibility, based on expediency and necessity, even where a gazetted development plan exists for the area, allowing *ad-hoc* planning control over the housing developments. However, it is opined that this situation may lead to certain unwarranted results. For this reason, too, it is opined that, following case law and the subservient authority of the planning authority to the State Authority, these may undermine initiatives and the need to adopt and apply the gazette comprehensive development plans.[239] Thus, if this were the case, then the judicial policy and the policy of the local planning authority are in conflict with section 22(4)(a) of the TCPA, *viz*, 'the local planning authority shall not grant planning permission if the development in respect of which the permission is applied for would contravene any provision of the development plan'.

In another situation, the development plans are not gazetted. Thus, the local planning authority and the State Planning Committee may provide *ad hoc* planning, not restricted to the ungazetted development of local plans. *Ad hoc* planning here means, it is submitted, the local planning authority plans and approves certain planning permission based on current expediency, necessities and needs and not dependent on the plans and conditions as prescribed under the development plans. Sometimes, the authority and Committee may refer to the development master plan. This happens in Penang.[240]

In the author's opinion, it is good to have stringent conditions and requirements on the applicant developers before they can carry out the development to ensure that development issues such as abandoned housing projects, flood disasters and soil problems do not occur and protect the rights of resident purchasers. However, the conditions and requirements would surely add monetary responsibility and development costs to the developers. As a result, the cost of development will increase. This will mean the purchase price for the houses for sale will be higher to commensurate with the increasing development costs and may not be affordable for public purchase. This will indeed frustrate the national policy of providing sufficient housing accommodation. Thus, a balanced policy must be formulated and

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239 Sharifah Zubaidah Syed Abdul Kader Aljunid, "Controlling Changes of Use of Land in Malaysia: Dual Authorities and The Dilemma of Certainty vs. Flexibility," 252.

240 Abd Talip Abd Rahman, personal communication.

implemented to ensure safety, security, equity, justice, and sustainable development to the public and that the houses provided are sufficient and affordable.[241]

Projects that fall under 'prescribed activities' require an EIA Report. The EIA Report will be vetted and examined by JAS. If JAS is satisfied, the proposed project will be supported. If not, JAS will require the developer to amend the proposed development per JAS's views. Besides, JAS also invites other technical agencies to examine the EIA report. These agencies include the Department of Public Works (JKR), the Department of Irrigation and Drainage (JPS) and the Department of Mineral and Geoscience (JMGS). In some cases, JAS has found the report to be fake or inadequate. Thus, the report is rejected.[242]

In other situations, even though developers might have submitted the Development Proposal Report (DPR) to the local planning authority, pursuant to section 21A of the TCPA, there is a possibility that problems (for example, prone flood areas) at the location of the project are not being emphasised nor envisaged. It should be noted that pursuant to section 21A(1)(d)(i) of the TCPA, the applicant developer shall have to describe, *inter alia*, the physical environment, topography, landscape, geology, and natural features of the said land. In other words, the report submitted to the local planning authority is incomplete, as the applicant developer did not carry out detailed investigation on the land in order to ascertain the 'suitability' of the purported project land against flood.[243]

The author also finds that the information provided in the development plans are not updated, are inaccurate, inadequate, and not revised in meeting the contemporary development challenges. This is partly due to the absence of comprehensive data relating to the

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241 Dr Hajah Asiah binti Othman, "Planning requirements in housing development," In: Convention on Land development, 22-23 September 2003, A' Famosa resort, Melaka, 8 & 9; Ibrahim Mohd @ Ahmad, Ezrin Arbin & Ahmad Ramly, "Urban Housing Development: Town Planning Issues, Planning Malaysia, Journal of the Malaysian Institute of Planners" 5 (2007): 43-60.

242 Johanim Johari, personal communication, March 1, 2018.

243 Nuarrual Hilal Md Dahlan, Abandoned Housing Projects in Peninsular Malaysia: Legal and Regulatory Framework, 222 & 224.

developmental elements, such as the nature of soil, geographical site location and their fitness and sustainability, particularly from the JPS, JAS and JMGS.[244] The above non-compliance is partly because some states had yet, as at the date of the applications for planning permissions by the applicant developer, adopted the TCPA in full (section 1(3) TCPA).

Be that as it may, it is submitted that the decisions of the local planning authority issuing planning permission can be challenged if it is proven that the decisions were made not in accordance with the law, as happened in *Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and Another Appeal*. In this case, the local planning authority failed to give the adjoining landowners the right to object to the development of the land that was being subject to the planning permission. This requirement was spelt out in the Planning (Development) Rules 1973, Emergency (Essential Powers) Ordinance No 46 of 1970, the City of Kuala Lumpur (Planning) Act 1973 and the Federal Territory (Planning) Act 1982.

The above principle was also adopted in *Mayland Valiant Sdn Bhd v Majlis Perbandaran Subang Jaya.*[245]

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244 Abd Talip Abd Rahman, Personal Communication; Chong Co Sdn. Bhd v. Majlis Perbandaran Pulau Pinang [2000] 5 MLJ 132 and Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; Mohd Izham bin Abdul Hamid, personal communication, February 6, 2018; Wan Salmi Wan Harun, personal communication; Adibah Awang, Shahidah Mohd. Ariff & Ahmad Fauzi Nordin, "Geo-Spatial Data Accuracy and its Legal Implications in the Malaysian Context," Eighteenth United Nations Regional Cartographic Conference for Asia and the Pacific Bangkok, 26-29 October 2009 Item 7(b) of the provisional agenda Invited Papers, Economic & Social Council, United Nation; https://unstats.un.org/unsd/methods/cartog/Asia_and_Pacific/18/Papers/IP/IP%2014%20Malayisia%20GEOSPATIAL%20DATA%20ACCURACY.doc.pdf); Nuarrual Hilal Md Dahlan, "Alienation of Land for Housing Development Projects in Malaysia and New South Wales, Australia: A Comparative Legal Analysis," I, xii & xiii; Nuarrual Hilal Md Dahlan, "Legal Issues in the Alienation of Lands for Housing Development Projects in Malaysia," xlvii, xlix, & I.

245 [2018] 4 MLJ 685 (Court of Appeal at Putrajaya).

It is opined that the local planning authority could be liable for negligence in their failure to exercise due care in granting planning permission and failure to exercise proper and sufficient planning control, which partly has caused the detrimental flood disaster. This is because no provision in the TCPA confers on the local planning authority immunity against any breach of duty and negligence, compared to and provided for the State Authority and the Local Authority, pursuant to section 95(2) of the SDBA. However, any action against the local planning authority shall be subject to the provisions in the Public Authorities Protection Act 1948 (Act 198) (Revised 1978); for example, pursuant to section 2(a) of this Act, the legal action must be commenced within three years from the default of that authority. It is worth mentioning that, in *Wong Lup Tuck & Ors v. Majlis Perbandaran Pulau Pinang* [2016] MLJU 1382 (Planning Appeal Board (Pulau Pinang)), the Planning Appeal board held that the planning authority as a public authority needs to pay heed to public interest, sound planning practices, balance development and the law bearing in mind its responsibilities to the public at large.

FINDINGS AND SUGGESTIONS

The followings are key points that can be extracted from the above discussion.

1) There evidently exists some non-coordination between the federal agencies and the states' agencies as matters relating to land, town and country planning, drainage and irrigation, water supply and water services, whether they are placed under the States' List or Concurrent List to the Ninth Schedule of the FC as the policies and guidelines relating to flood control of the Federal agencies **are not binding** on the states. Thus, this problem will become a prolonged issue in Malaysia unless both the Federal agencies and States' agencies are aware of and respect the need to preserve the welfare and well-being of the public and protect the rights and interests of the people above their respective political interests and personal judgments.
2) Even though the requirement to refer to the technical agencies is not mandatory on the Local Planning Authority in the issuance of Planning Permission, they are still liable to ensure that the decision-making process in issuing Planning Permission is

reasonable, fair, equitable, and for the benefit of the public, not otherwise. Thus, if there is evidence that the Local Planning Authority has acted unreasonably to the detriment of the public in the issuance of Planning Permission and other development control approvals, for example, preventive and curative measures to deal with flood disasters, they will be liable, at law.

3) The Court of Appeal case in *Perbadanan Pengurusan Trellises* reinforces the statutory requirement in section 22(2)(a) TCPA that the Local Planning Authority must comply with the Development Plan. Thus, the case law that negates the importance of Development Plan, as evident in *Syarikat Bekerjasama-sama* and *Chong Co,* may no longer be relevant and may be superseded and overruled with the latest Court of Appeal case.
4) Some evidences prove the Development Plan, guidelines and views of the technical agencies have not been comprehensively prepared, done and updated as there is no periodic and updated big data information and data analytics provided by the Local Planning Authority and relevant technical agencies for each district in Malaysia that can provide comprehensive updated current information of the suitability of all geographical location for housing development projects. For this matter, new amendments of statutory provisions governing Local Planning Authority and relevant technical agencies are needed to the effect of imposing a duty on these parties to provide and prepare periodic updated big data information and data analytics in each district in Malaysia as sources and guidelines for consideration and analysis in the issuance of planning permission and other development control approvals.
5) Many new requirements, conditions, and laws will finally cause development approvals and planning permission to become stringent. As a result, this may burden the developers' monetary provisions, investment, logistics and time. This will cause housing prices to skyrocket. Surely this can affect the objective and policy of the government to provide sufficient and affordable housing to the people. Thus, a balancing policy, law and approach must be formulated to ensure that the houses provided by the developer are sustainable, adequate, and of quality and that the house prices too are affordable for public purchase.

