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Abstract

The development of Waqf lands in Malaysia is steadily growing and has attracted the interest of many. States in Malaysia are beginning to promulgate their own Waqf enactments therefore granting their State Islamic Religious Council (SIRC) more power in administering and managing Waqf lands. Coupled with the call for a more effective method of registration and for the introduction of a Waqf registry, the administration of Waqf lands in Malaysia holds a promising future. The issue regarding management of disputes however remains as one of the lingering issues which hamper the development of this promising institution. A survey of surrounding literature shows that most of the Waqf related disputes brought to court relates to the question of validity of the Waqf land as well as the management of Waqf land by the SIRC as trustees. Coupled with questions of jurisdiction between the Shariah and civil courts, cases involving Waqf are usually exposed to extensive delays which in effect incur exorbitant costs for the parties involved. This has put the State Religious Council (SIRC) in a dilemma in pursuing any Waqf related disputes. Therefore, by adopting the qualitative approach, the paper analysed reported cases involving Waqf lands in Malaysia and literature on ADR and Waqf to determine the best way forward to address this issue. Based on the recommendations by several authors, it is felt that the formation of a specialized body, namely the Waqf Tribunal could provide a viable solution to this problem.

Keywords: *ADR, Waqf land disputes, Waqf Tribunal, Malaysia*

1. INTRODUCTION

Waqf is a concept that has long been practiced in Malaysia. The earliest record of Waqf practices in Malaysia has been recorded since the 10th Century, and since then, this Islamic concept of endowment has undergone several phases due to Malaysia's colonial history. With the colonization by the British in the 19th century, the practice of Waqf in Malaysia experienced a great change with the introduction of the Torrens system; a concept of private ownership of land through land title registration.1 Furthermore, through judicial interventions by the British, common law was applied when adjudicating Waqf related disputes in courts.

Fast-forwarding through history, the development of the Waqf institution in Malaysia has since gained traction. Although Waqf is wholly under the jurisdiction and administration of each individual state, the Federal government is determined in ensuring its success. Significant funds were invested

1 Murat Cizakca, *A History of Philanthropic Foundations: The Islamic World from the 7th Century to the Present* (Boğaziçi University Press, 2002), 122.

to ensure the development of Waqf lands in Malaysia. It is expected that the effect would bring about massive benefits and opportunities to the local Muslim community. With the allocation of RM256.4 million of federal funds through the 9th Malaysian Plan (2006-2010) and a further increase to RM1.9 billion through the 10th Malaysian Plan (2011-2015), numerous state Waqf developments projects were made possible under a range of issues and sectors including health, education, charity, religion, housing and commercial development.[2] The establishment of the National Wakaf Corporation under the 11th Malaysian Plan (2015-2020) and the allocation of a further RM50 million by the Bumiputera Economic Council[3] further signal the continuous efforts of the Federal Government in supporting the growth of Waqf in Malaysia.

Although the prospect of Waqf in Malaysia remains bright, various issues are still hindering the abovementioned efforts from being effectively executed. Among the issues which have yet to be addressed is the concern over the management of disputes involving Waqf lands. It has been recorded that Waqf related disputes which have been litigated in courts are mainly cases relating to claims on Waqf lands, management issues by the trustees and payment of returns to beneficiaries. Umar Oseni highlights that Waqf lands have often been the subject of litigation due to questions of its title as these lands were often endowed many decades or even centuries ago.[4] Combined with the conflict of jurisdiction between the civil and Shariah courts, Waqf related cases are usually exposed to extensive delays which incur exorbitant costs for all the parties involved. Such litigation may also adversely affect the reputation of the SIRCs as sole trustees of Waqf lands. This has put the SIRC in a dilemma in pursuing any Waqf related disputes thereby forcing the development of the Waqf lands to be put on hold for an unforeseeable amount of time.

Therefore, this paper aims to briefly explore the issues faced by stakeholders in addressing disputes relating to Waqf lands. It also aims to propose a more feasible solution and access to justice through the establishment of a Waqf Tribunal for the stakeholders involved. Case studies are also conducted to determine the complexity of Waqf land disputes and to justify the proposal in searching for resolution through a specialized body. This paper will be divided into three sections. First, a general overview of how disputes involving Waqf lands are currently addressed while briefly discussing the issues which contribute to and further complicate the disputes. Second, a presentation of case studies to determine the nature of Waqf land disputes and the range of time it usually takes for a court to release its decisions and third, a proposed framework of a Waqf Tribunal and the possible usage of Alternative Dispute Resolution (ADR) in resolving these disputes.

2. POSITION OF WAQF LANDS IN MALAYSIA

Waqf can be explained as "a dedication of property either in expressed terms or by implications, for any charitable or religious object, or to secure any benefit to human beings".[5] In Malaysia, Waqhas mainly been created over land for religious purposes such as for the creation of mosques, *suraus* and burial sites.[6] Over time, this practice has extended to housing and commercial developments.

The power to administer Waqf and to legislate Waqf related enactments and provisions are all contained exclusively in the Federal Constitution. Under the 2nd list i.e. the State List, the Ninth Schedule of the Federal Constitution places matters relating to religion, customs and practices, as

2 Anan bin C. Mohd, 'Pembangunan Wakaf Menerusi Pendanaan Kerajaan Dan Kerjasama Institusi Kewangan Dan Korporat: Hala Tuju, Cabaran Dan Harapan' (Muzakarah Wakaf, Sansana Kijang, Bank Negara Malaysia, 11 December 2015), 12.

3 Bernama, 'Najib Launches National Wakaf Corp, Endowment Programme', *Borneo Post Online*, 15 July 2015.

4 Umar A. Oseni, 'Shari'ah Court-Annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia' (14th Annual Conference of the Shari'ah Legal Officers of Malaysia, Langkawi, Kedah, 2012), 9.

5 Siti Mashitoh Mahamood, *Waqf in Malaysia: Legal and Administrative Perspective* (Kuala Lumpur, Malaysia: University of Malaya Press, 2012), 1.

6 Zulkifli Hasan and Muhammad Najib Abdullah, 'The Investment of Waqf Land as an Instrument of Muslims' Economic Development in Malaysia' (Dubai International Conference on Endowments' Investment, United Arab Emirates, 2008), 12.

well as land under the jurisdiction of states. Waqf is amongst the matters which have been expressly mentioned in the list and is therefore under the powers of the ruler or governor of the state.7 Under the Administration of Islamic Law Enactments and Waqf Enactments of certain states, the SIRC is deemed as the sole trustee of Waqf lands. This fact therefore places the burden on the SIRC of each state to be wholly responsible for the administration and management of the Waqf in their respective state. Furthermore, by virtue of Article 74(1)(2) of the Federal Constitution, legislative power concerning Waqf has also been bestowed on the State Legislative Assembly. From this division between the federal and state jurisdiction, it is understood that Waqf is a matter for individual states.8

In addition, land generally is also a state matter within List II (Item 2) in the Ninth Schedule. The State Authority9 is vested with the entire property, including all minerals and rock materials, in all state lands within the territories of the state. Article 76 of the Federal Constitution however has granted the federal Parliament an overriding legislative power in making laws with respect to land matters for purposes of uniformity. With the intention to make law on the basis of uniformity of law and policy, the National Land Code (NLC) was enacted.10 Waqf land however reserves a special position wherein the NLC cannot be applied.11

In summary, Waqf and land are both state matters although they are administered by different state authorities. Waqf being an Islamic origin is solely administered by the SIRC and is regulated by its own law. Waqf lands are further excluded by the NLC12 which in turn makes its administration more complicated due to the lack of comprehensive laws. State laws regarding Waqf can be found in the Administration of Islamic Law Enactments or the Waqf Enactments of each state. Although the Waqf Enactments are more extensive compared to the Administration of Islamic Law Enactments, it is felt that more can be included to ensure the comprehensiveness of the laws in administering land matters. Due to the lack of adequate legal provision, confusion may occur regarding the applicable law in solving disputes. Therefore, to remedy the problem it is felt that flexibility in terms of approaching justice is needed. This work explores ADR as a potential solution to the problem.

Waqf Dispute Management in Malaysia

Presently, part of the challenge involved in Waqf administration is slowly being clarified through the promulgation of new enactments. Disputes and issues involving the mishandling of Waqf properties have been partially alleviated with the centralization of Waqf and the step of entrusting the responsibility wholly to the SIRC.[13] However, majority of Waqf disputes still occur due to the lack of proper survey of existing Waqf properties. Another instance where disputes do occur is in the cases of Family Waqf whereby the beneficiaries are in disagreement with the way the SIRC manages the Waqf assets.[14]

In the past, Waqf were usually made verbally by the *wakifs* (donor) and were left to be administered by *imams* or *penghulus.* Due to the circumstances at that time, there is no record of

7 The ruler or governor may delegate this power to the SIRCs.

8 Sharifah Zubaidah Syed Abdul Kader, 'The Legal Framework of Waqf In Malaysia' (Seminar on Waqaf, Seri Pacific Hotel, Kuala Lumpur, 2013), 3.

9 Under Section 13 of the NLC, the State Authority may delegate his power to the State Director or the Registrar or to any Land Administrator to exercise and perform any powers or duties conferred or imposed on the State Authority by or under the National Land Code.

10 Adibah Awang, "A Critical Assessment of Provisions of the Federal Constitution with Regard to Federal-State Relationship on Land Law" (International Conference on Contemporary Issues of Law, *Shariah* & Legal Research, University of Jordan, 2008), 2,

11 ' Under Section 4(2)(e) of NLC, it states: "Except in so far as it is expressly provided in the contrary, nothing in this Act (NLC) shall affect the provisions of any law for the time being in force relating to wakaf.".

12 Sallehuddin Ishak, 'Kuasa Menghurai Model Goodchild Dan Munton (1986) Dan Van Assen (2009) Dalam Masalah Pembangunan Tanah Wakaf Di Malaysia', *Jurnal Pentadbiran Tanah* 3, no. 1 (n.d.): 8.

13 The appointment of SIRCs as the sole trustees of awqaf assets has been done prior to 1957 through the promulgation of the Islamic Administrative laws of each state.

14 Example can be seen in the case *Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu* Summons No. 11200-099-0400-2008.

laws applicable to Waqf and its administration during the Malaccan Empire and the other Malay states in Peninsular Malaysia and Borneo.[15] Nuarrual Hilal however, asserts that since Islamic law was the inherent law at that time, matters and disputes pertaining to Waqf would have applied Islamic principles. He further asserts that since Waqf had mainly been administered by the *Kadhis, Imams* and Mosque Committees, Islamic legal texts would have been the appropriate reference for the resolution of such disputes.[16] Examples of Islamic legal texts which have been referred to by the Malaccan Empire include the *Fath al- Qarib* and the *Majelle* by the state of Johore.

However, with colonization by several foreign bodies, the institution of Waqf in Malaysia had evolved. In terms of dispute resolution, the British had brought about the most change in terms of dispute management involving Waqf properties. Common law became the applicable law and although it acknowledges the practice of Waqf to be comparable to charitable trust, the validity of *Waqf Khas* was questioned due to application of the *cy-pres* doctrine and the rule against perpetuity in charitable trusts.[17]

Prior to independence, numerous cases on Waqf had been adjudicated in the civil courts. The most prominent example is the case of *Ashabee & Ors v Mahomed Hashim & Anor*[18] *where the court applied the English law on trust in deciding the validity of a family Waqf. Unfortunately, no Waqf related cases were brought to the Kadhi* Court during this time.[19] These developments led to the current situation of Waqf.

With the establishment of the Shariah Courts through state laws after independence, the civil courts and Shariah Courts coexisted. However, as a result of overlapping jurisdiction, Waqf cases had often been plagued by jurisdictional issues. With the amendment via Article 121(1A) of the Federal Constitution, the civil courts should in effect have no jurisdiction to try and decide matters within the jurisdiction of the Shariah Court and this includes Waqf disputes. However, due to the extensive jurisdiction[20] of the High Court in hearing cases and in granting reliefs, disputed Waqf properties are often referred to the High Court as opposed to Shariah Courts. Often times, the laws applicable to decide these cases are not Shariah laws and therefore do not conform to the spirit of Waqf.[21] Although expert evidence can be laid to guide the court in making Islamic law decisions, such evidence are not binding on the courts. As seen in the case of *Commissioner of Religious Affairs Terengganu v Tengku Mariam*,[22] where civil courts are held to not be bound to follow the opinions/edicts by the *Mufti*.

It is understandable why one would perceive that the High Court would be the more competent avenue in bringing land cases (including Waqf lands) as land is within the jurisdiction of the High Court pursuant to section 23(1)(d) of the Court of Judicature Act 1964 and Section 5 of the NLC.[23] As such, the High Court would have the power to grant relief which are appropriate to disputes involving land.

The conflict of jurisdiction between the Civil and Shariah Courts as mentioned above has been highlighted by many writers as one of the issues which impedes the development of Waqf in Malaysia.[24] By having parties questioning the court's power to hear the disputed matter, more time

15 Nuarrual Hilal Md Dahlan and Abdul Rani Kamarudin, 'Wakaf in Malaysia: Its Legal Evolution and Development', *Shariah Law Reports Articles* 1 (2006): 2.

16 Ibid.

17 Zuraidah Ali, Nor Asiah Mohamad, and Sharifah Zubaidah Syed Abdul Kader, 'Failure of Charity: Theoretical and Practical Comparison between the Cy-Pres Doctorine under Charitable Trust and the Concept of Istibdal under Waqf' (4th Global Waqf Conference 2016, Swansea, United Kingdom, 2016).

18 [1887] 4 Ky 213

19 Nuarrual Hilal Md Dahlan and Abdul Rani Kamarudin, 'Wakaf in Malaysia: Its Legal Evolution and Development', 4.

20 Per Section 25(1) of the Court of Judicature Act 1964, the High Court shall have unlimited original jurisdiction to hear all matters.

21 Under Section 3(1) of the Civil Law Act 1956, the applicable law for civil courts are the written laws in force in Malaysia and where there is none, then the common law of England and the rules of equity as administered in England as at 7 April 1956 (Subject to the proviso 'so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary).

22 [1970] 1 MLJ 222.

23 Under Section 5 of the NLC, High Court is the only court recognized in adjudicating land disputes.

24 Hisham Yaacob, 'Waqf History and Legislation in Malaysia: A Contemporary Perspective', *Journal of Islamic*

and resources are spent and wasted before a decision can be made by the court.

Another related issue concerning parties' access to justice when it comes to Waqf disputes is the limited jurisdiction of the Shariah Courts. As mentioned above, Waqf development projects involve numerous parties and in certain circumstances these stakeholders are non-Muslims. Due to the limited jurisdiction of the Shariah Courts which does not extend to non- Muslims, these stakeholders in consequence are not allowed to intervene into the proceedings.[25]

Another issue which has been raised is the lack of resources on the part of the SIRC.[26] Resources utilized to administer and manage Waqf properties come from the Wakaf Fund.[27] Therefore, prolonged litigation can actually be seen as wastage of Waqf income. A more effective method of dispute resolution is needed to ensure that Waqf income is not wasted and can be utilized to develop and manage other Waqf properties. Prof Khalid Rashid in his paper has recommended the creation of a Waqf Tribunal to avoid such wastage.[28] It is further mentioned by Fazlul Karim that perhaps under the Tribunal, the trustee should be exempted from paying the costs of the proceeding.[29]

The issue of costs and delays is indeed a concern for all the stakeholders involved in the development of Waqf lands. With the participation of the federal government in the development projects, the scope of parties who have interest in the development of Waqf lands has widened and includes the beneficiaries, *wakifs*, developers, the SIRC as *Mutawwali* (trustees), creditors, financial institutions etc. The complexities of these disputes have since been elevated and therefore require the expertise of a specialized body which can decide the matter justly and in accordance to the principles of Islam.

3. ANALYSIS OF SELECTED WAQF LAND CASES FILED IN MALAYSIAN COURTS BETWEEN 2005 AND 2016

Waqf land disputes have been cited as one of the main disputes involving Waqf. Looking at the list of reported cases, we can see that parties have brought these cases to both the civil and Shariah Court. Selected cases are presented in Table 3.1 below to show the types of cases which have been brought to these courts. A further analysis presents the relief or order sought and the duration of time taken for each case to be decided by the courts. The cases listed below are reported court cases between the years 2005 and 2016.

Table 3.1: Selected Waqf Land Cases filed between 2005 and 2016

No.	Case	Subject Matter	Judgment	Duration (including appeals)

and Human Advanced Research, no. 6 (10 June 2013).

25 As seen in the case of Tengku Zainal Akmal bin Tengku Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor [2012] 3 SHLR 39.

26 Sohaimi Mohd. Salleh and Syarqawi Muhammad, 'Waqaf Development in Malaysia: Issues and Challenges' (Dubai International Endownments' Investment, Dubai, 2008), 15.

27 For example, under Part VIII of the Wakaf (State of Selangor) Enactment 2015, the establishment of the Wakaf Fund by the Selangor SIRC may be for the purpose of paying for the cost, charges and expenditure for the administration of any Waqf (Section 38(2)(b)).

28 Syed Khalid Rashid, 'Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf', *Islamic Economic Studies* 19, no. 1 (2011): 22.

29 Muhammad Fazlul Karim, 'Problems and Prospects of Awqaf in Bangladesh: A Legal Perspective', http://waqfacademy.org/wp-content/uploads/2013/02/PROBLEMS-AND-PROSPECTS-OF-AWQAF-IN-BANGLADESH-A-LEGAL-PERSPECTIVE-Muhammad-Fazlul-Karim.pdf. (accessed July 1, 2017)

1	Dalam Perkara Permohonan Ahmad Yahya; Majlis Agama Islam Negeri Pulau Pinang (intervener)[1] (High Court Pulau Pinang)	Application to amend a 'Deed Poll' made on Waqf Land.	Application dismissed.	March 2015 - September 2015
2	Kamarolzaman Bin Hajar v Majlis Agama Islam Selangor[2] (Shariah Court of Appeal (Shah Alam))	Application to change status of Waqf land from ' Waqf am' to 'Waqf Khas'.	Appeal allowed. Decision by Shariah High Court to dismiss the Plaintiff's claim was overturned. Plaintiff's application is to be heard again in front of another Shariah Judge.	August 2013- November 2014
x3	Mohd Ridza bin Abdul Latiff (berniaga sebagai Rimbunan Niaga) v Majlis Agama Islam Negeri Johor & Anor[3] (High Court Johor Bahru)	Tenancy Agreement made on Waqf land.	Application by Plaintiff was dismissed and Plaintiff was ordered to pay double rental to the SIRC due to failure to deliver vacant possession to SIRC upon termination of contract.	April 2014- July 2016
4	Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff Bin Hassan & Anor[4] (High Court Pulau Pinang)	Declaration and Order for Waqf land to be registered under Plaintiff's (SIRC) name. Defendant applied to strike out the Plaintiff's Writ and Statement of Claim.	Court dismissed the Defendant's application and held that there are triable issues which cannot be summarily disposed of by a striking out application.	June 2014 - October 2015 (Striking out Application)

5	Ajar Bt Taib & Ors v Majlis Agama Islam dan Adat Istiadat Melayu Perlis[5] (High Court Kangar)	Application for declaration that the Waqf land in question is to be returned to the Plaintiff as conditions of Waqf was not met by the Defendant.	Preliminary Objection from Defendant: Determine whether Civil Court has the jurisdiction to hear matters regarding Waqf and Fatwa from Perlis Religious Committee. Preliminary objection allowed. Writ and Statement of Claim struck out on the grounds that High Court did not have the jurisdiction to hear matters involving Waqf and Fatwa.	April 2011- August 2013
6	Majlis Agama Islam Pulau Pinang v Katijah Yoan & Ors[6] (High Court Pulau Pinang)	Application to ascertain validity of Waqf and recognized trustees and validity of contract of sale involving Waqf land.	Court allowed the application by SIRC and declared the land in question as Waqf land and SIRC as its sole trustee. Taking into account the inapplicability of the NLC in according protection to Waqf land by virtue of Section 4(1) of the NLC, the concept of indefeasibility of title under Section 340(3)(b) cannot be applied on the land therefore invalidating the sale of the land.	SIRC Pulau Pinang brought the claim in 1987. Decision passed on 22 December 2009.
7	**Cenderong Concession**			

7(i)	Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu[7] (Shariah High Court Kuala Terengganu)	Application for a declaration that leases created over Waqf land are null and void. Compensation for loss of income resulting from act of Terengganu SIRC.	Parties reached an amicable settlement through *sulh*.	2008-2012
7(ii)	Majlis Agama Islam dan Adat Melayu Terengganu lwn Tengku Zainul Akmal bin Tengku Besar Mahmud dan Seorang Lagi[8] (Shariah Appeal Court Terengganu)	Application to review Family Waqf.	Appeal to review decision of High Court in ordering for all heirs of the waqf to be named in the suit was dismissed.	2008-June 2010.
7(iii)	Tengku Zainal Akmal bin Tengku Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor[9] (Shariah High Court (Kuala Terengganu))	Application to intervene as 2nd Defendant by SPPT Development Sdn. Bhd.	Application to intervene was dismissed on the grounds that directors and shareholders are non-Muslims.	September 2011-January 2012
7(iv)	Majlis Agama Islam dan Adat Melayu Terengganu v Tis 'Ata' Ashar Sdn Bhd[10] (Shariah High Court (Terengganu))	Declaration that the disputed land is a Waqf land and that the SIRC is the sole trustee to the property.	Parties' undergone 'sulh' and Respondent agrees to the application made by the SIRC.	6 July 2008 - 13 July 2008

8	Majlis Agama Islam Selangor lwn Hicom Gamuda Development Sdn Bhd dan Seorang Lagi[11] Shariah Court of Appeal & Shariah High Court	Application to ascertain validity of Waqf.	The Shariah High Court had dismissed the Writ and Statement of Claim of the Selangor SIRC due to a preliminary objection by the Respondent. The Shariah Court of Appeal overturned the decision by the Shariah High Court and ordered for original suit to enter trial.	2007-2011 (Suit was later withdrawn)
9	Majlis Agama Islam Selangor v Bong Boon Chuen & Ors[12] (Federal Court & Court of Appeal)	Application by the Respondent for a Judicial Review to review decision in allocating land as burial ground i.e Waqf land. Selangor SIRC applied for leave to intervene.	Appeal by SIRC to intervene was dismissed.	The proceedings in the Shariah Courts and civil courts happened simultaneously. Prior to the application to intervene, the High Court in August 2008 passed an injunction to stop any burial activity to be carried out. 2007- 2009
10	Ismail Bin Wahab v Majlis Agama Islam Melaka & 3 Ors[13] (Shariah High Court Melaka)	Claim of Waqf Property (Waqf Khas)	SIRC (Melaka) is still recognized as the sole trustee of the Waqf land. However, transfer of the land can only be made after the death of all beneficiaries.	2005-2007
11	Bakhtiar Bin Adnan v Mohd Fawzi bin Nahrawi dan 6 Yang Lain[14] Shariah High Court (Kuala Lumpur)	Application for an interim injunction to prohibit the Respondents from destroying and moving the surau located on the Waqf land.	Ex- Parte Application was rejected. Wilayah Persekutuan SIRC should be made the Respondent of the application.	April 2005- July 2005

3.1 Issues in Dispute before the Court

The majority of the reported cases involve determining the status of the land. Between the years 2005 to 2016, the SIRCs can be said to hold a proactive role in seeking for a declaration from the courts on the validity of the Waqf land. Other disputes also involve the administration of the Waqf land itself as seen in the Chenderong Concession cases. Two of the above cases involve an application from the applicants to amend a deed poll which contains the provision of Waqf by the Wakif. In both cases, the court rejected the application for amendment and upheld the status of Waqf land.

Cases involving the question of the title of Waqf property stems from the major issue of the lack of a proper system of survey of existing Waqf properties and a uniform method of registration of these lands from the *wakif* to the SIRC.[30] At present, there has been a proposal for the registration of Waqf lands by SIRCs to be made through a computerised land registration system with the cooperation by the Federal Department of Lands and Mines.[31] Until such system comes to reality, disputes involving the question of title of Waqf lands will continue to persist.

3.2 Duration of Cases before the Courts

Each of the above cases is different in nature and some of the cases above involve numerous parties. On average, even when a striking out application has been made by the respondents, it will usually take at least one year before the cases are decided by the respective court.

When there are many interested stakeholders and parties in the suit, the proceedings tend to take longer. Delay could be caused by applications to intervene made by interested parties. This was the situation in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors*[32] and *Tengku Zainal Akmal bin Tengku Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor*[33].

Cases are usually put on hold when they are simultaneously brought to both the civil courts and Shariah courts. In addition, when the decisions are appealed and brought to higher courts, further delays are caused. However, in the case of *Majlis Agama Islam dan Adat Melayu Terengganu v Tis 'Ata' Ashar Sdn Bhd*,[34] we can see that the dispute only lasted for 7 days whereby on the seventh day, the parties came to an amicable settlement through '*sulh*'. It is the opinion of this paper that if ADR was prioritized and utilized, a shorter amount of time and resources will be spent on these disputes.

From the above, we can see that much time is taken when there are multiple applications from the parties either in the form of an intervening application or by questioning the jurisdiction of the courts in hearing the matter which in turn had also increased the litigation costs which would have to be borne by the parties. By establishing a specific body to hear the matter and to have the body conduct ADR, much time can be spared on the part of the parties involved. Observation has also been made in the case of Chenderong Concession that through appropriate ADR processes, most of the numerous court procedures could be spared.[35] The case in 2009 had since been withdrawn, after an extensive number of suits, through amicable settlement between the parties in 2012.

30 Syed Khalid Rashid, 'Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf'.

31 Abdul Aziz Mohd. Johdi, in *Melestarikan Wakaf Menerusi Perdanaan Alternatif* (Persidangan Meja Bulat Wakaf JAWHAR 2016, Port Dickson, 2016).

32 [2009] 6 MLJ 307 (FC) & [2008] 6 MLJ 288 (COA)

33 Summons No. 11200-099-0400-2008

34 [2010] 2 SHLR 181

35 Umar A. Oseni, 'Shari'ah Court-Annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia', 11.

4. Need for the Establishment of a Waqf Tribunal

With the development of Waqf in Malaysia, there is a need for a stronger and more reliable structure of dispute settlement mechanism. Previously, issues involving Waqf related disputes have been highlighted which affect the administration of Waqf lands. Scholars have suggested for the establishment of a Waqf Tribunal as formed in India through its Waqf Act 1995.[36] However, laws would have to be legislated to confer power, jurisdiction and establishment.

It is proposed that the Waqf Tribunal would be state-based as Waqf is a state matter as well as taking into consideration the appointment of members of the Tribunal who should possess expertise in interpreting the laws of the specific state. It would therefore be of utmost importance for each state in Malaysia to possess its own Waqf enactment for this purpose. However, taking into consideration the current reality of certain states which are smaller, it would not be feasible to establish a specific Waqf Tribunal. For example, from the year 2005 to 2016, there were no reported cases involving Waqf lands in Negeri Sembilan, Pahang, Kelantan and Kedah. It is the opinion of this paper that this issue could be alleviated by having the proposed tribunal to also hear disputes relating to Zakat. The proposed tribunal can be called the Waqf and *Baitul Mal* Tribunal.

The creation of a special tribunal to hear and determine sensitive cases has long been practiced even during the time of the Prophet Muhammad (SWT). Through the *Wali al- Mazalim (*Special Tribunal or Chancery)*,* a panel is conferred with special jurisdiction to hear and determine sensitive issues which involves certain people or the public interest.[37]

One of the related scholars, Umar Oseni, in his proposal for the establishment of Waqf Dispute Tribunals in Malaysia proposes for the composition of the Tribunal to be from the Shariah Judiciary and some learned members of academia sitting in an ad hoc basis.[38] The tribunal would be able to utilize all available dispute settlement processes such as *sulh* and *tahkim* and the decision and awards should be enforceable by the Shariah Court. One of the reasons that Umar Oseni advocates for the use of ADR in resolving Waqf related cases is that the privacy of the involved parties can be maintained without garnering unnecessary publicity. This is especially important in cases with numerous parties, such as in the case of family Waqf.

Syed Khalid, one of the pioneers of this field, pushes for the creation of a Waqf Tribunal as a solution to expensive litigation. It was discovered that litigation was one of the expenditures which heavily drains the financial resources of *awqaf* and Waqf Boards in India. As such, the Waqf Tribunal was established to reduce such wastage and to avoid the complicated procedures which courts must follow. He therefore recommends for the establishment of a similar Waqf Tribunal in Malaysia as a possible answer to avoid wastage of Waqf income on litigation. He states that civil courts are usually costly, slow and technical. The Shariah Courts in Malaysia are also not a viable alternative because of their limited jurisdiction which does not extend to non-Muslims who are parties to the Waqf dispute. He cites that there is a need to legislate laws prescribing the proposed tribunal of its power, jurisdiction and establishment.[39]

He also stipulated that for the Waqf Tribunal to be successful, courts should not have jurisdiction to hear Waqf related disputes and that simpler procedures should be devised in order to make the Tribunal more accessible, cheaper and faster. The proposed Waqf Tribunal should also be independent in the sense that it should not be dependent on courts.

4.1 Objective of Proposed Waqf Tribunal

36 Syed Khalid Rashid, *Waqf Management in India*, 1st Ed. (Institute of Objective Studies, 2006), 70.

37 Nora Abdul Hak, Sao'dah Ahmad, and Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, 1st ed. (IIUM Press, 2011), 49.

38 Umar A. Oseni, 'Shari'ah Court-Annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia', 16.

39 Syed Khalid Rashid, 'Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf', 24.

The proposed objective of the Waqf Tribunal will be as follows:

1. For the cases to be dealt with fairly and justly.
2. Ensuring Waqf disputes are decided based on the Islamic principles of Waqf or relevant *fatwa*.
3. Avoid unnecessary formality and to seek flexibility in the proceedings as long as it does not contravene the principles of Waqf.
4. Avoid delays, so far as compatible with proper consideration of the issues. Therefore, reducing costs on both parties.
5. To provide any interim remedy if needed by the parties.

4.2 Power and Jurisdiction

To ensure that the Waqf Tribunal can operate effectively and efficiently, its powers are proposed as below:

1. Settlements which have been agreed to by the parties will have to be recorded and be deemed as an Award by the Tribunal. This Award will be final and be binding on all parties.
2. Awards passed by the Waqf Tribunal should be deemed to be final and binding on all parties involved in the proceeding. If in the event any party is dissatisfied with the Award, an application for a judicial review[40] can be made to the High Court for reconsideration.
3. As land matters are under the jurisdiction of the High Court, every Award passed by the Waqf Tribunal should be deemed to hold the same status of an order by the High Court. These Awards should also be enforceable in the Shariah Courts.
4. To avoid delays, it is proposed that the Waqf Tribunal should make its Award within sixty days from the last day of the hearing.
5. To ensure compliance of the Award passed, the Waqf Tribunal has the power to punish the errant party. It is therefore proposed that any party who after a prescribed amount of time fails to comply with the Award be made liable to an offence which is punishable by fine or imprisonment.
6. In cases of encroachment, the Tribunal should have the power to assess damages by the unauthorised occupation and to penalise such unauthorised occupants for their illegal occupation.
7. The jurisdiction of the Waqf Tribunal is not limited to Muslims only.

It is also important to clearly define the jurisdiction of the Tribunal to include all disputes involving Waqf and Waqf land. In the context of Waqf land disputes, the jurisdiction of the Waqf Tribunal should include:

1. Disputes on land register/ownership. To determine whether the land is indeed Waqf property.
2. Application to amend documents relating to registered Waqf land.
3. Tenancy/lease related disputes.
4. Encroachment of Waqf properties.

4.3 Composition of Proposed Waqf Tribunal

Syed Khalid recommends the composition of the Waqf Tribunal should consist of a Muslim

40 Under Section 25(2) of the Court of Judicature Act 1964 read together with Section 1 of the Schedule, the High Court possesses the jurisdiction to review Awards made by administrative tribunals. Such power however is not granted by the Shariah High Court.

individual who has knowledge of Waqf law.41 It is agreed that such requirement is important to ensure the interest of Waqf institution is protected and upheld. In India, the composition of the state's Wakf Tribunal constitutes of one Chairman and two members. The Chairman is a person who is a member of the State Judicial Service while the two members are comprised of a representative from the State Civil Services and another person who has knowledge of Muslim law and jurisprudence.42

Taking into consideration the judiciary system in Malaysia and the fact that Waqf disputes are often intertwined with issues that are not necessarily dealt with under Islamic principles, it is suggested that the composition of the proposed Waqf Tribunal should also comprise of one Chairman but three members. One of the members would be a person from the Shariah judiciary while the other from the civil judiciary. Taking into account that majority of the disputes involves the status of Waqf lands, the membership of the Waqf Tribunal should also comprise of a person who is an expert in the technical aspect of land management procedures.

4.4 Tribunal and ADR

The use of modern day ADR processes is not a novel concept but has long been utilized and promoted during the period of Prophet Muhammad SWT. As mentioned in the Code of Conduct for Judges (*adab al-qadi*), a judge should always consider the possibilities of reconciliation before giving the final decision.[43] While commenting on the Chenderong Concession case, Umar Oseni opines that cases involving the management of Waqf properties should preferably be resolved through *sulh* rather than formal court declaration. Citing the benefit of privacy, Waqf disputes involving important personalities and the royal family could escape the prying eyes of the media. As mentioned by Ismail Yahya ShCJ, in the case of *Majlis Agama Islam dan Adat Melayu Terengganu v Tis 'Ata' Ashar Sdn Bhd*:[44]

> 'Islam menggalakkan *sulh* atau perdamaian atau persetujuan bersama dalam usaha menyelesaikan pertikaian atau menghentikan pergaduhan. Penyelesaian secara *sulh* di antara pihak-pihak yang bertikai adalah menepati keadilan, oleh kerana kedua-dua pihak lebih mengetahui apakah yang masing-masing sepatutnya lebih berhak jika dibandingkan dengan tuntutan yang dibuat dalam satu-satu dakwaan.
> (Islam promotes the use of '*sulh*' or mutual consent in efforts to resolve and cease disputes. Resolution of disputes between parties through '*sulh*' upholds the concept of justice as the parties themselves should be more aware of what each deserves as compared to the claims made.)'

With this in mind, the proposed Tribunal should not be restricted to only conduct hearings but should also possess the power to utilize ADR processes such as *sulh* and *tahkim* when it comes to resolving Waqf related disputes. Therefore, before parties enter into trial, appointed officers of the proposed Tribunal should first assess the claims and determine whether the parties are recommended to partake in a negotiation process or to undertake in any other procedure that may allow both parties to reach an amicable and mutually consented agreement. If there is indeed an alternative procedure for the resolution of the dispute, attention should be brought to the parties on the availability of such procedure. Parties would then be required to first engage in the ADR proceeding before deciding on entering a formal hearing. This requirement should be included and mentioned in the statute which had conferred power to the Waqf Tribunal.

If settlement is reached at the stage of negotiation, the terms of settlement should be recorded and regarded as an award from the Waqf Tribunal. This is to allow smooth execution in the future. Such an award can also be enforceable in courts. If, however a settlement cannot be reached between

41 Syed Khalid Rashid, 'Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf', 24.

42 Section 44 of the Wakf Act 1995.

43 Umar A. Oseni, 'Shari'ah Court-Annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia', 4.

44 [2010] 2 SHLR 181

the parties, the Waqf Tribunal will proceed to hear the case.

From the presentation above, we can see that mutual settlements through ADR are not impossible in cases of Waqf. All that is needed for the success of the session is the willingness to compromise between the parties.

5. SUGGESTED MODEL AND FLOW CHART OF PROCEDURES OF PROPOSED WAQF TRIBUNAL

Figure 5.1 below shows the procedure for the proposed Waqf Tribunal. When a dispute or claim arises, an application and relevant supporting documents will have to be filed at the Waqf Tribunal by the Applicant or his representative. It is proposed that the application forms will be provided in the amended Waqf Enactment or regulation. Disputes or claims are placed into three categories, namely; application involving determination of Waqf lands, disputes involving management of Waqf lands and disputes involving contract on Waqf property, whereby the format of the application and supporting documents required will differ based on the category of dispute. It is felt that the categorisation is important to help the Tribunal determine which member or panel members of the Tribunal will hear the matter and which law would be used. Any replies and objections from the Respondent will also have to be in the format provided in the Waqf Enactment. A deadline has also been set to ensure that the matter is dealt with expeditiously.

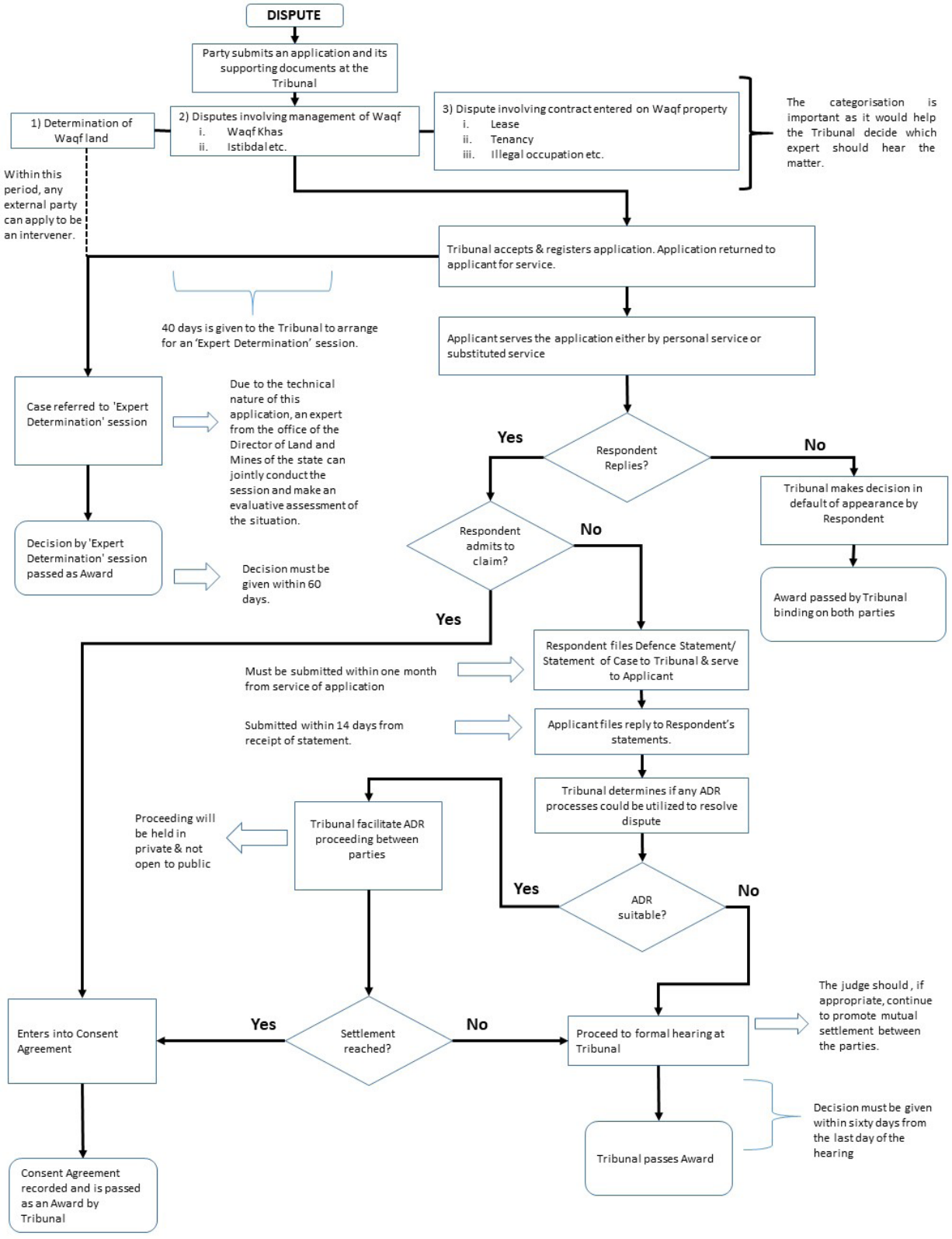
In cases involving determination of Waqf lands, it is proposed that an expert determination session is held after receiving all the relevant information regarding the land through a discovery of information exercise. A panel consisting of a representative from the state's Office of the Director of Land and Mines and members of the Tribunal will hear the application and make an evaluative assessment of the land based on the records held.