CONCLUSION

The author submits that flood disasters are due partly to acts of God and human mismanagement. This article concerns the legal aspects in dealing with the issues of flood disasters in housing areas. The author contends that the preventive and curative legal management for flood disasters is inadequate in Malaysia. This article discusses the legal issues that have contributed to the problems of flood disasters in housing areas in Malaysia. Among the legal issues are - the separate constitutional and administrative jurisdiction between the federal government and state governments, inadequate legal provisions to deal with flood problems and non-binding directives of the relevant technical agencies, non-coordination between relevant agencies in facing flood problems, incomplete big data and data analytics on flood areas and geographic suitable location for housing development, inadequate development plans and land development information and insufficient legal protection to resident purchasers in the housing law.

These legal issues, as highlighted, should be tackled to ensure that measures to deal with the problems arising from floods can be successfully executed by considering the discussion, analyses and suggestions provided in this article. Otherwise, flood disasters can be an unsettled and pervasive problem that can cause losses and irreparable damage to the stakeholders in housing areas in Malaysia.

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MOVING AWAY FROM THE "*ASEAN WAY*" APPROACH IN ASEAN DISPUTE SETTLEMENT MECHANISM

Cynthia Lee Mei Fei*

ABSTRACT

Since the inception of the Association of Southeast Asian Nations (ASEAN) in 1967, ASEAN member states have signed and ratified several treaties and agreements to signify their commitments in achieving a single market and production base. However, these treaties and agreements remain to be soft law instruments as the ASEAN dispute settlement mechanism envisioned for ASEAN economic agreements under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism ('EDSM 2004') has not been activated until today. This is contrary to the World Trade Organisation's Dispute Settlement Mechanism which has been widely used and adopted even by ASEAN countries. One of the limitations identified by scholars is the continuous reliance on the "ASEAN Way" principles by the ASEAN member states. Existing studies on the EDSM 2004 acknowledged the flaws in the ASEAN Dispute Settlement Mechanism to be the non-confrontational ASEAN WAY culture. This ought to be rectified in the EDSM 2019 but it was not. In fact, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 ('EDSM 2019') which seeks to revamp the previous EDSM 2004 is fraught with the same limitations. Similar to markets, the ASEAN Way culture entrenched in the ASEAN society will not self-correct and heavier rules and regulations are necessary to shift ASEAN transition to a more rules-based governmental organisation. There exists a gap in knowledge on the comprehensive strategies to overcome the deeply entrenched ASEAN culture. This study is important as it will spark debates and discussions from which robust policy recommendations can be drafted to improve the existing EDSM 2019. This article employs the doctrinal research method wherein the primary data is obtained through systematic content analysis of literature review in the area of study, ASEAN declaration and relevant agreements, i.e., the EDSM 2004 and EDSM 2019. In this regard, 3 recommendations for improvements are identified to include ease of access to readily available information on the ASEAN Dispute Settlement Mechanism, improve the

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human resource and support of the ASEAN Secretariat and limit the choices of forum.

Keywords: ASEAN Economic Community Law, ASEAN Protocol on Enhanced Dispute Settlement Mechanism, ASEAN Way

ASEAN DISPUTE SETTLEMENT MECHANISM

Since the coming into force of the ASEAN Charter on 15.12.2008, ASEAN has been receptive to the idea of a more rules-based inter-governmental organisation. In spite of this, the ASEAN dispute settlement mechanism envisioned for ASEAN economic agreements under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism ('EDSM 2004') has not been activated until today. Many scholars postulate that the non-activation of the ASEAN dispute settlement mechanism is a good indication that the ASEAN dispute settlement mechanism is working well. However, upon further scrutiny of the circumstances of the ASEAN member states' disputes and/or differences which have arisen and resolved throughout the years, it is observed that there has been a plethora of intra and inter ASEAN disputes resolved via third party dispute settlement mechanisms (i.e., the World Trade Organisation's Dispute Settlement Understanding ('WTO DSU')) or via the informal and non-confrontational approach consistent with the "ASEAN Way" principles[246].

The "ASEAN Way" is not new and has contributed to much economic cooperation in ASEAN through *musyawarah* and *mufakat*, rather than through rules and regulations. It is essentially premised on a "relationship-based" approach rather than a "rules-based" and "market-based" approach which the West adopts and abide by. This informal approach is in stark contrast to the formal legalism in the West.

One of the main objectives of the ASEAN Economic Community is to establish an integrated and cohesive economy in a unified single market and production base. It is hoped that this will increase ASEAN's competitiveness in the world market. However, the ASEAN economic agreements signed and ratified by ASEAN member states appear to have no teeth for they are not legally binding or unenforceable. In fact, Huala Adolf (2018)[247] compared the ASEAN Trade in Goods Agreement 2009 to a soft law instrument which is

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246 Hao Duy Phan, "Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanism," Arbitration Law Review, 5, no 14 (2013): 254 – 276.

247 Huala Adolf, "ASEAN Trade in Goods Agreement (ATIGA) and Its Implementation," Indian Journal of International Economics Law, 1, IX (2018): 1 – 18.

essentially not legally binding or enforceable. In an effort towards globalisation, soft law has its benefits for being convenient and meeting overriding interest of justice[248]. However, soft legal instruments are also heavily dependent on mutual commitments of each ASEAN member state in accordance with the "ASEAN Way" through *musyawarah* and *mufakat*, rather than through rules and regulations[249].

Today, as ASEAN countries are rapidly developing and improving their trades and services, the informal and non-confrontational "ASEAN Way" approach appears to be unsuitable in most cases for the purpose of resolving the increasingly complex disputes and/or differences of inter and intra ASEAN.

The recurring argument that ASEAN member state leaders are not prepared for a rules-based dispute settlement mechanism that is beyond the 'ASEAN Way' approach cannot hold water anymore. In fact, least developing countries in ASEAN (including CLMV countries, i.e., Cambodia, Laos, Myanmar and Vietnam) have referred disputes and/or differences to the WTO DSU and other third-party dispute settlement mechanisms which are essentially premised on a rules-based approach. Over the years, intra ASEAN disputes were referred to the WTO DSU and they are as follows: -

(a) In 1995, Singapore requested for consultation with Malaysia on the prohibition of imports of polyethylene and polypropylene. Mutually agreed solution was notified to the WTO DSU on 23.3.1995.

(b) In 2008, Thailand requested for consultation with Philippines on the customs and fiscal measures on cigarettes. On 21.12.2020,

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248 A notable case example where the "ASEAN Way" approach was used to resolve disputes and differences is the Malaysian government's amicable settlement with the estate of Boonsoom Boonyanit in 2018 pursuant to the 1987 ASEAN Agreement for the Promotion and Protection of Investments. Although the estate of Boonsoom Boonyanit finally attained the justice which it had been seeking for decades, the exact settlement sum paid or to be paid was not disclosed. (Datuk Roger Tan, 'Let Justice be seen to be done', published on 14 August 2020, https://www.edgeprop.my/content/1723709/let-justice-be-seen-be-done)

249 Paul J. Davidson, "The ASEAN Way and the role of law in ASEAN Economic Cooperation", 2004 *Singapore Year Book of International Law and Contributors*, 8 SYBIL (2004): 165 – 176

Thailand and Philippines agreed to an 'Understanding between the Philippines and Thailand to pursue facilitator-assisted discussions aimed at progressing and resolving outstanding issues in regards to DS371'. On 31.3.2021, the Facilitator submitted to the Dispute Settlement Body ("DSB") its report.

(c) In 2015, Vietnam requested for consultation with Indonesia for the safeguard of certain iron or steel products. On 15.4.2019, Indonesia informed the DSB that it had adopted a regulation to remove the safeguard measure challenged by Vietnam in the dispute, which is considered as full implementation of the DSB recommendations and ruling.

Other than the WTO DSU system, intra ASEAN disputes were also referred to other third-party dispute settlement mechanisms and they are as follows: -

(a) In a dispute between Cambodia and Thailand on the Request for Interpretation of the Judgment of 15th June 1962 regarding the case concerning the Temple Preah Vihear from 2010 – 2013 and the dispute between Cambodia and Thailand on the case concerning the Temple Preah Vihear from 1959 - 1962, the disputes were referred to the International Court of Justice ("ICJ").

(b) In a dispute between Malaysia and Singapore on the Land Reclamation by Singapore and around the Straits of Johor in 2003, the dispute was referred to an Ad Hoc Tribunal. In 2005, Malaysia and Singapore signed a settlement agreement and jointly submitted a letter to the International Tribunal for the Law of the Sea ("ITLOS") requesting it to deliver a final binding award based on the settlement agreement.

(c) In a dispute between Malaysia and Singapore on the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge from 2003 – 2008, the dispute was referred to ICJ.

(d) In a dispute between Malaysia and Indonesia on the Sovereignty over Pulau Sipadan and Pulau Ligitan (2 islands in the Sulawesi Sea) from 1998 - 2002, the dispute was referred to ICJ.

Based on past intra ASEAN disputes that were referred to third party dispute settlement mechanisms, it is evident that there has been a

shift in the mindset of ASEAN member states with regards to the "ASEAN Way" of full consensus only approach.

In light of this, the ASEAN dispute settlement mechanism should be improved and revamped to keep up with the shift in mindsets. Similarly, the ASEAN Secretariat should also take heed of this and implement the necessary improvements to the existing system.