In the other two categories, a different process is proposed to make room for the possibility of resolution through ADR. Therefore, should the Tribunal feel that the dispute can be resolved through ADR proceedings, all parties would have to undergo an appropriate ADR proceeding before pursuing a formal hearing. The Tribunal at this stage plays an important role in determining the appropriate ADR processes which would help resolve the dispute. Registrars in charge would have to be properly trained in evaluating the cases before they are referred to the proposed ADR proceedings. This step differs from the pre-trial case management practice of the civil courts45 as the Tribunal will also hold the role of determining which ADR process would be best to resolve the problem.

Only when the ADR proceeding is unsuccessful, will the party be referred to a formal hearing in front of a different panel to ensure independence of the proceeding. It is proposed that the hearing will be made in public to ensure more responsibility from parties involved and to ensure the judges are careful in making decisions regarding the dispute. However, exceptions could be considered in circumstances where high profile parties are involved or if such dispute might severely tarnish the credibility of the SIRC and the religion of Islam.

Although representation is allowed, an important aspect of the Tribunal should be the simplicity of the procedures which in effect would bring about speedier decisions at low cost. All Awards passed by the Tribunal either in the form of a consent judgment or a decision made during a formal hearing are final and binding on all parties. As previously mentioned, should parties feel unsatisfied with the Award; an application for a judicial review can be made at the High Court for a review.

45 Under O.34 r. 2(a) of the Rules of Court 2012, the Court in considering the possibility of settlement during pre-trial case management may direct parties to mediation.



6. CONCLUSION

With the attention and support that Waqf has been getting, it is predicted that Waqf practices

will further blossom in Malaysia. Further efforts to develop this institution should not be left stagnant and should be pursued due to its potential role of being an income generator for the ummah and a promoter of social integration.

One of the features which could be improved is on the aspect of Waqf dispute management. With the establishment of a specific body which would be responsible in hearing and deciding Waqf matters, it is hoped that any dissatisfaction or lack of confidence in the Waqf institution from the public could be overturned. Stability in terms of the administration and dispute management will improve the participation of the public in this institution.

With the added use of ADR, a modern trend adopted by present developed institutions in resolving disputes, it is hoped that this proposed Tribunal could serve as a platform for both the SIRC and the public in upholding the Waqf institution according to the principles of Islam.

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(Footnotes)

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5 [2014] 3 SHLR 40

6 [2010] 4 CLJ 592

7 Summons No. 11200-099-0400-2008

8 [2012] LXV (II) JH 191

9 [2012] 3 SHLR 39

10 [2010] 2 SHLR 181

11 [2011] 1 SHLR 10

12 [2009] 6 MLJ 307 (FC) & [2008] 6 MLJ 288 (COA)

13 [2008] 25(1) JH 123

14 [2006] XXI (1) JH 19

THE CHALLENGES OF INTEGRATING DOMESTIC VIOLENCE IN TO COURT CONNECTED 'ADR' PROCESSES IN NIGERIA

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ABSTRACT

Alternative dispute resolution has always been a panacea for access to justice and access to justice is any process or procedure that will make justice accessible, available and affordable. The elitist and technical litigation system has failed to respond with promptitude the societal quest for justice in the dawn of painful injustice. These realities exceedingly justified the establishment of the court connected 'ADR' processes in Nigeria. There is a universal consensus that one of the pervasive and endemic threat to global peace and development is domestic violence and has also bedevilled Nigeria and about to be declare a national malaise. This study seek to highlight the extent and severity of domestic violence and the need to be included in to purview of court connected 'ADR' system having satisfy the threshold severity of violence emerging from family/marital relationship. This study will also distinguish family/marital disputes from domestic violence and critique the jurisdiction of family court established without regard to the intricate complexities of family disputes and domestic violence. This study found that there is need to reposition the multi-door court house in both conceptual and structural paradigm with a view of integrating heterogeneous Nigeria and plural legal system.

Keyword:- Court connected 'ADR', Domestic violence, Nigeria

INTRODUCTION;

Litigation is the most common and popular process of dispute resolution. Thus disputes are inevitable disturbance in any social context and relationships. This formal process was influenced by population growth, technological advancement and domestic and international transactions. Thus over the year's litigation which is exclusively the business of the courts has grown monumentally and became undermined by technicalities, delays, corruption and formalities.[1] The cause list is overloaded and the atmosphere is intimidating and oppressive to the uninformed and therefore litigation became more complex, legalistic and institutionalised.[2] However successive Nigerian governments formulated several intervention policies and innovations in order to fast track justice delivery to optimistic litigant.

These includes the proclamation of new civil procedure rules first by the Lagos state high court

1 Anyebe, P. A, "Towards fast tracking justice delivery in civil proceedings in Nigeria", Lagos, Nigeria, (2012),NIALS journal of Judicial reforms and transformation in Nigeria, Pp, 136-169

2 Obla, G. O, "Arbitration as a tool for alternative disputes resolution in Nigeria, How relevant today?", (2011) available at https://www.oblaanco.com/arbitration-as-a-tool-for-disputes-resolution visited on 27/01/2017

of justice and subsequently adopted by comity of states in the federation.[3] The prominent features of the new rules are the front loading system and pre-trial conference, among others.

Despite these innovations litigation could only offer justice according to the law through a formalised and rule entrenched system of adversarial adjudication which is largely cumbersome, complex and absurdly demanding not simplified. Its timid and intimidating processes and procedure is time consuming, consequently disputing parties begin to devise means of settling their disputes amicably and without recourse to the courts.[4] These states of consternation lead to the emergence of multi-door court house in order to invent a simplified atmosphere for disputes settlement and resolution. The underlining purpose of the multi-door is to offer other options for disputes resolution rather than super-imposing litigation as the only avenue for resolving disputes. But it has not taken away the rights of litigant to approach the court for litigation, rather transform the courts in to multiple windows of disputes settlement venues.[5]

However litigation process which is concerned with asserting rights or revenge is exclusively attained through the interpretation of the lied down rules. Whereas the purpose and objectives of the multi-door court house to resolve disputes between the parties and preserve the relationship. Thus the inevitability of occurrence of disputes is not in contention but the resolution and management of the dispute is the prime concerned.[6] Thus, the emergence of the multi-door court has preserved the relevancy of the courts and provides other alternatives to disputing parties. It is therefore not necessary to resolve disputes by litigation as the multi-door court house is the contemporary alternative to litigants.

The task within the purview of this paper is to evaluate the possibility or otherwise of integrating domestic violence in to the jurisdiction of multi-door court house. To traced and analyse challenges of integrating domestic violence in to the multi-door court house. It will also seek to determine the distinction if any between family dispute and domestic violence and finally it suggest the need to review and overhaul the conceptual and structural composition of the multi-door court house. It is the ambitious objectives of this study to argue that the multi-door court house must accommodate the plural character and feature of Nigeria. The study is scoped to consider Abuja multi-door court house having regard to its status as the capital of Nigeria and the confluence of heterogeneity and pluralism.

CONCEPTUAL CLARIFICATION

1 **"ADR"** the acronym 'ADR' is a concept which is differently conceived and understood by different authors and it applications differ from one jurisdiction to another. While the letter 'A' is subjected to different meaning which includes; 'ALTERNATIVE', 'ADDITIONAL' or AMICABLE' in other jurisdiction the letter 'A' is replaced by letter 'E' which means 'EARLY' or 'EFFECTIVE' among others[7]. Thus it is appropriate to use the acronym interchangeably with either 'ADR' or 'EDR' respectively.[8] Therefore it is quite convenient to refer to it as 'Alternative dispute resolution', 'Additional dispute resolution', 'Amicable dispute resolution' as in the case of ADR' whereas in the case of 'EDR' it can be referred to as Early disputes resolution or effective disputes resolution. In common usage it is simply used interchangeably with Arbitration.

Meanwhile despite the common usage and prominence of the word 'Alternative' yet the international chamber of commerce when issuing its ICC ADR rules adopted 'Amicable' disputes

3 Nweze, C. C, "Redefining advocacy in contemporary legal practice: A judicial perspective" First Chike Chigbue memorial lecture, Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria, (2009), P, 6

4 Okafor, I. B, "Prospects and problems of access to justice through the multi-door court house", Abuad university press, Ado-ekiti, 1 (1), (2014), Abuad law journal, Pp, 30-57

5 Ibid at 44-45

6 Aina, K, 'The multi-door court house concept: A silent revolution in legal practice", being a paper presented at the annual conference of the NBA Jos, Plateau state, 28th Aug-8th Sept, 2005

7 Goldsmith, J. C, ADR in business practice and issues across countries and culture, Kluwer law international, Netherlands, 2006, p, 6

8 Ibid Goldsmith, J. C, p, 6

resolution.[9] Thus 'ADR' could be defined as processes aimed at resolution of a difference or a dispute through voluntary settlement agreement reached with the assistance of a third person(s).[10] It was also define to simply mean processes available for the resolution of disputes which includes arbitration, mediation, conciliation, early neutral evaluation and hybrid process.[11] The foregoing has crystallised definition and description together and offered a convenient comprehension of the subject, therefore 'ADR' or 'EDR' are available options to disputants to take in order to settle their dispute.

2 **MULTI-DOOR COURT HOUSE** it was opined that a multi-door court house is government response to public consternation over frustrating shortcomings of litigation system and to ensure the continued relevance of the court system within contemporary realities. Towards this end the judiciary device and incorporated various disputes settlement mechanisms to be readily available as alternatives to litigation to any prospective litigant.[12] Therefore the multi-door court house is an integral part of the court that offers private disputes resolutions options, without the necessarily denying a litigant his legal right to approach the court directly. The exercise of the right to approach the multi-door court house is without prejudice to the legal right to engage in litigation. It should be emphasised that there are other stakeholders whom operate a functional multi-door court apart from the court annexed multi-door house.

3 **DOMESTIC VIOLENCE** this is also called 'Intimate partner violence', 'Family violence' or 'Domestic abuse' and has been defined to mean a pattern of abusive behaviour by one partner against another in an intimate relationship such as marriage, dating, family or cohabitation.[13] This scholarly definition is unconnected with the statutory definition because its failed in a particular paradigm. Whereas under Nigerian law 'Domestic violence' is defined as any act perpetrated on any person in a domestic relationship and the said act causes harm or may cause imminent harm to safety, wellbeing and health of that person.[14] Thus the VAPP act (2015) defined domestic relationship to include religious and customary marital relationships before, during and after the marriage.

Meanwhile an explicit and comprehensive definition of violence against women summed up what domestic violence should be in a more express and clear terms. Thus violence against women means any physical, sexual and psychological violence occurring in the family. This includes battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women.[15] This definition underscored the essential theme of this study and will guide the study as the workable parameter.

4 **FAMILY DISPUTES** there is no acceptable definition of what constitute family disputes this because of its limitless scenarios and situations that will lead to disputes in the family. Frequently these disputes emerge from the application or observance of one cultural practices or another. But scholars opined that family disputes includes any disagreement either pre or post nuptial covenants.

It also involved petition for divorce, custody of children, adoption and surrogacy, alimony, cohabitation and judicial separation, among other issues.

ORIGIN AND DEVELOPMENT OF "ADR" IN NIGERIA

The coinage and acronym 'ADR' is alien to Nigeria but the intrinsic purpose and principle

9 Orojo, J. O and Ajomo, M. A, Law and practice of arbitration and conciliation in Nigeria, Lagos, Nigeria, Mbeyi & associates Ltd, (1999), P, 37

10 Carita Wallgren cited with authority in Goldsmith, J.. C, at 7

11 Lukman, A. A, "Entrenching sustainable development by enhancing mediation culture in Nigeria", Vol. 21, (2014) Journal of law, policy and globalisation, Pp, 19-27

12 Op,cit Okafor, I. B at 44

13 Izuora. O, "The perspective of Nigerian women on domestic violence", in (eds) E, Azinge & L, Uche, Nigerian institute of advanced legal studies, Lagos, (2012), *Law of domestic violence in Nigeria*, Pp, 64-95

14 Section 46 Violence against persons (prohibition) Act, Laws of the federation of Nigeria (2015) (hereinafter called VAPP act 2015)

15 Art 2 (a) UN, Declaration for the elimination of violence against women, (DEVAW, 1993) A/RES/48/104

of the acronym define the existence of the traditional inhabitants of the geographical contours of Nigeria. It can be said that 'ADR' has primordial origin because every human community that have existed in ancient times applied arbitration, mediation or conciliation in resolving their disputes.[16] Accordingly it has been judicially affirmed that 'ADR' has been the traditional process of disputes resolution in Nigeria. This was the decision in the case of **Okpuruwu vs Okpokam,**[17] the court held that in the ancient Nigeria before the advent of common law heritage of courts litigation system the people had inexpensive and convenient process of adjudicating over their disputes. It is usually referred the dispute to elders or a body set up for this purpose. This practice has over the years become highly entrenched in the system and therefore survived till date as customs.

However as a result of British colonial domination and the subsequent imposition of amalgamation of southern and northern protectorates and the colony of Lagos in 1914 which ultimately created a political entity called Nigeria. Consequently annexed to British Empire and subjected to British common law and English legal system.[18] Although 'ADR' is often referred to as arbitration even though it is more than that but frequently in conventional common usage it is so called. Thus the first formal statutes on 'ADR' to be promulgated in Nigeria was the arbitration ordinance 1914 which was a verbatim copy of the English arbitration act 1889 and was made compulsorily applicable to whole Nigeria.[19] Subsequently the ordinance was re-enacted in to law as arbitration ordinance (Act) laws of the federation of Nigeria and Lagos.[20] Thus the four regions that comprised Nigeria as at that time Northern, Eastern, Western and southern Cameroons regions were coerced in to adopting and incorporating the Act in to their respective legislations.[21]

However the modern and contemporary governmental endorsement of 'ADR' was the promulgation of arbitration decree by the then military government.[22] This law was modelled after UN commission on international trade (UNCITRAL) model law on international arbitration. Thus it provides a detail and comprehensive legal framework on commercial arbitration. Indeed the act's statement of purpose provides that it is an act that essentially provides a unified legal framework for fair and efficient settlement of commercial disputes by arbitration and conciliation.[23] Even though the arbitration act makes provision for commercial arbitration other areas of disputes that were not covered by the Act were the shortcomings which offered an imperative opportunity to be remedied by some inventive mechanisms, and readily available is the development of the multi-door court house.

SOURCING AND DEVELOPING COURT ANNEXED 'ADR' PROCESS IN NIGERIA

The concept and origin of the multi-door court house could be traced to Professor Frank Sander of the Harvard law school in 1976 it was at the national conference of the American bar association in honour of the famous jurist Roscoe Pound and under the theme "Causes of dissatisfaction with the administration of justice".24 This breakthrough led to the American experiment that profoundly enthroned justice beyond the legal text and inspire many countries to implement in their respective territories. The multi-door court house is a court of law in which facilities are provided for the application of 'ADR' processes. In other words it is a court with several and additional 'doors' or

16 Akpata, E, *The Nigerian arbitration law in focus*, Lagos, Nigeria, west African books, (1997), p, 1

17 (1994) 4 NWLR, (Pt, 90) p, 554 at 586

18 Obilade. A. O, *Nigerian legal system*, sweet & Maxwell, London, (1979), p, 5

19 Opcit, Orojo & Ojomo, p, 3

20 Ibid Orojo & Ojomo, p, 13

21 Ezejiofor. G, *The law of arbitration in Nigeria*, Ikeja, Longman Nigeria plc, (1997), 2-3

22 Arbitration and conciliation decree (1988) which was entered in to force on 14th March 1988 and was subsequently re-enacted as an act of National assembly when Nigeria return to democracy and was captioned Arbitration and conciliation Act, cap A18, Laws of the federation of Nigeria, LFN (2004)

23 The Preamble Arbitration and conciliation Act, cap, A 18, LFN, (2004) hereinafter referred to as Arbitration Act (2004)

24 Crespo, M.H. "A dialogue between Professor Frank Sander and Mariana Hernandez-Crespo; exploring the evolution of the multi-door court house", *University of St. Thomas law journal*

disputes resolution mechanism which it provides in addition to the conventional litigation door.25

Meanwhile Lagos state High court of justice was the first in Nigeria and indeed Africa to establish the multi-door court house as court connected 'ADR' centre.26 This success story was a collaboration between the 'Negotiation and conflict management group' (NCMG) with the Lagos state high court of justice on the basis of public-private partnership initiative (PPPI) The Lagos state high court was only obligated to provide space whereas the project in its entirety was funded by NCMG to desired conclusion.27 It was subsequently established in the federal capital territory Abuja and a host of other states in Nigeria.

Although the chief Judge of the FCT high court and of course other chief justices of respective states claimed to have constitutional powers for the establishment of court connected 'ADR' facility.28 But the said provision makes reference to the powers conferred on the respective chief justices to issue practice directions to regulate and control the processes and procedure in civil suits. Experts are of the view that the existence of arbitration act 2004 has accentuated the establishment of the court connected 'ADR' facility as an integral part of the court system in Nigeria.29 The Abuja multi-door court house (AMDC) was established in collaboration with department of international development (DFID) and the British council through their programme security, justice and growth project.30 Other states like Lagos also christened its 'ADR' centre as 'Lagos multi-door court house'31 (LMDC) whereas Borno state referred to it as 'Borno amicable settlement corridor' (BASC).32

However the fact that the nomenclature of the court connected 'ADR' centre varies with different states so also the doors available also varies from states to states. This is largely connected with the consideration of the predominant inhabitants and frequent disputes that requires settlement. Thus in the LMDC the following doors are available which includes arbitration, mediation, conciliation, neutral evaluation and any other 'ADR' mechanism considered suitable.33 Accordingly in BASC the available doors are early neutral evaluation, mediation, arbitration and sulhu.34 Conversely the AMDC has received potent support from the FCT high court (civil procedure) rules which called on the court and judge to seek the consent of the litigants before him and encourage them to resort to dispute resolution options available in the court. He can refer or they can approach the 'ADR' centre as walk-in disputants and the available doors are arbitration, conciliation, mediation or any other lawfully recognised mechanism of dispute resolution.35 Even though the inscription on the AMDC entrance claimed to have other doors which includes sharia mediation and customary mediation, among others.

JURISDICTION OF COURT ANNEXED 'ADR' CENTRE OVER DOMESTIC VIOLENCE

Although the court connected 'ADR' facility is essentially mandated to accommodate civil disputes and that criminal cases are by their very nature and characteristics are not negotiable nor can they be subject of settlement or resolution as there is nothing to resolve. It is primarily the establishment of criminal liability and imposition of deserved penalty. It has been succinctly opined that there are certain types of disputes that cannot be accommodated in any of the 'ADR' doors. These

25 Aina. K, "*Alternative dispute resolution and the relationship with court process*", being a paper delivered at the Nigerian bar association annual general/delegate conference, Abuja, Nigeria, (2004), p, 3

26 Ibid Aina, K at 4

27 Ibid Aina, K at 2

28 See Section 259 of the (1999) constitution of the federal republic of Nigeria (as amended)

29 Hon, Justice Bola Ajibola, "Recent development in arbitration and 'ADR' in African continent", in (ed) C. J. Amasike, *Arbitration and alternative disputes resolution in Africa*, Abuja, Regent Ltd, (2005), p, 17

30 Alternative disputes resolution: Multi-door court houses, available at https://www.britishcouncil.org.ng/sites/default/files/multi-door_courthouse.pdf acceseed on 13/05/2017

31 See Lagos multi-door court house law (2007)

32 See Borno amicable settlement corridor (2009)

33 See section 3 (1) of the Lagos multi-door court house law, (2007)

34 See Borno amicable settlement corridor (practice direction) 2009

35 See Order 17 Rule 1 (a-d) of the federal capital territory Abuja (civil procedure) Rules 2004

include disputes arising out of illegal transactions, void transactions or an indictment for an offence of public nature. The law is settled that criminal charge which is based on a matter of a public concern is not within the jurisdictional purview of 'ADR' centres.[36] The learned author's insightful claim only makes case for criminal charge of public nature. Thus domestic violence does not belong to this category of a criminal charge and liability. Matters that can effectively be referred to 'ADR' centre are disputes about real or personal property, breach of terms of contract or its performance, Family disputes or specific question of law such as construction of a document or its interpretation.[37] With respective to the learned author's insightful perspective, domestic violence is an emerging criminal liability that prohibits certain treatment, exclusion, domination or restriction whether religious, traditional or socio-cultural as women's human rights violation and criminal.[38]

However in USA and Australia court connected 'ADR' centre has been experimented for over three decades and different disputes were referred to the centre and over the years success was recorded for its operation, same can be said of India.[39] Indeed in USA issues of domestic violence which involved spousal battery and criminal assault has been specifically been send to court annexed 'ADR' centres for mediation.[40] The mediation of domestic violence was successful and fruitful particularly in District of Columbia and Florida, but subject to free and voluntary consents of both victim and abuser.[41]

It should be emphasise that without prejudice to procedure of compoundable of offences under the extant criminal procedure code applicable in the northern Nigeria,[42] and plea bargain in all criminal trials.[43] The law have conveniently offered mediation in all domestic violence offences subjected to the free and voluntary consent of the victim being sought and obtained.[44] This is provided for as an integral part of the powers confers on the court in its obligation of evaluating and issuing protection orders against a perpetrator of violence. Accordingly the court is extravagantly empowered to consider any issue or relief which is provided by any other law, the court should assume such jurisdiction as if it were commence in that respect.[45] The court is statutorily expected to consider and grant relief available under matrimonial causes act and under the child rights act.[46] In view of these developments that domestic violence can be mediated and the court has discretionary powers to grant civil relieves. All these are exclusive powers and jurisdiction of the court and not the multi-door court house.

LEGAL PLURALISM AND THE MULTI-DOOR COURT HOUSE

Incidentally the concept of 'ADR' forms an integral part of the culture and tradition of the people of Nigeria and equally their religion.47 It has been opined that effective disputes management is one of the fundamental duties of a judge under Islamic law. The promotion of reconciliation and effective settlement of disputants with a view to ensure social cohesion and promote peaceful co-existence is one obligation sharia imposed on a presiding judge.48 Thus Islamic law and customary law are part of Nigeria law and specific courts were statutorily established for their absolute application. Accordingly

36 Op, cit Ezejiofor. G, at 4

37 Ibid at 3

38 CEDAW committee Recommendation No. 19

39 Op, cit Lukman. A. A at 21

40 Fischer. K, Vidma. N, and Ellis. R, "Procedural justice implication 'ADR' in a specialised contexts: The culture of battering and the role of mediation in domestic violence cases", Vol. 46, (1993) *SMU law review*, Pp, 2117-2174

41 Ibid at 2151

42 Criminal procedure code, N. R 18 of 1960/cap. 80 laws of northern Nigeria, 1963

43 See section 493 of the administration of criminal justice act laws of the federation of Nigeria (2015)

44 See section 31 (2) (e) of VAPP Act 2015

45 See section 31 (8) of VAPP Act 2015

46 Matrimonial causes act, cap. M7, laws of the federation of Nigeria, 2004 & Child rights act (2003)

47 Rhodes-vivour. A, "Arbitration and alternative dispute resolution as instruments for economic reform", available at <ww.drvlawplace.com/media/ADR-DRV/UPDATE-2006.pdf> accessed on 06/05/2017

48 Oseni. U. A, "Sharia court-annexed ADR: The need for effective dispute management in waqf, hibah and wasiyyah cases in Malaysia", being a paper presented at the 14th annual conference of the sharia legal officers of Malaysia, (2012), p, 2

constitutionally created for the FCT Abuja are Sharia court of appeal and customary court of appeal with exclusive jurisdiction to apply Islamic law and customary law respectively.49

Although the Sharia court of appeal and customary court of appeal have no criminal jurisdiction but crucial powers were conferred on them in matters of family disputes and related issues. These include any question regarding marriage or its dissolution, waqf, gift, will or succession. Others are any question regarding guardianship, maintenance where all parties are Muslim.[50] Whereas the customary court of appeal has exclusive jurisdiction in all civil proceedings involving questions on customary law.[51]

It was argued that predominantly marital relationships are based on either Islamic law marriages or customary law marriages and frequently domestic violence are cultural and traditional interpretation of social co-existence of the people.[52] Sadly having regard to the constitutional provisions in the foregoing on the establishment and jurisdiction of the Sharia court of appeal and customary court of appeal the AMDC is situated at FCT high court of justice. Even though the AMDC has Sharia mediation door and customary law mediation door[53] yet these doors were wrongfully located having regard to the two particular courts. This is so for a number of reasons among which are the courts were not vested with criminal jurisdiction. Their jurisdiction is limited to certain issues that were constitutionally itemised, whereas the high court of justice has an unlimited original jurisdiction in both civil and criminal matters.[54] This position of the law has received judicial pronouncement in plethora of authorities that the jurisdiction of the high court of justice is unlimited with respect to civil and criminal matters.[55]

CONCLUSION

The existence of the multi-door court house as an integral part of court is complementary to the court as an alternative services rendered to the people. Thus it's certainly making the court relevant and functional within the purview of contemporary demand. The current 'ADR' centre is housed within single location. It is hope that other courts of equivalent jurisdiction (Sharia court of appeal and customary court of appeal) which will be allowed to initiate and establish such facility within its premises as they are more suitable to host and deliver 'ADR' centre having regard to their inherent and traditional obligations. Consequently the concept and application of 'ADR' is not new to the Sharia and customary courts, but what was new to them was the coinage of the acronym 'ADR' which they loosely called arbitration, mediation, negotiation or conciliation. Of course this is what the acronym stands for even in the common law parlance.

The study seeks to dissect the silent paradigm towards integrating domestic violence in to the jurisdiction of the multi-door court house. Even though there is statutory permissibility to that effect but its lack intensity. The study further distinguishes between domestic violence and family disputes, but intensely highlighted the need to subject domestic violence offences to court-annexed 'ADR' facility. This is because the fact that a spouse has inflicted injury and perpetrated harmful abuse against his wife or children the relationship should be saved. Frequently women victims of domestic violence don't report the abuse for fear of breakage of the marriage. If the marriage break down it is either wife has nowhere to go, the children would have no fatherly love and guidance or fear or losing maintenance as the breadwinner is taken to jail.

There often the complainant in domestic violence offences usually the woman many instances her complaint is to stop the abuse and not to punish her husband. In Nigeria women are often depended on their husband for sustenance. Meanwhile those illustrations of domestic violence that are cultural

49 See section 260 and 265 of the (1999) Constitution of the federal republic of Nigeria (as amended)

50 See section 262 (2) (a-e) of the constitution (1999)

51 See section 267 of the constitution (1999)

52 Aloh. B. o, "Violence against women in Nigeria", 2 (2) (2016) *Port Harcourt journal of business law,* Pp, 526-533

53 Alternative disputes resolution: Multi-door court houses, available at https://www.britishcouncil.org.ng/sites/default/files/multi-door_courthouse.pdf acceseed on 13/05/2017

54 See section 257 (1&2) of the constitution (1999)

55 Essien. E, "The jurisdiction of states high courts in Nigeria", 44 (2) (2000), *Journal of African Law,* Pp, 264-271

still require mediation or negotiation or any other intellectual engagement to enable the people who profess it realised as to its damaging and harmful reality. Thus state coercive power cannot resolve issues of traditional and cultural believes. That is why the multi-door court house is a veritable tool toward a sustainable development of Nigeria, but there is need to overhaul and review the function and operation of the multi-door court in order to re-position it for optimum services and result.

SUGGESTIONS

1 The Sharia court of appeal and customary court of appeal must also have a court connected 'ADR' centre to enable them function optimally.

2 The court connected 'ADR' centre must have enlarged jurisdiction to enable it accommodate domestic violence offences.

3 The Nigerian criminal justice sector must be reform to re-designate domestic violence a special crime to be tried by civil courts due its delicate nature and complexities.

4 The jurisdiction of both Sharia court of appeal and customary court of appeal be enlarged to enable accommodate domestic violence.

5 There should be legislative expression to mandatory application and practice of 'ADR' before resorting to litigation

6 The practice and procedure in the court connected 'ADR' centre must be made simple and free from technicalities to enable disputants approach the centre with optimism.

7 The court connected 'ADR' centre must be friendly, courteous, receptive and accommodating, also it must insist that English language must be the medium of communication, disputants must be allowed to use the language convenient to them and officials of the centre must speak that language too.

8 The court-annexed 'ADR' centre must de-emphasised the use of too many forms at the point of filling complaint, approaching the centre must be simple even in the disputant own hand writing.

BUILDING STRONG COMMUNITIES THROUGH MEDIATION: PROPOSING A LEGAL FRAMEWORK FOR MALAYSIA[1]

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ABSTRACT

The Malaysian government, through the Department of National Unity and Integration (DNUI) has decided in 2007 to introduce community mediation as a means of resolving community disputes, as this is well established in countries like Singapore, Australia, the UK, United States, amongst others. In Malaysia, there is no legal framework as yet developed for community mediation. Thus, the aim of this paper to explore the need for establishing such a framework, which for example, in Singapore, clearly establishes and promotes community mediation practice in the population. The writings in the history and establishment of community mediation and of the framework in countries that have this legal entity are looked into. Besides library research, the study organized interviews and discussions with firstly, the relevant authorities and policy makers with respect to current status, planning and development of community mediation. Secondly, descriptions and opinions of the practitioners of mediation such as community leaders, rukun tetangga activists, members of resident associations and possibly with individuals with the knowledge and experience in these disputes. The total sums of descriptions, experiences and opinions helps discern the need of a legal framework for community mediation. It helps improve and promote the practice of community mediation in managing to resolve community disputes and conflicts.

Keywords: community mediation, legal framework, community disputes

INTRODUCTION

The subject of the paper is development of community mediation in Malaysia by the Department of National Unity and Integration. The paper discusses the value of mediation as an alternative dispute resolution process. It outlines the reasons for introducing the community mediation program and actions taken to implement it in Malaysia. Mediation is recommended as a way of building community.

The Malaysian government had identified a need for a process of resolving community disputes that was less costly and complex than the usual formal court-based adversarial proceedings. The government wanted a system that encouraged voluntary participation and that would become a model to be adopted by any community looking for an alternative to the courts for resolving disputes that happen in the community. Mediation for dispute resolution became the process, and the establishment

1 This is project is funded by MOE under ERGS research grant secured in 2013

of dispute resolution centre became the vehicle for accomplishing these goals.

This paper highlights a community development effort that can be replicated and adapted in other communities. It explains the actions taken by the Department to create a positive reception for mediation efforts and discusses the impacts of a mediation structure on community. It discusses on the legal framework of community mediation in Malaysia by fragmenting the subject into several sub-topics comprising of mediators, mediation process, subject matter or scope, community mediation centre, followed by the proposed structure of the Malaysian community mediation centre and subsequently the proposed laws.

LEGAL FRAMEWORK FOR COMMUNITY MEDIATION IN MALAYSIA

The community mediation programme in Malaysia needs a legal framework to facilitate community mediation practise and ensure the effectiveness of the mediators' services. Currently, the law that mentions about community mediation is Section 8(d) Rukun Tetangga Act 2014 and Article 3(d) of the Rukun Tetangga Circular 2012 which provides that one of the functions of Rukun Tetangga committee members is to provide mediation services. There is no law that govern community mediation programme *per se*. Therefore, the community mediation programme under DNUI need to have its own rules or laws to ensure that formality, procedure and rules of conduct are observed by the community mediators. This paper discusses a few matters that will be the parts of the proposed community mediation laws and administration and/or organisation structure based on data collected.

Subject Matters

From the data collected, it is found that under the current practice of community mediation in Malaysia, no circular has ever been issued as to define the scope of the programme. Most of the cases mediated by the community mediators involve tort such as disturbing or making loud noise, issues relating to municipal councils such as pets issues, students of high schools absenteeism, crime such as rape case and suicide case. All type of cases referred to the community mediators were accepted due to the fact that there has been no clear delineation on matters that can be mediated. The mediators failed to differentiate between counselling, mitigation and mediation. For instance, one mediator shared with the researcher that he offered his service to a rape victim. Mediation session needs two parties and must not involve crimes such as rape.

Unlike Malaysia, the community mediation practice in India and Singapore, each has its own scope. Indian Institute of Arbitration and Mediation Community Mediation Service (IIAM CMS), Kerala, India, includes matters relating to family, relational issues, commercial, contractual, work, peer, and criminal matters limited to compoundable offences under the Indian Penal Code. Whilst in Singapore, the Singapore Community Mediation Centre (SCMC) draws a line allowing the centre only to handle cases involving neighbourhood matters including landlord – tenant disputes, family relational issues, community matters including disputes between friends, stallholder and owner and social issues that does not involve family violence and seizable offence under any written law.

This research proposes that community mediation in Malaysia has an immediate need to have an ascertainable scope or boundaries. It is suggested that the subject matter must not include disputes involving customary laws of native people of Sabah, Sarawak and aborigines of West Malaysia and matters prohibited by Mediation Act 2012, but to be restricted to neighbourhood issues and family squabbles. However, community mediation in Malaysia may include some petty crime cases as its subject matter as per the Memorandum of Understanding between the DNUI and police force.[2]

The jurisdiction/boundary of community mediation in Malaysia may be extended in future upon the programme being acknowledged by the members of the community of its services. It is further suggested for the DNUI to have a special power to accept any cases (not within the boundary)

2 Zulkifli Hashim, Speech, Director Unity Management Unit, DNUI Putrajaya at Sabah Community Mediators Training Session at Grand Borneo Hotel Kota Kinabalu, Sabah on 5 September, 2014.

that needs to be mediated for the purpose of maintaining harmony in the community in line with the purpose of the establishment of the department. Therefore, it is recommended for the DNUI to collaborate with the authorities such as municipal council, native courts, police force, etc. So that it may accept cases from these authorities under its special power, where without it intervention, the harmony of Malaysia may be jeopardised. This practice might not be found to be needed in other countries, except Malaysia due to its unique composition. It is important for Malaysia to have its own template of design of community mediation programme that is suitable for its citizens.

Mediators

In the current practice, the community mediators are the *Rukun Tetangga* committee members and staff of DNUI. The committee members are chosen because of their position as the grassroot leaders, and the staff of DNUI due to their work with community members. The community mediators are volunteers who offer *pro bono* services. The practice of using trained volunteers as mediator by DNUI is in line with the guideline provided by National Associate for Community Mediation (NAFCM). It is characteristic of community mediation centre which is also adopted by IIAM CMS and SCMC.

It is proposed for the DNUI not to limit the candidates to *Rukun Tetangga* committee members. According to Liebmann and Beckett (1998),

> "people from varied educational backgrounds and life experience, possessor can learn the skills, understanding and competence required to be a good mediator.[3]

Thus, it is suggested for the DNUI to open the post to include other professions, especially persons respected in the community such as teachers, headmasters, doctors and lawyers.[4] Presently the DNUI has yet to open this post for others to apply. IIAM CMS as well Singapore CMC's community mediators are also grassroots leaders. However, in both institutions, the mediators are volunteers from various backgrounds, in the sense that they are not restricted to certain organisations or institutions such as *Rukun Tetangga* committee members.

From the data analysed, this research suggests that the DNUI should not depend solely on *Rukun Tetangga* committee members due to the reason that in some areas the *Rukun Tetangga* committees members are dominated by a certain race only (who are actively involved in Rukun Tetangga programme, whilst others are not interested to get involved). In accordance to NAFCM that require community mediators to represent the diversity of the ethnic groups in Malaysia, the DNUI must open the position to all interested Malaysians. Having said that, many Malays/indegenous are appointed as community mediators because of Malaysian demographic where Malays/indigenous are the majority. Despite the Malaysian demographic, the DNUI must consider appointing Punjabis, Eurasians, Pakistanis and more mediators from both Indian and Chinese ethnicities in West Malaysia. The DNUI might not be able to fulfil the NAFCM ouline if it depends on the *Rukun Tetangga* committee members. The same practice needs to be adopted in East Malaysia. Each etnic and sub-ethnic group in East Malaysia shall have at least one mediator in their area, because each of them speaking different accent or language. It is important to have a diversity in ethnicities of mediators because only the person who belongs to the same ethnic group would understand the cultures and nature of his/her people better.[5]

3 Marian Liebmann, Gavin R. Beckett, *Community And Neighbour Mediation,* Routledge, 1998, at 205.

4 Nora Abdul Hak, Farheen Baig Sardar Baig, Hanna Ambaras Khan, "Empowering Communities through Mediation in Malaysia: Issues and Challenges" Paper Presentation in International Conference on Law and Society I (ICLAS I) 16 – 18 February 2013, Universitas Muhammadiya Yogyakarta Indonesia.

5 Nora Abdul Hak, Hanna Ambaras Khan, "Mediation as a Means in Resolving Community Dispute in Peninsula Malaysia : A Historical Perspective" in Paper Presentation in International Conference on Law and Society II (ICLAS II): Discovering the Past in Charting the Future, 18 -19 September, 2013 International Islamic University Malaysia, Kuala Lumpur Gombak

This is one of the important elements that may attract members of the community to adopt community mediation as a method of dispute resolution. It is also an element that leads to successful mediation sessions. Further, according to the third characteristic of a community mediation centre outline by NAFCM, the mediators must represent the diversity of the community it serves.

Selection of mediators

Currently, the DNUI selects the candidates without any briefing on the course and the responsibilities upon being appointed as community mediators. Further, the candidates have never been interviewed on their interest in joining the programme. The DNUI needs to select suitable candidates who are truly interested to practice mediation with dedication to voluntarism. From the data collected, these elements are missing, and as such caused them not to be interested to practice. There are a few mediators who attended the course because their spouses were attending. There is a high possibility that these uninterested persons might turn out to be non-practising mediators.

Under IIAM CMS practices, the institution selects volunteers based on their personal experience in dealing with public, and resolving disputes at community level, as well as their reputation in the society of their high voluntarism in working for community *pro bono*. The SCMC selects candidates for community mediators based on the excellant results of the evaluation done. Therefore, it is suggested that the DNUI through Malaysian Community Mediation Centre, to look out and select interested candidates to ensure the effectiveness of the programme.

Qualification of mediators

There is no specific qualification required by the DNUI for a Rukun Tetangga committee member to join the community mediation programme. IIAM as well as Singapore CMC also adopt the same practice where there is no specific qualification that has to be acquired by the candidates before they could join community mediators training. However, IIAM encourages retired judges, lawyers and social and religious workers to volunteer as mediators. The qualification of candidates is not an issue, as long as they must be willing to perform their task. The selection of candidates is not based on on paper credentials but personal performance. According to Adams (2003);

> There is no particular formal education that a mediator must have in order to be effective. As we have seen, an understanding of the negotiation process draws on several academic disciplines. Moreover, many professional negotiators have acquired their expertise by experience, not by training and education.[6]

Therefore, DNUI may continue with the current practice, but it is suggested for them to make a formal selection in choosing the candidates, rather than choosing randomly. This requirement is in line with the first characteristic outlined by the NAFCM. It is further suggested for DNUI to choose candidates who are known for their good character, experience in handling neighbourhood disputes or community works, good track record, ability to digest the process and procedures of mediations, appreciate cultures of other ethnic or races and non-computer illiterate to enable the DNUI to disseminate information through emails or online courses or talks or conferences.

Training of mediators

Training is the most important element for the creation of mediators. Mediator's training is essential to educate the mediator on the philosophy, rules, process and techniques of mediation. It enhance the mediator's skills. Without proper training a mediator might not perform well. The training ensures the success and effectiveness of the community mediation programme. NAFCM mentioned "trained community mediators" as the first criteria. In any profession, the practitioners need to be fully equipped with all the tools in performing their duty. They can thus choose which tool would be

6 Adams, G. W. *Mediation Justice : Legal Dispute Negotiations* CCH Canadian Limited, 2003, at 260.

most suited to be used in a situation. In mediation, the mediators need to understand the process and procedure, as well as to be equipped with the soft skills that would assist them in mediating cases.

Furthermore, training is important to ensure the mediator is competent to mediate. Otherwise it would be unfair for the parties to appoint a mediator from an institution or organisation who is not properly trained and has no skills in mediation. According to Zilinkas,

"To ensure the mediator is a competent person to mediate and has a standard skill rather than anybody who simply believe he can mediate without an adequate training. It is, however, intended to show that the skills necessary for a person to become a competent and effective mediator can be identified, described, taught and learned in a structured manner. It will also contend that it is not only unfair to the parties to entrust their dispute to an untrained mediator, but that the mediation process can be minefield for untrained and unwary mediators."[7]

The practice in professional bodies, require mediators to be trained by an accredited body, that adhere to the professional ethics or rules of conduct, and non-compliance will lead to disciplinary action. Many institutions have penalise mediators by withdrawing the accreditation for non-compliance.8 In addition, training is needed to avoid any unethical conduct that can affect the disputing parties and mediation practice as a whole. Zilinkas (1995) states,

> "mediation of disputes by untrained individuals can pose substantial dangers, not only to themselves, but also to the disputing parties. It has also been contended that the techniques used by a mediator and the procedures that are followed (even if unconsciously) can be isolated, described, categorized, taught and ultimately learned. Whilst there will always be different levels of skills and competence in any field of endeavour, these skills can be improved with training."9

This research discusses on training provided by DNUI, IIAM and SCMC in previous chapters. The training provided by the DNUI through IKLIN is limited to process and procedure only. On the contrary, IIAM and SCMC provided a professional training to community mediators which include soft skills. Therefore, it suggested that, first, the DNUI through IKLIN to revise the training module and include soft skills and adopt a better method in conducting the course. Despite 16 days of training, many mediators have no confidence to conduct mediation sessions (excluding mediators who attended mediation course for personal purpose without the intention to serve the community). Secondly, for IKLIN to reduce the number of the participants. Due to the big number of participants with only one trainer caused the participants to have little chance to participate in role play session. Thirdly, to brief the mediators on the history of amicable settlement in Malaysia with the intention to highlight the application of mediation as the method of dispute resolution at community level in pre-colonial period of Malaysia.