From an economist point of view, the private bargaining reached between ASEAN member states appears to be efficient due to the minimization of costs and maximisation of joint profits between parties – whereby least cost is spent when ASEAN leaders reach a consensus informally without having to abide by the rule of law in courts. However, in the long run, the politicised dispute settlement system controlled and manoeuvred by ASEAN leaders would cause the foreign investors to lose trust and confidence in the ASEAN trade and services.

It is observed that the lacklustre commitment to develop the ASEAN dispute settlement mechanism over the years could be due to the fact that it is essentially a peer review mechanism. However, the protectionist trait of previous ASEAN leaders as displayed in amongst others as well as the infamous territorial dispute on the sovereignty over Pulau Sipadan and Pulau Ligitan between Malaysia and Indonesia in the early 1990's[250] does not necessarily reflect the attitudes of ASEAN leaders today.

The ASEAN Secretariat should take heed of the increasingly cooperative attitudes of ASEAN leaders today and revamp the ASEAN dispute settlement mechanism. Once developed, tried and tested, certainly ASEAN member states will develop trust and confidence in the ASEAN dispute settlement mechanism.

Some existing limitations of the ASEAN dispute settlement mechanism which ought to be addressed by the ASEAN Secretariat are as follows: -

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[250] John G. Butcher, "The International Court of Justice and the Territorial Dispute between Indonesia and Malaysia in the Sulawesi Sea," *Contemporary Southeast Asia*,. 35, no. 2 (2013): 235 – 257.

There are no readily available information and easily accessible system to the ASEAN dispute settlement mechanisms

Unlike the WTO DSU system which is clearly explained in the official website of WTO, any and/or all information on the ASEAN dispute settlement mechanism is lacking even on the official website of ASEAN, wherein: -

(a) There is no link to the ASEAN dispute settlement system on the ASEAN website;
(b) While a copy of the ASEAN economic agreements and the EDSM 2004 are available on the ASEAN website, there is no page dedicated to the ASEAN dispute settlement mechanisms that provides further information, assistance and/or legal support;
(c) There is no information on the composition of the Senior Economic Officials Meeting and the panel in the EDSM 2004;
(d) There is no information on past cases which was referred to the ASEAN dispute settlement mechanism but thereafter resolved via peaceful means;
(e) There are no e-learning modules, legal texts, documents and/or background papers for the purpose of increasing familiarity, transparency and confidence.

To this end, members of the public have to resort to the information and analysis found in articles and legal texts prepared by scholars and/or other organisations. For example, WTO and the United Nations[251] each provide a brief explanation to the ASEAN Dispute Settlement Mechanism on their official website.

In comparison with the WTO DSU system, there is a link to 'Dispute Settlement' on the WTO official website homepage and there is a plethora of documents, legal texts, case summaries and case reports that are available for public reading. There is also a 2019 edition of the WTO Dispute Settlement: One Page Case Summaries from 1995 – 2018 which provides concise summaries of past cases determined by the WTO DSU panel.

[251] United Nations Conference on Trade and Development: Dispute Settlement, "Regional Approaches 6.3 ASEAN" (2003).

The ASEAN Secretariat lacks resources and human support

There is a clear lack of resources and human support, including legal and financial support in order to ensure that the ASEAN dispute settlement mechanism is workable. Whilst Article 17 of the EDSM 2004 provides for an ASEAN DSM Fund which is to be separate from the ASEAN Secretariat regular budget, it is only intended to meet the expense of the panels, Appellate Body and other administration costs of the ASEAN Secretariat. Every other cost and expense incurred, such as legal research, legal representation and support are expected to be borne by the ASEAN member states themselves, including the least developing ASEAN member states such as Cambodia, Laos, and Myanmar. Certainly, this creates an unnecessary hurdle and burden on disputing parties who are from less developed countries.

It was reported that the DSM Fund has reached USD$ 345,000.00[252], however, no clear information can be found on the use of the DSM Fund in the ASEAN website, especially considering no cases were referred to it as of today.

There is a lack of knowledge and familiarity on the ASEAN Dispute Settlement Mechanism. The ASEAN Secretariat, which is relied on for legal advice also does not have enough legal advisors and it was reported by Natthada Temudomchai (2016) that there are only 5 lawyers within the ASEAN Secretariat's Legal Services and Agreements Division in 2014.

In order to set up a training programme (online and physical courses and modules, webinars, conferences, booklets, hypothetical scenarios to show how disputes are resolved under the ASEAN Dispute Settlement Mechanism) for the purpose of equipping each ASEAN member state (leaders, officers and relevant private sectors) with the requisite knowledge to refer disputes to the ASEAN dispute settlement mechanism, the ASEAN Secretariat must have sufficient funds in order to have enough manpower and experts to assist and facilitate all parties. However, Natthada Temudomchai (2016) reported in his article that Dr Surin Pitsuwan, the ASEAN Secretary General is reportedly employing only 260 personnel including 79 staff recruited from the ASEAN

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252 Natthada Temudomchai, "ASEAN Dispute Settlement Mechanism: A Study of its Ineffectiveness in Resolving Economic Disputes," *Assumption University Law Journal*, 7, no. 2 (2016),

member states. In comparison to WTO's employing of 600 staff to handle only trade cooperation and settlement of disputes in 2016, the lack of efficiency of the ASEAN Dispute Settlement Mechanism is clearly attributable to the lack of human resource support and the immense workload.

To further minimise the transaction costs of the ASEAN dispute settlement mechanism and encourage ASEAN member states to opt for the same, the DSM Fund should be utilized to ensure that the ASEAN Secretariat headquarters in Jakarta, Indonesia and the respective ASEAN member states offices are sufficiently equipped with the physical and technological facilities for online and substantive consultation, mediation and hearings.

It is noteworthy that the ASEAN Secretariat and the respective ASEAN member states offices have shown sufficiently adequate technological facilities for online conferences and meetings during the Covid-19 pandemic. However, there should be a check and survey to ensure that the existing offices and technological facilities are sufficiently adequate to facilitate and/or conduct online and/or physical consultation, mediation and hearings.

There are too many choices of forum

Due to the flexibility and freedom of choice afforded under the 'ASEAN Way' principle, ASEAN member states are allowed to opt to resolve their disputes and/or differences via other forums, i.e., a referral to the ICJ, the WTO DSU and even a referral to the ASEAN Summit (which only comprises of political leaders). More often than not, disputes and/or differences between ASEAN member states are resolved at the ASEAN Summit between the political leaders.

As a result, ASEAN member states forum-shop and opt for forums other than the ASEAN dispute settlement mechanism which is still at infancy stage.

Further to the above, the EDSM 2004 allows a flexible choice of forum thereby defeating its very purpose of being the primary mode of ASEAN dispute settlement mechanism. While the flexibility and freedom of choice afforded to ASEAN member states under EDSM 2004 are in line with the 'ASEAN Way' approach, it overrides the

overall intention to gradually move ASEAN dispute settlement mechanism into a more rule-based and quasi-judicial system.

In addition, although EDSM 2004 is meant to be the primary mode of dispute settlement mechanism for 'covered agreements', however, the term 'covered agreements' is not defined and the list of covered agreements are in fact attached in a list annexed to the EDSM 2004 thereby requiring continuous modification of the EDSM 2004 in order to cover future treaties and/or agreements. In comparison, the WTO DSU does not envisage the use of alternative forums for its covered agreements.

STRATEGIES TO OVERCOME THE LIMITATIONS

As a way to revamp the ASEAN dispute settlement mechanism, the ASEAN member states had on 20.12.2019 signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2019 ('EDSM 2019'). However, the EDSM 2019 has yet to come in force pending the date on which the 10th ASEAN member state notifying the Depository of its completion of the internal procedures necessary for the entry into force of the Protocol.

Clearly, there are many limitations to the ASEAN dispute settlement mechanism which have dampened the public's trust and confidence in the mechanism. However, there are strategies to overcome these limitations and the same are addressed as follows. From the past trend of disputes and/or differences intra ASEAN, clearly there is an increasing inclination to the rules-based and quasi-judicial approach and a move away from the "ASEAN Way" approach.

Some scholars in the likes of Edmund Sim (2020) commented that in light of ASEAN's experience with the WTO DSU system which displays severe delays and ineffectiveness due to the unresolved dispute between Philippines and Thailand on customs valuation of imported cigarette disputes since 2008 and the increasing number of backlog cases in the WTO DSU system by other WTO members, there might be a keener interest by ASEAN member states to refer to the ASEAN dispute settlement mechanism. Therefore, there is an urgency to quickly revamp the ASEAN dispute settlement mechanism.

It is suggested that a special Eminent Persons Group (EPG) comprising of leaders of each ASEAN member state and lawyers with

specialisation in international laws and trade could be formed for the purpose of reviewing, assessing and strategizing ways to increase the effectiveness and credibility of the function and operation of the ASEAN dispute settlement mechanism. At the same time, it could increase awareness and publicity of the ASEAN dispute settlement mechanism to members of the public. Some of the suggested strategies to curb the existing limitations are addressed as follows:

Ease of access to readily available information on the ASEAN Dispute Settlement Mechanism

The ASEAN Secretariat should take the effort to disseminate information pertaining to the ASEAN dispute settlement mechanism by way of publication on the ASEAN website, online publicity and physical training of ASEAN member state leaders, officials and other relevant persons. Just like the WTO DSU system, the ASEAN Secretariat could incorporate the following in the ASEAN website: -

(a) Information on how to obtain assistance and legal support when intending to refer disputes and/or differences to the ASEAN dispute settlement mechanism;
(b) Reports on the meetings held by the Senior Economic Officials Meetings;
(c) Composition of the Senior Economic Officials Meetings and panels;
(d) Case summaries of cases referred to the ASEAN dispute settlement mechanism but eventually resolved via peaceful means (information of which could be redacted or not subject to the approval and consent of the disputing parties);
(e) Hypothetical case scenarios of how disputes and/differences under different ASEAN instruments and agreements are resolved and decided; and
(f) E-learning modules, legal texts and documents and background papers on the ASEAN dispute settlement mechanism.