The researcher was invited to conduct training for community mediators at the state level of Federal Territories Labuan, Sabah and Sarawak. The researcher had a meeting with IKLIN's representative and requested for the institution to reduce the number of the participant to less than 30. However, for some reason the request was not fulfilled. There were almost 50 participants in the courses conducted by the researcher together with two professors from Ahmad Ibrahim Kuliyyah of Laws International Islamic University Malaysia, who had undergone mediation training from Australian accredited mediators as assessors. The researcher received good comments from the participants and the DNUI's officers who attended the training.

The researcher was given 18 hours which was divided into three parts. The first part involves explanation on philosophy, process and boundaries on community mediation including mediators ethics. The second part was where participants were provided with mediation skills such as listening and reframing; and the third part was allocated for role play sessions. 6 hours was allocated for

7 Andrew Zilinskas, 'The Training of Mediators - Why Is It Necessary?', (1995) 58. *Australian Dispute Resolution Journal*, at 59.

8 Nadja Alexander, *Global Trends In Mediation,* Otto Schmidt Verlag DE 2003, at 298.

9 Andrew Zilinskas, n. 6.

role play that involved 17 mediators and 34 role players. The researcher hopes that IKLIN would consider conducting more training sessions with lesser number of participants, to enable all of them to participate in role play as mediator in future in any training conducted by them.

The Director of Unity Management Unit had a meeting with the researcher after the mediation training and comments:

> "My officers say despite the short duration and the course was too packed, the training was good and very informative. Now they have courage to conduct mediation. I test them by asking them to do opening and they are able to do it efficiently. They explain what they need to say, introduce themselves and share their background and now they are aware that mediation is part of ADR."

According to one trained mediator who attended the training (Respondent T1), having joined the first training in 2012 and received his certificate of appointment in 2013, both training courses have different approaches. The second training (conducted by the researcher) gave more input and used effective mechanism in ensuring the participants understand the process. He says,

> "It is undeniable that this time the technique use showed the whole process clearer than the previous training which is considered as more general. The participants are given chances to do role play which was lacking in the previous training. In my personal view, even though I am trained mediator but this course helps me a lot. I suggest for the organiser (IKLIN) to again conduct the training in future. The exercise given to us in this training is more effective from the previous training because we have assessor who assess our performance and comment as well as advise us how to improve ourselves. This time the training has built confidence in mediators to mediate in real situation."

Respondent T2 commented on the whole process as follows:

> "The input that we got from this training is different from the earlier training. It encourages us to mediate and build confidence. We appreciate all the efforts by the trainer to prepare the role play questions and all exercises and hope that IKLIN would provide us with further training."

Respondent T3 concluded the training session as follow,

> "The training exposes us to the procedure and skill of mediation. We got all the steps clearly starting from the opening speech, first joint session and second joint session. We were given the information in detail by referring to the notes and practical exercise. That part has given us courage and built confidence to mediate at our area. We suggest IKLIN to provide us further training or course."

All the mediators who attended the training by the researcher have attended 2 phases of the training with the earlier trainer. However, for some reason the training with the earlier trainer was stopped. All the respondents are happy with the training method adopted by the researchers and suggested to IKLIN to provide further training in the same manner. The researcher has conducted 4 training courses in West and East Malaysia. The invitation letter is annexed herewith and marked as Annexure 2.

Accreditation of mediators

The term accreditation implies that an occupational group or public body recognise that an individual has successfully completed a prescribed course of education or training and meets certain levels of performance.[10] At its most basic level accreditation involves the formal recognition of individuals, organisations or programs in a particular profession, occupation or pursuit, in terms of specified objective standards relating to qualifications, competence and performance. Accreditation usually occurs in the context of organisational schemes designed to promote quality, standards and accountability among practitioners. It could apply to individual practitioners, to organisations which provide particular services, to specific service-providing programs, or to employers engaging practitioners in the area.[11]

In this context the accreditation body shall be the institution that provides training to the mediator and monitor compliance of the accredited mediator. The accreditation body will has control over the accredited mediator and may withdraw the licence if the procedure or standard guideline or requirement laid by the accreditation body is not adhered to. Lau and Mohamed (2010) explained that,

> "Accreditation or certification involves nothing more than an individual taking one or more training programmes with a reputable or known training body, which subsequently, on the individual taking an accreditation assessment process, is so accredited."[12]

The importance of an accreditation body is to provide a standard guideline towards the practice of the accredited mediator. Without the standards, there is unlikely to be consistency of quality in service of the community mediator across the country.

An accreditation body is important in defining standards for practice, covering processes and procedures as well as end results, providing a sound basis for evaluation and external accreditation. Thus, accreditation means that clients, users, contracting agencies and mediators can be confident they are dealing with a quality service.[13] Furthermore, accreditation can be advantageous as it will set a benchmark standard, inspires public confidence and it is consistent with the movement towards the introduction of reliable public standards. Indirectly, accreditation will improve mediator's knowledge, skills and ethical standards, promote quality of mediation practice, serve and protect the needs of consumers of mediation services and provide accountability where they are not met, enable mediators to gain external recognition of their skills, and broaden the credibility and public acceptance of mediation.

Community mediators in Malaysia have yet to be accredited by any institution. They are trained by IKLIN, but the DNUI has yet to have a single standard that needs to be complied with, in training the mediators. The mediators have never been assessed. In addition, the mediators are unaware of any rules or laws that govern their practice. Until now, the DNUI have yet to develop a comprehensive set of rules or code of conduct to be observed by the community mediators. Training and accreditation are two different matters. Any institution may offer training for community mediators but not all institutions may accredit the mediators. In India, IIAM train the community mediators following the International Mediation Institute ("IMI") method and rules and subsequently the mediator received accreditation from IMI, an international institution based in Hague, Netherland.

In regulating the current practice of community mediation in Malaysia and later to enhance the programme, the DNUI needs to adopt a standard that would allow the community mediators to be accredited by any international institution such as IMI since currently Malaysia has yet to have a

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10 Laurence Boulle, Teh Hwee Hwee, *Mediation Principles Process Practice,* Butterworth Asia, 2000, at 258.

11 National Mediation Conference, National Mediation Accreditation System. Available at http://www.mediationconference.com.au/html/051117%20Accreditation%20Draft%20Proposal.pdf accessed on 25 February, 2014.

12 William KH Lau, Ashgar Ali Ali Mohamed, "Accreditation of Mediators in Malaysia" in Mohammad Naqib Ishan Jan, Ashgar Ali Ali Mohamed, (eds) *Mediation in Malaysia: The Law and Practice* Malaysia: Lexis Nexis Malaysia, 2010, at 510.

13 Liebmann and Beckett, n. 2 at 202.

national accreditation body for mediation.

Ethical Standard and Conduct

Each profession has its own ethical codes. In transforming the current mediation practice into a professional standard, the mediators need to be guided by codes of ethic. Currently, there is no code of ethic for community mediators. The following are the matters suggested to be the code of conduct of community mediator in Malaysia either to be included in the laws or to be separate rules under community mediation centre.

Impartiality

A mediator must be impartial in any situation. The mediator must ensure he/she conducts mediation without bias or favouritism. In case the mediator has relation with any of the parties, he/she must disclose the fact to the parties in advance. Any potential ground of bias must be avoided. Sourdin (2008) define impartiality as:

> "freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias."[14]

According to the definition, the mediator must not only be impartial but must be seen as impartial by the parties. Impartiality is important in order to build trust towards the mediator by the parties. The question of impartiality may arise in many situations such as when the mediator let one party control the session and fail to allocate equal time for both parties. The mediator must always be aware of their words and conduct to ensure they are not partial towards any of the party. Section 7 (7) of Mediation Act 2012 requires a mediator to disclose of facts that might affect his or her impartiality in mediating cases.

Coercion

The mediation process allows parties to make decisions without interference of a third party. The existence of a mediator is to facilitate communication between the parties and not to direct the parties to certain settlements. Coercion would change the mediation process from facilitative to directive. The parties must also join the mediation sessions voluntarily and must not be coerced. For instance, in compulsory mediation such as court-annexed mediation, the parties have no choice but participate in the mediation session. Roberts (2012) shares his view:

> "With voluntariness so essential a principal of mediation, it is important that people are not and do not feel coerced into participation."[15]

Therefore, in developing the ethical code of conduct of mediators in Malaysia this element must be included. From the data analysed, many mediators are advising parties of the best solution. It is hoped that with the establishment of a community mediation centre in Malaysia, the mediator would not impose his/her decision on the parties or coerce the parties.

Competence

A mediator needs to be competent to conduct mediation sessions. There is no exact assessment to check on mediator competency, but training, skills and knowledge of a mediator may add value to it. Having said that, the institution that accredited mediator may conduct assessment in the training to ensure the participants are competent. Experience may be one of the factors that build mediators'

14 Tania Sourdin, *Alternative Dispute Resolution*, 3rd Ed, Lawbook Co, 2008, at 62.

15 Marian Roberts, *Mediation in Family Disputes: Principle of Practice*, Ashgate Publishing Ltd, 2012, at 94.

competence. According to Stahl (2000);

> "the mediator, rather than the parties, will be in the better position to know whether his or her qualification and competence levels are sufficient. Consequently, a mediator should consider that it is his or her professional responsibility to decline to serve when not qualified or competent for that particular mediation"[16]

The mediators should decide whether they would be able to handle a case alone, or to have a co-mediator or not, to accept a certain case. In the case of Malaysia, from the data collected, it is found that that many community mediators in Malaysia do not practice because they are unsure of their own competency. Therefore, in order to impose competency as of the mediators' code of conduct, the DNUI need to ensure the training module is revised and the whole programme to be regulated.

Confidentiality

Confidentiality, is an important element that is required in almost all professions. It is well known that mediation is a private process, so the elements of privacy in the mediation process must be protected. Thus, due to the need to keep the confidentiality of the matters discussed in the mediation session, confidentiality rules are needed.

Mediators are trained not to disclose any information gathered in a mediation session. However, the parties might not adhere to this rule unless it is a legal requirement. Therefore, community mediation in Malaysia urgently needs laws or rules to govern its practice. Further, this rule is one of the protections that should be available to the mediators so that they will not be called to court as witness. This rule may be breached only if there is a threat that serious harm that will be taken by one disputing party towards another, such as; where one party asserts that he has a gun with him, and threatens as soon as they go out from the mediation room he will shoot the other party.

Termination of Mediation

The parties are allowed to withdraw and end a mediation session at any time. There is no procedure or rules that prevent the parties from withdrawing including mandatory mediation session by the court.[17] This rule is applicable to community mediators as well. In cases where the mediator think that there is a valid reason to do so are such as where the parties are unable to honour the ground rules, being aggressive, and the mediator believe that he/she would cause injury either to himself/herself or the other party or to the mediators and one of the party admitted that he/she has committed a criminal act.

Conflict of Interest

A mediator must avoid conflict of interest. The issue may arise if the mediator personally knows one party or has had a previous transaction or involvement with that party. Conflict of interest can arise during and after mediation, so mediator need to ask questions to the parties and make inquiry whether there are any facts that could create conflict of interest for the mediator in mediating the case. If there is any conflict of interest, the mediator must immediately disclose to the parties and seek their permission to proceed with the mediation session. If the disputants disagree, the mediator must withdraw himself.

As for community mediators in Malaysia, they are the grassroot leaders and known to most of the residents in the neighbourhood. Hence, this issue must be highlighted to them. They need to disclose any conversation or transaction with any of the parties, if they were about to be engaged as mediator.

16 Sidney Stahl, Nancy F Atlas, Stephen K Huber, E Wendy Trachte-Huber, *Alternative Dispute Resolution: The Litigator's Handbook*, American Bar Association, 2000, at 58.

17 Michael P. Silver, Peter G. Barton, *Mediation and Negotiation: Representing Your Clients*, Toronto and Vancouver : Butterworths, 2001, at 102.

Marketing, Publicity and Advertising

In Malaysia, community mediators may market or advertise themselves. However, they must not gain publicity from any cases mediated. It is suggested for community mediators in Malaysia to adhere to the rules and regulation provide by the DNUI. It is further suggested for the DNUI to advertise its service rather than through publicity made by individual community mediator.

Compensation and Gift

Community mediators are prohibited from receiving any compensation, fee or gift from disputing parties. They are volunteers and must observe the mediation centre rules and regulations. The restriction on accepting gifts and compensations is to avoid any accusation of impartiality on the part of the mediator.

Community Mediation Process

Mediation process has no standard procedure. Carlton and Dewdney (2004) divide the mediation process to 7 stages comprises of mediators' opening statement, parties' opening statement, identification of issues and agenda setting, exploration of issues, private session, negotiation and problem solving and mediation outcome.[18] Whilst Boule and Hwee (2000) divide mediation processes into three parts where the first part discusses preparatory matters or pre-mediation, mediation meeting and post-mediation activities.[19]

According to Silver and Barton (2001), the stages are less important and mediators may have many stages, but it is crucial to ensure that the mediation processes includes "preliminaries, openings and presentations, identifying areas of discord and of agreement, gathering and exchanging information, searching for options and negotiating through to decision and enclosure".[20] It is suggested for the community mediation in Malaysia to have four stages beginning with pre-mediation, mediation sessions, agreement and post-mediation which details will be discussed below. This suggestion is the combination of the knowledge of academicians and the experience of the researcher.

First Stage: Pre-Mediation

Pre-mediation is meant to educate the parties on the mediation's process and the mediator's task, as well as rules that need to be adhered to by mediators and the parties. It is suggested for community mediation in Malaysia, to begin the mediation process with pre-mediation stage. At this stage, the centre needs to ensure that the parties joined mediation voluntarily and all cases forwarded to the

centre are screened to ensure suitability. The parties are required to sign an "Agreement to Mediate" which states the duty of mediator such as to be impartial, neutral and etc., nature of mediation process; such as voluntary and duty of the parties such as to follow the ground rules. The agreement must also state that each party who joins the mediation session has authority to sign the settlement agreement if mediation success.

This stage is crucial if the parties are 2 groups of people. In this situation, the mediators need to meet both parties separately, listen to them and advice them to reduce the number of persons who will attend the mediation session or to appoint representative.

Second Stage: Mediation Process

The mediation process begins with mediators' opening speech in the first joint session followed by a private session, and thereafter a second joint session. In the event the parties manage to negotiate terms, moving towards settlement, and agree for a settlement without the need to have a separate session, then the mediator may proceed to agreement stage.

18 See Ruth Carlton, Micheline Dewdney (2004).The Mediator's Handbook Skills and Strategies for Practitioners 2nd Edition, Lawbook Co.

19 See Boulle and Teh Hwe Hwe, n. 12.

20 Silver and Barton, n. 19 at 106.

In the opening speech, it is suggested that the mediator deliver his/her speech in a calm tone, build rapport and gain trust from the parties by sharing his experience in mediation as an accredited mediator, laying the ground rules, describe the nature and the structure of the process, clarifies issues of neutrality, impartiality and confidentiality of the mediator, explain that mediation is an interest-based process and describe roles as well as power and authority of mediator. Subsequently, give time for the parties to deliver the opening statement.

The mediators opening speech is the first step for the first joint session. The next step is to facilitate the parties by giving each of them a chance to speak. At this juncture, the mediators assist the parties in gathering and exchanging information, getting their positions off their chest, communicating directly with one another and venting any emotional/feelings.

If the parties come to a deadlock or impasse or the mediator feels there is a need to have a separate session/caucus, the mediator must separate the parties and give both parties the chance to meet the mediator separately. This time must be utilised to let the parties express their feelings, probe for more information, do a thorough risk assessment/reality check, examine carefully the real interest of the parties, discuss thoroughly alternatives, showing empathy and further venting, helping the parties by generates option if they are unable to do so, narrowing the available options and prepare the parties for second joint session.

Upon completion of private session with both parties, the mediator proceeds with second joint session. At this stage, the mediator must assist the parties to communicate and/or confirm an agreement by allowing the parties to communicate and exchange message in person, summarizing the process, and calling the parties to action or suggesting an ending to the mediation session, clarifying and confirming any agreement and reducing it into writing, and acknowledging the parties and the outcome.

If the parties achieve settlement, the mediator may proceed to assist them to reduce their settlement terms into an agreement. However, if the parties are not moving towards settlement and the mediator is the only person generating options and put effort towards settlement, the parties refuse to move further from their suggestion or refuse to cooperate, or the parties refused to honour their own suggestion, mediator may end the mediation session. [21]

In case the parties did not achieve any settlement and the mediation ended, the mediators must summarise the session and highlight any achievement in the session and appreciate the attendance of both parties. The mediator must not use words that might make the parties feel bad due to their inability to achieve settlement.

Third Stage: Agreement

Any settlement agreement entered voluntarily between two parties is legally binding. Therefore, the mediator must ensure that parties understood and acknowledge all clauses in the agreement. It is good to have a written agreement rather than an oral one because a written document is more likely to be honoured by parties. Further, a written agreement creates permanent record and avoid future misunderstanding on each party's responsibility, covenant, undertaking towards the other. However, the agreement must be drafted using simple language without any legal jargon. In current practice of community mediation, the mediators do not insist that the parties sign any settlement agreement. According to Anil Xavier, if the cases relate to relationship within family members, the mediators are discouraged to insist on settlement agreements. It is better for the mediator to let the parties shake hands and enjoy the mended relationship, unless the issue ended with the parties agreeing to perform certain acts.[22] According to Pavlich (2003),

In the final stages of community mediation, such visions of self are inscribed in a written, signed agreement that demands particular sorts of self-conduct from individuals.[23]

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21 See Silver and Barton, n. 19; Boulle and Teh Hwe Hwe, n. 12; John W. Cooley, *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation*, National Institute for Trial Advocacy, 2006, at 157-239; David Spencer, Michael Brogan, *Mediation Law and Practice*, Cambridge University Press, 2006 at 42-79.

22 Anil Xavier, Interview by Author, Kuala Lumpur, 5 April, 2014

23 George C. Pavlich, *Justice Fragmented : Mediating Community Disputes under Postmodern Conditions*,

It is suggested for the community mediators in Malaysia to follow the international standard of mediation practice by preparing settlement agreement in all cases, whenever appropriate unless the parties insisted not to do.[24] Therefore, it is suggested that upon successful completion of the mediation process, the mediator must either prepare or assist the parties to prepare a settlement agreement to be signed by them.

Fourth Stage: Post-Mediation

Post-mediation is an important stage that allows the parties to evaluate the performance of the mediators and the mediation process. In certain mediation centres, it is a must for the parties to give feedback. For unsuccessful mediation sessions, the parties must be given opportunities to come back and attempt to solve their disagreement in new mediation sessions. At this stage, the centre may also ask for updates from the parties on the settlement they have reached.

Post-mediation requires mediators to prepare a simple report and submit to the centre for record purposes. In case the mediation involves co-mediation, there can be a debriefing session to evaluate the mediation session especially if the mediators are pair of a junior and senior mediator.

Co-Mediation

Co-mediation means there are more than one mediator conducting the mediation session. Carlton and Dewdney (2004) define co-mediation as,

> "Mediation conducted by two or more impartial and neutral third parties working together to assist participants in the negotiation of a mutually acceptable settlement of the issues in dispute."[25]

The number of mediators who handle mediation sessions depends on the request of the disputing parties and the practice of the community mediation centre. Some centres such as IIAM appoint only one mediator to conduct mediation sessions which is known as "solo" mediator. On the other hand,

centre such as SCMC adopt co-mediation practice where each mediation session involve 2 mediators. In most cases, two mediators are used and only in a rare situations more than two mediators, such as three or more are appointed to conduct mediation.

Co-mediation requires mediators to have good teamwork in handling the process because they have to decide how to handle, and what method to be adopted in the mediation session. They will have to decide on, e.g., who will cover first joint session, private session and second joint session, as well as who should give the opening statement and conclude the session. The mediators need to appoint the main and co-mediator mediator within themselves. The term 'main mediator' and 'co-mediator' is used to show who will lead the mediation session, and does not mean that one mediator is preferred or has a better standing than the other. Both mediators are in equal standing. In SCMC practice, a junior mediator must join few sessions with a senior mediator to observe mediation process as a co-mediator.

The benefit of having a co-mediator is to train junior mediators, to allow assessment for accreditation purposes, and build confidence of new mediators. Co-mediation is very beneficial to multi-races, ethnic and religion community in ensuring that the mediators are representing each race, ethnicity and religion of the parties involved in a mediation session. For cases involving adolescent, co-mediation also would an advantage to ensure that at least one of the mediators is young. In addition,

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Routledge : London and New York, 2003, at 129.

24 *See* Hanna Ambaras Khan, Nora Abdul Hak, "Community Mediation in Malaysia: A Step Forward" vol 1 (2014), Malayan Law Journal, (vi – xxi).

25 Ruth Carlton, Micheline Dewdney, *The Mediator's Handbook Skills and Strategies for Practitioners*, 2nd Ed, Lawbook Co, 2004, at 133.

co-mediation would be a better choice in mediation cases involving groups of people. The mediator will be more confident with the available assistance from the co-mediator. Co-mediation also may be used as a yardstick to see the quality of community mediators by using peer review.

However, there is limitation in practicing co-mediation. There are some mediators who are unable work with others and prefer to work alone. It is important for both mediators in co-mediation to sit together and prepare for their mediation sessions. If both decide to play active roles, a detail discussion is necessary to ensure that the mediation session is successful and no disagreement arise between the mediators that might have a negative effect on the mediation session. If mediators cannot agree on the division of the task and unable to work in a team, the possibility of co-mediation to succeed is very thin.

It is suggested for community mediators in Malaysia to adopt co-mediation practice as mandatory since Malaysia is multi-racial, multi-cultural and multi-ethnic and to assist the junior mediator in building their confidence.

Shuttle Mediation

Shuttle mediation is a process where both parties refuse to meet each other in a joint session. In conducting shuttle mediation, the mediator must ensure that both parties understood the mediation process. It is crucial for the mediator to explain to the parties that the process might consume more time than normal mediation process, and in this case, the mediators must never convey his own opinion but deliver the other party's viewpoints. In most cases, shuttle mediation is used at the very beginning of a mediation process. Until the parties agree to meet each other, the mediator is the messenger to both parties. The mediators must emphasise on confidentiality repeatedly, and the point that she/he is just a messenger that communicate each party's opinion, suggestion and concerns and the opinion is not hers/his. This is a hard work for community mediators, but some cases need to be mediated using shuttle mediation such as in cases where the parties having a grudge/enmity against each others. Among the benefit of shuttle mediation is to allow parties from different locations to joint a mediation session.[26]

According to the president of IIAM and MMC, it is in very rare cases that shuttle mediation is needed. The former had mediated a family case in which the parties have not spoken for more than 20 years and he had adopted shuttle mediation and resolved issues faced by the parties. The latter also had adopted shuttle mediation in at least half of the sessions, until both parties were willing to sit together in a session with his presence as mediator. It is suggested for the community mediators in Malaysia to learn this method and make it available as one of community mediation centre services.

ORGANISATION STRUCTURE OF COMMUNITY MEDIATION IN MALAYSIA

In order for the DNUI to institutionalise and formalise community mediation practice in Malaysia, there are certain elements need to be considered, regulated and maintained. For instance, the present practice of the DNUI that provide *pro bono* mediation service is suggested to be maintained. The matter that DNUI needs to regulate is to have an organisation structure as well as an administrative centre. The DNUI also needs to create an awareness programme to introduce mediation to Malaysians. Promotion needs to be done instantly to ensure people are aware of community mediation as an alternative forum for dispute resolution at the community level. This sub-chapter proposes the structure of community mediation centre, advisory board, framework of training module, funding of the centre and programme that may be designed to promote and create awareness of service of the centre.

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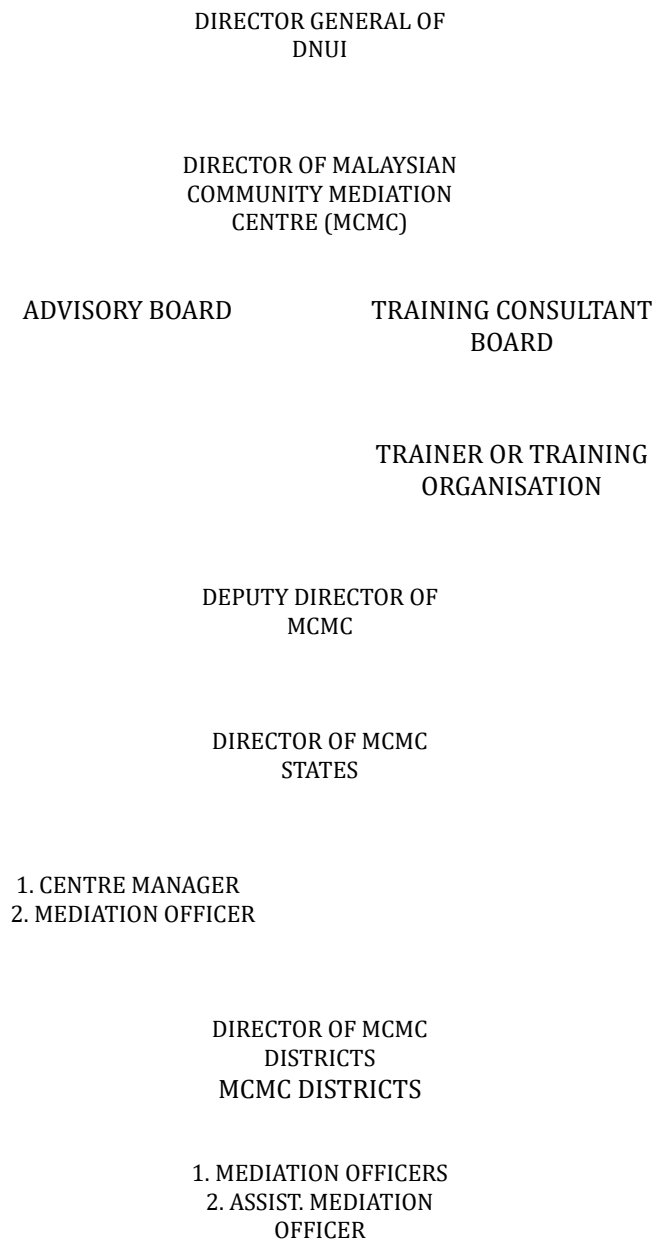
26 See Carlton and Dewdney, n. 27; Tania Sourdin, *Alternative Dispute Resolution*, 3rd Ed, Lawbook Co, 2008, at 56-57; Wayne F. Regina, *Applying Family Systems Theory to Mediation: A Practitioner's Guide,* University Press of America, 2011, at 93-94.

Proposed Malaysian Community Mediation Centre ("MCMC") Organisation Structure

The proposed organisation chart for MCMC is illustrated by Figure 6.1 below. The organisation structure is suggested in such way after considering many factors. Firstly, it is important to maintain the community mediation programme under the DNUI because the purpose of the establishment of the department among others is to maintain harmony in the country. However, the DNUI might not be able to handle the centre alone without assistance from other agencies due to the lack of expertise in this new area as discussed in earlier chapters. Therefore, it is suggested that the DNUI to be assisted by the Advisory Board and Training Consultant Board. In addition, under the requirement of NAFCM a community mediation centre need to have an advisory board.

Secondly, there is a need to bring experts in laws and mediation practice as members in the advisory board. Thirdly, MCMC needs to have a Training Consultant Board that comprises of experts in mediation from various agencies to ensure that the training provided is comprehensive and there will be continous training for the community mediator since training is one of the more important elements in building the community mediation and inadequate training would cause ineffectiveness of the programme. Fourthly, the DNUI may utilise the current facilities in their offices in state and district levels in establishing mediation centre. At the same time, all DNUI offices at district and mukim level are required to establish satellite office at community halls, residents associations' offices, police stations and municipal councils. Prior to the establishment of the interim office at such agencies premises, the DNUI is required to educate those agencies on community mediation's nature and the services provided by community mediators.

Figure 6.1: Proposed Organisation Structure of Malaysian Community Mediation Centre



The roles and responsibilities of each components of the MCMC as stated in the organisation structure are stipulate as follows:

1. Director General of the DNUI

The MCMC is suggested to be under the patronage of the Director of General of DNUI (DG of DNUI) due to the experience of the department in handling conflicts and inter and intra-ethnic fights. Even though the nature of the centre is to promote alternative dispute resolution method of solving problem, Malaysia needs to suit the centre with the country's nature of multi-races, ethnicities, cultures and religions. The function of MCMC is to resolve disputes amicably, and indirectly promoting harmony. The DG of DNUI will be receiving reports on the centre's progress every three months from the Director of MCMC.

The duties and roles of the DG of DNUI are to ensure the administration and management of the centre is handled efficiently and the centre is provided with sufficient funds from the government;

to be consulted prior to any changes on the policies or major decision on the direction of the centre and to form an *ad hoc* committee based on the Advisory Board advice to conduct investigation any of complaint against the Director, Deputy Director and States' Director of MCMC.

The DG of DNUI is responsible to ensure that progressive report is sent to the minister representing the department once every three months and prepare an annual report for the minister's presentation at the cabinet.

2. Director of Malaysian Community Mediation Centre

It is suggested that the Director of MCMC to be a person who has exceptional experience in understanding, mingling, and handling each of the Malaysian communities in West and East Malaysia. Therefore, it is suggested the Director of MCMC to be one of the qualified community mediators and has excellent background in resolving disputes at the community level or any person who is an expert in community mediation and are able to conduct mediation without any limitations in time. The appointment of Director of MCMC is suggested by the Minister on the recommendation of the Advisory Board and the DG of DNUI.

The roles and duties of the Director of MCMC are to work together with the Advisory Board and Training Consultant Board in determining the policies, directions, products, limits and task of each of the officers and managers of the MCMC and training of the mediators; to consult the DG of DNUI for his opinion prior to introduction of any policy to the centre; actively conduct meeting with the Advisory Boards to present the centre's progress and draw policies in enhancing the effectiveness of the programme; to obtain funds for the centre by entering Memorandum of Understanding (MOU) with companies under corporate social responsibilities (CSR) policy and subsequently ensure each State to be allocated sufficient funds and to ensure all centres are allocated with funds to promote community mediation.

The Director of MCMC is responsible to submit a progressive report to the DG of DNUI once in three months. The Director of MCMC must ensure that the Training Consultant Board has sufficient funds to conduct training. He/she has the responsibility to submit the financial report to the DG of DNUI and to conduct meeting with all companies to present the financial report and MCMC progress once in a 6 months.

3. Advisory Board

It is crucial to include an Advisory Board into the MCMC organisation structure. The Advisory Board members plays the role of steering committees in drawing policies and making major decisions, revising the policies from time to time, achieving targets and suggest future plans for the community mediation centre.

The Advisory Board's members must be experts in legal matter and practice of mediation and community mediation. This research suggest the Advisory Board's members comprise of a legal expert on mediation from Attorney General's Chambers' office, academicians from universities on community mediation, accredited mediators representing Malaysian Mediation Centre, Kuala Lumpur Regional Centre for Arbitration and Kuala Lumpur Court Mediation Centre and representative from Royal Malaysia Police.

The important tasks of the Advisory Board member is to create boundaries for MCMC, draw policies, mediators' code of ethic and conducts and outline house rules; advice MCMC on legal aspects, services and promotion or advertisement; to advice the DG of DNUI in forming *ad hoc* committees to conduct investigation against complaint; to work closely with the Director of MCMC on the progress of the centre; to provide assessment and evaluation scheme in determining the grade of community mediators and to come out with appropriate schemes or circulars in any matters upon request by the Director of MCMC.

4. Training Consultant Board

This research suggests that MCMC is to be assisted by a Training Consultant Board rather than a consultant per se, due to the differences of customary laws in East and West Malaysia. The board must comprise of native customary laws, community mediation, peace building programme and legal experts. The Training Consultant Board ("TCB") and Advisory Board's members must conduct meetings to discuss the progress of the centre and plan future targets in ensuring success of the programme.

The task of the TCB is to decide the area of training that needs to be provided to the mediators and appoint trainer/trainers or organisation/institution to conduct training for mediators; to examine the mediator's assessment report prepared by trainers, to notify the Director of MCMC on the training progress; to structure yearly training plan for mediators, to ensure all active mediators are given chances to join internal and external training programme and to provide community mediation training to any organisation/institution/agency upon request by the Director or Deputy Director of MCMC.

5. Deputy Director of Malaysian Community Mediation Centre

The criteria of candidates to be appointed as Deputy Director of MCMC is similar to the Director of MCMC, but he/she may not be part of the DNUI. It is very important to appoint someone who has mediation qualification or legal background. The appointment of Deputy Director of MCMC is suggested to be made by the Minister on the recommendation of the Advisory Board and the DG of DNUI.

The duties and roles of the Deputy Director of MCMC is to assist the Director in management and administration of the centre, such as to ensure adequate manpower, appoint candidates with suitable qualification as part of the MCMC organisation, to provide clear stipulation on the task of the employees of MCMC; to hold meetings with Director of States' MCMC once in three months; to receive complaints from all States' MCMC and ensure investigation and proper actions are taken and to ensure all centre has appropriate facilities to conduct mediation session.

Deputy Director of MCM is responsible to ensure all MCMC's yearly target is achieved; to submit reports to the Director of MCMC on financial once in 6 months and progressive report once in three months for all States' MCMC and to assist the Director of MCMC in all tasks upon request.

6. Director of States' Malaysian Community Mediation Centre

It is suggested that all State's Director of MCMC must be qualified mediators and have adequate knowledge on mediation. Their duties and roles are to ensure the States MCMC is managed and administered smoothly, to create awareness programmes and to promote the MCMC services to the community, to interview community mediator candidates prior to proposing their names to TCB, to hold meetings with all districts' MCMC once in three months, to provide mediation services to the people free of charge and to educate any agencies that cooperate with the MCMC under the SCR policy.

The responsibilities of State's Director of MCMC are to ensure reports are received from MCMC at Districts level, any complaints lodged against community mediators at State and Districts level, financial report once in six months and progressive report once in three months from Director of Districts' MCMC and to send financial reports at State level once in six months and progressive report once in three months to Deputy Director of MCMC.

The Directors will be assisted by Centre Manager and Mediation Officer. The task of Centre Manager is to ensure the centre is well managed either in administration or finance. Whilst the task of the Mediation Officer is to handle matters regarding registration of cases, appointing mediators, mediation process, ensuring the attendance of parties, and all matters relating to community mediation process. It is suggested that the same qualification, roles, duties and responsibilities apply to the Director of Districts' Malaysian Community Mediation Centre.

Funding

Funding is one of the most important elements in institutionalising community mediation in Malaysia. It is suggested that the Government of Malaysia through the DNUI provide funds for Malaysian Community Mediation Centre ("MCMC") directly to the centre and must be separated from other programmes under DNUI such as *Rukun Tetangga*. However, the centre must not depend solely on the government funds. Therefore, it is further suggested that the centre to obtain funds from companies under the CSR policy and the companies that has agreed to provide funds to the MCMC is to be called as MCMC's Associates.

Proposed Outreach and Awareness Programme

This research proposes the MCMC to design outreach and awareness activities to promote community mediation as a dispute resolution to members of the community and to invite non-*bumiputera* participation as community mediators. The MCMC may begin to educate the public and create awareness of the existence of the community mediation programmes by road shows, disseminate information through passing pamphlets, brochures and advertisement in newspapers, to use media electronic as mode of communication, such as explanation on community mediation program in television and radio, to upload explanation social media such as "Facebook" and "Youtube", to create education programmes to government agencies such as the police force, schools' teachers, higher education institutes' students, to offer training and attachment programme for Alternative Dispute Resolution (ADR) students, to encourage the companies that join MCMC under CSR policy assisting the centre to create awareness activities and to encourage all *Rukun Tetangga* areas to conduct at least one programme in a year to introduce and promote community mediation programmes.

Training Module Framework

Training is one of the important element in ensuring the community mediators practice upon receipt of the certificate of appointment. Data collected revealed that many mediators refused to practice because they complain of the lack of confidence and knowledge, despite of 16 days of training. Due to the good response received by the researcher in conducting training to the community mediators as discuss earlier, it is suggested that the TCB consider dividing community mediation training into 3 parts, and to grant certificate of attendance for each session and certificate of appointment upon successfully completing all 3 parts and an assessment.

The first part comprises of introduction to traditional dispute resolution, ADR in general, mediation as one of ADR branch, community mediation in general and mediation process. Institutionalised mediation is a new concept in Malaysia and needs to be introduced to the participants. In the second part, the participants will learn soft skills in conducting mediation and practical or role play to ensure each candidate is given a chance to be a mediator at least four times. Role play helps the participants to build confidence in mediating. The number of plays would help the participants to overcome shortfalls and improve their performances in the earlier exercise. Participants will be given an opportunity to learn how to negotiate in the third part and then to be assessed. Negotiation is part of mediation and both skills are needed by the participants to perform well in mediating actual cases. Upon completion of all this training, the participants will be appointed as community mediator.

PROPOSED LEGAL FRAMEWORK

It is crucial for community mediation in Malaysia to have its own set of laws rather than depending to Rukun Tetangga Act 2012. This research suggests legal framework for community mediation to shape and regulate its practice.

Community mediation in Malaysia needs separate laws in form of an Act rather than rules. The whole Mediation Act 2012 might not be relevant to community mediation practice except for a few sections that spells the the general ethics in mediation such as Section 15 on confidential and Section 9 on facilitative roles of mediator. The reasons to propose for community mediation Act rather than

rules is because the Act would be very comprehensive and detailed. It is suggested for the Act to include the relevant authorities and bodies that shall govern the community mediation practice as well as the organsation structure of community mediation in Malaysia. Many mediation centres are handled by private institutions that use rules rather than act. The purpose of the rules is to govern the practice of community mediation. The rules did not mention the structure of the mediation centre. For example rules are used by IIAM Community Mediation, KLRCA and MMC. On the contrary Singapore Community Mediation Act 1998 provides for organisation structure as well as laws to regulate and govern community mediation practice. From the data collected, respondents strongly request for laws to govern the practice of community mediation in Malaysia. This research suggest for Malaysia to have a separate Community Mediation Act or to insert one part in current Mediation Act 2012 on Community Mediation.

This research suggests a legal framework that proposes laws on community mediation to be divided into several parts that consist of introduction, community mediation centre, community mediator, community mediation and miscellaneous.

This research proposes the Community Mediation Act in such a way based on the Malaysian situation and the data collected i.e the opinion of respondents, observation of the researcher and comparison made between the Malaysian situation and the community mediation in India and Singapore. Each State needs to have a centre because of the difference in languange, customs and culture. However, it is not necessary that each district in each state need to have a centre. The establishment of the centre depends on the need to have it in such district. Some rural areas are under the jurisdiction of the institution of the and may refer their problem to the Penghulu. There must be a research done prior to setting up of any centre in district and the decison must be based on the research outcome.

CONCLUSION

The structure of IIAM, Indian IIAM and CMC, Singapore, the current practice of community mediation in Malaysia and suggestion made by the respondents as well as the Malaysian situation as discussed in previous chapters is considered in proposing the Malaysian community mediation structure and legal framework. This paper proposes for Malaysia to have a community mediation organisation struture that covers the federal and states level to ensure goverments' agencies, departments and institutions at each level support the programme. The structure is also incorporated in the second part of the Community Mediation Act proposed herein.

This paper suggests the current practice needs to be regulated to institutionalise community mediation in Malaysia and subsequently to be recognised at national and international level. The legal framework proposed has considered all the relevant and important matters to be the governing laws for community mediation practice in Malaysia.