Aside from the above, the ASEAN Secretariat could increase awareness and publicity of the ASEAN dispute settlement mechanism by having international moot competitions for students from each ASEAN member state based on hypothetical scenarios of disputes and/or differences under different ASEAN agreements which are resolved using the ASEAN dispute settlement mechanism. As a

starting point, the ASEAN Secretariat could refer to previous cases which has since been resolved under the WTO DSU.

Leaders of ASEAN member states could also take initiatives to disseminate information on the ASEAN dispute settlement mechanism in their respective countries using the English language and their national language. In this way, layman and private business sectors will find it easier to understand the system and procedures that they have to adhere in order to lodge a complaint.

Further thereto, it is suggested that there should be an additional guideline paper to ensure that ASEAN member state leaders and officials take steps to undergo courses and training in order to understand the ASEAN dispute settlement mechanism better.[253]

Improve the human resource and support of the ASEAN Secretariat

Some scholars in the likes of Locknie Hsu[254] (2013) suggested setting up a legal unit within the ASEAN Secretariat comprising of specialised international lawyers to solve trade and investment issues. This could be a network of government agencies, one from each ASEAN member state to allow private sectors to cut through red tapes. Other than this, the ASEAN Secretariat could also: -

(a) Set up training programmes for the leaders, officials, officers and other relevant persons in charge or involved in the ASEAN dispute settlement mechanism within the ASEAN Secretariat and in each of the ASEAN member states;
(b) Set up a complementary and complimentary legal and human resource unit within the ASEAN Secretariat comprising of staffs and specialised international and trade lawyers to advise, assist and/or provide legal opinion and representation to ASEAN Member States in the English language and the ASEAN member states respective national languages;
(c) Set up a sub-unit of staff specifically to prepare legal texts, booklets, case summaries, hypothetical case scenarios and other

253 Edmund W. Sim, "ASEAN Further Enhances Its Dispute Settlement Mechanism," *The Indonesian Journal of International & Comparative Law* (2020).

254 Locknie Hsu, "ASEAN Dispute Settlement Systems" *The ASEAN Economic Community: A Work in Progress*, p 382 – 410, available at http:/works.bepress.com/locknie-hsu/5

online texts and documents in the English language and the ASEAN member states respective national languages to be published on the ASEAN website; and

(d) Set up a sub-unit of staff and specialized international and trade lawyers to run the process of the ASEAN dispute settlement mechanism.

Prior to implementing the above strategies, it is suggested that the ASEAN Secretariat first carry out a transparent check and survey to determine whether the existing facilities at the ASEAN Headquarters at Jakarta, Indonesia and the relevant ASEAN member states offices are adept for the purpose of physical and online consultation, mediation and/or hearings.

In order to do carry out the above suggestions, obviously the ASEAN DSM Fund has to be replenished constantly. Therefore, it is suggested that Article 17 of EDSM 2004 be amended to include mandatory yearly contribution by all ASEAN member states for the setting up and maintenance of the legal and human resource unit for the ASEAN dispute settlement mechanism system. In light of the varying levels of development of each ASEAN member states, different allocation of contribution can be agreed between them. Any and/or all use of the DSM Fund should thereafter be published on the ASEAN website every quarterly to ensure transparency.

Limit the choices of forum

Over the years, ASEAN member states have increasingly shown an inclination towards a rules-based organisation, albeit via a different forum, i.e., the WTO DSU. Therefore, it is suggested that the ASEAN Secretariat conduct a survey and produce a report with regards to the many different dispute settlement mechanisms under the various agreements, treaties and instruments intra ASEAN and inter ASEAN and impose only one dispute settlement mechanism.

In order to increase the attractiveness of the ASEAN dispute settlement mechanism, it is suggested that the EDSM 2004 be amended to allow the participation of non-ASEAN member states, albeit only as amicus curiae, like the WTO DSU. Indirectly, other foreign investors from WTO member states or from faraway region including

economically stronger countries could develop trust and confidence in ASEAN's structure and systems.

Further to the above, Article 1 of the EDSM 2004 should also be amended so that it does not only cover a specific list of covered agreements (which has not been updated since 2004), but cover the agreements or instruments which would fall under the definition of "covered agreements" in the EDSM 2004. As a result, there is no need to continuously revise other ASEAN agreements which refer to the outdated Protocol or the EDSM 2004 (itself or its amendment) for the list of covered agreements so that there is better clarity of the ASEAN dispute settlement mechanism.

With a stronger, clearer and unified ASEAN dispute settlement mechanism, ASEAN member states can be habituated with following the rule of law of the region. In the same vein, the rest of the world can have better trust and confidence in the organisation.

CONCLUSION

There are many more deficiencies in the ASEAN Dispute Settlement Mechanism which requires improvement. Certainly, further research and investigation on the ASEAN Dispute Settlement Mechanism is required and necessary. However, a perusal of the proposed Enhanced Dispute Settlement Mechanism 2019 signed and ratified by ASEAN member states in December 2019 exhibits similar deficiencies as its predecessor[255]. Therefore, it is fair to conclude that the current ASEAN Dispute Settlement Mechanisms (EDSM 2004 and EDSM 2019) warrants improvement.

The ASEAN Secretariat and ASEAN member states ought to keep up with the shift in mindset of the ASEAN member states and move beyond the 'ASEAN WAY' approach. This move will not abrogate the 'ASEAN Way' or ASEAN culture but an evolution to a more efficient system like the WTO DSU system. The ASEAN Dispute Settlement Mechanism is an essential secondary tool to ensure that the ASEAN member state commitments are complied with and implemented. ASEAN member state leaders must therefore be

[255] Locknie Hsu, "The ASEAN Dispute Settlement System: A Work in Progress," *The ASEAN Economic Community*, (2013).

encouraged to use the ASEAN Dispute Settlement Mechanism, instead of using third party dispute resolution mechanisms.

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

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ABSTRACT

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

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

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INTRODUCTION

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

i) *Undang – Undang Melaka* (Laws of Melaka), also known as *Hukum Kanun Melaka* and *Risalat Hukum Kanun;* and

ii) *Undang – Undang Laut Melaka* (Maritime Laws of Melaka).

Undang – Undang Melaka covered a wide range of constitutional, civil and criminal matters whereas *Undang – Undang Laut Melaka* covered largely maritime matters[256].

Today, the subject matter of Federal and State laws is laid down in Article 74 of the Federal Constitution and must be read concurrently with List II in the 9th Schedule of the Federal Constitution. List II, or better known as the State List, enumerates matters that are exclusively within the power of the State. Islamic law, personal and family matters of persons professing the religion of Islam fall under the purview of State jurisdiction. Hence, all matters that are personal to a Muslim shall only be heard in *Shari'ah* Courts. Every *Shari'ah* Court has its own set of system, laws, procedural laws and is governed by respective enactments.[257]

The federal government's power to enact laws relating to civil and criminal matters, as well as the procedure and administration of justice for matters other than Muslim personal law is laid down in the Federal List[258]. The power provided in Article 74 must be read together with Article 3 of the Constitution. Article 3 confers special position to Islam, it being the religion of the Federation. In view of this, every law passed by the Parliament, must reflect universal principles such as

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

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

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

justice, equality to all and importantly, it must not go against the spirit of Islam, that is *rahmatan lil aalamin* (mercy to the whole world).

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

MAQASID SHARI'AH

Shari'ah is part of the religion of Islam that is sent by Allah through The Prophet Muhammad (SAW) to mankind. Islam has brought compassion and mercy to the universe including mankind which is also known as *Rahmatan lil aalamin*. *Al-Shatibi* refer to Surah Al-*Anbiya*'[259] to reinforce that mercy is a reflection of achieving *maslahah* and avoiding *mafsadah* which is the reason why Prophet Muhammad SAW was sent to mankind. The same was mentioned by Allah in Surah Al-Nisa[260] where Allah uses the words *mubasshirin* (bearers of good tidings) and *mundhirin* (warning bearers) which is a symbol of good and evil to state the missions of the Prophets before Prophet Muhammad SAW. These verses, according to Al-Shatibi, indicate that *Shari'ah* is meant to guarantee human wellbeing in this World and the Hereafter[261].

Ibn Qayyim, in the same tone has also explained that Shari'ah as a whole is fair and a blessing to mankind, bringing good and wisdom

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

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

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

to all. Hence, every solution that departs from maslahah to mafsadah and leads to ignorance will not be considered part of *Shari'ah*[262].

Maqasid Shari'ah as discussed above, confirms that the *maslahah*[263] should be emphasized whereas *mafsadah*[264] should be monitored in order to arrive at any decision based on Shari'ah[265]. *Maqasid* Shari'ah is divided into 3 categories:

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

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

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

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

SIYASAH SHAR'IYYAH

Siyasah Shar'iyyah is a field of knowledge that discusses the administration of an Islamic government. It includes laws and systems that is based on Islamic principles. The general affair of the Islamic

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

263 Public benefits

264 Harm

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

state is administered in a way not only propagating good to the people but also prevents them from harms, without going against the Shari'ah and *Maqasid Shariah* even in matters that is not agreed to by the *Mujtahidiin* scholars.[266]

In general, it upholds all the five[267] *Maqasid Shariah* mentioned above. Therefore, it is of great importance for the people in authority to enact laws that aims in bringing peace and comfort for its citizens. The Quran highlights the necessity for the establishment of justice as one of the pillars in good governance.