HAKAM (STATE OF SELANGOR) RULES 2014: AN OVERVIEW

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Abstract

In 2014, Hakam Rules was introduced by the State of Selangor with the aim to help estranged Muslim couples to resolve their quarrels with the help of hakam. Under this Rules, the Syariah Court could grant a divorce to a woman even if her husband is uncooperative. Divorce by hakam is a better alternative than forcing the wife to endure the protracted trial of fasakh or ta'liq. Selangor is the first state to effect this change and it is hoped that other states will follow suit. Thus, it is the aim of this paper to discuss the provision on marital dispute resolution by means of hakam as provided for under the Hakam Rules 2014 of Selangor. Firstly, the paper deals with the provision on hakam under the Islamic Family Law (State of Selangor) Enactment 2003. The critical analysis focuses on section 47 (5) to (17) and, specifically of section 48 of the Enactment. These relevant provisions are analysed against the background of the principles and rules of tahkim (arbitration) as deliberated in the sources of syariah i.e., Qur'an, Sunnah, Ijma', Qiyas and other secondary sources of shariah. In this paper, Islamic legal research methodology is adopted. It involves a study of the relevant literature on the law (fiqh), the Qur'anic exegesis, the traditions of the Prophet Muhammad (hadith) and opinions of the four major schools of shariah relating to the principles and rules of tahkim/hakam. Finally, suggestions and recommendations to further improve the current practice and provisions on hakam are discussed in this paper.

Keywords: Hakam, Family law, Dispute Resolution in Islam

INTRODUCTION

Tahkim as an alternative dispute resolution had existed long time before the coming of Islam. Islam recognises *tahkim* along side with the institution of *qada'* as a means of dispute settlement and this is clearly evidenced in the Qur'an, the Sunnah of the Prophet Muhammad s.a.w and the practice of the Companions. The principles of *tahkim* were general and brief at the early stage of Islam however, later these principles have been elaborated throughout the period of Islam. It is important that these principles of *tahkim* be utilised effectively together with the other currently practised means of dispute resolution such as, ombudsmen, *fatwa al-mufti* and *ibra'*. This paper discusses the provision on marital dispute resolution by means of hakam as provided for under the Hakam Rules 2014 of Selangor. Based on Islamic principles, Hakam Rules was introduced in 2014 by the State of Selangor with the aim to help estranged Muslim couples to resolve their quarrels with the help of hakam.

PRINCIPLES OF TAHKIM IN ISLAM

Definition of *Tahkīm*

Taḥkīm is a verbal noun of the 'Arabic word ḥ*akkama*.[1] The word ḥ*akkama* primarily signifies the turning of a man back from wrongdoing.[2] Al-Zamakhsharī,[3] explains the meaning of the word ḥ*akkama* as making someone an arbitrator (ḥ*akam/muḥakkam*), for example, a person is arbitrating to Allah SWT. It means he is submitting to the law of Allah SWT i.e., to the Qur'ān and it is also the same if someone is asking a judge to decide in his case.[4] Literally, *taḥkīm* means to make someone an arbitrator (ḥ*akam*) and to authorise him (the ḥ*akam*) to pass judgement.[5]

According to Islamic legal terminology, *Taḥkīm* (arbitration) is an appointment, by the disputing parties, of someone (arbitrator) to judge between them.[6] Al-Māwardī[7] defines *taḥkīm* as the appointing, by two disputing parties, of a man amongst the community to judge on a matter that both parties are in dispute. Al-Zuhaylī, Wahbah[8] defines *taḥkīm* as an agreement by the parties to appoint a qualified person to settle their dispute by reference to Islamic Law. Zīdān, Abd al-Karīm[9] states that *taḥkm* is a process whereby the disputing parties agree to appoint someone to act as an arbitrator (*akam*) for the settlement of the issue in dispute between them. An arbitrator is also like a *q*āḍī (judge) that has the power to give judgement. There should be clear pronouncement (*lafaż*) that a person has been appointed as an arbitrator, for example, the parties should say, "We have appointed you as ḥ*akam* (arbitrator) to judge over the dispute between us."[10]

The definition of *taḥkīm* is also provided for under article 1790 of the *Majallah al-Aḥkām al-'Adliyyah*[11] which states that:

> "Arbitration consists of the parties to an action agreeing together to select some third person to settle the question at issue between them, who is called an arbitrator (ḥ*akam*)."

It is to be noted that the terminological definition of *taḥkīm* is close to its literal meaning. The jurists differ in wordings in their definitions of *taḥkīm*. They were, however, in agreement as to its meaning and scope, in that *taḥkīm* is an appointment, and together with it, authority, made by the disputing parties of a third party, to resolve the disputes of the parties. Unlike the appointment of *q*āḍī, this appointment may come from individuals within the community or those with specific designation, responsible to the *ummah* (community), such as the *imām* (leader).

The Characteristics of *Taḥkīm*

The following are the characteristics of *taḥkīm* that can be deduced from the above definitions of *taḥkīm*. They are as follows;

- Agreement to refer the dispute to third party is voluntary in nature. Therefore, there must be consent from both parties for it to be binding and enforceable. There shall not be any coercive effort by one party onto another.

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1 Ibn Manżūr, Muḥammad, *Lisān al-ᶜArab*, Dār Ṣādir, Beirut, 1990, vol. 12, at 142-144.

2 E. W. Lane, *Arabic-English Lexicon*, The Islamic Texts Society, Cambridge, England, 1984, vol. 1, at 616.

3 Al-Zamakhsharī, *Asās al-Balāghah*, al-Hai'ah al-Miṣriyyah al-ᶜĀmmah, Egypt, 1985, vol. 1, at 190.

4 *Ibid*.

5 Ibn Sayyidah, Abū al-Ḥasan ᶜAli Ibn Ismāᶜīl, *al-Makhṣaṣ,* Dār al-Fikr, Beirut, n.d., vol. 3, p. 235; al-Jauharī, Ismāᶜīl Ibn Ḥamād, *al-Ṣiḥāḥ Tāj al-Lughah wa Ṣiḥāḥ al-ᶜArabiyyah*, Dār al-Kitāb al-ᶜArabī, Egypt, n.d., vol. 5, at 1902.

6 Ibn ᶜĀbidīn, *Radd al-Muḥtār,* vol. 5, at 428.

7 Al-Māwardī, *Adab al-Qāḍī*, Maṭbaᶜah al-ᶜĀni, Baghdād, 1972/1392, vol. 2, at 379.

8 Al-Zuhaylī, Wahbah, *al-Fiqh al-Islāmī wa ᶜAdillatuhu*, Dār al-Fikr, Damascus, 1989, vol. 6, at 756.

9 Zīdān, ᶜAbd al-Karīm, *Niżām al-Qaḍā fi al-Sharīᶜah al-Islāmiyyah*, Mabaᶜah al-ᶜĀnī, Baghdād, 1984, at 291.

10 *Ibid*.

11 In this book, an English Translation of the Majallah is used i.e., Mejelle, the translated by CR Tyser, Law Publishing Company, Lahore, at 494.

- Although the agreement to submit to *taḥkīm* is binding on the parties, the parties can withdraw from *taḥkīm* at any time before the pronouncement of the award. However, after decision is pronounced it becomes binding.

- *Taḥkīm* has restricted jurisdiction specific to the issue at hand and the standing of an arbitrator is lower than that of a *q*āḍ.

Stages of *Tahkim*

The stages of *taḥkīm* can be categorised into three;

1. The agreement of the disputing parties (*muḥakkim*) to settle their disputes by way of *taḥkīm* instead of *qaḍā'* (adjudication), either after the dispute has occurred or before it, when the potential of it happening is recognised.

2. The agreement between the disputing parties and the person to be appointed (*muḥakkam/ḥakam*), and that person appointed agrees to take on the duties.

3. The agreement on the process of *taḥkīm* beginning from the commencement of the arbitral proceedings till the giving of the award.

Authorities for *Tahkim*

The authorities for *taḥkīm* are derived from the Qur'ān, the *Sunnah* of Prophet Muḥammad (s.a.w.), consensus of opinions (*ijm*ā') and the practices of the Companions of the Prophet. The Qur'ān contains many references to *taḥkīm* and enjoins the appointment of an arbitrator from each of husband and wife where there is marital discord. Thus, a Qur'ānic verse (al-Nisa'; 35) translates:

> "If ye fear a breach between them twain, appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation for Allah hath full knowledge and is acquainted with all things."

There is full agreement amongst jurists that the appointment of two just arbitrator*s* is recommended if there is a marital dispute feared or anticipated to lead towards *shiqāq* (marriage breakdown) between married couples.[12] Some of the jurists even go further to making it compulsory. This is based on the order from Allah to appoint arbitrators in the above verse.[13] This settlement by *taḥkīm* is also strongly encouraged in all types of disputes.[14] According to al-Qurṭūbī[15] this verse is the principal authority for *taḥkīm* in Islam.

The Qur'ān lays down the principle that the arbitrator has the choice to accept or refuse his appointment. If he accepts the office, he has to act with fairness and justice. Another Qur'ānic verse (al-Maidah; 42) translates:

> "If they do come to thee, either judge between them or decline to interfere. If thou decline, they cannot hurt thee in the least. If you judge, judge in equity between them, for Allah loveth those who judge in equity."

There are ḥ*adiths* of the Prophet on *taḥkīm* which clearly show that the Prophet himself approved tahkim as an institution in Islam. The following ḥ*adiths* are authorities for *taḥkīm*.

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12 Ibn Rushd, Abū al-Walīd Muḥammad Ibn Aḥmad, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, Dr al-Fikr, Beirut, n.d., vol. 2, at 74.

13 Al-Ramlī, Shams al-Dīn Muḥammad, *Nihāyah al-Muḥtāj ila Shar*ḥ *al-Minhāj*, Muṣṭafa al-Bābī al-Ḥalabī wa Awlāduhu, Egypt, 1967, vol. 6, at 392.

14 Al-Khaṣṣf, Abū Bakr Aḥmad Ibn ᶜAmar, *Shar*ḥ *Adab al-Q*āḍī, Dār al-Kutb al-ᶜAlamiyyah, Beirut, 1st ed., 1994, at 482.

15 Al-Qurṭubī, *al-Jāmiᶜ li Aḥkām al-Qur'*ān, Dār al-Kātib al-ᶜArabī, Cairo, 1387/1967, vol. 5, at 179; Ibn Qudāmah, Abū Muḥammad ᶜAbdullah Ibn Aḥmad, *al-Mughn*ī, Maktabah al-Riyāḍ al-Ḥadīthah, Riyād, vol. 20, at 104.

Prophet Muḥammad (s.a.w.) said,

> "Whoever judges between two disputing parties (by way of *taḥkīm*) and both of them agree with (the arbitrator) whereas he does not do justice between them, Allah will curse him."[16]

During the time of the Prophet there were many instances that he himself practised *taḥkīm* and often acted as an arbitrator between individuals and tribes to settle their disputes. For example, the Prophet when still in Makkah was invited by the people of Madīnah to act as an arbitrator in the feuds of two large Arab tribes of al-Aus and Khazraj with three Jewish clans.[17] The prophet in another case, appointed Sa'ad bin Mu'ādh as an arbitrator relating to the actions of Banū Quraiżah in the battle of al-Aḥzāb. In this case, Banū Qurayżah requested that the dispute should be arbitrated under customary law accepting Sa'ad as the arbitrator.[18] Another example of *takīm* is when the Prophet agreed with the arbitration of al-A'war bin Bashāmah in the case of Banī al-'Anbar relating to the distribution of *zakāt* (charity).[19]

The authorities for *taḥkīm,* besides from the Qur'ān and the *Sunnah*, are also derived from the consensus of opinions of jurists. The jurists unanimously agreed that *taḥkīm* is an approved institution in Islam. It is reported from *Mu'in al-*Ḥ*ukkā*m that:

> "A settlement of a dispute by a third party, where the parties have voluntarily agreed to submit their dispute to *taḥkīm* has been recognised in the Qur'ān, the *Sunnah* and also the consensus of the *ummah.*"[20]

The agreement by Muslim jurists on *taḥkīm* is also based on the practices of *taḥkīm* by the Companions of the Prophet Muḥammad s.a.w., who had unanimously agreed on *taḥkm*.[21] They resolved their disputes which occurred among them by appointing a ḥ*akam* (arbitrator).

TAHKIM/HAKAM IN THE STATE OF SELANGOR

Provision on hakam has long existed in section 48 of Islamic Family Law (State of Selangor) Enactment 2003 which states that hakam process will be applicable when shiqaq between the parties always occur in their marriage. However there are no comprehensive rules or S.O.P to implement hakam in the syariah Court. Thus, the function of hakam under the Islamic Family Law Enactment is not effective. According to divorce statistics, Selangor has a high number of divorces. Divorce cases in this state increases every year. In practice, dissolution of marriage cases takes relatively long time to be resolved, especially when a husband refuses to divorce his wife. This situation raises a lot of dissatisfaction on the part of the wife who wishes a divorce be granted without any unnecessary delay. This issue has attracted the attention of His Royal Highness the Sultan of Selangor and heobserved that the process of divorce in Selangor Syariah Court should be accelerated and expedited. Subsequently, a series of workshops and meetings were held at JAKESS to find effective solutions to expedite cases of divorce so that justice can be achieved. As a result, JAKESS find that tahkim/hakam has a high potential as a means to help parties in divorce cases in court. Thus, there is an urgent need to introduce a comprehensive rule, so that hakam can be implemented more effectively and efficiently.

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16 Al-Bahūṭī, Manṣūr Ibn Yūnus Idrīs, *Kashshāf al-Qinā*ᶜ *ᶜan Matn al-Iqnā*ᶜ, Dār al-Fikr, Beirut, 1402/1982, vol. 6, at 309.

17 Ibn Hishām, Abū Muḥammad Ibn ᶜAbd al-Mālik, *Sīrah al-Nabī*, Dār al-Hidāyah, Egypt, n.d., vol. 2, at 121.

18 Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 5, at 498; al-ᶜAsqalānī, Ibn Ḥajar, *Fath al-Bāri*, Dār al-Maᶜrifah, Beirut, n.d., vol. 7, at 411-2.

19 Al-ᶜAsqalāni, Ibn Ḥajar, *al-Aṣābah fi Tamyīz al-*Ṣ*aḥābah,* Dār Nahḍah, Egypt, 1972, vol. 1, at 95.

20 Al- arāblisī, ᶜAlā' al-Dīn Abū al-Ḥassan ᶜAli Ibn Khalīl, *Muᶜīn al-*Ḥ*ukkām*, Dār al-Fikr, n.d., at 24-5.

21 Al-Sarkhasī, Shams al-Dīn, *al-Mabsūt*, Dār al-Maᶜrifah, Beirut, 1986, vol. 21, at 62; Ibn al-Hummām, *Sharḥ Fatḥ al-Qadīr* ᶜ*alā al-Hidāya: Sharḥ Bidāyah al-Mubtadī*, Dār al-Fikr, Beirut, 2nd ed., 1977, vol. 7, at 315; al-Kāsānī, al-Imām ᶜAlā' al-Dīn Abū Bakr Ibn Masᶜūd, *Badā'iᶜ al-Ṣanā'iᶜ*, Dr al-Kitāb al-ᶜArabī, Beirut, 1982, vol. 7, at 3.

Provision on hakam

Before Hakam Rules 2014 were drafted, there has been a Practice Direction from the Department of Syariah Judiciary Malaysia for all judges to implement hakam at the syariah court since 2006. This Hakam Rules provide more detail provision to the one provided under section 48 of the IFLE 2003. It is an improvement to what has been provided under the Practice Direction of JKSM.

A series of meetings were held to formulate Hakam Rules 2014, which was attended by members of the Selangor Syariah Court Rules Committee, which was chaired by the Chief Judge, the Chief Registrar, High Court Judge, Syariah Subordinate Court and representative from the Attorney General. The draft was finalized on May 3, 2013, approved by the Law Committee Majlis Agama Islam Selangor on May 17, 2013 and approved by the MAIS Meeting on May 21, 2013. Hakam Rules was assented His Royal Highness the Sultan of Selangor on January 13, 2014 and gazetted on May 8, 2014.

HAKAM (STATE OF SELANGOR) RULES 2014

Format of the Rules

The Rules is divided into 8 Parts with 34 Rules and 3 Schedules. Part I - Preliminary; Part II - Appointment of Hakam; Part III - Function of Hakam; Part IV - Procedure of Majlis Tahkim; Part V - Committee of Hakam; Part VI - Ethics of Hakam; Part VII - Complaint and Investigation against Panel Hakam and Part VIII - General. Part I contains 2 Rules which deal with citation and commencement; and interpretation. Part II contains 6 rules which provides for power of the court; appointment of hakam, procedure on appointment of hakam, appointment of the member of Panel Hakam, Termination of appointment as member of panel hakam and qualification of a hakam. Part III provides for function and responsibilities of hakam. Procedure of Majlis Tahkim is found in part IV. It contains 10 Rules, which deals with procedure of majlis tahkim. Part V deals with committee of Hakam. This part has 4 rules, which is about establishment, membership, meetings and functions of Hakam committee. Ethics of hakam is provided for under part VI and complaint and investigation against panel hakam are included in Part VII and last part is Part VIII, which deals with general provision. The Rules of 2004 is discussed in detail below;

Appointment of Hakam

Before appointing hakam, the court shall decide that shiqaq has occurred between husband and wife upon investigation conducted by the court. If the court is satisfied that there are constant shiqaq between the parties to a marriage, the court shall as soon as possible direct the husband and wife to appoint hakam from amongst their respective close relative. If the husband or wife fails to produce their respective hakam, the court shall appoint a hakam from amongst the members of panel hakam. Hakam may be appointed from amongst;

(a) Close relative of husband and wife who fulfill the qualification

(b) Members of panel hakam; or

(c) Any syariah officer or Islamic Affairs Officer in the General Public Service of the Federation or State or any Majlis Officer who is proficient family matters and hukum syarak

The court shall direct the husband and wife to appoint hakam on their behalf from amongst close relative within 14 days from the date on which shiqaq is decided by the court. The term close relative refers to any man who is related by consanguinity, affinity or fosterage and having knowledge of the circumstances of the case. This preference to the close relative is in line with the manifest meaning of the verse 35 of an nisa' and the opinion of the majority of the Muslim jurists. After the husband and wife appoint their hakam, the court shall record and declare such appointment by an order. If the

close relatives are not available or they are available but not qualified to be appointed as hakam, the court may under these circumstances allow the appointment of non-relative hakam from the member of panel hakam. The purpose of tahkim is to find the solution to the dispute between the parties.

Under the Rules 2014 panel hakam will be appointed for those who fail to appoint hakam from their own close relative. Subject to the qualification under sub rule 8(3), the Majlis may, on the proposal of the committee, appoint any person as member of the panel hakam, and any person appointed as member of the panel hakam shall be registered in the Register of panel hakam.

In the case of *Salmah bt Mohd Sarip v. Salman bin Arop*, the plaintiff had applied for divorce from the defendant. The reason is the husband does not give nafqah for 2 years because he is unemployed. The husband at the same time has an affair with other women. The husband also abused the wife. The syariah court was satisfied that there were shiqaq (marital discord) between the parties. The judge ordered that hakam be appointed under section 48 of the IFLE (Selangor) 2003. Unfortunately, the parties failed to appoint their close relative as hakam. Without any prejudice, the court has appointed two hakam from the member of the hakam panel to conduct majlis tahkim. Hakam finally had pronounced khulu' divorce on the wife by paying RM10.00 to the husband.

Function and Responsibilities of Hakam

The main function of hakam is to try all their best to terminate the shiqaq between husband and wife by way of reconciliation or by separating both of them by talaq or khulu'. During the conduct of Majlis Tahkim, hakam is expected firstly, to accept and perform directions of the court; and to explain the general regulations to be complied with by all parties.

Procedure of Majlis Tahkim

The procedure of Majlis Tahkim is as follows;

(1) The proceeding of Majlis Tahkim shall commence after the appointment of Hakam is made.

(2) Before the proceeding of Majlis Tahkim commences—

(a) the Court may give directions on the procedure to conduct Majlis Tahkim to Hakam and Hakam shall comply with the directions and Hukum Syarak;

(b) subject to subrule (3), Hakam shall endeavour to obtain full authority from their respective principals by using Form 3 or Form 4 of the First Schedule, as may be appropriate.

(3) The full authority from principals to their Hakam is as follows:

(a) for the husband, he may allow his Hakam to pronounce one talak or khuluk before the Court;

(b) for the wife, she may allow her Hakam to accept the pronouncement of khuluk before the Court.

(4) If—

(a) the Hakam are of the opinion that the parties should be divorced but are unable to order a divorce due to the failure of Hakam to obtain full authority from the principals or due to other reasons;

(b) the Hakam fail to reach an agreement at any stage of the Majlis Tahkim;

(c) the Court is not satisfied with their conduct of Majlis Tahkim; or

(d) any Hakam withdraws himself or refuses to proceed with his duty as a Hakam, the Court may remove and revoke their appointment by using Form 5 of the First Schedule and appoint other Hakam from amongst members of the Panel Hakam or any person referred to in paragraph 4(1)(c) and shall give full authority as provided under subrule 11(2) to them by using Form 6 or Form 7 o f the First Schedule, as may be appropriate.

Determination on types of divorce by hakam is as follows;

(1) In conducting Majlis Tahkim under these Rules, if both Hakam are satisfied that both parties fail to reach reconciliation, they shall determine the party who causes the shiqaq.

(2) If the *shiqaq*—

(a) appears to be caused by the husband or both husband and wife, both *Hakam* shall propose divorce by talak;

(b) appears to be caused by the wife, both *Hakam* shall propose divorce by *khuluk* and the rate of *'iwadh* shall be determined by *Hakam*;

(c) cannot be determined in terms of its cause and the husband claims divorce, both *Hakam* shall propose divorce by *talak*; or

(d) cannot be determined in terms of its cause and the wife claims divorce, both *Hakam* shall propose divorce by khuluk and the rate of *'iwadh* shall be determined by *Hakam*.

If the husband or wife or both parties refuses to attend any proceeding of *Majlis Tahkim*, such refusal shall not cause the proceeding to cease and the *Hakam* may make his decision. Concerning the report of Majlis Tahkim, it is stated that *Hakam* shall prepare a report by using Form 8 of the First Schedule at the end of each *Majlis Tahkim* and the report shall be laid before the Court.

Rule 15 provides for Sighah Talak and Khuluk as follows;

(1) If both *Hakam* in *Majlis Tahkim* decide that the marriage is to be dissolved, the *talak* shall be pronounced by the *Hakam* for husband before and with the permission of the Court as specified in the Second Schedule.

(2) If both *Hakam* in *Majlis Tahkim* decide that marriage is to be dissolved by khuluk and 'iwadh has been made by the wife in *Majlis Tahkim*, the *khuluk* shall be pronounced before and with the permission of the Court.

(3) The pronouncement of *ijab* and *qabul* for *khuluk* is as specified in the Second Schedule.

(4) The pronouncement of *talak Hakam* is *talak ba-in*.

The duration of *Majlis Tahkim* shall not exceed thirty days from the date of the order of appointment and declaration of *Hakam* issued by the Court. The Court may extend the duration of *Majlis Tahkim* if it thinks proper, but such extension shall not exceed the period of sixty days from

the date the extension is granted. Any proceeding of *Majlis Tahkim* shall cease if the husband or wife dies; the husband or wife is of unsound mind; the *hakam* withdraws himself as a *hakam* by using Form 9 of the First Schedule; or there exists other reasons recognised by *Hukum Syarak*. The divorce determined in *Majlis Tahkim* is final and no appeal is allowed.

The Court upon allowing pronouncement of one *talak* before it, shall record the pronouncement of one *talak*, and send a copy of the certified record to the relevant Registrar and to the Chief Registrar for registration. It is clearly stated in the Rules that unless a person is the immediate family member of the party, no other parties or *Peguam Syarie* shall be allowed to appear or represent any party before the *Hakam*.

Establishment and Membership of Hakam Committee

The *Majlis* shall establish a committee known as Committee of *Hakam*.

(1) The Committee shall consist of—

(a) Chief Syarie Judge, as Chairman;
(b) a Syariah High Court Judge, as Deputy Chairman;
(c) State Legal Adviser or his representative;
(d) Legal Adviser of the *Majlis* or his representative;
(e) a *Syariah* Subordinate Court Judge;
(f) State Chief Registrar, Marriages, Divorces and *Rujuk* or his representative; and
(g) three persons who are proficient in *Hukum Syara*k appointed by the *Majlis*.

(2) The members of the Committee under paragraphs (1)*(b)* and (e) shall be appointed by the Chief *Syarie* Judge.

(3) The members appointed under paragraph 1*(g)* shall hold office for a period of two years and shall be eligible for reappointment.

(4) All members of the Committee referred to under subrule (1) shall be *Muslim*.

(5) The Chief Registrar of *Syariah* Appeal Court shall be the Secretary to the Committee.

Meetings and functions of the Committee are as follow;

(1) The Chairman of the Committee shall preside at a meeting of the Committee and if the Chairman is absent, the Deputy Chairman shall preside at the meeting.

(2) Five members of the Committee shall constitute a quorum of the meeting.

(3) The decision of the meeting of Committee shall be made by way of meeting and shall be unanimous or according to the majority members who present.

(4) Subject to these Rules, the Committee may determine its own procedure.

The Committee shall have the following functions:

(a) to propose to the *Majlis* the appointment of any qualified person as member of the *Panel Hakam*;

(b) to prepare and maintain the Register of *Panel Hakam*;

(c) to investigate any complaint against any member of the *Panel Hakam*;

(d) to prescribe the forms of training to be attended by member of the *Panel Hakam*; and

(e) to perform any other matters as may be proper and necessary from time to time for the purpose of enforcing the provisions of these Rules.

Ethics of Hakam

The *Hakam* shall make every effort to complete the *Majlis Tahkim* and shall not delay without reasonable ground and shall comply with the procedure and duration of the *Majlis Tahkim*. The *Hakam* shall in carrying out his duty, exercise fairness as required by *Hukum Syarak*. The *Hakam* who conducts *Majlis Tahkim* shall observe the following;

(a) not conduct *Majlis Tahkim* when he is not calm, angry, hungry, thirsty, sleepy, tired and not well;

(b) not leave the *Majlis Tahkim* without reasonable ground;

(c) be strict, be fair and not be influenced by surroundings or person who is present before it;

(d) open, friendly and patient when conducting *Majlis Tahkim*;

(e) encourage the parties to settle their disputes and reach an agreement voluntarily; and

(f) provide equal treatment to parties.

The *Hakam* shall not be arbitrary; remain neutral; maintain the secrecy of all matters disclosed in *Majlis Tahkim* unless when directed by the Court which hears the said case. He must avoid conflict of interest; make sure that he possesses skills or expertise on matters in dispute; and reject the application to become witness or adviser to parties in the *Majlis Tahkim*, which has been conducted by him.

The *Hakam* shall not—

(a) behave in such a way which may cause reasonable suspicion that he—
(i) allows his personal interest to contradict with his duty as a *Hakam*;

(ii) uses his position for his own benefit;

(b) behave in a dishonest manner or in such a way that caused damage or tarnished the name of the Court and is detrimental to the *Majlis Tahkim* conducted by him;

(c) ignore the duty and responsibility for his own interest; and

(d) commit any act which may cause suspicion on his ability to act fairly in carrying out duty.

Complaint and Investigation on Panel Hakam

Rule 27 states;

(1) Any complaint on the behaviour of any member of the Panel *Hakam* shall be made in writing to the Chairman.

(2) The Court may, at any time, refer to the Chairman any information affecting the behaviour of the Panel *Hakam*.

(3) Nothing in these Rules may be taken as preventing the Committee from making any complaint, on its own motion, affecting the behaviour of the Panel *Hakam*.

Rule 28 states;

(1) Upon receipt of a complaint by the Chairman, he shall direct the Secretary to:

(a) ensure that the following documents are delivered to the relevant member of the Panel *Hakam* by way of personal service:

(i) a copy of the complaint; and

(ii) a notice requiring the relevant member of the Panel *Hakam*, within the period of fourteen days from the date of receipt, to provide a written explanation to the Committee; and

(b) upon expiry of the fourteen day period, inform the Committee on the status of such complaint.

(2) Upon receipt of the complaint against any Panel *Hakam* under subrule 28(1) and written explanation, if any, under subparagraph 28(1)*(a)*(ii), the Committee shall investigate such complaint.

(3) If:

(a) the complaint is reasonable and true, the Committee shall make recommendation on revocation of appointment to the Majlis as provided under rule 29; or

(b) the complaint appears to be groundless, the Committee may reject the complaint.

Rule 29 states that the Majlis, on recommendation of the Committee, may revoke the appointment of any member of the Panel *Hakam* and remove the name of the said *Hakam* from the Register of Panel *Hakam* under rule 31 if—

(a) the behaviour of the said member of the Panel *Hakam*, whether in connection with his duties as a member or otherwise, is a behaviour that caused damage to the name of the Majlis or Court;

(b) he becomes incapable to carry out his duties properly as a member;

(c) in the opinion of the Committee, he fails to attend three scheduled

Majlis Tahkim consecutively without any reasonable ground;

(d) his action is inconsistent with the Ethics of *Hakam*; or

(e) he is a bankrupt.

Other General Matters

Rule 30 states as follows;

(1) The *Majlis Tahkim* shall be conducted in the Court.

(2) The *Majlis Tahkim* may be conducted in other places as the *Hakam* thinks fit.

Rule 31 states that the Secretary shall maintain a record on registration of member of the Panel *Hakam* appointed by the Majlis in the Register of Panel *Hakam*.

Rule 32 provides that the Majlis may pay allowance to the Panel *Hakam* appointed under rule 6 and paragraphs 4(1)*(c)* according to the rate as prescribed in the Third Schedule.

Rule 33 (1) and (2) of the Rules provide any provision or interpretation of any provision under these Rules, which is inconsistent with Hukum Syarak, shall be void to the extent of its inconsistency. If there is lacuna or if any matter in respect of the conduct of *Majlis Tahkim* and *Hakam* is not expressly provided in these Rules, the Court shall follow *Hukum Syarak*.

DISCUSSION AND OBSERVATION ON THE HAKAM PROCESS

As practice in Selangor, majority of the ḥakam appointed is among the local imam in each district who is also the officer responsible for marriages of Muslim in their respective district. The state of Selangor provides allowances to the external ḥakam under the allocation of state's budget. Observing the requirements above and as reflected in practice, the issue of academic qualification and experience of the individual ḥakam appointed to attend the conflict is a major concern. This is because a minimum knowledge in Islamic Family law may not be sufficient to handle the conflict. The person must be well trained in related fields as it involves highly complicated issues and the ḥakam must at least acquire certain skills and knowledge.

On that note, the hakam appointed under the Rules 2014 may be ordered to attend trainings related to their scope of works. Thus, in practice, the individual ḥakam has been sent for several training on family mediation or counselling in preparing them for the task. Though the effort is rather minimal in ensuring the competency of officers in conducting hakam proceedings, such move is necessary to gain confidence of the public, especially in cases where other forms of divorce proceedings are not feasible.

From the criteria of hakam discussed earlier, it is important to note that the requirement for the ḥakam are many but they must be male following the majority opinion of Muslim scholars. Considering the issue of insufficient manpower in managing the ḥākam process, this requirement does not seem to be practical. Furthermore, the ruling is mainly developed through ijtihad, which does not have a binding effect. Though the guidelines are not meant to be mandatory, preference for female hakam will arise in cases where the hakam is not from the family members. Women will be at ease to discuss facts material to the conflict if the hakam is a woman.

As practice currently, there are three stages of reconciliation efforts; firstly, reconciliation by the conciliatory committee (JKP) chaired by the Religious Officer and the other two stages is reconciliation under the purview of shar'ie judge, which is known as hakam proceeding. The second stage can be considered as putting another attempt to reconcile the couple without a chairman, but the proceedings will be under the purview of the Shariah court judge. At the end of the proceedings, hakams appointed have no right to divorce the couple should reconciliation effort fails as they are mandated only to reconcile. Instead, the court will appoint two hakams with a full authority to divorce the couple in the third stage. At this point, the objective of the ḥakam is to seek for the possibility of amicable divorce and they will no longer put so much effort to reconcile the couple. Thus, full force of the reconciliation process, in practice, is done in the first and second stage.

However, in practice, stage one and stages two of reconciliation proceedings are redundant since the objective and the procedures are the same. The only difference is that in the third stage, the hakam has the authority to decree a divorce. Based on the interviews with Sharīʿah Court officers that were involved in hakam proceedings, it is not practical to have three stages of reconciliation process due to insufficient time allotted for each stage and lack of officers to conduct the proceedings. The

reason was due to the large number of divorce applications in both states and insufficient number of offices to conduct the reconciliation process. There has been complaining from the couple that the sessions with the conciliation committee were not sufficient where the officers have to work out the proceedings within the time framed.

It has been suggested that both states shall only maintain two stages where reference shall be made to professional counsellor in the first stage to overcome problems of manpower with some form of allowance for their professional service. Upon failure to reconcile, then the parties will be referred to hakam proceedings with the power to decree a divorce in the second stage. By removing one stage of hakam proceedings, it will eventually give more space and time for the parties to attend the sessions. Reference to professional counsellors or psychotherapists is a viable option as they are in a position to handle complicated matters such as marital conflicts.

CONCLUSION

From the discussions above, it is clear that Islam recognises the marital reconciliation for couple that are in dispute. It is further established in this study that marital reconciliation is obligatory and should be undergone by the couple before resulting to divorce. Islam requires the involvement of the family members in assisting the couple to reconcile their marital relationship under the *ḥākam* process. However, as stated hereinabove, the involvement of family members should be restricted to those who really have the qualifications and experience in managing disputed marriage couple. As the objective of *ḥākam* process is to reconcile the couple, appointment of *ḥakam* who could achieve this objective is important. Therefore, although family members are preferable in managing the reconciliation process, considering the objective is to reconcile the couple, appointment and participation of professional in the *ḥākam* process should be made available.

The Islamic family law of the state of Selangor has adopted *ḥākam* process into its written law. Discussions above have identified few issues on the reconciliation process under the *ḥākam* procedure implemented in the state of Selangor. The main issue is the appointment and requirement of *ḥakam* themselves. There is need to re-look at the qualification of the *ḥakam* and the proper training for the *ḥakam* in ensuring effective reconciliation sessions can be conducted. There is also need to review and re-structure the two stages of *ḥākam* in the Sharīʿah Court considering there is already the conciliatory committee session before the *ḥākam* process.

RESOLUTION OF MATRIMONIAL PROPERTY DISPUTE IN THE CIVIL COURT OF MALAYSIA: MEDIATION AS A WAY FORWARD

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Abstract

In the system of justice, techniques for resolving family disputes are either negotiation or litigation. It is however, seen to have minimized the importance of negotiation and exaggerated the importance of litigation. It has been commented that lawyers have not fully explored other alternatives to litigation such as, mediation, conciliation and med-arb. Many jurisdictions around the world have introduced ADR processes in their legal systems such as Singapore, Australia, New Zealand and United States. In Malaysia, the Malaysian Judiciary Department has introduced Practice Direction No. 10 of 2010 as an effort to encourage mediation in the Civil Court among lawyers and judges. As the nature of many family disputes is self-assertion and compromise, negotiation is developing to be a primary method for resolving conflicts within the family environment. Thus, mediation, as one of the important mechanisms of negotiation, has great potential to resolve family disputes, one of which is matrimonial property dispute. There may be disagreements between the parties over division of property during or after divorce. This type of dispute may be settled using goal-oriented mediation process so that further conflict can be avoided. This paper aims to discuss the use of mediation in resolving matrimonial property dispute by looking at the nature of mediation, its advantages and disadvantages; the present relevant law relating to mediation and its practice in Malaysia. Data for this write up was obtained from materials consisting of textbooks, decided cases, legislation, journals, newspapers, seminar and conference papers and unpublished writings (dissertations and theses). This paper involves investigation and analysis of the materials available in the library hence, it uses a legal analytical approach. This paper is a preamble to a more detailed study of the use of mediation in matrimonial dispute which hopefully the suggestions/obsevations made will be useful for further improvement of the existing legal provision and practice in Malaysia.

Keywords; Family Law, Matrimonial Property, Mediation, Civil Law

INTRODUCTION

As the nature of many family disputes is self-assertion and compromise, negotiation is developing to be a primary method for resolving conflicts within the family environment. Thus, mediation, as one of the important mechanisms of negotiation, has great potential to resolve family disputes, one of which is matrimonial property dispute. There may be disagreements between the parties over division of property during or after divorce. This type of dispute may be settled using goal-oriented

mediation process so that further conflict can be avoided. In Malaysia, Practice Direction No. 10 of 2010 has been introduced as an effort to encourage mediation in the Civil Court among lawyers and judges. In Kuala Lumpur, the KL Family Court has been following the "Guidelines for Family Law Practice" which was issued by the Judiciary in September 2011. Under these Guidelines, mediation in matrimonial proceedings is conducted on a voluntary basis by the parties involved. Parties have a choice of mediators, namely: (a) the judges of the KL Family Court; (b) A judge from the Court Mediation Centre; (c) the Deputy Registrar; or (d) A private mediator of the parties' choice. The parties can, at the case-management stage, indicate to the Deputy Registrar whether they wish to opt for mediation, and if so, the preferred mediator. The Kuala Lumpur Family Court judge will act as a mediator only if the parties specifically request her/him to do so. Thus, the focus of this paper is on the use of mediation in matrimonial property disputes looking at the nature of mediation, its advantages and disadvantages; the present relevant law relating to mediation and its practice in Malaysia.

MEDIATION IN FAMILY DISPUTES

It is noted that most family disputes are resolved within the family by negotiation, conciliation, mediation, and sometimes by private adjudication.[1] In appraising the role of mediation in society, Fuller viewed that "marital problems qualify on all counts for mediational solution." He further observed that mediation had played and would continue to play important role in marital difficulties.[2] However, in assessing the suitability of any form of dispute resolution there are special characteristics of family disputes that need to be considered.[3] Sander had discussed characteristics of family disputes that led him to argue in favour of mediation, as compared to the adjudicatory process. Firstly, family disputes occur in family situations where there are continuing and interdependent relationships. Secondly, in family disputes the conflicts often involve a complex interplay of emotional and legal complaints. In such a case, it is sometimes difficult to discover the real issue in dispute. Thus, there may be a great need for an open-ended, unstructured process that permits the disputants to air their true sentiments. Thirdly, is the fact that marriage breakdown leads to disputes with frequent impacts on some family members who are not legally competent such as children. Obviously that requires special procedures and protections. Finally, the family itself represents a private ordering system that has the capacity for resolving its own disputes.[4] Davis G, et al., stated that mediation was much more likely to facilitate communication and so to leave parents in a position to manage future negotiations.

Family mediation has been seen as a more sensible way of resolving family disputes such as property dispute and as a civilised and civilising procedure, a process which returns to, or keeps control in, the couple.[5] In mediation, the emotional and personal relationships involved in the dispute are acknowledged and the impact of the conflict on other family members, especially children is considered paramount, and thus, relevant to the process.[6] Furthermore, with the special nature of family disputes, mediation offers a more appropriate level of support, which focuses on problem-solving and private ordering.[7] Walker[8] points out that divorce is rarely easy, and almost always

1 Goldberg, Stephen, B, et al., *Dispute Resolution; Negotiation, Mediation and other process,* Little, Brown and Co., Canada, 2nd ed., 1992, p. 299.

2 Fuller, Lon L, 'Mediation-Its Forms and Function,' (1971) *Southern California Law Review*, 44, p. 330.

3 Walker, J, 'Development of Family Mediation', in *Information Meetings and Associated Provisions within the Family Law Act 1996 - Final Evaluation Report*, Newcastle Centre for Family Studies, 2000, p. 401 (hereinafter cited as *the Final Evaluation Report*).

4 Sander, Frank, E, 'Towards a Functional Analysis of Family Process,' in Eekelaar, J and Katz, S. N (ed.), *The Resolution of Family Conflict-Comparative Legal Perspective*, 1984, Toronto, Butterworth, pp. xii and xiii; see also, the characteristics of family disputes laid down in the "Explanatory Memorandum" of the 4th European Conference on Family Law, para. 15, p. 168.

5 Walker, J, 'Development of Family Mediation' in *the Final Evaluation Report*, p. 402; see also, Philip, Wan, F, 'Mediating Family Property Disputes in New Zealand,' *Dispute Resolution Journal*, New York, August 1999, vol. 54, pp. 70-79.

6 *Family Mediation in Europe* (*Explanatory Memorandum),* para. 15, p. 168.

7 *Ibid*.

8 Walker, J, "Family Mediation in Europe," in the 4th European Conference on Family Law Council of Europe publishing, 2000, p. 25.

painful and distressing. It normally results in sadness, rejection, anger, bitterness, hostility and an overwhelming sense of loss. It has been said that interventions in matrimonial disputes such as matrimonial property dispute has generally been regarded as unsuited to regulation by act-oriented rules; and suggested that person-oriented mediation is far better suited than such formal mechanisms, to the sensitive issues surrounding family disputes.[9]

MEDIATION AND MATRIMONIAL PROPERTY DISPUTES IN MALAYSIA

The discussion below focuses on the practice of the matrimonial property dispute in the Malaysian civil courts, the institutions in Malaysia that offer mediation service and the relevant legal provisions on mediation.

Mediation Development and its Relevant Institutions

In an effort, to encourage Malaysians to settle their disputes through mediation including family disputes, the Bar Council (NGO) in 1999 established the Malaysian Mediation Centre (MMC). It is funded by the Bar Council, but those who use its services are required to pay the requisite fees for mediation. The mediators are drawn from a panel of trained and accredited lawyers, who are trained as mediators, as well as professionals from other fields.[10] Under this service anyone may approach the Centre to request for mediation, and the Centre would commence the process by appointing a mediator. Parties may either attend the mediation themselves or may be represented by lawyers. Parties may bring in expert witness. The mediator cannot subsequently be called up as a witness in court proceedings. The parties are not allowed to use any information given during mediation in any subsequent legal proceeding. The process may be withdrawn at any stage by the mediator or either party if it is felt that no benefit may be derived out of it and the parties are bound by any settlement agreement signed by them.[11]

Other institutions such as, the Kuala Lumpur Regional Centre of Arbitration (KLRCA), the Association of Architects, Malaysia and Banking and Financial Institutions also provide mediation service. However, these institutions only deal with commercial, financial and construction disputes. In 2010, there is Practice Direction No. 10 introduced with the aim to encourage mediation in the Civil Court. Presently, mediation is a voluntary option available to the disputing parties including in family cases. The judiciary in its 2005/2006 annual report on the superior and subordinate courts proposed a Mediation Act to allow for court-annexed mediation. This is an attempt to provide an alternative means for the disposal of cases. According to Tun Zaki Azmi, the Former Chief Justice of Malaysia, at the end of 2008 the number of civil cases pending in courts are as follows; 93, 523 at the High Court, 94, 554 at the Session Court and 156, 053 at the Magistrate Court.[12] To overcome backlog of cases problem in the civil court, drastic steps has been taken by the Malaysian Judiciary Department including introduction of mediation in April 2010. There are two types of mediation practised; first, is by an independent third party who is a trained mediator and the other is by the judge himself and if he fails in this task the case will be heard by another judge.[13] In 2012, Mediation Act was passed and gazetted by the parliament. The main aim of the Act is to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost effective manner.

In August 2011, Kuala Lumpur Court Mediation Centre was established to run a pilot project providing court-annexed mediation using judge as mediators. According Tun Zaki Azmi, the centre was set up in the KL Courts' building to reflect the seriousness of the judiciary in integrating mediation

9 Fuller, L, "Mediation-Its Forms and Function," (1971) *Southern California Law Review*, 44, pp. 330-332.

10 Syed Khalid Rashid. (2000). *Alternative Dispute resolution in Malaysia*. Kuala Lumpur: Kulliyyah of Laws, IIUM.

11 *Ibid*.

12 Zaki Azmi. (2010). *Overcoming Case Backlogs: The Malaysian Experience*. Retrieved from http://202.75.7.131/portal/images/pengumuman/YAA.pdf viewed on 27 October 2011.

13 Ibid.

into the court process. This idea was to send a strong message to litigants and lawyers that mediation is encouraged as part of the civil litigation process (MLTIC 2011a). With the establishment of this centre, mediation will no longer be conducted in a judge's chambers. This may remove the element of pressure on the parties to settle and create a friendly atmosphere (MLTIC 2011a). The mediation service provided is free of charge. The mediators are judges of the High, Sessions and the Magistrates Courts.

In 2016, Practice Direction No. 4 of 2016 (Practice Direction on Mediation) was introduced. With effect from 15 July 2016, all judges of the High Court and its Deputy Registrars and all judges of the Sessions Court and Magistrates and their Assistant Registrars may at the pre-trial case management stage give such directions that the parties facilitate the settlement of the matter before the court by way of mediation.

The objective of this Practice Direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. This Practice Direction is intended to be only a guideline for settlement. Advocates and solicitors shall cooperate and assist their clients in resolving the dispute in a conciliatory and amicable manner. Under this Practice Direction judges may encourage parties to settle their disputes at the pre-trial case management or at any stage, where prior to, or even after a trial has commenced. It can even be suggested at the appeal stage. A settlement can occur during any interlocutory application. Mediation may be conducted by judge, KLRCA or by other mediators agreeable by both parties. If a judge is able to identify issues arising between the parties that may be amicably resolved, he should highlight those issues to the parties and suggest how those issues may be resolved. The judge can request to meet in his chamber in the presence of their counsel, and suggest mediation to the parties. If they agree to the mediation then the parties will be asked to decide whether they would wish the mediation to be the judge-led, by KLRCA or by other mediators agreeable by both parties. When the parties agree to mediate, each of the parties shall complete the mediation agreement form. Parties must report to the Court on the progress of mediation within one month from the date the case is referred to mediation. If the mediation process has ended the parties must report the outcome of such mediation. Where mediation fails to resolve the disputes, the Court shall, on the application of either of the parties or on the Court's own motion give such directions as the Court deems fit. All mediation must be completed not later than three months from the date the case is referred for mediation.

Relevant Legal Provisions

Below are the relevant statutes that have provisions on mediation and these provisions provide the Malaysian civil courts the authority to refer the parties to mediation including matrimonial property dispute.

Law Reform (Marriage & Divorce) Act, 1976

For the non-Muslims in Malaysia, in the case of petitions for divorce based on the irretrievable breakdown of marriage, section 106 (1) of the Act makes it mandatory that all petitioners have to obtain a certificate from the conciliatory body testifying that it has failed to reconcile the parties before filing their petitions.[14] This mandatory requirement of a reconciliation attempt by the parties takes place prior to the filing of the petition for divorce and it is conducted by out of court reconciliation bodies[15] as specified under the Law Reform (Marriage and Divorce) Act, 1976 (LRA).[16] Failure of the parties to refer their case to a conciliatory body constituted under s 106 of the Law Reform (Marriage and

14 The 'mediation' and 'conciliation' are sometimes used interchangeably and synonymously. 'Conciliation' is the term used before the term 'mediation' becomes popularly used. In conciliation, conciliator appointed plays more pro-active role as compared to mediator who acts only as a facilitator and does not have the authority to give advice or to make any suggestion to the parties.

15 Reconciliation bodies are institutions such as church and temple that have been appointed to reconcile the estranged couple to return to live as husband and wife again.

16 See, s 106 (2) of the LRA 1976.

Divorce) Act 1976 is regarded as an abuse of process of the court.[17] Thus, reconciliation is mandatory in the following contested divorce cases;

1) adultery;[18]
2) unreasonable behaviour;[19]
3) desertion for a period of two years;[20] and
4) separation for a period of two years.

This compulsory reconciliation for couples who wish to divorce under section 53 of the LRA, 1976 has been severely criticised. Some criticisms attacked the very basis of this concept that reconciliation does not work in the Malaysian society because most couples would have exhausted all avenues of reconciliation before they even petition for the divorce.[21] The couple when they are referred to the reconciliatory bodies, like, marriage tribunal, already made up their mind to dissolve their marriage. Thus, any effort to repair the relationship between them does not work anymore.

Legal Aid Act, 1971

By way of an amendment to the Legal Aid Act, 1971, a Mediation Unit was introduced in 2006 in the Malaysian Legal Aid Department. Part VA of the Act deals with provision of mediation services. In September 2006, the Legal Aid Department appointed twenty-four mediators from its pool of paralegals, sixteen of whom are women.[22] Majority of the cases handled by the Department are matrimonial matters such as, maintenance of spouses or children, distribution of matrimonial property and divorce. The introduction of the mediation service at the Legal Aid Department leads to a large number of cases settled through mediation.[23]

Section 29B of Legal Aid Act, 1971 provides that any person, who is a party to a dispute which is the subject of, or which is related to any proceedings specified in the Third Schedule, may refer the dispute to a mediator. This means that any subject matter as provided for in the Third Schedule can be mediated upon by the in-house mediator of the Bureau. Examples of proceedings under the Third Schedule are maintenance, custody, divorce and matrimonial property.[24] Section 29(A) (2) of the Act states that each mediation session shall be conducted by one or more mediators. At the Bureau with the composition of mediators of whom the female mediators outnumbering the male mediators, there is a likelihood of a mediation session being comprised of both the female and male mediators.[25]

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17 In *P v S [2015] 9 MLJ 400*, the court allowed the application made by the respondent to struck off the petition under O 18 r 19(1)(a) or (d) of the Rules of Court 2012 on the ground that the cause of action was unreasonable as the petition was said to be an abuse of process of the court. The respondent objected to the petition on the ground that the matrimonial difficulty was not first referred to a conciliatory body constituted under the s 106 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

18 The LRA, s 54 (1) (a) which provides that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent

19 Ibid., s 54 (1) (b) which states that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

20 Ibid., s 54 (1) (c) which says that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

21 Mimi Kamariah Majid. (1999) *Family Law in Malaysia.* Kuala Lumpur: Malayan Law Journal, p. 188; See also Round Table Discussion. (2009, May). *Keberkesanan Badan Pendamai Di Bawah Seksyen 106, Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 (Akta 164)*.

22 Faridah Abrahim (June, 2009). *Realizing the Potential of Women in Building Effective Family Mediation and Community Mediation Programmes*. Paper Presented at the Workshop on Empowering Communities through Mediation in Malaysia, Kuala Lumpur, Vistana Hotel.

23 Ibid.

24 Third Schedule of the Legal Aid Act 1971 (Act 26)

25 Faridah Abrahim (June, 2009). Realizing the Potential of Women in Building Effective Family Mediation and Community Mediation Programmes. Paper Presented at the Workshop on Empowering Communities through Mediation in Malaysia, Kuala Lumpur, Vistana Hotel.

It is said that there is the need for the Department to enhance the knowledge and skills of the mediators, which would definitely require proper and adequate training. According to Faridah Abrahim the paralegals appointed have undergone training in mediation which was conducted by Singapore and New Zealand mediators.[26] Furthermore, there is also the need for the mediators to be trained in the field of psychology or social sciences. Faridah also emphasised on the importance to change the mindset of those related officials such as, the legal officers, the paralegals, the judiciary and the legal fraternity as a whole.[27] At present, mediation at the Department has been well accepted by the public as can be seen from the increasing trend shown by the statistics of cases mediated from 2006 to 2008.[28]

Matrimonial Property Disputes in the Malaysian Courts

In Malaysia, in cases involving matrimonial property disputes, agreement between spouses is now very common. It is always encouraged for the parties to make an agreement as to the division of the property acquired during their marriage. This agreement or settlement may be reached by the parties through mediation process. Mediation gives the parties the power to determine what should be a fair and just solution to their matrimonial property disputes. The mediator with the skills and experience that he or she has will be able to assist the parties to arrive at best solution for both parties.

In Malaysia, Section 56 of the LRA 1976 provides for such an agreement or arrangement to be referred to the court to express an opinion as to the reasonableness of the agreement or arrangement.[29] Besides, the Rules of the High Court 1980[30] which govern all proceedings brought in the High Court, render sufficient jurisdiction to enable the parties in a matrimonial dispute to refer to the court any agreement or arrangement they have entered for consideration.[31] Therefore, the spouse's agreement which has been reached through the process of mediation may assist the court as to how the property should be divided between them.

The Malaysian court will only uphold the spouse's agreement if it is found that the terms of the concluded agreement do not transgress the provision stated in section 76 of the LRA 1976.[32] In the Singaporean case of *Wee Ah Lian* v. *Teo Siak Weng,*[33] the parties had, in the course of divorce proceedings, entered into an agreement dealing with *inter alia*, the disposition of their matrimonial property.[34] The question then arose as to whether the settlement should be upheld. In delivering the judgement of the Court of Appeal, Karthigesu J, said that;

> We must still decide whether in the exercise of our discretion under section 106 of the Women's Charter (Cap 353) we ought to uphold the settlement. Section 106 does not specifically provide for the validation of agreements honestly negotiated by the parties but it does give jurisdiction to the court to order a division of matrimonial assets when granting the decree of divorce. …In our view it is incumbent on the court to see that these

26 Ibid.

27 Ibid.

28 Ibid.

29 Section 56 of the LRA 1976 reads: "Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangement and to give such directions, if any, in the matter as it thinks fit."

30 Rules of the High Court, 1980 O. 33 r. 2 provides: "The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

31 Per James Foong J. in the case of *Lim Thian Kiat* v. *Teresa Haesook Lim* [1993] 2 SLR 192, at p.107.

32 Tan Cheng Han, Matrimonial *law in Singapore and Malaysia*, (Singapore, Butterworths Asia, 1994) p. 199.

33 [1992] 1 SLR 688.

34 The parties agreed that the husband has to transfer ownership of certain property to the wife.

> provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention.[35]

The power of the court to consider whether to accept or not the agreement concluded by the parties is discretionary power. Thus, the court may ignore the agreement completely and exercises its power under section 76 of the LRA, 1976.[36] The test that the court should apply is to see whether the agreement provides for a reasonable division of the matrimonial property between the parties.[37] In *Dr Gurmail Kaur a/p Sadhu Singh v Dr Teh Seong Peng & Anor*[38] the court emphasized that the parties should honour the agreement in relation to medical clinics they operated during the marriage since it is reasonable. It appears that there was no reservation or qualification over the agreement. Therefore, the court decided that the petitioner's claims on the PJU clinic is dismissed and the first respondent be given full control and ownership of the PJU clinic accordingly as stated in the agreement.

The court is normally asked whether the validity of the agreement is challengeable. In *Lim Thian Kiat* v. *Teresa Haesook Lim,*[39] the court held that the agreement entered into was perfectly valid as the terms were arrived at voluntarily, with the advantage of the respondent possessing adequate legal advice. The judge in this case said that:

> These terms were performed by the petitioner, and I do not accept the sudden recent change of heart by the respondent in attempting to vary the terms of the agreement on matrimonial assets, when she had for the last seven years, quite comfortably and without much complaint, accepted and lived by the terms stated in the deed of separation. [40]

An agreement which has been concluded properly with competent legal advice should not be displaced unless there are good substantial grounds to do so. In mediation, mediator is required to refer the parties where necessary for independent legal information and advice. Thus, in matrimonial proper cases, lawyer who is expert in family law may be referred and consulted. The court usually would have no problem to adopt the terms relating to the division of the matrimonial property stated in the deed of separation, as it is a perfectly valid agreement between the parties.

CONCLUSION

There are matters that need to be considered seriously should family mediation be introduced in Malaysia. It is proposed that mediation be introduced in the family division of the civil court. Currently, *sulh* has been introduced at the Syariah Court. For this purpose, legislation needs to be introduced to empower family law judges to order parties to go for mediation. Family dispute is the most suitable dispute for mediation especially relating to child and property. Thus, it is necessary, to introduce or to amend relevant legislation in order to facilitate the use of family mediation in Malaysia. There should be rules drafted to govern the practice of mediation, such as, a code of ethics and complaints procedures, rules for privilege and confidentiality and etc.

Mediation especially in family disputes should be conducted by suitably qualified and experienced mediators thus; there is a need for mediation trainings to train the mediators. It is suggested that the government should make an allocation/fund for setting up of mediation centres as well as mediation training centres in Malaysia. Accreditation of mediation services is the aspect that should be considered by the government for monitoring the quality of mediation services in Malaysia.

To ensure that mediation session is conducted comfortably and successfully, there is a need

35 [1992] 1 SLR 688, at p. 698.
36 Tan Cheng Han, *Matrimonial law in Singapore and Malaysia*, (Singapore, Butterworths Asia, 1994) p. 199.
37 *Ibid.*
38 [2014] 11 MLJ 843
39 [1988] 2 MLJ 103
40 *Ibid,* Per James Foong J., at p. 115.

for properly designed mediation facilities attached to courts, such as, mediation rooms with suitable furniture, round tables, whiteboards, comfortable chairs, waiting areas and air-conditions. This is important because an environment promoting confidence, security and privacy is essential for the parties to deliberate their disputes towards resolution. As the awareness of mediation among the public in Malaysia is still low, it is thus, suggested to the government and the relevant NGOs to organize road shows, seminars, conference, workshops to disseminate to the public about the use of mediation in resolving disputes and its benefits/advantages.

Finally, mediation except, in certain situations, such as, domestic violence and child abuse, is the best way to resolve matrimonial property disputes. The court cases discussed earlier show that the judgement by the court in the division of matrimonial property is not always to the satisfaction of the parties. Thus, mediation should be offered to the parties so as to arrive at the amicable settlement.

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COMPARISON BETWEEN COMMUNITY MEDIATION PROGRAM IN MALAYSIA AND IRELAND: SOME LESSONS FOR MALAYSIA[1]

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Abstract

Malaysia is a multiethnic country, whose population is made up of Malays, Chinese, Indians and various indigenous ethnicities. She has fared relatively well peacewise, despite simmering interethnic tensions and disputes. The Malaysian government, through the Department of National Unity and Integration has decided in 2007 to introduce community mediation as a means of resolving community disputes, as this is well established in countries like Singapore, Australia, the UK, United States, amongst others. Ho Khek Hua (2009) addressed the challenges faced i.e., the limited number of trained mediators, the issues of providing mediation training to community leaders, the need for case studies and financial constraints. In this paper, for the research in Malaysia, interviews have been carried out with the aim of gathering the descriptions and opinions of the practitioners of mediation such as, community leaders, mediators, trainers, members of resident associations and individuals with knowledge and experience in community disputes. The research in Ireland involves studying the structure, practice and development of the community mediation centres. Besides library research, interviews and discussions have been conducted with project managers, mediators and trainers with respect to current status, planning and development of community mediation. The findings of this research should assist Malaysia in its effort to improve the current structure, practice, training and development of community mediation. Based on the research conducted, the paper will examine firstly, the structure and practice of community mediation in Malaysia, secondly, the structure and practice of community mediation in Ireland, thirdly, comparison between Ireland and Malaysia, and lastly, what Malaysia can learn from Ireland.

Keywords: Mediation, Community Disputes, Malaysia, and Ireland

INTRODUCTION

Development of community mediation started in the United States and later, it rapidly spread across the world, in many countries of Western Europe, through Latin America, Africa, parts of Central Asia, and even in countries of Eastern Europe and many former republics of the Soviet Union (Shonholtz, 2000). Community mediation is premised on the goal that is to provide the public with the voluntary way to resolve dispute in a collaborative manner that relies primarily on self-determination. In Malaysia, the government, through the Department of National Unity and Integration has decided in 2007 to introduce community mediation as a means of resolving community disputes. Ho Khek Hua (2009) addressed the challenges faced i.e., the limited number of trained mediators, the issues of providing mediation training to community leaders, the need for case studies and financial constraints.

1 This is project is funded by MOE under ERGS research grant secured in 2013

In this paper, the writings in the history and establishment of community mediation and of the legal frameworks in Malaysia are discussed. Besides library research, interviews and discussions with firstly, the relevant authorities and policy makers with respect to current status, planning and development of community mediation were conducted. Secondly, descriptions and opinions of the practitioners of community mediation such as community leaders, *rukun tetangga* activists, members of resident associations and individuals with the knowledge and experience in these disputes were obtained. The total sums of descriptions, experiences and opinions are gathered to identify the best structure and form that should be developed in Malaysia. It should then help improve and promote the practice of community mediation in managing to resolve community disputes and conflicts. This paper also examines the structure and models of community mediation in Ireland. The aim is to design a model of community mediation suitable for the social and legislative framework of Malaysia.

CONCEPTUAL BACKGROUND OF ADR AND MEDIATION

There are several ways to approach conflict resolution. Conflicts may be solved using a wide range of techniques that imply different degrees of persuasion and coercion, starting with avoidance, continuing with negotiation, mediation, arbitration, litigation, executive and legislative decisions, and going all the way to use of violence. Negotiation, mediation, arbitration, and a range of other less-known methods are grouped under the acronym ADR – alternative dispute resolution – which is described as 'a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, usually involving the intercession and assistance of a neutral and impartial third party' (Brown and Marriot, 2012, p. 12).

To mediate is to act as 'an intermediary to intervene for the purpose of reconciling and to settle a dispute by mediation'.[2] There have been numerous discussions on the definition of mediation in many literatures.[3] Some of the literature even described mediation as not a simple term to define.[4] Mediation is a process to facilitate disputing parties with the assistance of a third party who acts as a mediator in their dispute.[5] In mediation, this third party has no power to impose a settlement on the parties, who retain authority for making their own decision. He also must not have any competing interests in the case.[6] In order to help the parties negotiate a resolution of their dispute by agreement, the mediator uses certain procedures, techniques and skills. Mediation is different from other types of dispute resolution in the sense that in mediation, the parties are helped to work out their own decisions and arrangements. They are encouraged to take independent legal advice before entering into an agreement which may be legally binding.

In an ideal situation, the process of mediation empowers the peoples by providing them communication and conflict resolution skills so that the next time they encounter a dispute, they can solve it on their own (Ray, 1997).

Some of important benefits of mediation are:

- The cost of mediation is relatively cheap when compared with litigation and arbitration. The costs of the mediator are normally shared by the parties. Section 17 of the Mediation Act, 2012 of Malaysia states the costs of mediation shall be borne equally by the parties.

- Delay has long been recognized as enemy of justice. Excessive delay makes effective adjudication of a dispute impossible. Memories fade, witnesses go missing, the judge hearing

2 The Oxford English Dictionary, Oxford, At The Clarendon press, Reprinted 1961, vol. VI, at 291-2

3 For example, Brown, Henry and Marriott, Arthur, *ADR Principles and Practice*, Sweet & Maxwell, London, 1999, at 127-8

4 Boulle, Laurence and Nesic, Miryana, *Mediation, Principles Process Practice*, Butterworths, London, Dublin, Edinburgh, 2001, at 3

5 Haynes, John, M, *The Fundamentals of Family Mediation*, State University of New York Press, Albany, 1994, at 1

6 Roberts, M, *Mediation in Family Disputes: Principles of Practice*, Ashgate publishing Company, 1997, at 4

a case may retire or gets elevated and cost escalation may make difficult for the parties to continue. Mediation is time saving as it takes a short time to settle the dispute.

- Communications in mediation are private and confidential. Thus, any statements made and documents produced are on a without prejudice basis. Section 15 of the Mediation Act, 2012 of Malaysia provides that no person shall disclose any mediation communication. However, in certain situation communication in mediation may be disclosed if the disclosure is made with the consent of the parties. If the disclosure is required under the Act or for the purpose of any civil or criminal proceedings under any written law, it can also be disclosed. It can be disclosed if it is required under any other written law for the purposes of implementation or enforcement of a settlement agreement.

- Mediation process is in the control of the parties. Mediator manages the process but disputing parties dictate the process. In mediation, there is no decision is imposed on the parties. The parties own the decision and issue is resolved only if both parties agree.

- Mediation is informal and non-confrontational. Hence, successful implementation of agreement is more likely compared to adjudication and arbitration.

- In mediation, arrangements can be worked out to fit individual circumstances. The parties can explore options that they believe will work for them. Encouraging the parties to explore ideas and suggestions helps them to shift from fixed positions and work out possible solutions that they can both accept.

- Judges make decisions based on evidence presented by the parties, thus, only certain remedies can be imposed. In court system, judges cannot expand options and cannot give a solution that was not argued and the application of the law would not allow. Mediation allows for creative options and solutions. In mediation, parties can vent their emotions and express in their own words the issues and get them off their chests.

COMMUNITY MEDIATION

Defining community mediation can be a difficult task, due to the high variety of social systems in which the different community mediation models have developed. Even in culturally related and closely connected systems, the United Kingdom and the United States, we can identify very different approaches. In the United Kingdom, community mediation refers mainly to the process involving an impartial third party who assists people located in clearly circumscribed areas (hence the term neighborhood mediation) to find a mutually acceptable solution to their dispute. In the United States, community mediation may refer to a much wider range of fields of application, including family disputes, school and juvenile matters, victim-offender mediation, hospital collections, inter-group conflicts, conflicts with the new religious congregations or business and non-profit entities (Jacobs, 2011), intervention in the criminal justice system, environmental issues and even public policy design (Mackay and Brown, 1999). Community mediation can also be considered as a process of 'devolving the judicial power from the state to the people for a meaningful response to the social problems' and as a democratic approach to settle the disputes (Sangroula, 2013).

Nevertheless, regardless the variety of services provided, community mediation programs have common characteristics, first stated by the National Association for Community Mediation (NAFCM)

from the US, commonly shared by all the different approaches (Ray, 1997):

– The use of trained community volunteers as providers of mediation services, with the practice of mediation open to all persons;

– Sponsorship by a private, non-profit or public agency or program, with mediators, staff and a governing and/or advisory board representative of the diversity of the community served;

– Providing direct access of mediation to the public through self-referral and striving to reduce barriers to service, including physical, linguistic, cultural, programmatic and economical.

– Providing service to clients regardless of their ability to pay;

– Advocating, initiating, facilitating and educating for collaborative community relationships to effect positive systemic change;

– Engaging in public awareness and educational activities about the values and practices of mediation;

– Providing a forum for dispute resolution at the early stages of the conflict; and

– Providing an alternative to the judicial system at any stage of the conflict.

COMMUNITY MEDIATION IN IRELAND

Mediation Northside

In 2004, Mediation Northside was established by the Northside Community Law and Mediation Centre (NCLMC). It was set up in response to the need to have mediation service following surveys relating to problems and concerns of the community. Areas of mediation are; neighbour disputes, conflict within families, cultural disputes, tenants and landlords, anti-social behaviour, teenagers causing havoc in the community. Mediation Northside started by training six mediators on the pilot project with nine cases handled by them. Valerie Gaughran was appointed as a project manager and started working on the policy and procedure, and mediation models. There are various mediation models available at the Mediation Northside for example, family mediation, elderly mediation, community mediation, financial and debt, workplace, teenagers. Mediation Northside also delivers different training programmes to cater the needs of the community in the area. It organises fund raising activities such as fashion shows and marathons.

The success of Mediation Northside has inspired similar projects across the country, run on the same model such as, Limerick Community Law and Mediation Centre, Cavan Family Resource Centre and Wicklow Mediation Pilot Project. Recently, Mediation Northside introduced child voice mediation. The aim is to incorporate the voice and views of the child in the resolution of family breakdown. In its short history, Mediation Northside has achieved many successes.

In 2012, Mediation Northside established a pilot scheme of Court Referred Mediation in the Dublin Circuit and District Civil Courts together with Ballymun Community Law Centre and South Dublin Mediation Services. The aim is to encourage lay litigants to engage in mediation. The scheme covers issues relating to boundary disputes, private prosecutions for breach of the peace, complaints about noise or nuisance and disputes between adult family members on questions of property. Cases may be referred to mediation by staff in the circuit and district Civil Court Office and by the County Registrar.

Mediation Model

Clients attended the Mediation Northside come from all over Ireland. The clients are referred to mediation by social workers, member of the Garda (police), healthcare professionals, other organisations and recently the court. For family disputes, clients are allowed six two-hour sessions. For community disputes, they are allotted one or two two-hour slots as well as a one-hour private meeting with each party. Mediation session is conducted within 20 working days of the first point of contact. This is to ensure fairness and to prevent any perception of bias, Mediation Northside Centre adopted co-mediation model. It is the duty of the centre to ensure that all mediation sessions are facilitated by one male and one female mediator or observer. After mediation session, there will be a feedback session for 20 minutes.

In 2012, Mediation Northside dealt with 246 referrals. Of those 246 referrals, 166 cases were taken on. The remainder were either referred to other services or could not take place as the other party did not wish to take part. The majority of cases involved two parties but some involved larger groups. The total number of clients assisted by Mediation Northside was 457. This is a very high rate of success.

Mediation Training

It has over 150 volunteers, all trained in the Community Mediation Basic Skills course, accredited by the Mediation Institute of Ireland. The training model used by Mediation Northside is designed to ensure that there is a continuous supply of trainees and qualified mediators to maintain the service. Trainees become volunteer mediators; volunteer mediators deliver a free mediation service and train the next trainees. Mediation Northside provides affordable training to trainees to practitioner level. After completing the initial 60 hours of training in mediation skills, trainees are given the opportunity to co-mediate under the supervision of an experienced trainer until they have built up the required number of hours and other requirements to attain certified mediator status. In exchange for this training, once qualified, the mediators volunteer 100 hours of mediation to the service and support the new cohort of trainees on a co-mediation basis. This model ensures that there is a continuous group of trainees and volunteers to maintain the service in a cost effective manner. Below is a brief discussion of two community mediation centres in Ireland.

Ballymun Community Law Centre

Ballymun Community Law Centre was established in 2002 to tackle unmet legal need in Ballymun. It is a non-profit/voluntary organisation. Gives people within the community access to justice by providing free legal advice, information, and representation. The centre delivers a mediation service as well as a legal education programme. Community Mediation is part of the regeneration programme for Ballymun – low income population – translocation of population to high-rise buildings – subsequent attendant socio-economic issues. It organises peer mediation training at schools to train the school children with mediation skills. The Centre also organises programmes to promote mediation as dispute resolution service in Ballymun. It also organises legal courses and seminars.

Ballymun Community Law Centre has been working successfully with six of the eight primary schools in Ballymun on a peer mediation programme. The goal of the programme is to reduce conflict and provide children with problem-solving techniques. Peer mediation is successful because it empowers students, which motivates them to behave more responsibly.

South Dublin Mediation Services (SDMS)

South Dublin Mediation Services was established in 1996 following the completion of a Community Mediation course conducted by Geoffrey Corry. From Tallaght Community Mediation to the Mediation Bureau and now SDMS. The first Community Mediation organisation in Ireland

which was set up on its own and it is not part of community law structure. It is an independent charity working to improve the lives of residents and communities throughout South Dublin by offering community mediation service. Mainly, focus on neighbourhood disputes, however, it also assists in disputes between tenants and landlords, in workplaces, and within groups, organisations and families. Recently, South Dublin Mediation Services receive a growing number of referrals from cases where the judge recommends mediation. The mediators are volunteers – currently 25 of them. They completed an accredited training course. Most of them have a South Dublin connection. They are committed to delivering a professional mediation service to the local communities. Conduct basic training course in mediation and conflict resolution skills. The aim is to train new community mediators for the service. Conduct training to a wide variety of organisations and individuals like Gardaí, resident's associations and other community groups. Training for Primary school pupils and staff aimed at establishing peer mediation (by senior pupils) of minor disputes which arise. It hosts regular briefing sessions to explain about their services to various community groups and agencies such as gardai, family and community groups.

COMMUNITY MEDIATION IN MALAYSIA

Background and Development

In order to avoid and prevent further problem in the future, the Malaysian government has developed many programmes through government's departments and ministries. For instance, the Ministry of Education introduced compulsory Ethnic Relation subject in universities to replace the earlier effort, the Islamic and Asian Civilisation. It is hoped that through education, the government would be able to build a strong foundation for a harmonious community in Malaysia.[7] Institute of Ethnic Studies ("KITA") was established in *Universiti Kebangsaan Malaysia* ("Malaysia National University") in 8th October 2007,[8] One Malaysia, Integration School and National Services Program were designed to promote integration and unity among the races and ethnics, to instil a sense of belonging towards Malaysia as their country and to treat fellow Malaysian equally and without racist despite of the race and ethnic.

The most important step taken by the government was the establishment of the DNUI in 1969. The Incident had led to the declaration of Emergency by the King on 15 May 1969 in pursuant to Article 150 of the Federal Constitution. Such declaration has empowered the establishment of a National Operation Council (*Majlis Gerakan Negara)*.[9] On 1 July 1969 under the command of the National Operation Council, the Department of National Unity was established to address issues related to rebuilding the social cohesion in the country. The Department of National Unity has undergone many changes since 1969.

For example, in 1980, the Department of National Unity was renamed as Department of Peaceful Neighbourhood and National Unity and placed under the Prime Minister Office. In 1990, the Department was placed under the Ministry of National Unity and Community Development. In 2009, again it was placed under the auspices of the Prime Minister Office and its name was changed to Department of National Unity and Integration.[10] The Department focuses on national and societal

7 *See* Shamsul Amri Baharuddin (n.d) "Enhancing Inter-Ethnic Relations in Malaysia:Personal Observations on the Inter-ethnic Module in Public Universities", *Occasional Papers Series 5*, International Institute of Advanced Islamic Studies, at 7-9.

8 Institute of Ethnic Studies [Online] Available: http://www.ukm.my/kita/profilekita.html/2009 (accessed on 5 January, 2013).

9 Majlis Keselamatan Negara [Online] Available: http://www.mkn.gov.my/mkn/default/article_m.php?mod=1&article=9 (accessed on 5 January, 2013).

10 Jabatan Perpaduan Negara dan Integrasi Nasional Negeri Selangor [Online] Available: http://www.jpninselangor.gov.my/v2/ms/latar_belakang (accessed on 5 January, 2013). *See also* Malaysia Kita, n. 17 at

integration. Their mission is to promote unity and integration by increasing the opportunities for interaction between ethnic groups through activities such as organising social gathering on festive occasion for example the celebration on Chinese New Year (for the Buddhist), Hari Raya (for the Muslims), Christmas (for the Christian) and Deepavali (for the Hindus).

The importance of unity is highlighted by the Director General of the Department of National Unity, YBhg Dato Azman Amin Bin Hassan in 2012 New Year Message;

> "Malaysia is a country where the people from different races, religions, cultures and lifestyles. Therefore, national unity is an important pillar and become the most important goal in each of the policies implemented by the government whether in the economic, social nor political. Without unity, the country will be exposed to various threats and vulnerabilities. These threats and vulnerabilities that can cause the country's sovereignty detriment and cause chaos, riots, fight among races and so on."[11]

The Department work hard to follow their vision to become a major leading agency which preserves, increases and strengthens unity and societal harmony in Malaysia and to fulfil their mission to increase and strengthen unity and societal harmony based on the Federal Constitution, Rukun Negara and Gagasan 1Malaysia with a motto "United We Progress".[12]

One of the efforts by the Government of Malaysia through DNUI was the establishment of *Rukun Tetangga.* The programme was established to create social unity among the people. It was hoped that through this programme, a strong friendship, understanding and tolerance and good neighbourliness will be formed in a residential area.[13] The programme that has been established since 1975 initially was to ensure the safety of the local residents. The government gazetted the Peaceful Neighbour Regulation 1975 (PU (A) 279/75) to grant certain powers to the Peaceful Neighbour Association. The committee of the Association gathered the residents, formed groups and take turn to patrolling their residential area at night. In 1984, the focus of this organization changed to strengthen the relations between the various races in Malaysia.[14] In 2001, the focus of this program was turned to develop the community. The priority of this Peaceful Neighbour programme is to help the disputants in the neighbourhood to resolve dispute and to avoid any racial tension and subsequently maintain the harmony in the society.

The DNUI has developed a pilot project of "Community Mediation" under the *Rukun Tetangga* programme in selected areas in promoting integration and harmony residential area. The main purpose of this programme is to train the *Rukun Tetangga* Committee to be Community Mediators in their residential areas, who shall play a role as third party in helping the disputants/residents to resolve dispute. The idea of having this pilot project emerged from the finding of DNUI that the social tensions at the community level arises from the inter and intra-ethnic fight. The project was developed in 2007 and implemented in 2008.[15]

This programme was initially introduced in few urban areas where crime rates and ethnic diversities are prominent. In 2012, *Rukun Tetangga* Act (Peaceful Neighbour Act) was tabled in the Malaysian Parliament and was gazetted on 22nd June, 2012. Section 8 of *Rukun Tetangga* Act 2012 provides function and duties of *Rukun Tetangga* Committee inter alia, to make the service of mediation to the community available at any time for the purpose of conciliation or otherwise to settle any dispute or differences among the members of the community (Section 8(d)). The responsibility of

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11 Azman Amin Bin Hassan, *Message*, Department of National Unity, Available at: http://www.jpnin.gov.my/perutusan-kp-2012 (accessed on 5 January, 2013).

12 Vission, Mission & Motto, Department of National Unity, Available at : http://www.jpnin.gov.my/visimisi (accessed on 5 January, 2013).

13 Malaysia Kita, n. 17 at 287-288.

14 "1Malaysia: Aspirasi Perpaduan Pencapaian JPNIN 2009-2011" Jabatan Perpaduan Negara dan Integrasi Nasional at.10.

15 Ho Khek Hua. (2009). "Talk On: Community Mediation" Workshop on Empowering Communities through Mediation in Malaysia. Vistana Hotel, Kuala Lumpur.

the *Rukun Tetangga* Committee to mediate is also prescribed in the Rukun Tetangga Circular 2012. Article 3 (d) of the circular provides, *inter alia* the *Rukun Tetangga* Committee has the roles and responsibilities to offer mediation in the community for the purpose of resolving disputes or conflict among the community's members.

Presently, Community Mediator is placed under the auspices of the Unity Management Unit under the DNUI. As the result, the *Rukun Tetangga* Committee who is appointed as Community Mediator is wearing two hats. They hold the position as the Community Mediators under Unity Management Unit as well as the *Rukun Tetangga* Committee under the Community Development Unit.

The institutionalization of community mediation in Malaysia started for real with the enactment of the Mediation Act by the Parliament in 2012. The Law defines mediation and the profession of mediator, stipulates the principles, the fields of application, the rules and procedures of mediation, the training and certification of mediators and the relationship between mediation and the courts.

Unfortunately, there is no empirical data on the number of cases mediated in Malaysia, the types of cases and the settlement rate other than that of the Civil Courts and Syariah Courts.

Though no specific provisions are made by the law concerning the models of mediation to be used, the practice of mediators in Malaysia tends to go along the main lines of the facilitative model. All mediators have to be certified by the DNUI in order to practice mediation, following a mandatory eighty-hour initial training in mediation techniques and skills. The training providers have to observe some formal criteria in order to be accredited by the Department. Only the certificates issued by accredited trainers are accepted by the DNUI as proof of mandatory training.

Use of mediation in Malaysia is voluntary, but for certain types of disputes, parties are mandated to attend mediation session before submitting their cases to courts.

Community Mediation Training

Institut Kajian dan Latihan Integrasi Nasional ("IKLIN") (National Integration Research and Training Institute) under Community Unity Training Unit (IKLIN, JPNIN) is entrusted with responsibilities to train the community mediators.[16] Community Mediators under the Community Mediation programme undergone a unique training conducted by the DNUI appointed trainer, a socio-psychological, Dato Dr Wan Halim Othman who is the only trainer since the programme started until today.[17]

The training began with the introduction of community mediation in general. This is because many of the *Rukun Tetangga* Committee have no information on ADR, mediation or community mediation. Thus, the committee of *Rukun Tetangga* or the participants need to understand the general idea of community mediation. The first part of the training discusses the role of the participants as the Committee of Rukun Tetangga and the second part focuses on the role as community mediators. There are 20 steps that need to be understood by the participants. Thus, the programme is well-known or frequently referred to as "*Kursus Kemahiran Proses Mediasi Komuniti 20 Langkah*" or "Skill of Community Mediation Process 20 Steps" in Malaysia. The twenty steps are the community mediation process.[18] The twenty steps are as follows:-

1. Melakukan pendampingan (Outreach)
2. Pemilihan aduan (Selection of complaints)
3. Menentukan Keperluan Intervensi (Determine the needs of intervention)

16 Institut Kajian dan Latihan Integrasi Nasional, Jabatan Perpaduan Negara dan Integrasi Nasional, Available at: http://www.jpnin.gov.my/programlatihan (accessed on 5 January, 2013).

17 "1Malaysia: Aspirasi Perpaduan Pencapaian JPNIN 2009-2011" Jabatan Perpaduan Negara dan Integrasi Nasional, p. 18.

18 Wan Halim Othman. (2009). Community Based Mediation in Malaysia : Rukun Tetangga. Workshop on Empowering Communities through Mediation in Malaysia. Vistana Hotel, Kuala Lumpur.