Truly, Allah commands you to hand back your trusts to their (rightful) owners, and (Allah commands you) whenever you have to judge between people, to pass judgment upon them with fairness. Indeed, most excellent is that which Allah exhorts you to do. Truly, Allah is All-Hearing, All-Seeing. [268]

Ibn Taymiyyah states that a leader is responsible for promoting the religion and that he must make decisions for the benefit of his people[269]. *Siyasah Shariyyah*[270] requires the government to enact laws that emphasized the above-mentioned objectives. The scope is wider for a government as government is allowed to enact laws especially in the fields where there is no specific revelation found. Generally, thereto, any laws will be considered as Islamic law even if it is not directly or indirectly derived from the divine revelations (Al Quran and As Sunnah), subject always that it does not go against the principles of Islam and is within the scope of *Maqasid al Shariah.*

The laws enacted must also conform to other principles such as justice ('*adl*) and equality before the law (*taswiyah*). Islam emphasizes on justice so much so that it has been mentioned in the Quran fifty-three times. *'Adl* (justice) is the major objective of the *Shari'ah* and it

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

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

268 Al Nisa: 58

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

270 Political administration which is based on Shariah,

aims at establishing a balance between obligations and rights such that there remains no disparities in life.

Equality is derived from basic principles which includes the principle that all men are created by One and the Only God, the Lord of the universe and all mankind comes from common parentage of Adam and Eve. Allah is Most Gracious, Most Merciful [271]. He has no preference for any race or religion. Everyone is treated equal blurring the distinction between the living and dead. Every individual is judged based on his or her own merits and deeds.

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

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

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

SECTION 7 OF CIVIL LAW ACT 1956

Section 7 of the Civil Law Act 1956 deals with the compensation to be paid, for loss occasioned by a person's death, to his family. This section

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

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

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

Those who can benefit from the claim under this section are the deceased's spouse, parents and children. The claim can be filed by the executor[272] or the beneficiaries themselves[273]. When filing the claim, the writ must state the full particulars of the person claiming or person for whom or on whose behalf the action is brought, and the nature of claim sought to be recovered[274]. The claim can only be made once, and it must be made within 3 years from the death of the deceased[275].

The definition of beneficiaries is:

"child" includes son, daughter, grandson, grand-daughter, stepson and step-daughter; "parent" includes father, mother, grandfather, grandmother; provided that in deducing any relationship referred to in this subsection any illegitimate child who has been adopted or whose adoption has been legally registered under any written law shall be treated as being or as having been the legitimate child of his mother or father, or as the as the case may be, his adopters.[276]

Under the definition of section 7(11), it appears that only the adopted child who is registered legally under written law will be able to make a claim as a beneficiary. The requirement for legal registration

[272] Ibid, section 7(2)

[273] Ibid, section 7(8)

[274] Ibid, section 7(7)

[275] Ibid, section 7(5)

[276] Ibid, section 7(11)

of the adoption is intended to avoid false claims so that one cannot simply come out and claim the deceased is his adopted child in the absence of proper documents of registration. Otherwise, the compensation will become a windfall for the so-called adopters (without proper documents of registration).

However, the courts have made an exception to the Orang Asli. A good example is the case of *Ali Tan & Ors v Mazlan Bidin & Anor*.[277] This is an appeal case in relation to a motor vehicle accident between a motorcycle ridden by one Yakin Ali, deceased (D1) along with his pillion rider, one Hok Ancis, deceased (D2), and the second respondent's lorry which was driven by the first respondent. As a result of the said accident, D1 and D2 died. The Sessions Court found that the rider and the driver were equally liable for the accident. However, the Sessions Court dismissed the third and fourth plaintiffs' claim since they had failed to produce any document to support their claim that D2 was their lawfully adopted son. The High Court agreed with the reasoning of the Sessions Court. Hence the plaintiffs appealed to the Court of Appeal. It was the third and fourth plaintiffs' contention that they had never registered D2's adoption as they were "Orang Asli."

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

The Court of Appeal further said that the Session Court and the High Court should have taken judicial notice of the fact that various "Orang Asli" communities of this country live in the outer fringes of the mainstream society, and some still live in the remote jungle. The vast majority are still socially backward and is often the case that they do not have birth certificates, identity cards, etc. They cannot be expected to have adoption orders issued under s.3 of the Adoption Act 1952. If strict compliance with the law pertaining to marriage was never insisted upon by the courts in respect of persons claiming to be 'wife' of the deceased persons in claims under s.7 of the Act, there was

277 [2012] 4 CLJ 736

no reason why similar flexibility could not be accorded to cases of de facto adoption, particularly where it involves the "Orang Asli". Hence, for the purpose of s.7 of the Act, the de facto adopted parents of D2 were his parents.

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

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

The main claim under section 7 is the dependency claim[278]. Besides that, beneficiaries can also claim for funeral expenses, bereavement, and any reasonable expenses incurred as a result of the wrongful act of the defendant. The claims are discussed in detail below.

DEPENDENCY CLAIM OR LOSS OF SUPPORT

The calculation of the amount of compensation for dependency claim has been formulated by the Parliament.[279] The formula takes into consideration the deceased's income at the time of his death and the deceased's age at the time of his death. Therefore, two issues need to be determined before the compensation can be calculated i.e., the multiplicand and the multiplier. The multiplicand is the monthly monetary compensation whereas the multiplier is the years' purchase or in layman's term how long or how many months or years are payable to the family of the deceased. In short, multiplicand x multiplier = dependency claim.

For the multiplicand, the court considers only the earnings of the deceased at the time of his death without any consideration that the earnings might increase subsequently, i.e., after the person's death. [280] The deceased's earning will be further deducted by his living expenses, leaving the balance which will be used in the formulation to calculate the multiplicand.[281]

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278 Ibid, section 7(3)

279 Ibid, section 7(3)(iv)

280 Ibid, section 7(3)(iv)(b)

281 Ibid, section 7(3)(iv)(c)

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

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

In the case of *Ali Tan & Ors v Mazlan Bidin & Anor.*,[282] the Court of Appeal held that in relation to the claim by the first and second plaintiffs, the High Court had erred in reducing the multiplicand to RM 100 per month since there was evidence from D1's employer that he was earning RM 750 per month. There was also evidence from the first plaintiff that D1 gave his parents RM 500 – RM 600 per month. Hence, the multiplicand of RM 500 per month was restored as previously determined by the Sessions Court. Further the multiplier of 16 years was confirmed as it complied with s. 7(3)(iv)(d) of the Civil Law Act 1956.

In the case of *Rohani a/p Tengkah* (widow suing on behalf and on behalf of two children, as dependence of *Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor*,[283] the plaintiff appealed to the High Court at Shah Alam against the decision of the Session Court. Among the grounds appealed from was the Session Court's decision in using RM 500 as the multiplicand in calculating the sum to be awarded, when the deceased's salary was RM 1,300. He had a wife and two children (all three were the plaintiff in the dependency claim). Out of the RM 1,300, he gave RM 900 to his wife plaintiff (a housewife) for the family expenses. No evidence was led as to what happened to the RM 400 (i. RM 1,300 – RM 900 = RM 400) kept by the deceased. From the RM 900 that she received from the deceased, the plaintiff wife in turn gave RM 100 to the deceased's parents, i.e., her in-laws, RM 100 to her own parents, and RM 40 to her *adik* (i.e., a younger sibling, but

[282] supra, p. 744.

[283] [2004] 2 MLJ 289

it was not stated in the evidence whether it was a younger brother or a younger sister of the plaintiff).

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

a) He deducted a sum of RM 100 which the plaintiff wife gave to the deceased's parents;

b) He deducted a sum of RM 100 which the plaintiff wife gave to her own parents; and

c) He deducted a sum of RM 40 which the plaintiff wife gave to her younger sibling;

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

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

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

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

Another issue worth discussing is, what if the deceased has no proper documentation for his earnings? Will the claim made by his family for dependency be denied by the court? The answer can be found in the case of *Latif Che Ngah & Anor v Maimunah Zakaria*.[284] This case is an appeal against the decision of the Session Court Kuala Terengganu. The issue of quantum of damages only stemmed from a road accident which took place on 17 April 1997. The Respondent Plaintiff, a housewife with six children had lost her husband and brought this action for loss of dependency pursuant to s.7 of the Civil Law Act 1956. The High Court judge, Nik Hashim J, held that the Session Court judge was correct when he accepted the evidence of the respondent and had taken into consideration the fact that she had six children to support in awarding the amount. In his decision, the High Court referred to the Ground of Judgment in the Appeal Record which stated:

> "*Mengenai pendapatan simati saya menerima penghujahan peguam plaintif bahawa pendapatannya adalah sebanyak* RM4,000.00 *sebulan walaupun tidak disokong oleh apa-apa keterangan dokumentari.* SD1 (1st Appellant) *di dalam keterangannya juga telah mengesahkan bahawa simati telah bekerja di Singapura kerana beliau memang kenal dengan simati.*
>
> *Saya juga menerima keterangan* SP2 (the respondent) *bahawa pemberian sebanyak* RM1,500.00 *oleh suaminya sebulan kerana jumlah ini adalah munasabah memandangkan simati mempunyai 6 orang anak sebelum kematiannya."*

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

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284 [2002] 4 CLJ 442

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

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

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

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

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

In *Tan Phaik See v Multi-Purpose Insurance Bhd*,[285] the deceased was involved in a road accident. The deceased was baking biscuits from his house and selling them. He did not have a license to manufacture and sell the biscuits. The mother claimed as a dependent. The defendant pleaded that since the deceased's earnings arose out of an unlicensed income it was illegal earnings. The Session Court disallowed the claim. Her appeal to the High Court was dismissed in spite of authorities allowing the claim as the court adopt the principle that each case had to be looked individually. While the Government is encouraging cottage industries for which the Government has embarked in encouraging every man and woman to be self-reliant and self-supporting, the courts should not readily strike down earnings gained out of businesses just because it is carried on without licence. Running a business without a license is an offence under licensing laws. Earnings acquired cannot therefore be considered illegal earnings as the profits are not from an illegal business, but a business runs illegally. Fortunately, the plaintiff's appeal to the Court of Appeal was successful.

The stand taken by the court to recognise only legal earnings is in line with Allah's command in *Surah An Nisa* verse 29[286] and *Surah Al Baqarah* verse 188.[287] The Prophet SAW was also reported to have said;

"Every flesh nourished by haram deserves fire"[288]

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285 [2004] 7 CLJ 289

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

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

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

Funeral expenses

The family of the deceased can claim for funeral expenses.[289] The court will take judicial notice on the cost based on the deceased's ethnicity. For Chinese, usually the court awards RM 5,000 while for Muslim, a range between RM 2,000 to RM 3,000 has been awarded. In *Jub'li Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd*,[290] the High Court held that:

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

Bereavement

The family of the deceased can claim for bereavement[291]. Bereavement means sadness and it was quantified by the Parliament in monetary value as RM 30,000[292]. The RM 30,000 shall be divided equally between the family members who can claim under section 7 of the Civil Law Act 1956.[293]

Any other reasonable expenses incurred

Besides the above, the family of the deceased can also claim for any other reasonable expenses incurred as the result of the wrongful act[294]. The definition of any reasonable expenses incurred is very subjective and has to be assessed case by case basis. In *Jub'li Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd*,[295] the High Court had also allowed the following claims:

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289 Ibid, section 7(3)(ii)

290 2001 4 CLJ 599

291 Ibid, section 7(3)(b)

292 Ibid, section 7(3A)

293 Ibid, section 7(3C)

294 Ibid, section 7(3)

295 [2001] 4 CLJ 599

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S: *Item 7 bukan air mawar tapi air mineral?*

J: Ia.

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

J: Tidak ada.

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

J: Digalakkan.

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

J: Tidak.

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

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

S: Kegunaan air mineral adalah kehendak sendiri.

J: Ya.

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

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

J: Tidak

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

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

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

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

J: Ya

From the above case, it can be noted that the court had carefully considered the reasonable expenses incurred by SP1. The court had rightly rejected the claims for *bunga mawar* and mineral water which will be continuously used by SP1 every time when he visited his wife's grave. This act of putting *bunga mawar* and pouring mineral water on the grave is not part of the Muslim law and a Muslim is not obliged to do so. These claims had no basis and therefore ought to be dismissed as in my humble view that SP1 was just trying his luck. Allowing such claims will enrich SP1 unjustly which is prohibited in Islam. The call for justice has been made numerous times by Allah in the Al Quran; among His words are in Surah Al Maidah verse 8[296].

THE AMENDMENT IN 2019

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

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

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

from the present age limit from 55 years to 60 years. Accordingly, the computation of the multiplier for assessment of loss of earning is also amended.

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

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

Diyyah is a type of punishment in Islamic criminal law which literally means blood money. It originates from the Quran[297] and Sunnah[298]. It

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

[298] "Anyone who is killed, his legal heirs have two options against his murderer: to exact *qisas* or to pardon him upon *diyyah*" (Sahih al-Bukhari, Kitab al-Diyat). In another hadith, the Prophet said: "If anyone kills a man deliberately, he is to be handed over to the relative of the one

is a monetary compensation payable to the victim or the victim's next of kin in cases of crime against an individual, such as homicide, bodily injuries including infliction of wounds, or battery, in place of retribution[299]. The amount *Diyyah* has been fixed by the Quran and Sunnah of the Prophet SAW as one *diyyah* is equivalent to 100 camels.

Besides *diyyah* there are several other types of financial punishments which falls under the category of *Ta'zir* punishment. *Ta'zir* punishment is appropriate to be considered by the courts in Malaysia in exercising their discretionary power for judgements and sentencing.[300] *Ta'zir* punishment could be decided for moral injuries such as bereavement and grief. It is up to the court to decide how much damages or financial punishment is to be awarded to the victim. The issue of moral injuries in Islamic law is open for debate since there are a few *Mazhab* or Islamic schools of thought did not acknowledge it.[301] The differences of opinions among the Islamic schools of thought do not invalidate the authorities and the courts to adopt opinions from the minority group in allowing monetary compensations being awarded to parties who are suffering from personal or moral injuries.

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

Section 7 provides for various heads of claims to the deceased's family. The discretionary powers of the judge in such claims are limited in the sense that restrictions must be deliberated and comply with. This section acknowledges the modern day's need and consider it as

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who has been killed; if they wish can retaliate or if they like can accept blood-money".

299 www.oxfordislamicstudies.com/article

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

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

necessities in life, for example the cost of childcare, loss of dependency, loss of spouse's contribution, funeral costs, bereavement suffered by the family members and the fact whether the deceased could potentially be the sole breadwinner of the family.

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

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

CONCLUSION

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

Book Review

Reviewed Work: Renewable Energy Law: An International Assessment by Penelope Crossley
Publisher: Cambridge University Press, 2019.
Length: 270 pages
ISBN 9781107185760

Reviewed by: John Vercoe*

Some readers may have missed the announcement of Penelope Crossley's book[302] "Renewable Energy Law." That is understandable given the impact of Covid 19, but I would say that this is not a book to be missed, albeit my review is a little late. I say this because I believe that as the concept of renewable energy has grown quite quickly, this book provides a substantial foundation upon which to base your future renewable energy law personal sources.

As part of my review, I have decided to refer to some important developments which have occurred since publication of the book, and it is rather useful to see these recent subsequent developments in the context of Crossley's initial foundation stone.

Penelope Crossley is currently the Senior Industry Advisor to the Australian Energy Storage Alliance on regulatory and policy issues and is the Chair of the Product Listing Review Panel for the Clean Energy Council. Prior to entering academia, Penelope practised as a solicitor in London and Beijing, specialising in Global Energy and Infrastructure Law. I think that private practice as a solicitor in both, UK and China, has undoubtedly given Crossley an edge in pulling together this multi-faceted text.

Crossley's book is the first research to analyse the primary piece of national renewable energy legislation from each of the 113 countries that had such a law on 1st August 2018, as well as the EU Directive and the Statute of the International Renewable Energy

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Agency (IRENA Statute) quite appropriately, on page 1 of her book, Crossley raises the Paris Agreement, when '145 Parties included domestic action to support renewable energy to help mitigate and adapt to climate change as part of their Nationally Determined Contributions.'

Crossley's book, notwithstanding the book's title, is not a legal textbook, but is a research work that will be very helpful for lawyers who work (or those who want to work) in the renewable energy law sector because of Crossley's very significant range of foundation areas. If there is a particular weakness, the book contains no world country maps showing country location. Most lawyers look for an effective date, and this book's effective date is 1st August 2018 and 'changes in the law over time' are not addressed. Compared with law books, the book's structure is not standard, but here you will find 'renewables' learning, information and data which you will not find in other books on this subject.

Because it is a research book, Crossley sets out her research questions (this book was created for her own doctoral thesis) at the outset, but paying attention to her research questions and answers should not be the sole purpose for the reader of this book. This book represents a great opportunity to become knowledgeable in 'renewables' generally. However, you need to read what are Crossley's research questions: 'Which countries have a national framework law to govern or promote the accelerated deployment of renewable energy? (Crossley's book sets out the list, in English language, of the 113 national renewable energy laws). Which energy sources are recognised as renewable energy sources within the legislative definitions in the national renewable energy laws of different countries? What is the theoretical rationale for governments legislating to support the accelerated deployment of renewable energy? What are the stated legislative objectives for supporting the accelerated deployment of renewable energy in the primary legislation? How have regulatory support mechanisms been designed to accelerate the deployment of renewable energy in different countries? Given the benefits of national renewable energy laws becoming more similar, how will regulatory support mechanisms likely develop in the future? Will they be unified, harmonized, converge, diverge or actively compete through regulatory competition? Be sure that you understand Crossley's own chosen key terminology in

the book such as: ‘accelerate legislative objectives,’ ‘harmonised’, ‘converge’, ‘diverge’ and ‘regulatory support mechanisms.’

Crossley explains her methodology and she shares some of the snags along the way. Her key challenge was 'identifying and locating the national renewable energy laws in every country that possessed them.’ Crossley found applicable laws in 47 different languages. English was chosen as Crossley's research language. Each law was 'coded', focusing on two terms 'renewable energy' and 'legislative objectives' in order, as she says, to make sense of all the data. 'Codes' were used 'to examine the similarities, differences and frequency of key concepts and themes'. Crossley would have preferred to translate the entirety of all the laws into English, to obtain more accurate interpretation but this was not feasible.

Crossley takes us carefully through what turns out to be 9'renewable energy sources used for electricity generation'. Wind and solar are at the front of renewable energies. 'Wind Energy is the second fastest growing form of renewable energy' and 'Solar radiation is the largest and most accessible resource on Earth'. Crossley makes judicious choice of academics’ existing work with full footnote references to strengthen her entire research. If you want to look up the earlier literature, then you might find it easier to use Crossley's e-book rather than the hard back text.