4. Menentukan kesesuaian mediasi (Determine the suitability of mediation)
5. Mengenalpasti pihak-pihak (Identify the parties)
6. Mengenalpasti mediator utama (Identify the main mediator)
7. Mengenalpasti mediator bersama (Identify the co-mediator)
8. Pre-mediasi: pelawaan pihak-pihak berkepentingan (Pre-mediation : invitation to interested parties)
9. Persediaan sesi mediasi pertama (First mediation session set-up)
10. Memulakan sesi mediasi (Mediation session begin)
11. Mengendalikan luahan (To handle expression of parties)
12. Penumpuan kepada pemilik/petindak utama (Concentration on the main party)
13. Mengendalikan penghujahan (To handle arguments)
14. Menghadapi kebuntuan (Impasse)
15. Menjayakan kokus (Private caucus)
16. Mengendalikan proses tawar-menawar (To handle the bargaining process)
17. Mencapai persetujuan dan perjanjian (To reach a consensus and an agreement)
18. Penglibatan penyokong social (Involvement of social supporter)
19. Perlaksanaan persetujuan (Execution of agreement)
20. Penamatan kes dan tindakan susulan (Ending of mediation and follow-up) (Kursus Kemahiran Proses Mediasi Komuniti 20 Langkah, IKLIN, JPNIN).[19]

This programme consisted of 4 phases and each phase is a four days course. Each session has a large number of participants for example 80 to 100 persons. The training methodologies adopted is workshop, attendee active participation and role-playing sessions.[20]

The term "Community Mediator" in Malaysia under the Community Mediation Programme by the DNUI is different from the term Community Mediator in other countries such as Singapore. According to Wan Halim Othman (2009) *Rukun Tetangga* committee leaders are trained as a second sense of the term "Community Mediator" rather than as professional community mediator. He explained that the first sense of community mediator refers to a person who has undergone a specific technique in conflict resolution, trained and recognized as official mediator or professional mediators. The second sense of mediator is a mere third party who involve in mediating with any social situation.[21] He distinguishes the two terms of community mediator. It is understood that the terms are differentiated to show the training received by the mediators to enable them to be community mediators. They may be professional community mediators if they have undergone a professional training. However, in Malaysia, the training provided to the community mediator is not a professional training. Nevertheless, they are accredited by the DNUI and are called "Community Mediator" who assists people in their neigbourhood in resolving disputes. Hence, Malaysian Community Mediators fall under the second sense of community mediator.

The Government of Malaysia was very much interested in promoting unity and integration. Therefore, the DNUI has sent more *Rukun Tetangga* leaders to undergo the training. As a result, in March 2012 a number of 519 individuals were as trained community mediators. It is claimed that the cases involving racial issue have decreased from 1315 cases in 2007 to 912 in 2011. The DNUI has planned to train more mediators in the future to ensure that each area of *Rukun Tetangga* will has at

19 Kursus Kemahiran Proses Mediasi Komuniti 20 Langkah, Training Powerpoint Slides, Institut Kajian dan Latihan Integrasi Nasional (IKLIN), Jabatan Perpaduan Negara dan Integrasi Nasional.

20 The Training for Community Mediator by the Department of National Unity and Integrity.

21 Othman (2009), n. 243.

least one mediator.[22]

Community Mediators

The mediation session handled by the mediator is free of charge. There are no charges imposed on each mediation session and the mediators receive no remuneration. They work solely on voluntary basis.[23] Currently, the Community Mediator is governed by "*Prosedur Perlaksanaan Mediasi Komuniti*" (Community Mediation Operating Procedure) provided by the DNUI. This procedure is to be followed by the *Rukun Tetangga* Committee and the Community Mediator. The procedure prepares guidelines for both parties on the prevention action that need to be taken by them to avoid racial tension in the community. Thus, allowed both parties to work hand in hand as to ensure harmony is maintained. Among the procedures, there is a mediation techniques provided to the mediators inter alia the mediators must among others, evaluates the case, makes suggestion, negotiate the matters and get consent from both parties.[24] Malaysia has gazetted Mediation Act 2012 (Act 749) that came into force on 1 August, 2012. This Act provides for the roles of mediators and laws that govern mediation processes.[25] However, the laws have not been introduced to the community mediator.

Community Mediation Model

When proposing a community mediation model suitable for Malaysia, we have to take into account the Malaysian legislative and social particularities, in order to identify its goals, its organization and its activities. Any tentative to establish a community mediation centre/instutute in Malaysia has to pay attention to several issues that can have a direct impact on this endeavour.

First, community mediation is still in its infancy in Malaysia and there is a need to inform and educate the population about the process, its advantages and limits. Second, the Malaysian law clearly stipulates the right of the parties to freely select their mediator – this means that cases cannot be allocated to mediators by the administrative officers of the centre. Third, to be acceptable to local government, mediation services have to be provided on a free of charge, meaning that the certified mediators (the only persons that can legally mediate in Malaysia) have to volunteer their hours and services to the centre. As a consequence, support of the mediators is crucial for the program and it can be achieved only if the selection of cases referred to the centre will not conflict with their own practices.

Therefore, there should be a clear definition of the range and types of cases that can be mediated as part of the program, in order to not compete unfairly with the mediators' private practice.

Structure

The current structure of community mediation service model is more appropriate as is run by the government department/authority, but this does not imply that the service is necessarily means that the independence of mediation is compromised by its relation with the running department/agency.

One of the main reasons is that this type of structure can also be an important source of case referrals because they handle most of the complaints concerning neighbourhood disputes. An independent community mediation centre, as a private NGO, would face difficulties in ensuring consistent funding. The possibilities of offering other services, besides mediation, are quite low. For example, mediation training is highly regulated and can be provided only in particular conditions unlikely to be met by an organization like a community centre.

22 Koh Tsu Koon (2012)."Dialog Y.B Tan Sri Dr Koh Tsu Koon, Menteri di Jabatan Perdana Menteri Bersama Mediator Komuniti" unreported in *Case Conferencing of Community Mediator*. Seri Cempaka Service Suites, Menara PGRM, (24 March 2012).

23 Ibid.

24 Item 8, II Mediasi, Prosedur Perlaksanaan Mediasi Komuniti, Jabatan Perpaduan Negara dan Integrasi Nasional Malaysia.

25 Muhammad Bukhari Ab. Hamid. (2012), Akta Pengantaraan 2012 (Akta 749*), Chambers News Channel, Attorney General of Chambers,* Retrieved from *http://www.agc.gov.my/cnc /index.php?option=com_con tent&view=section&layout=blog&id=19&Itemid=414*

Mediators

The core of every community mediation service is presented by the volunteer mediators. Due to the mediation regulations imposed by the Malaysian mediation law, only a certified mediator can provide mediation services in Malaysia. A partnership between a community mediation centre and a professional association of mediators can supply the needed mediators.

A screening process, involving experience as a mediator or expertise in a particular type of disputes, can assure some service quality. Attracting skilful mediators can be a concern. In Malaysia, the numbers indicating volunteering are not very encouraging: under 13% of the Malaysians are involved in volunteering activities, and most of them are between 18 and 30 years old. It is more likely that a beginner mediator will be more interested to volunteer in a community centre, as a form of apprenticeship. A mentorship scheme would be helpful as well as additional trainings, provided either by academics or licensed professional mediator trainers. This can also be an incentive to volunteer, because, by law, every certified Malaysian mediator has to continually develop its knowledge and skills in conflict management.

LESSONS FROM IRELAND

Below are some aspects of practice of community mediation that Malaysia can learn from Ireland.

1. Community Mediation centres in Ireland are independent of government control - the significant of this independent contributes to the manifestation of neutrality and impartiality, among the fundamental characteristics of mediation.

2. Self-funded organisations – they organise their own fund raising activities.

3. Degree of volunteerism among the mediators in Ireland is high.

4. The training package of Community Mediation – in return for the training, the trained mediators are willing to give back their service to the centre and community. This serves the mediators and the community well – the mediators will have the chance to practice their skills as well as to train the new mediators and the community will have their disputes be mediated by qualified mediators.

5. Ireland adopts co-mediation model as this is suitable for community dispute.

6. Continous Professional Development (CPD) programmes – e.g., Learning and sharing programmes. This is good programme to ensure continuous professional development of mediators.

7. Broader scope of community disputes. This allows more disputes be attended to and thus, more interaction with the community and enhance their further knowledge and understanding of conflicts and solutions.

8. Peer mediation programme introduced at schools for example the Ballymun Community Law Centre and South Dublin Mediation services. This is novel approach to introduce mediation at the early age and mediation being societal developmental tool bodes well for the future of the community.

9. Community Mediation has a significant role in regeneration programme and cross border

disputes as evidenced by success in these programmes.

10. Story telling as part of mediation process – Story telling allows parties to tell their story and be heard and respected. It is a way of breaking an impasse.

11. Incorporating the useful element of culture of the community in developing the mediation process e.g., Storytelling.

12. The undisputed role of the Mediators, Institute of Ireland in managing quality training, accreditation, code of ethics and CPD programmes ensure readily available trained experienced mediators i.e., the core of mediation practice.

CONCLUSION

It is heartening that community issues in Malaysia have their parallel in Ireland i.e., socio-economic status, neighbourliness, sectarian issues, housing and facilities, among others. The researcher's short exposure in Dublin has enlightened her greatly as to the role of community mediation in managing community issues in Ireland. It will definitely be usefully utilised for further development of community mediation in Malaysia.

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RESOLVING CONFLICT OF LAW ISSUES IN PARENTAL CHILD ABDUCTION: MEDIATION AS AN EFFECTIVE MECHANISM

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ABSTRACT

Abduction often involves the parents of the child. After a marriage is dissolved most parents will fight to have custody of the children. The party that is unable to lawfully obtain custody of children sometimes resort to abduction. Abduction of children is an issue that raises concern due to its effect on the child. Abducted children are sometimes even taken outside the country of abduction to another country by the non-custodian parent in order to prevent tracing and punishment. These attributes of abduction have a far reaching negative consequence on the child. The sudden separation of the child with his environment and the attempt to hide the child negatively affects the child physically and psychologically. The paper examines the position of parental child abduction under the Malaysian law and the approach of the courts in dealing with the matter. The paper also briefly discusses the position of child abduction under the international law and shariah and suggests mediation as an effective means to resolve the disputes involving parental child abduction. Doctrinal methodology is used in the paper in arriving at the findings of the work.

Keywords: Parental Child Abduction, Mediation, Law, Shariah, Disputes

Introduction

Parental Child abduction has been defined as the "taking, retention, or concealment of a child or children by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member.[1] Parental child abduction is an illegal act in most parts of the World. The crime has several effects on the child and the person from whose custody the child is unlawfully taken. To the child, his separation from his immediate environment psychologically affects him and sometimes physical injury could be occasioned in the process of the abduction.[2] Since the law considers abduction as an offence, persons that abduct children try to hide

1 Chiancone, et al, Issues in Resolving Cases of International Child Abduction by Parents, 2001, https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf. (visited 1/4/2014).

2 Freeman, M., International Child Abduction the Effects, 2006,

their act to avoid tracing and punishment. This move equally adds to the danger of more harm on the innocent child. Similarly, the person under whose legal custody the child is taken gets traumatised due to the sudden separation from the child and lack of certainty as to the where about and well being of the child.[3]

After the termination of marital relation, custody of children is often a matter of disagreement between the parties. Both parties often want to have the custody of the child after a divorce. The law in Malaysia considers the mother as the first person to be considered for the purpose of custody especially when the child is very young. Similarly, Islamic law equally gives preference to the mother with respect to the custody of her children. This is not unconnected with the fact that the mother is more attached and compassionate towards the child compared to the father. After the issue of custody is settled, parental abduction happens when the parent that is unable to lawfully obtain custody decides to abduct the child. Mothers have been recognised as more likely to abduct their children from the other parent than the fathers due to the emotional attachment to the child.[4] Most cases of parental abduction are not for the purpose of causing any harm to the child but rather to have the custody of the child by any means.

The law in Malaysia specifically mentions parental abduction as a specific crime. It falls under the heading of abduction and is considered a punishable offence in Malaysia. Islamic law equally considers abduction a crime and punishment in the form of *ta'azir* (discretionary) punishment will be imposed on any parent that abducts a child. At the international arena, abduction is a crime under International law. It amounts to deprivation of the right of the child to family as reflected by various international instruments on child protection.

Recognition of Parental Child Abduction as a Crime under International Laws

Several international instruments have spoken against child abduction and urge States Parties to cooperate in the fight against the crime.

Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction provides a mechanism for locating and returning children "wrongfully" removed from or retained outside of their jurisdiction of habitual residence, a problem that most commonly arises in the breakdown of an "international" marriage. The Convention seeks to protect the welfare of the children involved by deterring and remedying unilateral action by one parent. Article 8 of the Convention provides that any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. Similarly, Article 7 states Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.[5]

The Convention, therefore, is a return mechanism that does not seek to resolve custody issues or prevent the abducting parent from seeking a more favourable custody decision in a different country often a country where the abducting parent has citizenship, other family members, or a common (i.e., empathetic) ethnic or religious community.[6]

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http://www.reunite.org/edit/files/Library%20%20reunite%20Publications/Effects%20Of%20Abduction%20Report.pdf.(visited 1/4/2014).

3 Smith, A.M., International Parental Child Abductions, 2014, http://www.fas.org/sgp/crs/misc/RS21261.pdf. (visited 1/4/2014).

4 Hart, B.J., Parental Abduction and Domestic Violence, Paper presented at the American Prosecutor Research Institute, Boston, Massachusetts, 1992,http://www.mincava.umn.edu/documents/hart/abduction/abduction.pdf. (visited 1/4/2014).

5 See also Article 10 of the Convention.

6 Schnitzer-Reese, E.A. (2004). International child abduction to non-Hague convention countries: the need for

For the Hague Convention to apply, the abducted child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights".7 Custody rights may arise (a) by operation of law or (b) by reason of a judicial or administrative decision or an agreement having legal effect under the law of the country of habitual residence. Most cases discussing whether petitioners have custody rights involve custody rights that arise by operation of law. In cases where the parties have an agreement or a judicial decree, courts usually hold that the issue of custody rights is undisputed.8

A major problem with the Hague Convention is that it is only applicable when the case involves the member countries. Non-member countries such as Malaysia and most Muslim countries are not bound by legal obligations enshrined in the Convention. The non-acceptance of the Hague Convention by these countries could be due to the perceived differences between Islamic law and other systems of law in resolving custody disputes, with the result that Muslim countries do not want to give up their right to determine what is in the child's best interest.9

Thus, in a case where one of the parents is a non-Muslim and the court awards custody to such a non-Muslim parent, it will be against the principles of Islamic law to allow the child to return to the non-Muslim Parents.10 Under Islamic law, a child is presumed to be a Muslim if either of his parents is a Muslim.11 That means allowing the child to go to the mother where she is a non-Muslim and is awarded custody means surrendering a Muslim and paving way for his becoming a non-Muslim. Due to this challenge and conflict with the Islamic principles, many Muslim states refused to cooperate in the return of a Muslim child to a non-Muslim custodian parent in another country.12

Other International Instruments have equally provided against child abduction. United Nation Convention on the Rights of the Child (herein after known as UNCRC), in force since 1989, also calls for action on child abduction. Under the UNCRC, contracting states must "take measures to combat the illicit transfer and non-return of children abroad" and to that end must "promote the conclusion of bilateral or multilateral agreements or accession to existing agreement".[13] The Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, in force since 1996, also contain provisions concerned with child abduction. In particular Article 7 preserves the jurisdiction of the contracting State of the child's habitual residence even if the child is not returned by the Contracting State to which the child has been wrongfully taken or retained. Article 35 strengthens the Contracting States' obligation to secure effective rights of access. Similarly, the European (or Luxembourg) Convention on Recognition and Enforcement of Decisions Concerning Custody of Children has the same objectives of locating children, securing their prompt return, and enforcing access rights by using the administrative mechanism of Central Authorities. In contrast to the Hague Convention, however, this Convention is concerned with the recognition and enforcement of court orders. Accordingly, in order to use this Convention, applicants must either already have or must obtain court orders that support their position. Member States to the European Convention are drawn from members of the Council of Europe and are therefore confined to that continent. Most of these Member States are also Contracting States to the Haque Convention.

While these additional instruments exist, experience shows that they bring little assistance to resolving child abduction cases. This is largely due to the fact that many signatory countries do not uniformly apply the international treaties.[14]

an international family court (2004), *Northwestern Journal of International Human Rights*, 2,1.

7 Kilpatrick, T. (2012). Litigating international child abduction cases under the Hague convention.

8 ibid

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13 Article 11 of UNCRC; see also Articles 35, 9 and 18.

14 Lowe, N. & Meyer, C. (1999). International forum on parental child abduction: Haque convention action

Parental Child Abduction under Islamic Law

The position of Islamic law is clear to the effect that abduction is a crime that is punishable by *ta'azir* (discretionary) punishment. Since the child is at the center of the issue of family abduction, Islamic law considers the interest of the child as the first factor for consideration before that of the parents. To that effect Islamic law states that the custody of the child should be placed under the mother. Custody under Islamic law is considered as the legal authority to have control of the child.[15] There is no specific verse of the Qur'an that discusses custody, however, the Muslim jurists deduce the legal principles (*hukm*) relating to custody by relying on the verse of surah al-Baqarah that provides for a breast feeding.[16] The mother is considered closer to the child and affection between them is very strong. In fact, Islam has always given preference to the mother when it comes to the issue of the relationship with the child.[17] Ibn Kathir opined that the mother is emotionally attached to the child because of the huge sacrifice she has done for the child to that extent, Islam puts her at a higher status in relation with the child.[18]

In terms of custody of the child, preference is always given to the mother as indicated in a tradition of the prophet Muhammad (PBUH) where he told a woman that she is entitled to the custody of the children so long as she does not remarry.[19] Where custody is granted to any of the parties by a court of law, it will amount to contempt of court for any of the parties to go against the court order and abduct the child.[20] Similarly, if in the process of the abduction of the child, injury or any form of harm is caused to the child, Islam will not allow the person responsible for such harm to go unpunished, rather punishment depending on the nature of the injury caused to the innocent child will be imposed on the wrong doer.[21]

Islam has guaranteed every child the right to family and abduction of a child is a means of denying a child of this important right.[22] Imam Qasimi, mentioned that Islam considers family as an important unit of our existence. It is therefore important to strive to maintain the unity of the family through mutual respect and understanding.[23]

The family is very important to the child hence, the glorious Qur'an in several places mentioned that children should obey their parents. In fact the Qur'an has even placed obedience to parents next to obedience to Allah SWT in several verses.[24]

The Organisation of Islamic Cooperation (OIC) has equally stated in Article 8 of the Covenant on the Rights of the Child that Islam guarantees every child the right to have a family and to stay peacefully with his family. The Covenant further stressed that the States Parties shall take into account in their social policies the child's best interests and if separation of the child with his family becomes necessary then the child must not be deprived from maintaining relationship with his family.[25] Certainly, the purpose of abduction is to cut the relationship between the child with the other parent and establish that same relationship with the other parent. Looking at the nature and illegality involved in abduction, it will be very unlikely for the abducting parent to want to retain or maintain the relationship between the child and the other parent and thereby becoming a contravention of the spirit of this covenant.

The Law in Malaysia

Malaysia is not a signatory country to the 1980 Hague Convention on Child Abduction due

agenda, national center for missing & exploited children.

15 Naimi, M.S., and Al-Hiyat, J., (2000).Takmilatu muajim al-arabiyatu, Vol. 8. Iraq: Wazaratu al-Thaqafatu al-Ilmiyyah.

16 Qur'an, *al-Baqarah*:233.

17 Qur'an Lukman:14.

18 Ibn Kathir, I. (1999). Tasfir qur'an al-azim, vol. 14. KSA: Daru Tayyibatu Linashri wal Tawzi.

19 Al Bahaiqi. (nd). Sunan al Kubra. Dakkan.

20 Rafiq, A. (2014). Child custody in classical Islamic law and laws of contemporary Muslim world: an analysis. *International Journal of Humanities and Social Science,* 4,5.

21 Audah Shaheed, A. Q. (2005). Criminal law of islam. New Delhi: Adam Publishers & Distributors

22 Qur'an, Nisa:1.

23 Al-Qasimi, M.J. (1957). Mahasinu al-ta'wil, Vol. 2. Egypt: Albaby Halaby.

24 For e.g, Qur'an, al-Nisa:36.

25 Article 8(3).

to some reservations on the provisions of the Convention particularly on the issue of the religion of the child in parental child abduction cases. Nonetheless, the law in Malaysia generally recognises child abduction as a crime and it is not in the best interest of the child. There are various laws that apply in Malaysia relating to children. Under the Family law, there are three major laws that regulate matters pertaining to guardianship and custody of children, namely, the Islamic Family Law (Federal Territories) Act, 1984 (IFLA, 1984) that governs the Muslims, the Law Reform (Marriage and Divorce) Act, 1976 (LRA, 1976) and Guardianship of Infant Act, 1961 (GIA, 1961) which applies to non-Muslims. Other laws which specifically deal with crime against children are Child Act, 2001 and Penal Code. These two laws apply to both Muslims and non-Muslims children.

Law of Custody in Malaysia

With respect to custody of children, best interest of the child is the governing principle under IFLA, 1984, LRA, 1976 and GIA, 1961. Section 86(2) of IFLA, 1984 and section 88(2) of LRA, 1976 similarly provide that the court, "in deciding in whose custody a child should be placed, shall give paramount consideration on the welfare of the child and shall have regards to the wishes of the parents and the wishes of the child, where he or she is of an age to express an independent opinion." While in GIA, 1961 section 11 provides that the court shall have regards primarily to the welfare of the child and the wishes of the child's parent or parents.

The principle of best interest of the child has been consistently applied in Malaysia as have demonstrated by the judicial pronouncements in many cases.[26] For instance, the Shariah court in *Wan Junaidah v Latiff* [1989] 8 JH 122 it was held that for the best interest of the children, the elder children should remain in the custody of the father while, the younger child should remain in the custody of the mother. The court further ordered both parents to arrange amicably as to appropriate visitation rights. In *Mohamed Radhi v Khadija* [1998] 8 JH 247 the court cautioned both parents to always maintain harmonious relationship after the divorce especially in relation to parent and child relationship. Thus, the right of access should be seen as a means to protect the interest of the child as well as the right of the both biological parents. This is to avoid a tug of war situation, as both parents are equally responsible for their children. Perhaps, the current approach of granting joint custody order would be more appropriate to encourage active participation of both parents for the betterment of their children.[27]

The Civil courts equally put the interest of the child higher than other matters.[28] In *Teh Eng Kim v. Yew Peng Siong* ([1977] 1 MLJ 234) the court stated that "As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim. Parental rights are overridden if they are in conflict with the welfare of the child." While in *Mahabir Prasad v. Mahabir Prasad [1981] 2 MLJ 326,* the court held that it was in the best interest of the children to live with their mother in India although prior to the decision, the parents had entered into an agreement that the children's custody to be given to the father.

In relation to parental child abduction, the principle of best interest of the child will be given weight of importance. However, the degree of the court's consideration on the principle in parental child abduction's case is not as higher as in the normal custody cases. The most prominent factor to be considered is that which forum has the most and real substantial connection to hear the case or *forum non conveniens*.[29] Such approach was taken by the judge in *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, Intervener)* [2006] 6 MLJ 372. The case involved an Australian couple who were in a custody dispute over their daughter. The husband had taken the daughter to

26 Suzana, M.S. & Suhor, S., (2012), International parental child abduction in Malaysia: foreign custody orders and related laws for incoming abductions. *Pertanika J. Soc. Sci. & Hum*. 20(s): 101 – 110.

27 Zin, N. M , 'How best interests of the child is best served in Islamic law with special reference to its application in the Malaysian Shariah court', 2005, Cited in http://www.refworld.org/pdfid/4b6fe2a80.pdf (visited 1/4/2014).

28 Malek, N.A. (2001). Factors determining welfare of the child in Malaysian civil law of custody: an analysis of decided cases. *JUUM,* 15, 171.

29 Suzana, M.S. & Suhor, S., (2012), International parental child abduction in Malaysia: foreign custody orders and related laws for incoming abductions. *Pertanika J. Soc. Sci. & Hum*. 20(s): 101 – 110.

Malaysia for holiday and did not return to Australia as scheduled. The wife applied to the Australian court for orders for the custody and return of the daughter. The husband subsequently filed and obtained an ex parte interim order of custody and guardianship of the daughter from the Malaysian court. The wife applied to set aside the interim order of the Malaysian court and *inter alia* for the delivery of the daughter to her in accordance with the Australian court's order. The orders sought were granted by the Malaysian court. In determining which forum is more appropriate for the best interest of the child, the court considered two factors, firstly, whether the child would be harmed if returned to Australia and secondly, whether Australia would apply the paramountacy of the child's welfare principle. Based on these considerations, the court's main concern was to ensure prompt return of the abducted child to the country with which the child was substantially connected, unless there was a compelling reason to the contrary.[30]

Being a non-member country to the 1980 Hague Convention on Child Abduction, the application of the doctrine of *forum non conveniens* in custody cases involving foreign nationals in Malaysia may assist the court in resolving the problems relating to child parental abduction as it is in line with the spirit of the Convention.

In addition, although IFLA, 1984 and LRA, 1976 do not directly provide for parental child abduction, both laws nevertheless make it an offence for the non-custodian parent to take a child who is in the lawful custody of the other parent outside Malaysia. The court may issue a restraining order upon the non-custodian parent from committing such action and non compliance of the order will render the said parent to be in contempt of court.[31] Therefore, any attempt to take out the child out of Malaysia without the consent of the custodian parent is unlawful. Accordingly, these provisions may assist the court in curbing parental child abduction within domestic context.

Some Other Related Provisions on Child Abduction in Malaysia

Other provisions on child abductions in Malaysia can be found in the Child Act, 2001(Act 611) and the Penal Code of Malaysia (Act 574). The Child Act, 2001 criminalizes the act of any parent or guardian in bringing or sending out the child without a proper consent from the lawful custodian of the child.[32] Section 52(2) of the said Act further provides that the person that committed such act to be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or both. It is to be noted that 'lawful custodian' under this section must have been conferred custody of the child by any written law or by the court's order be it civil or *Shariah* court.[33] Hence, the existence of the court's order on the custody of the child is the condition of the offence. Without the court's order, the parents are generally treated by the law as having equal rights over the child of which they are able to freely exercise their rights including to travel with the child anywhere within or outside Malaysia.[34]

The provisions of the Penal Code mainly concern with kidnapping of children. Under the Penal Code, the offence of kidnapping is of two kinds, kidnapping from Malaysia[35] and from lawful guardianship.[36] The two provisions of the Penal Code nevertheless do not specify parent as the kidnapper. The act of kidnapping may be done by anybody and as such the punishment for the offence committed in either situation is similar. This is clearly mentioned in section 363 where it states that; **"**Whoever kidnaps any person from Malaysia or from lawful guardianship shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

Sub-section two to section 48 of the Child Act, 2001 equally prescribes a punishment of ten thousand ringgit fine or imprisonment for a term not exceeding five years or both imprisonment and

30 Suzana, M.S & Suhor, S. (2009). The law review. Malaysia: Thomson Reuters, Sweet & Maxwell, Asia.

31 Section 105 of the IFLA, 1984 & Section 101 of the LRA, 1976.

32 section 52(1).

33 section 52(3).

34 Mad Salleh, A.S. (2015). Parental Child Abduction in Malaysia: Is Everything Right With Our Domestic Laws? *IIUMLJ, 23(2), 247-265.*

35 section 360.

36 section 361.

fine for any person who harbours or unlawfully takes possession of a child or transfers a child for a valuable consideration. A defence to the charges relating to child abduction under section 48 includes transfer taking place in contemplation of or pursuant to a *bona fide* marriage or adoption; and at least one of the natural parents of the child or the guardian of the child was a consenting party to the marriage or to the adoption by the adopting party, and had expressly consented to the particular marriage or adoption.

Mediation as an Effective Means to Resolve Parental Child Abduction

Parental child abduction cases arise out of a variety of circumstances and typically they involve social, cultural and religious clashes. This is clearly evident when it involves parents who are of different religions and nationalities. The situation becomes even more complicated when the child is abducted across international borders. This is due to the fact that the countries and parties involved are not of the same cultural and social mores and applying different legal systems. More often than not, this clash of cultural, religious and legal norms is always resulted in a failure to resolve the issue of international parental child abduction.[37] Despite having the 1980 Hague Abduction Convention, the resolution of the problem under the Convention still seems far from satisfactory. The problem is deteriorated when the child is abducted to the countries which are not yet member to the Abduction Convention in which case the return remedy under the Convention is not applicable and thus the process to return the child to his country of habitual residence will become more complex.

Looking to the seriousness of the problem and the rise in the number of parental child abduction incidents around the world, many research have been done on the topic and few solutions have been proposed in order to resolve the problem such as diplomatic and legislative intervention through bilateral treaties,[38] the implementation of legislative measures,[39]judicial conference,[40]re-abduction,[41] utilization of the United Nation's Convention on the Rights of the Child (UNCRC), and the establishment of the International Family Court.[42]Among all the proposed solutions, alternative dispute resolution (ADR) methods, particularly mediation may be considered to be the most productive way to resolve the issue of parental child abduction. Through mediation, parties may be able to resolve their dispute amicably without having to go through the court process which is more costly and time consuming. In addition, research shows that mediation plays an important role in reducing litigation and increasing parties' satisfaction in resolution of disputes.[43]

The definition of the term mediation is mentioned in the Guide to Good Practice under the Hague Convention of October 25th, 1980 on the Civil Aspects of International Child Abduction for Mediation. The Permanent Bureau of the Hague recognizes that the best interests of the child are likely to best be served if an amicable solution can be achieved. It is recognised that steps to achieve a resolution should start as soon as possible and it depends on the individual country whether to commence such steps before or during court proceedings.

What is Mediation?

37 See Ericka A. Schnitzer Reese, International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court, 2 *Nw. U. J. Int'l Hum. Rts*. 1, 3(2004).

38 Ibid.,11.

39 Ibid., 12; See Michael R. Walsh and Susan W. Savard, International Child Abduction and the Hague Convention, 6 *Barry L. Rev*. 29, 47 (2006).

40 Ibid., 47.

41 Ibid.,13; Debbie S. L. Ong, Parental Child Abduction in Singapore: The Experience of a Non-Convention Country, 21 *Int'l J.L. Pol'y& Fam*. 220, 239 (2007).

42 Reese, International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court, 13-14.

43 Forrest S. Mosten, Mediation Makes Sense How to Prevent an International Crisis, 15 *Fam. Advoc*. 44 (1992-1993).

Mediation is a process to facilitate disputing parties with the assistance of a third party that acts as a mediator in their dispute.[44] In mediation, this third party has no power to impose a settlement on the parties, who retain authority for making their own decision. He also must not have any competing interests in the case.[45] In order to help the parties negotiate a resolution of their dispute by agreement, the mediator uses certain procedures, techniques and skills. Mediation is different from other types of dispute resolution in the sense that in mediation, the parties are helped to work out their own decisions and arrangements. They are encouraged to take independent legal advice before entering into an agreement which may be legally binding.

Why Mediation

Mediation has several advantages over litigation. In respect of the international parental child abduction cases, mediation offers more options to the parties in the sense that it allows the parties to reach agreements in a broader range of issues relating to a child such as deals related to the right of access, schedule of visits for the non-resident parent, education, financial support and travels.[46] In other words, through mediation, parents can make an agreement on custodial details of their child and this is apparently outside the scope of the Hague litigation which only addresses the issue of the child's return and not the custody. Furthermore, the outcomes of the Hague litigation is unpredictable as there is uncertainty and irregularity in the application of the Abduction Convention and consequently, it renders Hague litigation more complicated, expensive and time consuming".[47]Compared to the process of litigationwhich can take several months or years to complete, the mediation process can be arranged within a shorter period of time.It may take weeks or even days to complete the mediation session.[48] For this reason, mediation is very much known for its ability to facilitate an expeditious dispute resolution. This is consistent with the objective of preserving the best interest of the child because in child abduction cases, the longer period that it takes to resolve the case, the more harm and negative effects that it would have on the respective child.

Another concrete advantage of employing mediation in international parental child abduction cases is to avoid "a wide range of criminal, civil and economic penalties"[49] that may be imposed on the abducting parent as a result of the Hague litigation. In this sense, mediation can be helpful in encouraging the parties to reach to an amicable settlement and at the same time discourage the left-behind parent from instituting further legal action.In addition, a settlement reached by the parties through mediation would render the exceptions or defenses under the Hague Abduction Convention inapplicable.[50] Finally, mediation also can be an effective tool in bringing about agreed solutions in family disputes particularly in child abduction cases and thus retaining a good relationship between the parties. The parties of the mediation"are far more likely to comply with the terms of their settlement"[51] since they themselves workout on the terms of the agreement.As a result, it will

44 Haynes, John, M, *The Fundamentals of Family Mediation*, State University of New York Press, Albany, 1994, at 1

45 Roberts, M, *Mediation in Family Disputes: Principles of Practice*, Ashgate publishing Company, 1997, at 4

46 Nuria Gonzalez Martin, International Parental Child Abduction and Mediation: An Overview, 48 *Fam. Law Quarterly*, 2, 321 (2014).

47 Ibid.; See also Jennifer Zawid, Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators, 40 *U. Miami Inter-Am. L. Rev*. 20 (2008-2009).

48 In the United Kingdom, based on the pilot mediation program held by Reunite International (a non-governmental organization) in 2006, it was found that the face-to-face mediation sessions took place in approximately two days with a maximum of three hours per dayconducted by two independent mediators. SeeMartin, International Parental Child Abduction and Mediation: An Overview, 325.

49 Martin,International Parental Child Abduction and Mediation: An Overview, 321; Zawid,Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators, 28.

50 Martin, International Parental Child Abduction and Mediation: An Overview, 322. If any of the exceptions provided in the 1980 Hague Abduction Convention were applicable, the return of the child must be denied for the purpose of protecting the child's best interest.

51 Timothy Arcaro, Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction, 40 *U. Miami Inter-Am. L. Rev*. 109, 127 (2008).

ensure that the welfare of the child is secured and enable the child to enjoy his/her life in a stable environment by having continued communication with both parents.

Mediation has been long recognized as one of the useful tool under the ADR methods. Despite the recognition given to mediation as a useful mechanism in resolving various domestic family disputes, it has not been widely used in international parental child abduction cases.[52]In relation to the Hague Convention, the promotion of mediation as a useful mechanism in resolving family conflict in particular international parental child abduction cases can be found in Guide to Good Practice on Mediation and the work of the Working Party on Mediation in the Context of the Malta Process.[53]

A. *Guide to Good Practice on Mediation*

Mediation under this Guide to Good Practice[54] is defined as a "voluntary, structured process whereby a 'mediator' facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict."[55] This Guide is primarily prepared to promote good practices in mediation and other methods of amicable dispute resolution relating to children which falls within the scope of the 1980 Hague Abduction Convention. The Guide gives a general overview of the benefits and the risks of using mediation in international family disputes. It also explores the challenges in adopting mediation such as different cultural and religious background as well as language difficulties. In the process of mediating international parental child abduction cases, the mediator needs to take into consideration not only two parents but two countries which may adopt different culture, religion and legal systems and this clashes can create complexities for the mediator.[56] Thus, in order to safeguard its quality the Guide also deals with the issue of specific training for mediation. More importantly, the Guide provides for the flow of mediation process from questions of access to mediation to its outcome and legal effects. Finally, there is discussion on the use of mediation to prevent child abductions and special issues on its use in non-Convention cases.

The usefulness of the mediation in international family disputes in particular the case of child abduction has been illustrated in the Guide of the Good Practice in the following situations:

a.In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

b. Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.

c. In the course of Hague return proceedings, mediation may be used to establish a less conflictive framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.

d. Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.

52 Zawid, Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators,, 11.

53 Paula Shulman, Brazil's Legacy of International Parental Child Abduction: Mediation under the Hague Abduction Convention as a Solution, 16 *Cardozo J. Conflict Resol*. 237, 253 (2014-2015).

54 Guide to Good Practice under the Hague Convention of October 25th, 1980 on the Civil Aspects of International Child Abduction, Mediation (2012), *available at*http://ec.europa.eu/justice/civil/files/mediation_en.pdf

55 Ibid.

56 Melissa A. Kucinski, The Delicate Art of Mediating International Parental Child Abduction Cases, 20 *Disp. Resol. Mag.*, 18, 19 (2013-2014).

e. At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction."[57]

B. *The Working Party on Mediation in the Context of the Malta Process*

The Working Party on Mediation in the context of the Malta Process was established to promote the development of mediation structures in resolving cross-border disputes relating to custody of or contact with children, which involve State Parties to the 1980 Hague Child Abduction Convention, as well as non-State Parties.[58]With the assistance of the Permanent Bureau of the Hague Conference, the Working Party which comprises of twelve States[59]had drawn up a list of principles for the establishment of effective mediation structures in the participating States.[60]

The "Principles" provides for a designation of a Central Contact Point which acts as a facilitator to provide all information relating to mediation to parents who are seeking access to mediation and this include relevant legal information. It also highlights on the importance of having the mediated agreement binding before its implementation. This is to ensure that the agreement would be enforceable by all the legal systems concerned. In addition, there is also a need to have close co-operation with the legal representatives of the parties. The "Principles" prepared by the Working Party may be considered as a complete notes on mediation structures since it compiles every basic things on mediation such as details of information that need to be supplied to the respected parties, characteristics of mediators, elements of mediations process and information on rendering the mediated agreement binding and enforceable in the countries concerned.

In summary, mediation can be an effective mechanism to resolve parental child abduction cases when it is conducted in an appropriate and ethical manner. Compared to domestic mediation process, mediating international cases specifically cases of parental child abduction are full of challenges and complexities since there are various factors such as distance, clashes of cultural, religious and legal systems as well as languages which may complicate a mediation process. Despite all challenges and barriers, the usefulness and advantages of mediation are undeniable and therefore, there is a need to promote mediation as an alternative solution to the traditional judicial resolution of disputes.

Conclusion

Parental child abduction is largely caused by the pressing desire to have the custody of the child by the non-custodian parent. Where the legal means of obtaining custody fails or is not feasible, illegal means of obtaining custody such as abduction is usually adopted. The child who is at the centre of this action suffers psychologically due to the sudden separation from his immediate environment. Educationally, the child is affected due to the change in school. In some occasions due to the attempt to avoid tracing of the child, the child may end up denied the right to education completely. Where the abduction is carried out in a violent way, physical injury could be inflicted on the innocent child. The international instruments on child protection consider abduction as a form of infringement on the right of the child. In addition to several other deprivations, abduction amounts to the denial of the right of the child to family which is guaranteed under international instruments. As a dispute resolution process mediation is not appropriate for every dispute. It is not the panacea for all illnesses

57 Guide to Good Practice, 20.

58 The 'Principles For The Establishment Of Mediation Structures In The Context Of The Malta Process' And The Explanatory Memorandum(2011), *available at*https://assets.hcch.net/docs/30dc5a61-b930-460f-a10d-0ad13fd-b8ad6.pdf

59 The member States in the Working Party were: Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. A small number of independent mediation experts were also invited to join the Working Party.

60 Working Party On Mediation In The Context Of The Malta Process, Principles For The Establishment Of Mediation Structures In The Context Of The Malta Process (2010) (the "Principles"), *available at*https://assets.hcch.net/docs/c96c1e3d-5335-4133-ad66-6f821917326d.pdf

and in respect of child abduction disputes under the Hague Convention in some quarters mediation may be seen as an anathema to the process. Mediation may be suited to certain types of dispute and then there are disputes which must be referred to court. Thus, it is important to be able to indentify in the case of parental child abduction dispute whether it is best resolved by means of mediation process.

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Preferences of Dispute Resolution Mechanisms in Islamic Financial Services Industry in Malaysia: A Case Study of Retail Customers

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Abstract

The groundbreaking reforms in the legal and regulatory framework for Islamic financial services industry in Malaysia open a new phase in the modern history of this market. The financial ombudsman scheme (FOS) is applied by the Ombudsman of Financial Services (OFS) and resembles the classical muhtasib model in Islamic law. Earlier on, the i-Arbitration Rules (Revised 2013) was introduced by the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Focusing in making Malaysia as the global dispute resolution hub for Islamic financial services, this research investigates the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving disputes with their Islamic banks. While employing aqualitative legal approach on the availabilityof dispute resolution mechanisms for Islamic financial services in Malaysia, it is found that Shariah Advisory Council of Bank Negara (SAC) has an essential role as an expert body for reference in disputes involving Islamic financial services. Such reference to SAC is significant in ensuring the Shariah-compliance nature in the disputes of Islamic financial services. A collaborative bridge between the SAC and the institutions that offer dispute resolution mechanism must be built and maintained at all time.