Crossley reports that 80 of the 113 countries with national renewable energy laws provide for resources as 'renewable' as follows: wind energy, solar energy, biomass, landfill gas, sewage treatment gas and biogas, small-scale hydropower and geothermal energy. Crossley offers a view that decisions as to what is 'renewable' are not based solely on science or legal principle but rather highlight the political nature of defining renewable energy. Crossley highlights the debate of whether certain energy should be deemed renewable and receive government support or be excluded for environmental or other reasons. Large scale hydropower, woody biomass and peat are part of the environmental discussion and geothermal and nuclear rely on energy sources and therefore maybe, should not be counted, as renewable.

Crossley reviews in detail the economic justification for regulating renewable energy. We are talking about large percentages of the countries of the world. At the time of her book, 146 countries

had renewable power targets and 138 countries had support policies directed at 'renewables' and it becomes important to understand the economic rationale.

Electricity is proudly a secondary source of energy. It has traditionally been generated from fossil fuels such as coal, natural gas and oil, with an increasing quantity generated from renewables. Electricity is essential for society with major stakeholders including governments, industrial and domestic consumers, employees, electricity distribution/supply companies, corporate shareholders andregulators.

Crossley tells us that electricity pricing does not reflect economic and societal costs of generation, due to the presence of 'externalities' and 'information asymmetries': both terms you need to become familiar with.

The electricity sector always has to cope with balancing demand with supply. Consumers need cost information and Crossley argues strongly for 'smart grids and meters.' Energy markets can experience market failure without regulatory intervention and yet this calculation is not a straightforward task. No single model of government intervention in the renewable energy sector for either market failures and or market barriers works. Crossley suggests a variable approach towards intervention should be adopted taking into account politics, technology, resources and economics. Social welfare and living standards make intervention highly politicised. Major market shifts or accidents can suddenly add to the calculation (Fukushima nuclear disaster in Japan, energy security concerns rising out of Russia/Ukraine (highlighted in 2018) and civil unrest in Nigeria, Iraq and Libya). Many countries, says Crossley, have failed to implement a coordinated and integrated national energy policy. In addition, electricity use is uneven and unresponsive to short term price spike and affected by weather, time of year, economic cycle, transmission /distribution and varying amount of electricity use with- out notice. Crossley's research shows that there is broad consensus as regards at least three different 'market failures' ('negative externalities' associated with fossil fuels, positive 'spillovers' full return on investments not recovered, 'information asymmetries: for example, uncertainty around future market developments). In effect says Crossley, there should be national

regulatory intervention in the electricity sector. I can add a definition of 'Information asymmetry' being an imbalance between two negotiating parties in their knowledge of relevant factors and details. Government policy and regulation should provide more support to new market entrants.

Crossley discusses 'market barriers' within the renewable energy sector, specifically 5 categories: policy, institutional, economic, technological and infrastructure. Crossley takes a tough view as regards 'subsidies' to fossil fuels and their use in electricity generation. It is most important for governments to support electricity generation from renewable sources by removing 'subsidies' that they provide to fossil fuel and nuclear generation. I will address 'subsidies' later in my post-publication comments, driven by the publication of Crossley's book.

Planning permission applications tend to be the area of greatest political interest and interference within the renewable energy sector.

Crossley reports that the majority of economists believe that regulatory intervention within the renewable energy sector is warranted.

Crossley reports her research findings as to why countries legislate to accelerate the deployment of renewable energy. As of 1st August 2018, more than 40% of countries (86 of 199) did not have a primary framework piece of national renewable energy law. Quite a large gap, I think. 'Environmental protection' is more often addressed (55 countries) than energy security (49). But then, as part of her analysis, Crossley shows that the weighted rank of environmental protection' is actually given a lesser priority. Crossley ventures to guess that countries may simply be tacking important objectives as a means of capturing the diversity of political opinion in the community.

There was broad consensus that relying on environmental or competition law alone would be an insufficient means to achieve the desired end. Countries support renewable energy in an attempt to overcome a wide range of problems and to achieve a variety of objectives. There is a role for separate laws promoting renewable energy that contain 'regulatory support mechanisms' to help countries meet their 'legislative objectives.'

Crossley is critical of earlier rationale for 'legislative objectives.' Crossley says that existing literature have made generalisations based on a few select case studies, but Crossley reports that her research demonstrates that fallacies are being perpetuated. She asserts quite authoritatively that it is the wide-spread presence of misconceptions in the existing literature that highlights the need for a comprehensive study of the 'legislative objectives' in national renewable energy laws.

It was necessary to categorise the legislative objectives by theme due to the overlapping nature and often, quite similar outcomes of various categories. The need to ensure a secure supply of energy in light of diminishing reserves of fossil fuels is a central concern. A number of geopolitical and economic factors have led to an increased emphasis on energy security in recent years. Growing concerns expressed were the vulnerability of Europe given their heavy dependence on Russian gas and past and more recent conflicts with Ukraine, sectarian violence in parts of the Middle East such as Iraq and Syria, concerns about Iran's nuclear programme, Arab spring and grab for resources, as well as India and China to secure access to foreign sources of supply to meet their rising energy demand. Diversifying supply was the second most common category within security.

Crossley addresses international treaty obligations and international agreements with an effect on the renewable energy sector. Only 11 countries sought to use their renewable energy laws to help them meet their international treaty obligations and international agreements, but possibly many countries directly incorporate the principles of international treaties and agreements.

Crossley tries to persuade the reader of the benefits of harmonising or converging laws. Countries must have similar objectives for intervening in the market and must be committed to achieving those goals. Crossley reports that this is unlikely to be achieved through national renewable energy laws at least in the short to medium term, such a consensus is lacking in the renewable energy sector because different legislative objectives were identified in the primary framework pieces of renewable energy legislation of the 113 countries with renewable energy laws. Legal harmonisation or convergence may also impose significant costs while legal divergence may offer some advantages.

In terms of economic objectives, China, Japan, the EU, USA, India and Brazil aggressively target renewables as a means of achieving their economic and other goals.

Crossley confirms that this is the first comprehensive study as to why countries seek to accelerate the deployment of renewable energy. Surprisingly, we are told that, as of 1st August 2018, more than 40% of countries did not have primary framework piece of national renewable energy law. Crossley suggests two reasons for this situation: (1) some countries do not have the need or desire to support renewable energy (2) some countries do not have the skills, capacity or resources to develop the legislation. These two conclusions are drawn from Crossley's available evidence.

The question why the countries make renewable energy law at all is found, says Crossley, in their "legislative objectives." The prime role of legislative objectives is "to act as a guide for the statutory interpretation of ambiguous legislative provisions. We find out what is the 'legislative objective' by initially by finding the section in the legislation which might summarise the purpose of the legislation.Or we might read the legislation as a whole. We might also look at extrinsic materials to the legislation, however, in the context of this book, 80 out of 113 countries had an 'objectives' section and another 8 countries together with IRENA and the EU had a preamble. Whereas earlier research had concluded that there was almost uniformity in countries as to objectives, Crossley reports that this uniformity conclusion was not consistent with Crossley's research, who reports numbers of variable objectives. Crossley goes as far as saying that the conclusions drawn by other analysts may not all be correct. In effect, Crossley concludes that there are misconceptions amongst existing analysts that highlight the need for a comprehensive study of 'legislative objectives'.

Therefore, Crossley spends some considerable time and analysis to show the result of her own analysis. Crossley therefore finds that there are 28 categories of legislative objectives, representing a much broader range, than previously identified. After finding 28 categories, Crossley then invents the concept of' primary theme'. She reports the finding of 8 key themes in the legislative objectives, 1. Security, 2. The environment, 3 Industrial policy 4. The economy 5. Society 6. International and regional 7. Sectoral and 8. Education and training. Crossley says that this

conclusion might be useful to uncover trends about how legislative priorities are shifting as countries amend their legislation or new countries enact legislation. Greater, says Crossley, in national renewable energy laws should lead to lower transaction costs, greater competition and ultimately lower prices for the ultimate consumers.

Being topical, myself, right now in light of the Russian/Ukraine war 2022, 4 legislative objectives were found under 'Security: 1. Energy security 2. Diversify supply 3. Reduce use of fossil fuels or nuclear imports 4. Encourage great use of indigenous energy sources. 'Security' received the highest weighted rank. Crossley's conclusion for this 'ranking' is that these legislative objectives are seeking to address a source of' market failure', that is, the unpriced cost of ensuring a secure supply of energy. Crossley says that there is a need to ensure a secure supply of energy, in light of diminishing reserves of fossil fuels.

Crossley explains the future development of regulatory support mechanisms as regards which direction the law is likely to go. The direction is focused on 'unification', 'harmonisation' 'convergence,'divergence' or 'regulatory competition'. She refers to international organisations, IRENA, lEA, Energy Charter Treaty and EU. There has not been a comprehensive analysis of the scale and impact of 'market failures' in every country. Crossley argues that over time countries with similar social and economic development should gravitate towards similar policies and instruments. She sets out the arguments for and against 'harmonisation.' Crossley reports that the degree of 'unification' within 'regulatory support mechanisms' in 'national renewable energy laws' is not currently known. The benefits of the "regulatory support mechanisms" within national renewable energy laws becoming more similar are clearly evident, Crossley argues, especially for international market participants.

The issue of whether regulatory support mechanisms are growing more similar or more divergent over time requires further research. From case studies, the starting position for most countries seems to be one of substantive divergence with different regulatory support mechanisms being designed and implemented in different countries.

Crossley observes that there has never been an attempt to 'unify' the renewable energy laws of two countries. Two, possibly three attempts, to 'harmonise' 'regulatory support mechanisms' at the EU level have failed. Please read reports towards the end of this book review as events, which have unfolded in the EU and elsewhere, since publication of Crossley's publication.

Some countries are adhering to a policy of regulatory competition and some significant national differences still exist within national framework pieces of legislation governing the promotion or accelerated deployment of renewable energy. The national differences are largely explained because many countries use their renewable energy laws to address national problems (energy security, dependence on fossil fuels and nuclear imports, need to diversify supply, encouraging economic growth, supporting sustainable development, system safety and reliability, industrial policy objectives.

It is not surprising that national laws have differing priorities and have developed divergently, especially among those countries that prioritise energy security.

I would like now to turn to certain important international events since the publication of Crossley's book. These are certainly not the only critical events, but with hindsight, they illustrate quite vividly what can happen in a relatively short period of time since the publication of Crossley's book.

I do not include Covid-19, but Covid-19 itself had a particular negative impact on the progress of 'renewables'.

1. Russia/Ukraine war

I refer to the 'lEA Report' on Renewables, May 2022 with the following relevant extract:

> "The current global energy crisis has added new urgency to accelerate clean energy transitions and, once again, highlighted the key role of renewable energy. For renewable electricity, pre-crisis policies lead to faster growth in our updated forecast. Notably, wind and solar PV have the potential to reduce the European Union's power sector dependence on Russia's natural gas by 2023."

> "While looming market uncertainties increase challenges, the new focus on energy security – especially in the European Union – is also triggering an unprecedented policy momentum towards accelerating energy efficiency and renewable s. Ultimately, the forecast of renewable markers for 2023 and beyond will depend on whether new and stronger policies will be introduced and implemented in the next six months."[1]

I also quote from Schroder's report of 30th June 2022:

> "Following the Russian invasion of Ukraine, The EU has committed to phasing out its dependency on Russian fossil fuels. A sustained policy effort across multiple sectors is needed.
>
> The EU is seeking to diversify its gas supplies, while speeding up the introduction of renewables. Reducing energy consumption and improving energy efficiency will also be important,given the tight supply and current energy infrastructure constraints. While the plan can fast-track the clean energy transition and fight the climate crisis, this is no easy task. The task is made harder still given the bloc is already battling elevated inflation caused by bottlenecks as economies have re-opened."[303]

2. Directive (EU) 2018/2001 11 December 2018 on the promotion of the use of energy from renewable sources

> "Renewable forms of energy are one of the goals of EU energy policy. The increased use of energy from renewable sources is an important part of the package of measures needed to reduce greenhouse gas emissions and to comply with the 2015 Paris Agreement on Climate Change and the

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1 IEA, Renewable Energy Market Update (IEA, 2022) <https://www.iea.org/reporrs/renewable-energy-market-update-may-2022> accessed 29 September 2022.

303 Irene Lauro, 'Will Russia-Ukraine war disrupt Europe's energy transition?' (Schroders, 30 June 2022) <https:I/www.schroders.com/en/us/institutional!insights/economic-views3/will-russia-ukraine-war-disrupt-europes- energy-transition/ > accessed 29 September 2022.

EU policy framework for climate and energy (2020 to 2030). This recast directive – along with the revised energy efficiency directive (Directive (EU) 20 18/2002), which amended Directive 2012/27/EU on energy efficiency, and a new governance regulation (Regulation (EU) 2018/ 1999) –is part of the clean energy for all Europeans package, which aims to provide new, comprehensive rules on energy regulation for the 2020-2030 period."[304]

3. European Union (EU)-July 2022

"The European Parliament's industry committee voted on 13th July 2022 in favour of an EU-wide objective to more than double the Bloc's production of renewable energy'- from the current 22% to 45% by 2030 – in reaction to the war in Ukraine. The new 2030 objective is a substantial increase compared to the 40% target tabled by the European Commission only a year ago as part of its 'Fit for 55' climate plan. Bur following Russia's invasion of Ukraine, lawmakers from all political sides rallied behind proposals to raise this objective to 45%. The updated target is also in line with European Commission plans tabled on 18 May 2022, which sought to eliminate all imports of Russian fossil fuels "well before" 2030 and accelerate the energy transition in response to Russia's war of aggression in Ukraine".[305]

4. PPAs Renewable energy in Europe

Ukraine War has boosted renewable energy PPAs in Europe.

"Power purchase agreements (PPAs) for renewable energy have grown fivefold in five years in Europe. The European PPA market has rapidly expanded, with a five-fold increase from 2016 until2021. Solar is the fastest-growing renewable energy source internationally, and this is beginning to be reflected in the PPA market. In Europe, 33 of97 PPAs signed in 2021 were for solar. Wind accounts for nearly two- thirds

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304 EU Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJL328/ 82.

305 Frederic Simon, 'EU lawmakers sign up to 45% renewables target in response to Ukraine war (EURACTIV, 13 July 2022)

of the market. Europe's renewable PPA leader has been Spain, which contracted more than 2.3 gigawatts (GW) in 2021 alone including 1.2GW of solar and over 500 megawatts (MW) of wind PPAs"[306]

5. "Fit for 55 Package"

"At a glance The Fit for 55 Package consists of a set of inter-connected proposals, which all drive to- wards the same goal of ensuring a fair, competitive and green transition by 2030 and beyond. Where possible existing legislation is made more ambitious and where needed new proposals are put on the table. Overall, the package strengthens eight existing pieces of legislation and presents five new initiatives, across a range policy areas and economic sectors: climate, energy and fuels, transport, buildings, land use and forestry."[307]

6. ESG AND Renewable Energy

ESG is not discussed by Crossley. ESG growth has occurred since publication of Crossley's book. Now, in2022, ESG is a key topic: Orsted, a leading renewable energy company stated in March 2022 that "the renewable energy buildout will soon reach a scale at which it can fundamentally reshape the way our societies look and operate. It is vital that the E, S and G of renewable energy become core aspects of the buildout".[308]

International Sustainability Standards Board and Environmental, Social and Governance (ESG) "International

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306 Mirela Petkova, 'Weekly data : Ukraine War boots renewable energy PPAs in Europe' (Energy Monitor, 16 August 2022) <https://www.energymonitor.a i/secrors/power/ukraine-war-boosts-renewable-ppas> accessed 29 September 2022.

307 European Commission, 'Communication From The Commission To The European Parliament, The Council , The European Economic And Social Committee And The Committee Of the Regions: 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality COM (2021) 550 final.

308 Ira Krabek, 'Why it's viral to consider the E, Sand G of renewables' (Orsted, 30 March 2022).
< https :/orsted .com/ en/ insights/expert-take /why- it-is-vital-to-consider-the-e-s-and -g-of-renewables > accessed 29 September 2022.

investors with global investment portfolios are increasingly calling for high quality, transparent, reliable and comparable reporting by companies on climate and other environmental, social and governance (ESG) matters.

On 3 November 2021, the IFRS Foundation Trustees announced the creation of a new standard-setting board-the International Sustainability Standards Board (ISSB)-to help meet this demand.

The intention is for the ISSB to deliver a comprehensive global baseline of sustainability-related disclosure standards that provide investors and other capital market participants with information about companies' sustainability-related risks and opportunities to help them make informed decisions."[309]

7. Energy Charter Treaty 2022 and Renewable Energy

In June 2022, there was the conclusion of 2 years of negotiations between 53 contracting parties to modernise the outdated ECT. The treaty provides the framework for international trade and in- vestment on energy matters but was drafted and first published in 1994, in a world when fossil fuels dominated power generation.

The modernised treaty, which is due to be signed in November 2022, will have a much stronger focus on promoting clean, affordable energy. It will protect the UK government's sovereign right to change its own energy systems to reach emissions reductions targets in line with the Paris Agreement.

For the first time, it will ensure legal protections for overseas investments into the UK in green technologies, such as Carbon Capture, Utilisation and Storage and low-carbon hydrogen production, alongside other renewables. This will help give private investors in these types of technologies

[309] IFRS, 'About the International Sustainability Standards Board ' < https:// www.ifrs.org/groups/ international-sustainability-standards-board/ #about> accessed 29 September 2022.

increased confidence as the technologies develop.[310]

8. 27th session of the 'Conference of the Parties' (COP 27) to the UNFCCC will take place in Sharm El-Sheikh, Egypt, November 2022

At COP 27, there will no doubt be further discussion of section 20 of the Glasgow Climate Pact 2001, and in particular the phasing-out of inefficient fossil fuel subsidies.

Decision -/CP.26 Glasgow Climate Pact The Conference of the Parties, Recalling decisions 1ICP.19, l/CP.20, l/CP.21, 1/CP.22, 1/CP.23, l/CP.24 and 1/CP.25, Noting decisions l/CMP.16 and 11 CMA.3,

> "20. Calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition".[311]

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310 Department for Business, Energy & Industrial Strategy 'UK strengthens protections for taxpayers in energy treaty negotiations' (GOV UK, 24June 2022) <https ://www.gov.uk /government/news/uk-strengthens-protections-for-taxpayers-in-energy-treaty- negotiations> accessed 29 September 2022.

311 United Nations Framework Convention on Climate Change, 'Glasgow Climate Pact' (2022) UN Doc FCCC/PA/CMA/2021/10/Add.1 para 36.

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