Keywords: *Islamic financial services, dispute resolution, retail customers, Shariah Advisory Council*

1. Introduction

The progressive development of Islamic financial services industry (IFSI) in Malaysia is made possible with the continuous supports and interests from the stakeholders. Closely related to the Islamic financial services providers, one of the important stakeholders of IFSI is the retail customers. By referring to the Basel Committee on Banking Supervision,[1] there is no specific definition provided for the term "retail customer". However, based on the normal banking practice, a customer is treated as a retail customer when the said customer is not an institution or professional investor. According to Mohd.Zain,[2]the retail customer are those individuals who have banking contracts with the

1 Basel Committee on Banking Supervision, "The Joint Forum Customer Suitability in Retail Sale of Financial Products and Services (April 2008)," Bank for International Settlement (Switzerland), < http://www.bis.org/publ/joint20.pdf> (accessed 9th February, 2015).

2 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

Islamic financial services providers.They are allowed to partake with the retail banking services such as by depositing or withdrawing money from their bank accounts on a daily basis. Such retail banking services can be obtained either through: (i) the Islamic financial services providers' counters; or (ii) their online banking services, or (iii) the Islamic financial services providers' automated teller machines (ATM).[3] However, the channels for the retail banking services are not exhaustive and subject to the services provided by the Islamic financial services providers.

The supports and interests of the retail customers towards their Islamic financial services providers are essential to be maintained at all time. This is necessary to avoid them from changing their Islamic financial services providers and to terminate their banking contracts. As observed by Mohd. Zain,[4] the retail customers of the Islamic financial services providers in Malaysia are huge in number and have high value of deposits in total. This is crucial for the continuing growth of the Islamic financial services providers. Moreover, it is found that without depending on their religious orientation, the *SharÊ'ah*-compliant and asset-backed structure continue to attract the retail customers to participate in the retail banking services that are offered by the Islamic financial services providers. Such trend is directly or indirectly important for continuing growth of the IFSI in Malaysia. With such continuing growth of IFSI in Malaysia, the increase of Islamic finance services disputes (IFSD) inevitably impossible to be avoided.[5]

Focusing in making Malaysia as the global dispute resolution hub for IFSD, this research is done: (i) to evaluate the availability of the dispute resolution mechanisms for IFSI in Malaysia by employingqualitative legal approach; (i) to investigate the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers; and (iii) to evaluate the role of Shariah Advisory Council of Bank Negara (SAC) as an expert body for reference of IFSD conducted in any of the institutions that offer alternative dispute resolution mechanisms (ADR) in Malaysia's IFSI.

The presentation of this research is organised as follows. After the introductory section, the second section presentsthe evaluation on the availability of the dispute resolution mechanisms for IFSI in Malaysia. The third section discusses the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers. The fourth section provides the discussion on the essentiality of the SAC as an expert body for reference of IFSD conducted in any of the institutions that offer ADR in Malaysian legal framework. The fifth section provides the recommendations from the researchers in promoting ADR among the retail customers of the Islamic financial services providers in Malaysia. The sixth section is the final section that provides the conclusion of the research.

2. Availability of Dispute Resolution Mechanisms for IFSI in Malaysia

As identified by Mohd. Zain[6] and Engku Ali et. al.,[7] the Malaysian dispute resolution legal landscape for IFSD is not uniformed, but remains flexible and versatile. While the litigation is

3 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

4 Ibid.

5 Ibid.;Markom, Ruzian&Yaakub, Noor Inayah. (2012). Litigation as Dispute Resolution Mechanism in Islamic Finance: Malaysian Experience. European Journal of Law and Economics, 1-20.

6 Mohd.Zain, Nor RazinahBintiet. al. (2013).Utilizing ADR in Islamic Banking and Finance Industry: A Maqasid-Based Paradigm. Paper presented at International Seminar on UsulFiqh(I-Sufi 2013) on 23rd – 24th October 2013 at Universiti Sains Islam Malaysia (USIM), Nilai, Negeri Sembilan, Malaysia.
(Unpublished).

7 EngkuRabiahAdawiahEngku Ali, Umar A. Oseni, AdewaleAbideen Adeyemi and NorRazinahMohd. Zain, "Dispute resolution mechanisms in the Islamic finance industry in Malaysia: towards a legal framework", AlShajarah: Journal of the International Institute of Islamic Thought and Civilization (ISTAC), Special Issue of Islamic Banking and Finance, (2015):
19-40. ISSN 1394-6870.

suggested to be set as the last resort for IFSD,[8] the Shariah compliance of dispute resolution should be maintained at all time. This is necessary to secure the sanctity of Islamic finance contracts concluded between the Islamic financial services providers and their retail customers.

Under the Malaysian dispute resolution legal landscape; there are several institutions that provide dispute resolution or ADR for IFSI. Such institutions are:

(i) Malaysian judiciary, with reference to Muamalat court:Muamalat Court is a special Commercial Division 4 of High Court of Malaya, which was established in 2003, at Jalan Duta, Kuala Lumpur.[9] It was established through the Practice Direction No. 1 of 2003 which was issued by the Chief Justice Dato' HaidarMohd. Nor (as he then was) and came into force since 1st of March 2003. The code of 22A is used for any IFSD as registered before the courts.[10] It was established as a proactive step made by the Malaysian judiciary in facing IFSD and began its operation in February 2009.Litigation process is used as the main dispute resolution process.

(ii) Kuala Lumpur Court Mediation Centre (KLCMC): is a court-annexed mediation forum established pursuant to Practice Direction No.5/2010. The cases are brought to KLCMC through referrals made by the sitting judges, after they identify the issues under dispute between the parties during the case management or hearing. Based on the suitability of the issues, the judges may suggest or encourage mediation to the parties. If the parties agree, they have to enter into an agreement by filling in Form 1 of the Practice Direction. The mediation process will be conducted in accordance to the manners as accepted by the parties. The parties have option whether to continue their mediation process with the judge-led mediation or other mediation forum and they also have rights to refuse settlement through mediation. The referral to KLCMC can be done by the sitting judge within one month and settlement shall be achieved within 3 months. The process of mediation is completely done in private and confidential manners. The KLCMC has a high standing with judge-led mediation or other mediators who are high qualified. Under the new Rules of Court 2012, the mediation process is referred to under Order 34 Rule 2 (2), which is in accordance with the Practice Direction No.5/2010 (now, it is replaced with Practice Direction No.4/2016). The Mediation Act 2012 is not applicable to KLCMC. Their main dispute resolution process is mediation. They also appreciate conciliation and reconciliation as dispute resolution processes when such processes are necessary.

(iii) Kuala Lumpur Regional Centre of Arbitration (KLRCA): offers two main processes of dispute resolution, which are (i) arbitration and (ii) mediation (which is interchangeable with conciliation). The arbitration process can be further divided into (a) normal process of arbitration and (b) fast-track arbitration. The major difference between these two arbitration processes is based on the disposal period of arbitration process, with 160 fixed days for the fast track arbitration process. The main references are: (a) Arbitration Act 2005 (Act 646) (Amended 2011) which is supported by KLRCA Arbitration Rules (Revised 2013),[11] KLRCA Fast Track Arbitration Rules 2013,[12] and KLRCA i-Arbitration Rules (Revised 2013); (b) Mediation Act 2012 (Act 749) which is supported by KLRCA Conciliation/Mediation Rules (Revised 2013) that incorporate provisions from UNCITRAL Conciliation Rules 1980. In relation to IFSD, the KLRCA i-Arbitration Rules (Revised 2013) is referred to. This is based on the practice in KLRCA where reference is made to the said

8 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

9 Rusni Hassan, "Championing..., 1-16; "Dispute Resolution and Insolvency in Islamic Finance..., (accessed 1st September, 2014).

10 Muamalat cases are now registered under Code 22M for IFSD cases originated with writ of summons, and the code of 24M is used for the IFSD cases originated from originating summons. This is based on Practice Direction No.4 of 2013 which superseded the previous Practice Direction No.1 of 2003 and Practice Direction No.1 of 2008.

11 It is applicable for normal arbitration processes. The said Rules are adopted from UNCITRAL Arbitration Rules 2010 (replaced the UNCITRAL Rules 1976).

12 It is applicable for fast track arbitration process. It is "The KLRCA Fast Track Arbitration Rules are designed for parties who wish to obtain an award in the fastest way with minimal costs. The Rules provide that arbitration (with a substantive oral hearing) must be completed within a maximum of 160 days and tried before a sole arbitrator (unless parties prefer a larger panel). The Rules also caps the tribunal's fees and recoverable costs to a fixed scale. Other attractive features also include tighter obligations for disclosure so as to avoid surprises and controlled usage of expert evidence to ensure that the parties and tribunal are focused only on specific issues", as explained by the KLRCA Fast Track Arbitration Booklet, (Kuala Lumpur: KLRCA, 2013).

rules and not to the other available rules in resolving IFSD.

(iv) Ombudsman for Financial Services (OFS): is introduced pursuant to section 138 of Islamic Financial Services Act 2013. The said section outlines the upgraded Islamic Financial Ombudsman Scheme in resolving IFSD. The relevant regulation of OFS was coming into force in June 2016 and known as Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015.[13]The regulation is made as an effort by the Central Bank of Malaysia to upgrade dispute resolution arrangements for customers and customer protection mechanism.[14]Their main dispute resolution processes are mediation and adjudication.

(v) Malaysian Mediation Centre (MMC): is the only dispute resolution centre established and managed by a society of lawyers in Malaysia. Since 1999, the MMC is a known dispute resolution forum which promotes mediation as an ADR process to provide an avenue for resolutions of disputes. The management and administration of MMC is located at Kuala Lumpur, Malaysia at the same building with the Malaysian Bar. Their main dispute resolution process is mediation.

3. Preferences of Dispute Resolution Mechanisms among Malaysian Retail Customers in Resolving IFSD with Their Islamic Financial Services Providers

For the purpose of investigating the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers, the researchers employed the use of questionnaires to the targeted respondents. The respondents are considered qualified for the investigation when they are retail customers who concluded Islamic banking contracts with the Islamic financial services providers. They must also fulfill the definition of "retail customers" as given in previous section.

They were asked to answer two main questions. Question 1 is developed to evaluate whether the respondents know and aware about the independent institutions that offer ADR services for IFSI in Malaysia, namely the OFS, KLRCA and MMC. Question 2 is developed to evaluate the respondents' preferences in resolving IFSD with their Islamic financial services providers. The answers for Question 2 are in multiple choice formats where the respondents can select any of their preferred dispute resolution mechanisms available for IFSI in Malaysia. The listed dispute resolution mechanisms are:

(i) Dispute resolution with the Islamic financial services providers;

(ii) Dispute resolution through court process or litigation;

(iii) Dispute resolution through OFS;

(iv) Dispute resolution through KLRCA;

(v) Dispute resolution through MMC.

A thousand of survey questionnaires are distributed to the retail customers. Out of the total questionnaires, 205 completed questionnaires were collected. This is done either promptly or through online services. The response rate is considered low with 20.5 per cent. The responses were low due to the reluctance of the respondents to disclose their financial status which they considered as sensitive information. Based on statistical normality requirement where n>50,15 the collected responses of 205

13 At the same time, the Financial Service (Financial Ombudsman Scheme) is introduced through Financial Service (Financial Ombudsman Scheme) Regulation 2015. See "FOS Regulations," OFS, < http://www.ofs.org.my/en/fos_regulations> (accessed 12th June, 2016).

14 Nor RazinahBintiMohd.Zain and EngkuRabiahAdawiahEngku Ali, "The Introduction of the Financial Ombudsman Scheme as an Alternative to Dispute Resolution in the Islamic Financial Services Industry in Malaysia", Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilisation (ISTAC), Special Issue of IIIBF, (2016): 243.

15 Andrew Mayers,*Introduction to Statistics and SPSS in Psychology*, (Pearson, 2013), 28.

are enough to be used as a sample to measure the preferences of retail customers in resolving IFSD with their Islamic financial services providers.

Based on the respondents' demographic information, they are 61 per cent females and 39 per cent males. Their ages are between below 20 to 60 years old. Their educations ranged between PMR to post-doctorate. 68.3 per cent of respondents are Malays and the rests are from other races. It is found that majority of the respondents are Muslims. The respondents come from variety of backgrounds with income between below RM3000 to RM20,000. This indicates that the retail customers of the Islamic financial services in Malaysia are not specifically came from a specific class of people or race. The retail customers that use the retail banking services from the Islamic financial services providers in Malaysia are multi-racial and multi-religious customers.

3.1 Findings of Question 1

The evaluation of the answers from the respondents is done by using univariate descriptive statistical analysis. It is found that there is less familiarity among the respondents in relation to the independent institutions that offer ADR processes for IFSI in Malaysia. In a matter of their familiarity, the OFS (previously known as FMB) is ranked in the first place. MMC is ranked in the second place and KLRCA is ranked in the third place. Such less familiarity of the respondents towards the independent institutions that offer ADR processes is believed to be contributed by the nature of the disputes that the said institutions handled and the suitability of the dispute resolution processes offered.

Table 1: Descriptive Statistics of Question 1

Item	N	Min	Max	Mean	SD
I know and aware about Ombudsman for Financial Services.	205	1	5	2.60	0.933
I know and aware about Kuala Lumpur Regional Centre for Arbitration (KLRCA).	205	1	5	2.48	0.911
I know and aware about Malaysian Mediation Centre under Malaysian Bar.	205	1	5	2.56	0.972

3.2 Findings of Question 2

From the responses, it is interesting to note that only 5.4 per cent of the respondents wanted to resolve their dispute with their Islamic financial services providers through court process or litigation. This indicates that court process or litigation is less preferred by the retail customers in resolving IFSD. Reaching to 57.6 per cent, it is found that the respondents preferred to resolve IFSD directly with their Islamic financial services providers.

In relation to dispute resolution with the independent institutions that offer ADR processes, 20.5 per cent of respondents chose to resolve their IFSD with the OFS. While, 12.7 per cent of respondents preferred to refer their IFSD with KLRCA. 8.3 per cent of the respondents chose to resolve their IFSD with MMC. Again, this is believed due to the nature of the disputes that the said institutions handled and the suitability of the dispute resolution processes offered.

Even with the available dispute resolution channels for IFSI in Malaysia, it is found that 65.4 per cent of respondents were still not sure where they can resolve their IFSD with their Islamic financial services providers. Such finding indicates that there is low awareness among the retail customers concerning to the dispute resolution channels that they can refer to in facing IFSD with their Islamic financial services providers.

Table 2: Descriptive Statistics of Question 2

Methods to resolve dispute	Answers	Numbers (N=250)	Percentage (%)
I will go and settle the dispute with the Islamic bank.	Yes	118	57.6
	No	87	42.4
I will go and sue the Islamic bank through litigation or adjudication through court process.	Yes	11	5.4
	No	194	94.6
I will go and make a complaint to Financial Mediation Bureau (FMB)	Yes	42	20.5
	No	163	79.5
I will go and refer to Kuala Lumpur Regional Centre for Arbitration (KLRCA)	Yes	26	12.7
	No	179	87.3
I will go and refer to Malaysian Mediation Centre under Malaysian Bar.	Yes	17	8.3
	No	188	91.7
Not sure	Yes	71	65.4
	No	134	34.6

4. SAC as an Expert Body for Reference of IFSD

Unlike other jurisdictions, Malaysia has high potential in providing *Sharīʿah*-compliant resolution of IFSD. With proper structure of Muamalat Court, flexible legal framework in relation to ADR processes and concrete appreciation of *Sharīʿah* through promulgation of specific Federal laws such as IFSA 2013,*Sharīʿah*-compliant resolution of IFSD can be achieved and secured. Moreover, according to Mohamad and Trakic,[16] Malaysia does not have problems as faced byother jurisdiction in resolving IFSD because a reference can be made to SAC for guidance on *Sharīʿah* matters.In addition, Malaysia has a wide range of dispute resolution mechanisms that parties can choose from.

Since their establishment in May 1997, the SAC retains the position as the highest Shariah authority in Islamic financial services in Malaysia. SAC is authorised in determining the Shariah compliance of the Islamic finance, Islamic banking and takaful or any other business that derived its existence from Shariah principles. Under section 57 of the Central Bank of Malaysia Act 2009, the civil courts are bound to follow any ruling made by the Shariah Advisory Council when references are made by the courts themselves for such ruling. According to Moharani and Mustaffa,[17] since then, the Shariah Advisory Council plays an important role as the main reference to the civil courts in resolving*Sharīʿah* issues in IFSD. Kunhibava is of the opinion that the Shariah Advisory Council can act as expert witness before the court proceedings.[18]

Moreover, the resolutions of SAC are binding upon the arbitrators. Such initiative is necessary to ensure *Sharīʿah*-compliant resolution, regardless of the background of the arbitrators or parties themselves. This is evident in the "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia under Section 51 and Section 56 of the Central Bank of Malaysia Act 2009".[19]

16 Abdul Hamid Mohamad and Adnan Trakic, "Enforceability..., 1-34.

17 SitiNurulAzieraMoharani and AminuddinMustaffa, "Role of the Shariah Advisory Council (SAC) in Dispute Resolution Process: Perspective on Recent Case Development", *Malayan Law Journal,* vol. 6, (2012): lxxxvii.

18 SherinKunhibava, "Ensuring Shariah Compliance at the Courts and the Role of the Shariah Advisory Council in Malaysia", Malayan Law Journal, vol.3, (2015): xxi.

19 The "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Ma-

The mediation process provided by OFS in relation to IFSD is subjected to section 56 and 57 of CBMA 2009 and other relevant guidelines or directives given by the Central Bank of Malaysia, such as "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia under Section 51 and Section 56 of the CBMA 2009".[20] Even though, the term 'mediation' or FMB is not mentioned in the provisions of CBMA 2009, they are still applicable to OFS due CBMA's status as a statute of general application.[21]

5. Recommendations in Promoting ADR among the Retail Customers of the Islamic Financial Services Providers in Malaysia

In promoting ADR among the retail customers of the Islamic financial services providers in Malaysia, it is necessary to have:

(i) A continuous bridging effort between the SAC and the institutions that offer the ADR processes in resolving IFSD must be created. This can be done by making a reference to the SAC in the disputed issues of IFSD. The resolution by the SAC for the mediation or arbitration process is suggested to be recorded and published to the public without undermining the confidentiality of the parties involved.

(ii) A continuous campaign in promoting the institutions that offer the ADR processes in resolving IFSD is suggested to be carried out, especially among the retail customers that are living outside Kuala Lumpur.

(iii) By having a preference among the retail customers to resolve their disputes with their Islamic financial services providers, it is suggested for the Islamic financial services providers in Malaysia to structure an internal dispute resolution mechanism within their system. This can be done by making a policy or guideline on dispute resolution. It can be considered as a part of good practice in customer services. In a situation where the dispute cannot be resolved, the Islamic financial services providers can direct their retail customers to the appropriate dispute resolution channel, while placing the litigation as the last resort.

(iv) A continuous bridging effort should also be carried out between the institutions that offer ADR processes with the Islamic financial services providers. This can be treated as a strategy in promoting ADR processes to the retail customers by the institutions, while searching for a better dispute avoidance policy by the Islamicfinancial services providers.

(v) The success of IFSD resolutions by the institutions that offer ADR processes should be recorded and shared to the public. This is necessary to increase the public awareness. Moreover, the performances of the said institutions can be properly measured by having a credible statistical data of success. An exemplary practice can be learnt such as done by OFS that provides annual reports of their success. However, it is necessary to place a separate record of data between the conventional banking disputes and IFSD.

6. Conclusion

In the transaction of financial and banking services, dispute may happen between the Islamic financial services and their customers, especially their retail customers. As a part of good customer services, it is necessary for the Islamic financial services providers to at least inform their customers

laysia under Section 51 and Section 56 of the Central Bank of Malaysia Act 2009" is received from Assc. Prof. Dr. Umar A. Oseni.

20 As collected from Assc. Prof. Dr.Umar A. Oseni who obtained it from the Central Bank of Malaysia.

21 Mr. Jeremy Lee, during the Educational and Research Visit to FMB, as organized by the Postgraduate Students' Society in collaboration with the Postgraduate Office of Ahmad Ibrahim Kulliyyah of Laws. June 25, 2013.

the availability of dispute resolution mechanisms in resolving IFSD. Without undermining the litigation process, other dispute resolution processes should be appreciated by the involved parties in resolving IFSD.

Moreover, the important role of SAC must not be dismissed but appreciated. This is necessary in ensuringSharīʿah-compliant resolution for IFSD, while protecting the sanctity of Islamic finance contracts.

By evaluating the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers, it is proven that the respondents are less inclined to resolve their IFSD through litigation or court process. They are more inclined to resolve their IFSD with their Islamic financial services providers directly.

Continuous campaigns are important for the independent institutions that offer ADR processes to promote their institutions and their services to the IFSI stakeholders, especially the retail customers.

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Preferences of Dispute Resolution Mechanisms in Islamic Financial Services Industry in Malaysia: A Case Study of Retail Customers

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Abstract

The groundbreaking reforms in the legal and regulatory framework for Islamic financial services industry in Malaysia open a new phase in the modern history of this market. The financial ombudsman scheme (FOS) is applied by the Ombudsman of Financial Services (OFS) and resembles the classical muhtasib model in Islamic law. Earlier on, the i-Arbitration Rules (Revised 2013) was introduced by the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Focusing in making Malaysia as the global dispute resolution hub for Islamic financial services, this research investigates the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving disputes with their Islamic banks. While employing aqualitative legal approach on the availabilityof dispute resolution mechanisms for Islamic financial services in Malaysia, it is found that Shariah Advisory Council of Bank Negara (SAC) has an essential role as an expert body for reference in disputes involving Islamic financial services. Such reference to SAC is significant in ensuring the Shariah-compliance nature in the disputes of Islamic financial services. A collaborative bridge between the SAC and the institutions that offer dispute resolution mechanism must be built and maintained at all time.

Keywords: *Islamic financial services, dispute resolution, retail customers, Shariah Advisory Council*

1. Introduction

The progressive development of Islamic financial services industry (IFSI) in Malaysia is made possible with the continuous supports and interests from the stakeholders. Closely related to the Islamic financial services providers, one of the important stakeholders of IFSI is the retail customers. By referring to the Basel Committee on Banking Supervision,[1] there is no specific definition provided for the term "retail customer". However, based on the normal banking practice, a customer is treated as a retail customer when the said customer is not an institution or professional investor. According to Mohd.Zain,[2]the retail customer are those individuals who have banking contracts with the Islamic

1 Basel Committee on Banking Supervision, "The Joint Forum Customer Suitability in Retail Sale of Financial Products and Services (April 2008)," Bank for International Settlement (Switzerland), < http://www.bis.org/publ/joint20.pdf> (accessed 9th February, 2015).

2 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

financial services providers.They are allowed to partake with the retail banking services such as by depositing or withdrawing money from their bank accounts on a daily basis. Such retail banking services can be obtained either through: (i) the Islamic financial services providers' counters; or (ii) their online banking services, or (iii) the Islamic financial services providers' automated teller machines (ATM).[3] However, the channels for the retail banking services are not exhaustive and subject to the services provided by the Islamic financial services providers.

The supports and interests of the retail customers towards their Islamic financial services providers are essential to be maintained at all time. This is necessary to avoid them from changing their Islamic financial services providers and to terminate their banking contracts. As observed by Mohd. Zain,[4] the retail customers of the Islamic financial services providers in Malaysia are huge in number and have high value of deposits in total. This is crucial for the continuing growth of the Islamic financial services providers. Moreover, it is found that without depending on their religious orientation, the *SharÊ'ah*-compliant and asset-backed structure continue to attract the retail customers to participate in the retail banking services that are offered by the Islamic financial services providers. Such trend is directly or indirectly important for continuing growth of the IFSI in Malaysia. With such continuing growth of IFSI in Malaysia, the increase of Islamic finance services disputes (IFSD) inevitably impossible to be avoided.[5]

Focusing in making Malaysia as the global dispute resolution hub for IFSD, this research is done: (i) to evaluate the availability of the dispute resolution mechanisms for IFSI in Malaysia by employingqualitative legal approach; (i) to investigate the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers; and (iii) to evaluate the role of Shariah Advisory Council of Bank Negara (SAC) as an expert body for reference of IFSD conducted in any of the institutions that offer alternative dispute resolution mechanisms (ADR) in Malaysia's IFSI.

The presentation of this research is organised as follows. After the introductory section, the second section presentsthe evaluation on the availability of the dispute resolution mechanisms for IFSI in Malaysia. The third section discusses the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers. The fourth section provides the discussion on the essentiality of the SAC as an expert body for reference of IFSD conducted in any of the institutions that offer ADR in Malaysian legal framework. The fifth section provides the recommendations from the researchers in promoting ADR among the retail customers of the Islamic financial services providers in Malaysia. The sixth section is the final section that provides the conclusion of the research.

2. Availability of Dispute Resolution Mechanisms for IFSI in Malaysia

As identified by Mohd. Zain[6] and Engku Ali et. al.,[7] the Malaysian dispute resolution legal landscape for IFSD is not uniformed, but remains flexible and versatile. While the litigation is

3 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

4 Ibid.

5 Ibid.;Markom, Ruzian&Yaakub, Noor Inayah. (2012). Litigation as Dispute Resolution Mechanism in Islamic Finance: Malaysian Experience. *European Journal of Law and Economics,* 1-20.

6 Mohd.Zain, Nor RazinahBintiet. al. (2013).Utilizing ADR in Islamic Banking and Finance Industry: A *Maqasid*-Based Paradigm. Paper presented at International Seminar on *UsulFiqh*(I-Sufi 2013) on 23rd – 24th October 2013 at Universiti Sains Islam Malaysia (USIM), Nilai, Negeri Sembilan, Malaysia. (Unpublished).

7 EngkuRabiahAdawiahEngku Ali, Umar A. Oseni, AdewaleAbideen Adeyemi and NorRazinahMohd. Zain, "Dispute resolution mechanisms in the Islamic finance industry in Malaysia: towards a legal framework", *AlShajarah: Journal of the International Institute of Islamic Thought and Civilization* (ISTAC), Special Issue of Islamic Banking and Finance, (2015): 19-40. ISSN 1394-6870.

suggested to be set as the last resort for IFSD,[8] the Shariah compliance of dispute resolution should be maintained at all time. This is necessary to secure the sanctity of Islamic finance contracts concluded between the Islamic financial services providers and their retail customers.

Under the Malaysian dispute resolution legal landscape; there are several institutions that provide dispute resolution or ADR for IFSI. Such institutions are:

(i) Malaysian judiciary, with reference to Muamalat court:Muamalat Court is a special Commercial Division 4 of High Court of Malaya, which was established in 2003, at Jalan Duta, Kuala Lumpur.[9] It was established through the Practice Direction No. 1 of 2003 which was issued by the Chief Justice Dato' HaidarMohd. Nor (as he then was) and came into force since 1st of March 2003. The code of 22A is used for any IFSD as registered before the courts.[10] It was established as a proactive step made by the Malaysian judiciary in facing IFSD and began its operation in February 2009.Litigation process is used as the main dispute resolution process.

(ii) Kuala Lumpur Court Mediation Centre (KLCMC): is a court-annexed mediation forum established pursuant to Practice Direction No.5/2010. The cases are brought to KLCMC through referrals made by the sitting judges, after they identify the issues under dispute between the parties during the case management or hearing. Based on the suitability of the issues, the judges may suggest or encourage mediation to the parties. If the parties agree, they have to enter into an agreement by filling in Form 1 of the Practice Direction. The mediation process will be conducted in accordance to the manners as accepted by the parties. The parties have option whether to continue their mediation process with the judge-led mediation or other mediation forum and they also have rights to refuse settlement through mediation. The referral to KLCMC can be done by the sitting judge within one month and settlement shall be achieved within 3 months. The process of mediation is completely done in private and confidential manners. The KLCMC has a high standing with judge-led mediation or other mediators who are high qualified. Under the new Rules of Court 2012, the mediation process is referred to under Order 34 Rule 2 (2), which is in accordance with the Practice Direction No.5/2010 (now, it is replaced with Practice Direction No.4/2016). The Mediation Act 2012 is not applicable to KLCMC.[11] Their main dispute resolution process is mediation. They also appreciate conciliation and reconciliation as dispute resolution processes when such processes are necessary.[12]

(iii) Kuala Lumpur Regional Centre of Arbitration (KLRCA): offers two main processes of dispute resolution, which are (i) arbitration and (ii) mediation (which is interchangeable with conciliation). The arbitration process can be further divided into (a) normal process of arbitration and (b) fast-track arbitration. The major difference between these two arbitration processes is based on the disposal period of arbitration process, with 160 fixed days for the fast track arbitration process. The main references are: (a) Arbitration Act 2005 (Act 646) (Amended 2011) which is supported by KLRCA Arbitration Rules (Revised 2013),[13] KLRCA Fast Track Arbitration Rules 2013,[14] and KLRCA i-Arbitration Rules (Revised 2013); (b) Mediation

8 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

9 Rusni Hassan, "Championing…, 1-16; "Dispute Resolution and Insolvency in Islamic Finance…, (accessed 1st September, 2014).

10 Muamalat cases are now registered under Code 22M for IFSD cases originated with writ of summons, and the code of 24M is used for the IFSD cases originated from originating summons. This is based on Practice Direction No.4 of 2013 which superseded the previous Practice Direction No.1 of 2003 and Practice Direction No.1 of 2008.

11 Section 2 of Mediation Act 2012.

12 Nor RazinahBintiMohd.Zain and Prof. EngkuRabiahAdawiahEngku Ali, "Mediation for Islamic Financial Services Disputes (IFSD): A Reference to Malaysian Court-Annexed Mediation Process", (a paper presented at 4th ASEAN International Conference on Islamic Finance, Melaka, Malaysia, 6-8 December 2016). (Unpublished).

13 It is applicable for normal arbitration processes. The said Rules are adopted from UNCITRAL Arbitration Rules 2010 (replaced the UNCITRAL Rules 1976).

14 It is applicable for fast track arbitration process. It is "The KLRCA Fast Track Arbitration Rules are designed for parties who wish to obtain an award in the fastest way with minimal costs. The Rules provide that arbitration (with a substantive oral hearing) must be completed within a maximum of 160 days and tried before

Act 2012 (Act 749) which is supported by KLRCA Conciliation/Mediation Rules (Revised 2013) that incorporate provisions from UNCITRAL Conciliation Rules 1980. In relation to IFSD, the KLRCA i-Arbitration Rules (Revised 2013) is referred to. This is based on the practice in KLRCA where reference is made to the said rules and not to the other available rules in resolving IFSD.

(iv) Ombudsman for Financial Services (OFS): is introduced pursuant to section 138 of Islamic Financial Services Act 2013. The said section outlines the upgraded Islamic Financial Ombudsman Scheme in resolving IFSD. The relevant regulation of OFS was coming into force in June 2016 and known as Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015.[15]The regulation is made as an effort by the Central Bank of Malaysia to upgrade dispute resolution arrangements for customers and customer protection mechanism.[16]Their main dispute resolution processes are mediation and adjudication.

(v) Malaysian Mediation Centre (MMC): is the only dispute resolution centre established and managed by a society of lawyers in Malaysia. Since 1999, the MMC is a known dispute resolution forum which promotes mediation as an ADR process to provide an avenue for resolutions of disputes. The management and administration of MMC is located at Kuala Lumpur, Malaysia at the same building with the Malaysian Bar. Their main dispute resolution process is mediation.

3. Preferences of Dispute Resolution Mechanisms among Malaysian Retail Customers in Resolving IFSD with Their Islamic Financial Services Providers

For the purpose of investigating the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers, the researchers employed the use of questionnaires to the targeted respondents. The respondents are considered qualified for the investigation when they are retail customers who concluded Islamic banking contracts with the Islamic financial services providers. They must also fulfill the definition of "retail customers" as given in previous section.

They were asked to answer two main questions. Question 1 is developed to evaluate whether the respondents know and aware about the independent institutions that offer ADR services for IFSI in Malaysia, namely the OFS, KLRCA and MMC. Question 2 is developed to evaluate the respondents' preferences in resolving IFSD with their Islamic financial services providers. The answers for Question 2 are in multiple choice formats where the respondents can select any of their preferred dispute resolution mechanisms available for IFSI in Malaysia. The listed dispute resolution mechanisms are:

(i) Dispute resolution with the Islamic financial services providers;

(ii) Dispute resolution through court process or litigation;

(iii) Dispute resolution through OFS;

(iv) Dispute resolution through KLRCA;

(v) Dispute resolution through MMC.

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a sole arbitrator (unless parties prefer a larger panel). The Rules also caps the tribunal's fees and recoverable costs to a fixed scale. Other attractive features also include tighter obligations for disclosure so as to avoid surprises and controlled usage of expert evidence to ensure that the parties and tribunal are focused only on specific issues", as explained by the *KLRCA Fast Track Arbitration Booklet*, (Kuala Lumpur: KLRCA, 2013).

15 At the same time, the Financial Service (Financial Ombudsman Scheme) is introduced through Financial Service (Financial Ombudsman Scheme) Regulation 2015. See "FOS Regulations," OFS, < http://www.ofs.org.my/en/fos_regulations> (accessed 12th June, 2016).

16 Nor RazinahBintiMohd.Zain and EngkuRabiahAdawiahEngku Ali, "The Introduction of the Financial Ombudsman Scheme as an Alternative to Dispute Resolution in the Islamic Financial Services Industry in Malaysia", Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilisation (ISTAC), Special Issue of IIIBF, (2016): 243.

A thousand of survey questionnaires are distributed to the retail customers. Out of the total questionnaires, 205 completed questionnaires were collected. This is done either promptly or through online services. The response rate is considered low with 20.5 per cent. The responses were low due to the reluctance of the respondents to disclose their financial status which they considered as sensitive information. Based on statistical normality requirement where n>50,[17] the collected responses of 205 are enough to be used as a sample to measure the preferences of retail customers in resolving IFSD with their Islamic financial services providers.

Based on the respondents' demographic information, they are 61 per cent females and 39 per cent males. Their ages are between below 20 to 60 years old. Their educations ranged between PMR to post-doctorate. 68.3 per cent of respondents are Malays and the rests are from other races. It is found that majority of the respondents are Muslims. The respondents come from variety of backgrounds with income between below RM3000 to RM20,000. This indicates that the retail customers of the Islamic financial services in Malaysia are not specifically came from a specific class of people or race. The retail customers that use the retail banking services from the Islamic financial services providers in Malaysia are multi-racial and multi-religious customers.

3.1 Findings of Question 1

The evaluation of the answers from the respondents is done by using univariate descriptive statistical analysis. It is found that there is less familiarity among the respondents in relation to the independent institutions that offer ADR processes for IFSI in Malaysia. In a matter of their familiarity, the OFS (previously known as FMB) is ranked in the first place. MMC is ranked in the second place and KLRCA is ranked in the third place. Such less familiarity of the respondents towards the independent institutions that offer ADR processes is believed to be contributed by the nature of the disputes that the said institutions handled and the suitability of the dispute resolution processes offered.

Table 1: Descriptive Statistics of Question 1

Item	N	Min	Max	Mean	SD
I know and aware about Ombudsman for Financial Services.	205	1	5	2.60	0.933
I know and aware about Kuala Lumpur Regional Centre for Arbitration (KLRCA).	205	1	5	2.48	0.911
I know and aware about Malaysian Mediation Centre under Malaysian Bar.	205	1	5	2.56	0.972

3.2 Findings of Question 2

From the responses, it is interesting to note that only 5.4 per cent of the respondents wanted to resolve their dispute with their Islamic financial services providers through court process or litigation. This indicates that court process or litigation is less preferred by the retail customers in resolving IFSD. Reaching to 57.6 per cent, it is found that the respondents preferred to resolve IFSD directly with their Islamic financial services providers.

In relation to dispute resolution with the independent institutions that offer ADR processes, 20.5 per cent of respondents chose to resolve their IFSD with the OFS. While, 12.7 per cent of respondents preferred to refer their IFSD with KLRCA. 8.3 per cent of the respondents chose to resolve their IFSD with MMC. Again, this is believed due to the nature of the disputes that the said institutions handled and the suitability of the dispute resolution processes offered.

17 Andrew Mayers,*Introduction to Statistics and SPSS in Psychology*, (Pearson, 2013), 28.

Even with the available dispute resolution channels for IFSI in Malaysia, it is found that 65.4 per cent of respondents were still not sure where they can resolve their IFSD with their Islamic financial services providers. Such finding indicates that there is low awareness among the retail customers concerning to the dispute resolution channels that they can refer to in facing IFSD with their Islamic financial services providers.

Table 2: Descriptive Statistics of Question 2

Methods to resolve dispute	Answers	Numbers (N=250)	Percentage (%)
I will go and settle the dispute with the Islamic bank.	Yes	118	57.6
	No	87	42.4
I will go and sue the Islamic bank through litigation or adjudication through court process.	Yes	11	5.4
	No	194	94.6
I will go and make a complaint to Financial Mediation Bureau (FMB)	Yes	42	20.5
	No	163	79.5
I will go and refer to Kuala Lumpur Regional Centre for Arbitration (KLRCA)	Yes	26	12.7
	No	179	87.3
I will go and refer to Malaysian Mediation Centre under Malaysian Bar.	Yes	17	8.3
	No	188	91.7
Not sure	Yes	71	65.4
	No	134	34.6

4. SAC as an Expert Body for Reference of IFSD

Unlike other jurisdictions, Malaysia has high potential in providing *Sharīʿah*-compliant resolution of IFSD. With proper structure of Muamalat Court, flexible legal framework in relation to ADR processes and concrete appreciation of *Sharīʿah* through promulgation of specific Federal laws such as IFSA 2013,*Sharīʿah*-compliant resolution of IFSD can be achieved and secured. Moreover, according to Mohamad and Trakic,[18] Malaysia does not have problems as faced by other jurisdiction in resolving IFSD because a reference can be made to SAC for guidance on *Sharīʿah* matters.In addition, Malaysia has a wide range of dispute resolution mechanisms that parties can choose from.

Since their establishment in May 1997, the SAC retains the position as the highest Shariah authority in Islamic financial services in Malaysia. SAC is authorised in determining the Shariah compliance of the Islamic finance, Islamic banking and takaful or any other business that derived its existence from Shariah principles. Under section 57 of the Central Bank of Malaysia Act 2009, the civil courts are bound to follow any ruling made by the Shariah Advisory Council when references are made by the courts themselves for such ruling. According to Moharani and Mustaffa,[19] since then, the Shariah Advisory Council plays an important role as the main reference to the civil courts in resolving*Sharīʿah* issues in IFSD. Kunhibava is of the opinion that the Shariah Advisory Council can act as expert witness before the court proceedings.[20]

18 Abdul Hamid Mohamad and Adnan Trakic, "Enforceability…, 1-34.

19 SitiNurulAzieraMoharani and AminuddinMustaffa, "Role of the Shariah Advisory Council (SAC) in Dispute Resolution Process: Perspective on Recent Case Development", *Malayan Law Journal,* vol. 6, (2012): lxxxvii.

20 SherinKunhibava, "Ensuring Shariah Compliance at the Courts and the Role of the Shariah Advisory Council in Malaysia", Malayan Law Journal, vol.3, (2015): xxi.

Moreover, the resolutions of SAC are binding upon the arbitrators. Such initiative is necessary to ensure *Sharīʿah*-compliant resolution, regardless of the background of the arbitrators or parties themselves. This is evident in the "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia under Section 51 and Section 56 of the Central Bank of Malaysia Act 2009".[21]

The mediation process provided by OFS in relation to IFSD is subjected to section 56 and 57 of CBMA 2009 and other relevant guidelines or directives given by the Central Bank of Malaysia, such as "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia under Section 51 and Section 56 of the CBMA 2009".[22] Even though, the term 'mediation' or FMB is not mentioned in the provisions of CBMA 2009, they are still applicable to OFS due CBMA's status as a statute of general application.[23]

5. Recommendations in Promoting ADR among the Retail Customers of the Islamic Financial Services Providers in Malaysia

In promoting ADR among the retail customers of the Islamic financial services providers in Malaysia, it is necessary to have:

(i) A continuous bridging effort between the SAC and the institutions that offer the ADR processes in resolving IFSD must be created. This can be done by making a reference to the SAC in the disputed issues of IFSD. The resolution by the SAC for the mediation or arbitration process is suggested to be recorded and published to the public without undermining the confidentiality of the parties involved.

(ii) A continuous campaign in promoting the institutions that offer the ADR processes in resolving IFSD is suggested to be carried out, especially among the retail customers that are living outside Kuala Lumpur.

(iii) By having a preference among the retail customers to resolve their disputes with their Islamic financial services providers, it is suggested for the Islamic financial services providers in Malaysia to structure an internal dispute resolution mechanism within their system. This can be done by making a policy or guideline on dispute resolution. It can be considered as a part of good practice in customer services. In a situation where the dispute cannot be resolved, the Islamic financial services providers can direct their retail customers to the appropriate dispute resolution channel, while placing the litigation as the last resort.

(iv) A continuous bridging effort should also be carried out between the institutions that offer ADR processes with the Islamic financial services providers. This can be treated as a strategy in promoting ADR processes to the retail customers by the institutions, while searching for a better dispute avoidance policy by the Islamicfinancial services providers.

(v) The success of IFSD resolutions by the institutions that offer ADR processes should be recorded and shared to the public. This is necessary to increase the public awareness. Moreover, the performances of the said institutions can be properly measured by having a credible statistical data of success. An exemplary practice can be learnt such as done by OFS that provides annual reports of their success. However, it is necessary to place a separate record of data between the conventional banking disputes and IFSD.

6. Conclusion

In the transaction of financial and banking services, dispute may happen between the Islamic

21 The "Reference Manual for Courts and Arbitrators to the Shariah Advisory Council of Bank Negara Malaysia under Section 51 and Section 56 of the Central Bank of Malaysia Act 2009" is received from Assc. Prof. Dr. Umar A. Oseni.

22 As collected from Assc. Prof. Dr.Umar A. Oseni who obtained it from the Central Bank of Malaysia.

23 Mr. Jeremy Lee, during the Educational and Research Visit to FMB, as organized by the Postgraduate Students' Society in collaboration with the Postgraduate Office of Ahmad Ibrahim Kulliyyah of Laws. June 25, 2013.

financial services and their customers, especially their retail customers. As a part of good customer services, it is necessary for the Islamic financial services providers to at least inform their customers the availability of dispute resolution mechanisms in resolving IFSD. Without undermining the litigation process, other dispute resolution processes should be appreciated by the involved parties in resolving IFSD.

Moreover, the important role of SAC must not be dismissed but appreciated. This is necessary in ensuring*Sharīʿah*-compliant resolution for IFSD, while protecting the sanctity of Islamic finance contracts.

By evaluating the preferences of dispute resolution mechanisms among Malaysian retail customers in resolving IFSD with their Islamic financial services providers, it is proven that the respondents are less inclined to resolve their IFSD through litigation or court process. They are more inclined to resolve their IFSD with their Islamic financial services providers directly.

Continuous campaigns are important for the independent institutions that offer ADR processes to promote their institutions and their services to the IFSI stakeholders, especially the retail customers.

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Preferences of Dispute Resolution Mechanisms in Islamic Financial Services Industry in Malaysia: A Case Study of Corporate Customers

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Abstract

Focusing on the preferences of dispute resolution mechanisms as available to the Islamic financial services industry in Malaysia, this empirical legal study examines the trend among the corporate customers in resolving their disputes with the Islamic financial services providers. From the earlier researches, there is an indication that litigation may be used as a default mode in resolving disputes. Such indication may not reflect the preferences of dispute resolution mechanisms among the corporate customers in resolving disputes with their Islamic banks. By utilizing the responses as received from 145 corporate customers through a mixed methods approach, it is found that the litigation is the last choice of dispute resolution mechanism selected by the corporate customers in resolving disputes with their Islamic banks. Such findings reflect on the tendency of the corporate customers to refer to existing alternative dispute resolution mechanisms available for Islamic financial services industry in Malaysia.

Keywords: *Islamic Financial Services, Dispute Resolution, ADR, Litigation, and Corporate customers.*

1. Introduction

In pioneering the advancement of Islamic financial services industry locally and globally, the high competitions between the Islamic financial services providers in Malaysia persuade for overcoming any existence of dispute (especially legal dispute). A prolonged dispute may consume a lot of cost, time and cause adverse impacts to their names. Such reputational risks are necessary to be avoided. If not, their performances as credible Islamic financial services providers may be prejudiced in front of their customers or investors. According to Olayini,[1] it is important for the financial services providers (including the Islamic financial services providers) to understand their customers' needs and concerns in ensuring their loyalty towards their banking and financial services. Due to such position, the Islamic financial services providers must consider all the possible measures or strategies in order to attract potential customers and satisfy the existing customers. This is necessary to conquer larger population of customers, market and revenue, as well as to win the competition between the financial services providers either Islamic or conventional.

Dispute avoidance strategy through the appreciation of dispute resolution mechanisms should be considered as a mean to avoid Islamic financial services disputes or IFSD altogether or at least to

1 AbdelghaniEchchabiOladokunNafiuOlaniyi, (2012),"Malaysian consumers' preferences for Islamic banking attributes", International Journal of Social Economics, Vol. 39 Iss 11 pp. 859 - 874

shorten the time or cost taken. Opposite to the litigation which must be conducted in an open court, other dispute resolution mechanisms are high with confidentiality and privacy. This can overcome the reputational risks from happening to the Islamic financial services providers and also to their customers'. While positioning Malaysia to be the global hub for dispute resolution in the realm of Islamic financial services industry, a trend needs to be developed among the researchers, practitioners, regulators and those institutions that offer the dispute resolution mechanisms to maintain the need to have a Shariah-compliant resolution to IFSD and to maintain the sanctity of the Islamic finance contracts as they are. This is necessary to avoid any jeopardy happens to the concluded contracts. In addition, it is necessary to prevent any referral to other laws in resolution of IFSD made by the disputing parties just for sake of escaping themselves from fulfilling their obligations stipulated in the Islamic finance contracts.

By having such orientation, it is prudent to have a brief recap in viewing the historical development of Islamic financial services in Malaysia. The earlier trace of Islamic financial services in Malaysia is rooted back to the needs of Muslims in keeping their savings for holy pilgrimage or Hajj to Mekah. Previously, Muslims in Malaysia used several means in keeping their savings which sometimes not very secured.[2] According to Mokhtaret. al., such needs of Muslims lead to the establishment of Tabung Haji in 1963.[3] The triggering point for the establishment of Islamic banking in Malaysia also received influences from the experiments that were carried out in the Middle East,[4] such as the MitGhamr Bank in Egypt.

Subsequently, in 1980, a request was issued through the Bumiputera Economic Congress to the Malaysian Government. Such request is for the establishment of an Islamic bank in Malaysia. In the following year of 1981, the National Steering Committee was founded to evaluate the said request and to research the suitability of such bank's establishment from different scopes,[5] especially from Malaysian legal framework. As found by the elected National Steering Committee, it is viable to establish an Islamic bank in Malaysian legal framework. Bank Islam Malaysia Berhad (BIMB) becomes the first full-fledged Islamic bank in Malaysia through Islamic Bank Act 1984 or IBA. BIMB progresses well and it is rapidly expanding throughout Malaysia.[6] Such expansion of BIMB will not be successful without the strong supports from Muslims and acceptances from non-Muslims.

Such positive situation leads the Malaysian government to progressively expand the Islamic financial services industry (IFSI). The regulators legislated other important Acts to enhance the development of IFSI such as by having the Development Financial Institutions Act 2002. In May 1997, the Shariah Advisory Council of the Central Bank of Malaysia (SAC) was established as the highest authoritative body for ascertainment of Shariah compliance in the Islamic financial services business and any other related financial business that based on the Shariah principles. Their roles are further enhanced through the Central Bank of Malaysia Act 2009. The SAC can be referred by the Malaysian courts as an expert opinion in resolving any Shariah related issues in the financial services

cases. Malaysia reached another milestone through the legislations of Islamic Financial Services Act 2013 (IFSA) andFinancial Services Act 2013 (FSA). The duality of banking system in Malaysia is affirmed by having the said two separate Acts.

Malaysia continues to be referred to as a best practice model of Islamic financial services for other countries. This is proven by the numbers of delegates that were willing to come to the Central of Malaysia to learn about the Islamic financial services and its implementation in Malaysia.[7] In relation

2 Laldin, M.A. (2008), "Islamic financial system: the Malaysian experience and the way forward", Humanomics, Vol. 24 No. 3, pp. 217-38.

3 Mokhtar, H.S.A., Abdullah, N. and Alhabshi, S.M. (2008), "Efficiency and competition of Islamic banking in Malaysia", Humanomics, Vol. 24 No. 1, pp. 28-48.

4 Sufian, F. (2007), "The efficiency of Islamic banking industry in Malaysia, foreign vs domestic banks", Humanomics, Vol. 23 No. 3, pp. 174-92.

5 AbdelghaniEchchabiOladokunNafiuOlaniyi, (2012),"Malaysian consumers' preferences for Islamic banking attributes", International Journal of Social Economics, Vol. 39 Iss 11 pp. 859 - 874

6 Laldin, M.A. (2008), "Islamic financial system: the Malaysian experience and the way forward", Humanomics, Vol. 24 No. 3, pp. 217-38.

7 Mokhtar, H.S.A., Abdullah, N. and Alhabshi, S.M. (2008), "Efficiency and competition of Islamic banking in Malaysia", Humanomics, Vol. 24 No. 1, pp. 28-48.

to dispute resolution mechanism, Malaysia is the first country that established a special branch court to deal with the Islamic financial dispute cases. The special branch court is known as Muamalat court. Moreover, a referral can be made by the mediator or arbitrator to the SACin ensuring the Shariah compliance nature of the resolution achieved for the Islamic financial services disputes or IFSD. Such efforts are done to confirm the enforcement of the Islamic finance contracts concluded between the Islamic financial services providers and their customers are 100 per cent in accordance to the recognised laws of Malaysia and in conformity with the Shariah elements. Currently, according to Sufian[8] andOlayini,[9] the Islamic financial services providers have variety and comprehensive Islamic financial products and services which include current, saving and investment products. These said financial products are offered to customers, either retail or corporate customers.

Focusing in making Malaysia as the global dispute resolution hub for IFSD, this research is set: (i) to evaluate the availableprevious researches which have done in valuing the preference, perception and behavior of the customers (especially the corporate customers) in relation to their Islamic financial services providers. (ii) to investigate the preferences of dispute resolution mechanisms among corporate customers in Malaysia for resolving IFSD with their Islamic financial services providers; and (iii) to evaluate the importance of such corporate customers' preferences of dispute resolution mechanisms in facing IFSD.

The organisation of this research is presented as follows. After the introductory section, the second section presents the evaluation on the available previous researchesin valuing the preference, perception and behavior of the customers (especially the corporate customers) in relation to their Islamic financial services providers. The third section deliberates the methodology in investigating thepreferences of dispute resolution mechanisms among corporate customers in Malaysia for resolving IFSD with their Islamic financial services providers. The fourth section provides the discussion on the findings of the preferences of dispute resolution mechanisms among corporate customers in Malaysia for resolving IFSD with their Islamic financial services providers. Additionally, the importance of such corporate customers' preferences of dispute resolution mechanisms in facing IFSD is also provided. The fifth section provides the recommendations from the researchers in promoting ADR among the corporate customers in Malaysia. The sixth section is the final section that provides the conclusion of the research.

2. Literature Review

The preferences, perceptions and behaviors of the customers in relation to their financial services providers are frequently researched by the academicians, researchers, bankers and practitioners. Such researches are necessary to understand the pattern or trend of the customers in selecting or choosing the services offered by the financial services providers, regardless Islamic or conventional. By understanding theirpreferences, perceptions and behaviors, the Islamic financial services providers can upgrade themselves in attracting the potential customers and maintaining royalty of the existing customers. In relation to the preferences of dispute resolution mechanisms among the corporate customers in Malaysia for resolving IFSD, their preferences are essential to know especially to understand their trend. If their preferences incline towards litigation, we can say that corporate customers in Malaysia are conscious about their legal rights. Whereby, the Islamic financial services providers must be very certain about their Islamic finance contracts and banking services.

8 Sufian, F. (2007), "The efficiency of Islamic banking industry in Malaysia, foreign vs domestic banks", Humanomics, Vol. 23 No. 3, pp. 174-92.

9 AbdelghaniEchchabiOladokunNafiuOlaniyi, (2012),"Malaysian consumers' preferences for Islamic banking attributes", International Journal of Social Economics, Vol. 39 Iss 11 pp. 859 - 874

Researches such as done by Amin and Isa,[10] and Ta and Har[11] successfully reveal that the customers' preferences are important for the financial services providers in considering their products' pricing and variety of product services. Such factors are closely related to the customers' decisions to choose the services of the financial services institutions. Such findings are also similar with other researches such as carried out by Kennington et al. in 1996,[12] Gait and Worthington in 2008,[13]and Abdjalil et al. in 2010[14]. From a research done by Haque et al.,[15] it is found that the perceptions of the customers towards the Islamic financial services providers are related positively with theirquality of services, availability of services, social perspective and confidence. The results indicated that the perceptions of customers are positive as long as they considered their Islamic financial services providers are trustworthy in term of services and reliability. Similar findings are found through researches as done byHaron et al.,[16]Edris and Almahmeed,[17]Frimpong,[18]Metwally,[19]Erol et al.,[20] and Liang and Wang[21].

Religiosity of the customers is also one of the important factors that may influence theirpreferences, perceptions and behaviors towards the Islamic financial services providers. This is a unique element that is less considered by the conventional financial services providers. Many previous

10 Amin, M. and Isa, Z. (2008), "An examination of the relationship between service quality perception and customer satisfaction, a SEM approach towards Malaysian Islamic banking", International Journal of Islamic and Middle Eastern Finance and Management, Vol. 1 No. 3, pp. 191-209.

11 Ta, H. and Har, K. (2000), "A study of bank selection decisions in Singapore using the analytical hierarchy process", International Journal of Bank Marketing, Vol. 18 No. 4, pp. 170-80.

12 Kennington, C., Hill, J. and Rakowska, A. (1996), "Consumer selection criteria for banks in Poland", International Journal of Bank Marketing, Vol. 14 No. 4, pp. 12-21.

13 Gait, A. and Worthington, A. (2008), "An empirical survey of individual customer, business firm and financial institution attitudes towards Islamic methods of finance", International Journal of Social Economics, Vol. 35 No. 11, pp. 783-808.

14 Abdjalil, M., Yusoff, R. and Mahmud, R. (2010), "Selection factors of customers towards Islamic dan conventional home financing products offered by Malayan banking Berhad: a case study in Johor", paper presented in the International Conference on Business and Economics, Andalas University, Padang, Indonesia.

15 Haque, A., Osman, J. and Ismail, A. (2009), "Factor influences selection of Islamic banking: a study on Malaysian customer preferences", American Journal of Applied Sciences, Vol. 6 No. 5, pp. 922-8.

16 Haron, S., Ahmad, N. and Planisek, S. (1994), "Bank patronage factors of Muslim and non-Muslim customers", International Journal of Bank Marketing, Vol. 12 No. 1, pp. 32-40

17 Edris, T. and Almahmeed, M. (1997), "Services considered important to business customers and determinants of bank selection in Kuwait: a segmentation analysis", International Journal of Bank Marketing, Vol. 15 No. 4, pp. 126-33.

18 Frimpong, N. (1999), "Patronage behaviour of Ghanaian bank customers", International Journal of Bank Marketing, Vol. 28 No. 2, pp. 150-65.

19 Metwally, M. (1996), "Attitudes of Muslims towards Islamic banks in a dual-banking system", American Journal of Islamic Finance, No. 6, pp. 11-17

20 Erol, C., Kaynak, E. and El-Bdour, R. (2007), "Conventional and Islamic banks: patronage behaviour of Jordanian customers", International Journal of Bank Marketing, Vol. 8 No. 4, pp. 25-35.

21 Liang, C. and Wang, W. (2007), "An insight into the impact of a retailer's relationship efforts on customers' attitudes and behavioural intentions", International Journal of Bank Marketing, Vol. 25 No. 5, pp. 336-66.

researcnd it as essential such as by Okumus,[22]Naser et al.,[23]Metawa and Almossawi,[24] and Metwally[25]. In some other earlier researches, religiosity of the customers is less influential in theirpreferences, perceptions and behaviors towards the Islamic financial services providers. This means the religiosity of the customers tend to increase in the latter years of the development of Islamic financial services providers. This is found through works done by Erol and El-Bdour in 1989,[26]Haron et al,[27] and Ahmad and Haron[28].In relation to the preferences of dispute resolution mechanisms among the corporate customers in Malaysia for resolving IFSD, the element of religiosity is not one of influential element that motivates them to go for ADR.[29] The corporate customers are found to be more concerned about the reduction of time, cost and confidentiality of the dispute resolution processes.[30] However, similar with the findings found by Ahmad and Haron,[31]Mohd. Zain[32] found that the religiosity of the corporate customers is influential for choosing the Islamic financial services providers in Malaysia. This is more inclined to happen among the local based corporate customers. According toDusuki and Abdullah,[33] they found that the customers tend to consider the Islamic financial services providers from the aspects of Islamic, financial reputation, and the quality of services offered. Different from the Muslim customers, according to Haron et al.,the non-Muslim customers' preferences, perceptions and behaviors towards the Islamic financial services providers are more economical in nature.[34] They are more incline to look for better banking services, prolonged benefitsand securities.

In relation to the corporate customers, they are those legal persons that have rights and duties as recognized under the Malaysian laws, incorporated under the Company Act of 1965 and have contractual relationship with any of Islamic financial services providers as established in Malaysia.[35] Apart from the normal Islamic consumer banking services, such as, bank deposits, the corporate customers are eligible to benefit from the corporate banking or also known as business banking and investment banking services as offered by the Islamic financial services providers. Such services

22 Okumus,, S,.H. (2005), "Interest free banking in Turkey: a study of customer satisfaction and bank selection criteria", Journal of Economic Cooperation, Vol. 26 No. 4, pp. 51-86.

23 Naser, K., Jamal, A. and Al-Khatib, K. (1999), "Islamic banking: a study of customer satisfaction and preference in Jordan", International Journal of Bank Marketing, Vol. 17 No. 3, pp. 135-50

24 Metawa, S. and Almossawi, M. (1998), "Banking behaviour of Islamic bank's customers: perspectives and implications", International Journal of Bank Marketing, Vol. 16 No. 7, pp. 299-315.

25 Metwally, M. (1996), "Attitudes of Muslims towards Islamic banks in a dual-banking system", American Journal of Islamic Finance, No. 6, pp. 11-17.

26 Erol, C. and El-Bdour, R. (1989), "Attitudes, behaviour and patronage factors of bank customers towards Islamic banks", International Journal of Bank Marketing, Vol. 7 No. 6, pp. 31-7

27 Haron, S., Ahmad, N. and Planisek, S. (1994), "Bank patronage factors of Muslim and non-Muslim customers", International Journal of Bank Marketing, Vol. 12 No. 1, pp. 32-40.

28 Ahmad, N. and Haron, S. (2002), "Perceptions of Malaysian corporate customers towards Islamic banking products and services", International Journal of Islamic Financial Services, Vol. 3 No. 4, pp. 13-29

29 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

30 Ibid.

31 Ahmad, N. and Haron, S. (2002), "Perceptions of Malaysian corporate customers towards Islamic banking products and services", International Journal of Islamic Financial Services, Vol. 3 No. 4, pp. 13-29

32 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

33 Dusuki, A.W. and Abdullah, N.I. (2007), "Why do Malaysian customers patronise Islamic banks?", International Journal of Bank Marketing, Vol. 25 No. 3, pp. 142-60

34 Haron, S., Ahmad, N. and Planisek, S. (1994), "Bank patronage factors of Muslim and non-Muslim customers", International Journal of Bank Marketing, Vol. 12 No. 1, pp. 32-40.

35 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

include Islamic financial facilities for their businesses, trade finances in the form of letters of credits, commercial real estate services such as real asset analysis, portfolio evaluation, debts management, equity structuring and etc., and employer-employee services.[36]The corporate customersincludethe Islamic financial services providers' clients from small or mid-sized to large conglomerates with million dollars of business value. The corporate customers are selected due to their influential position as important stakeholders in Islamic financial services industry in Malaysia.

According to Ahmad and Haron,[37] the bankers (from conventional and Islamic financial services providers) consider that corporate customers are valuable for the banks in generating profits and businesses. The corporate customers have the abilities to bring profits and businesses in larger scales and value, while increasing the reputation of the banks in relation to the market and business world.[38] Due to this reason, according to an earlier research done by Haronet. al.,[39] the corporate customers are considered by bankers as more important, in comparison to retail customers.

This research is a pioneer in investigating the preferences of dispute resolution mechanisms among corporate customers in Malaysia for resolving IFSD with their Islamic financial services providers. Significantly, this research is an exploratory research that intends to discover the trend of the corporate customers in their preferences of dispute resolution mechanismsfor resolving IFSD with their Islamic financial services providers.

3. Methodology

This research is carried out by using mixed methods, with a combination of qualitative and quantitative investigations. The main focus of the research is the corporate customers in Malaysia, either local or international based. The leading reasons for choosing Islamic financial services providers and their corporate customers as sample are due to two following reasons. First, the Malaysian Government is aspiring to make Malaysia as an Islamic financial hub in the region. This eventually will leadthe Islamic financial services providers to explore their market potentialsin financing and deposits. In facing increase of IFSD, the Islamic financial services providers must be ready to understand their customers' preferences of dispute resolution mechanism for resolving disputes. Secondly, by placing the litigation as the last resort, the independent institutions that offer the ADR processes must be more progressive in promoting ADR to corporate customers.

The survey questionnaires are used and self-administered to collect information from the corporate customers. By following the earlier research as done by Ahmad and Haron,[40]the representatives of the corporate customers are chosen to fill up the survey questionnaires. For the corporate customers, their officer(s) who are influential in decision making in relation to their financial status are considered as representatives in filling up the questionnaires. Due to different structures of the companies who participate as the corporate customers, their representatives are varied. They include the deputy manager, manager, director, founder of company, executive officer, chief executive officer and chief financial officer. These representatives are those persons who are involved in decision-making of the companies, especially in relation to contracting financial matters with the Islamic financial services providers.

Relating to thepreferences of dispute resolution mechanisms among corporate customers in Malaysia for resolving IFSD with their Islamic financial services providers, they were asked two main questions. Question 1 is developed to evaluate whether the representatives of corporate customers know and aware about the independent institutions that offer ADR services for IFSI in Malaysia,

36 Ibid.

37 Norafifah Ahmad and SudinHaron, "Perceptions of Malaysian Corporate Customers towards Islamic Banking Products and Services", *International Journal of Islamic Financial Services*,vol. 3, no.4 (2002): 13-29.

38 Mohd.Zain, Nor Razinah. (2017). The Effectiveness of Dispute Resolution Clauses in Islamic Finance Contracts in Malaysia. Unpublished Ph.D. thesis manuscript, International Islamic University Malaysia.

39 S. Haron, N. Ahmad, and S. Planisek, "Bank Patronage Factors of Muslim and Non-Muslim Customers", *International Journal of Bank Marketing,* vol. 12, no.1 (1994): 32-40.

40 Ahmad, N. and Haron, S. (2002), "Perceptions of Malaysian corporate customers towards Islamic banking products and services", International Journal of Islamic Financial Services, Vol. 3 No. 4, pp. 13-29

namely the Ombudsman of Financial Services (OFS), Kuala Lumpur Regional Centre of Arbitration (KLRCA) and Malaysian Mediation Centre (MMC). For measuring this information, Likert type scaling was used, where 1 is forstrongly disagree and 5 is for strongly agree.

Question 2 is developed to evaluate the corporate customers' preferences in resolving IFSD with their Islamic financial services providers. The answers for Question 2 are in multiple choice formats where the representatives of corporate customers can select any of their preferred dispute resolution mechanisms available for IFSI in Malaysia. The listed dispute resolution mechanisms are:

(i) Dispute resolution with the Islamic financial services providers;

(ii) Dispute resolution through court process or litigation;

(iii) Dispute resolution through OFS;

(iv) Dispute resolution through KLRCA;

(v) Dispute resolution through MMC.

500 survey questionnaires are distributed to the corporate customers. Out of the total questionnaires, 145 completed questionnaires were collected. This is done either promptly or through online services. The response rate is considered low with 29 per cent. The responses were low due to the reluctances of respondents to disclose their financial status, certain restrictions/policies from the companies to disclose information, and their sensitivity to share their level of knowledge/ understanding or awareness concerning Islamic banking and finance matters from legal perspective. Based on statistical normality requirement where n>50,[41] the collected responses of 145 are enough to be used as a sample to measure the preferences of corporate customers in resolving IFSD with their Islamic financial services providers. Affirming the finding of Ahmad and Haron, this research found that the corporate customers in Malaysia do not rely on one sole bank (either Islamic bank or conventional bank) for purpose of financial services. Rather, they enjoy the advantages of having multiple banks' financial services especially when they understand the banks' operational systems which benefit them.[42]

Based on the respondents' demographic information, they are 61 per cent females and 39 per cent males. Their ages are between below 20 to 60 years old. Their educations ranged between PMR to post-doctorate. 68.3 per cent of respondents are Malays and the rests are from other races. It is found that majority of the respondents are Muslims. The respondents come from variety of backgrounds with income between below RM3000 to RM20,000. This indicates that the retail customers of the Islamic financial services in Malaysia are not specifically came from a specific class of people or race. The retail customers that use the retail banking services from the Islamic financial services providers in Malaysia are multi-racial and multi-religious customers.

41 Andrew Mayers,*Introduction to Statistics and SPSS in Psychology*, (Pearson, 2013), 28.

42 Norafifah Ahmad and SudinHaron, "Perceptions of Malaysian Corporate Customers towards Islamic Banking Products and Services", *International Journal of Islamic Financial Services*, vol.3, no. 4 (2002): 13-29.

For measuring this information, Likert type scaling was used (1 – not important and 5 – very important).

COMMON DISPUTES IN OIL AND GAS INDUSTRY AND THE ADR PROCESS

by

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ABSTRACT

The offshore petroleum projects involve broad of variety contracts entered by multiple parties to operate complex, expensive and high-risk activities. In this regards, the oil and gas sector has its own unique features in doing business. For instance, the oil and gas contracts re-allocate risk which may seem vivid to outsiders but seems perfectly reasonable for the industry. It also has its own outlooks on dispute resolution. The parties in the oil and gas industry prefer to opt for alternative dispute resolution (ADR) processes rather than litigation. ADR refers to all means of dispute settlement other than litigation such as negotiation, mediation, adjudication, and arbitration. This paper also discusses common disputes in the oil and gas industry such as the litigation arose from the Deepwater Horizon case (it also known as Macondo case) which happened in the Gulf of Mexico in 2010. Subsequently, this paper examines the ADR processes in the oil and gas industry. On this point, this paper argues that, due to the complexity and technicalities of operations in the oil and gas sector, there is a need to set up a particular arbitration centre to handle and resolve the disputes. In doing so, a special legal framework is needed to establish a special centre for oil and gas as a roadmap for the industry key players in resolving their dispute. The methodology employed in this research will be a comparative analysis which will be carried out in a descriptive, analytic and prescriptive manner.

Keywords: Oil and gas, arbitration, alternative dispute resolution.

Common Disputes in Oil and Gas Projects

Oil and gas projects are risky ventures. The projects involve multiple parties to operate complex, expensive and high-risk activities which usually last for a long-term. In doing so, the parties will enter

into special contracts to govern relationships amongst them. Owing to the complexity of operations which involve multiple parties, the oil and gas sector is exposed to various types of disputes.[1] The parties might be exposed to the disputes pertaining to 'international maritime boundary claims; equipment-related claims; claims over jurisdiction; expert determination; claims relating to quantity and quality of goods; insurance issues; and hedging.'[2] In addition, disputes may also arise as a result of 'environmental claims; shareholder value related issues, regulatory issues, trade restriction' etc.[3]

For example, in the infamous case of Deepwater Horizon which is also known as Macondo case,

> 11 oil workers died during a fire and explosion that led to the sinking of the Deepwater Horizon rig in the Gulf of Mexico. The resulting three-month-long leak created the largest accidental oil spill in the world. The U.S. Presidential Commission determined that the Macondo well blowout was caused by number of separate risk factors, oversights, and outright mistakes that combined to overwhelm the safeguards meant to prevent such an event.[4]
>
> In this case, Macondo's well was owned by Transocean and it was leased to British Petroleum (BP), one of the world's largest energy companies, operator and majority interest holder. BP had employed a number of service contractors to develop the Mississippi Canyon Block 252 (Macondo Prospect), for example, Transocean which is the largest deepwater oil drilling specialist contractor in the world, Halliburton which is one of the world's largest oilfield services suppliers, Schlumberger to perform logging, drilling, and measuring services on behalf of BP and three other contractors to provide the blowout preventer that was claimed to be deficient i.e. MI-Swaco Mud and Cameron International. [5] The contracting parties who were involved in the Macondo Prospect can be illustrated in the following chart:[6]

1 Raphael Bahati Mgaya, 'Dispute Resolution in Oil and Gas Industry: International Commercial Arbitration' <https://www.academia.edu/8782565/Dispute_Resolution_in_Oil_and_Gas_Industry_International_Commercial_Arbitration?auto=download> accessed 8 February 2017; HR Dundas, 'Dispute Resolution in the Oil & Gas Industry: An Oilman's Perspective' (2004) 1 Transnational Dispute Management (TDM).

2 Ibid.

3 Bayuasi Nammei Luki and Nusrat-Jahan Abubakar, 'Dispute Settlement in the Oil and Gas Industry: Why Is International Arbitration Important?' (2016) 6 Journal of Energy Technologies and Policy 30.

4 Alberto Serna Martin, *Deeper and Colder: The Impacts and Risks of Deepwater and Arctic Hydrocarbon Development* (Sustainalytics 2012) 6.

5 Chidi Egbochue, 'Reviewing Knock for Knock Indemnities Following the Macondo Well Blowout' (2006) 4 CLInt. 7, 7.

6 Wan M Zulhafiz, 'Recent Trends in Allocation of Risk Post-Macondo: The Growing Tension Between Oil and Gas Standard Forms of Contract, and Contractual Practice' [2017] International Energy Law Review 174, 176.

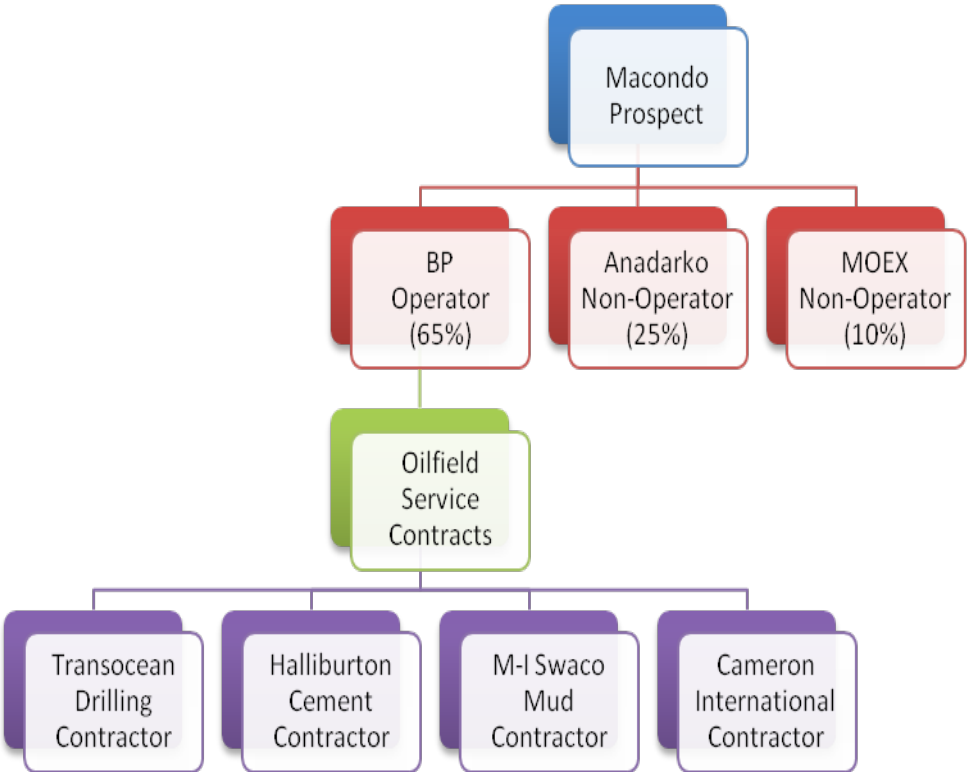

Figure 1[7] - Contracting parties involved in Macondo Prospect

Subsequent to the occurrence of disaster in Macondo Prospect, the US government, individuals and corporations have filed hundreds of claims against the contracting parties in which most of the cases,

> involved claims for monetary damages made directly against the companies involved in drilling the Macondo Well. These suits, now numbering over 7,000 separately filed actions with over 300 of them still active, have been consolidated in the MDL [Multi District Litigation] before Judge Barbier in the U.S. District Court for the Eastern District of Louisiana in New Orleans.[8]

'These lawsuits raise various legal claims, from tort law (e.g. personal injury) to environmental law (e.g. water pollution).'[9] It is argued that 'ADR could certainly have been considered in this case before the parties decided to take proceedings to court. This would have led to a reduction of not only the financial costs of litigation, but also the time taken to fully explore the issues of the case.'[10] Moreover, the ADR process would also preserve the confidentiality of the case.

Dispute Resolution in the Oil and Gas Industry

In order to ensure the smooth running of the projects, it is necessary for the parties to pre-determine an appropriate method of resolving the disputes. It was maintained that the parties in oil and gas industry prefer to opt for alternative dispute resolution (ADR) (or it is known as agreed dispute resolution in some jurisdictions) processes rather than bringing up those issues to national

7 Owen L Anderson and John S Lowe, 'International Oil and Gas Law', *Conference on ASEAN Integration 2015, Economics, Taxation, Negotiation and Contracting held on 10th-15th September 2012 at Faculty of Law, Chulalongkorn University, Thailand* (2012); SUBSEAIQ, 'Offshore Field Development Projects' (2012) <http://www.subseaiq.com/Data/Project.aspx?project_Id=562&AspxAutoDetectCookieSupport=1> accessed 26 September 2014.

8 RP Thibault and others, 'The Post-Macondo World of Litigation, Regulation and Transactions: No Longer Business As Usual' (2013) 11 OGEL 1.

9 Zulhafiz (n6) 177.

10 Gaby Goundry, 'Could Mediation Get BP out of "Deepwater"?' (*CEDR*, 2013) <https://www.cedr.com/blog/could-mediation-get-bp-out-of-deepwater/> accessed 2 May 2017.

courts.[11] 'ADR, in essence, refers to all means of dispute settlement other than litigation which includes mediation, arbitration, expert determination, negotiations, conciliation.'[12] All in all, the disputes in the oil and gas industry can be divided into four categories:[13]

Firstly, any dispute which involves inter-countries or issues concerning two or more sovereign states. For example, boundary disputes relating to oil and gas fields involving territorial sovereignty located in maritime waters. In normal cases, the dispute would usually involve governments. However, oil and gas companies may also indirectly engage with the disputes if their concession areas overlap with disputed boundary lines.

Secondly, any dispute between company and state. It is also known as state investment or investor-state disputes. The disputes happen when a particular state varies the terms and conditions of the original agreements significantly or nationalise or expropriate an investment. 'The investor (in this case, an oil and gas company or a consortium of oil and gas companies) can base its claim on its investment contract (e.g., a production sharing contract (PSC) or risk service agreement (RSA)) or an investment treaty, or possibly both.'[14] In respect of the treaty claims, they are made base on bilateral investment treaties (BITs) which were entered by two sovereign states that had negotiated and ratified it. On that point, companies should ensure that their investments are protected by the BITs, and they must have access to the International Centre for the Settlement of Investment Disputes (ICSID) to resolve any dispute with a sovereign state. This could be done by incorporating an ICSID dispute resolution clause in their host government contract. Thus, it is suggested that a company should seek legal guidance in structuring their investments and how to draft the dispute resolution provisions in their host government agreements.[15]

Thirdly, any dispute which involves two companies. It is also known as international commercial disputes. The dispute can be further divided into two types. The first one is amongst members of a joint venture in contracts 'such as Joint Operating Agreements, Unitization Agreements, Farmout Agreements, Area of Mutual Interest Agreements, Study and Bid Agreements, Sale and Purchase Agreements, Confidentiality Agreements.'[16] The second type is the dispute which occurs between operators and oilfield service contractors under various kinds of contracts, such as, Drilling and Well Service Agreements, Seismic Contracts, Construction Contracts, Equipment and Facilities Contracts, Transportation and Processing Contracts.[17] It is said that 'these disputes make up the majority of disputes in which oil and gas companies find themselves.'[18]

Finally, any dispute between individual and corporations. The dispute might happen in some situations; usually when individuals initiate legal action against oil and gas companies. For example, claim made by an individual for tortious liability and contractual claims by a consultant to demand payments from oil and gas companies.

Litigation, arbitration, and expert determination are typically used by parties in oil and gas contracts as binding methods of dispute resolution mechanisms. While using any of the dispute resolutions, it is important to ensure that it does not affect the commercial activities or permanently destroy the goodwill or sour the relationship and future cooperation between the parties. In this regard, arbitration is seen as a better form of dispute resolution mechanisms as opposed to litigation. It is claimed that the arbitration process is more user-friendly than the litigation and its confidentiality is well preserved since the whole process is done in private and away from the public eye.[19] Such aspect is very crucial in the oil and gas industry.

11 Mgaya (n1).

12 Aemen Zulfikar Maluka, 'Dispute Resolution in the Oil and Gas Industry' (2010) <https://joshandmakinternational.com/publications/dispute-resolution-in-the-oil-and-gas-industry-by-barrister-aemen-maluka/> accessed 2 August 2017.

13 A Timothy Martin, 'Dispute Resolution in the International Energy Sector: An Overview' (2011) 4 The Journal of World Energy Law & Business 332 <https://academic.oup.com/jwelb/article-abstract/4/4/332/913627/Dispute-resolution-in-the-international-energy> accessed 8 February 2017.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Muhammad Waqas, 'Dispute Resolution in Oil And Gas' (2015) 12 Oil & Gas Financial Journal <http://www.ogfj.com/articles/print/volume-12/issue-1/features/dispute-resolution-in-oil-and-gas.html>.

Besides, it also allows the parties to sense that they will be able to resolve the dispute in a fair, neutral and an independent environment.[20] The disputing parties are given right to select an arbitrator or venue depending on the contractual terms, complexity or expertise of each case.[21] Moreover, the award made by the arbitrator can be enforced in countries that have ratified the New York Convention 1958.[22] It is said that the cost of arbitration is cheaper than litigation and consumes lesser time. Thus, it can be concluded that 'arbitration remains the preferred mechanism for dispute settlement in the oil and gas sector.'[23]

Alternative Dispute Resolution in Foreign Jurisdictions

In discussing the issue of ADR in the oil and gas industry, it is necessary to review the outlook of ADR in foreign jurisdictions. This is because, more often than not, contracts in the oil and gas industry involve foreign parties and international players.[24]

In the United Kingdom, 'English courts, in particular, are now willing to take a more aggressive approach while deciding the outcome of disputes in which ADR has been refused unreasonably by disputants.'[25] For example, in a landmark case of *Susan Dunnett v. Railtrack Plc,*[26] has set a precedent for any opponents who seek to neglect ADR. It was held that the parties should recourse to all available mechanisms of ADR as appropriate prerequisites before the parties proceed to litigation.

Meanwhile, in the Netherlands, a settlement conference is used at a primary stage in civil litigation where the judge will deliver a high steer on the merits of the dispute.[27] Such requirement has been made mandatory across the courts in Netherlands especially if it seems that 'the litigation process will not in itself be able to determine all aspects of the dispute between the parties.'[28]

In some parts of the USA and also Norway, under particular circumstances, mediation is required by legislations as pre-condition prior to holding adjudication in the local courts. In addition, 'many US states and federal courts (including appeal courts) have court-annexed or court-ordered ADR programmes that have, on evaluation, proved to be very effective.'[29]

On the other hand, European Union Directive encourages the use of ADR in both civil and commercial matters. It sets out particulars for confidentiality and time limitation rules for litigation to stay in order to provide room for the use of ADR in the Member States.[30] Under the EU Civil Justice programme, EU itself has funded research with regards to 'the use of information in the Member States, and the cost of not using ADR in cross-state disputes' in promoting the use of ADR to its members. [31]

One of the unique features makes arbitration popular is because the arbitral tribunal decision is recognised and enforceable internationally. In other words, 'the enforcement does not only take place

20 Ahmad Jefri Rahman, 'Developments in Arbitration and Mediation as Alternative Dispute Mechanisms in Brunei Darussalam', *Conference: A Modern Legal Framework to Enable Globe Trade: The New Legislation on Arbitration and Electronic Transactions.* (University of Queensland, Brisbane 2013).

21 Waqas (n15).

22 The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) (1958).

23 'Arbitration Preferred Method of Dispute Settlement – Conclusions from LCIA's Ground-Breaking Debate at Oil and Gas Sector Sympos (LCIA - London Court of International Arbitration)' (27 October 2016) <https://article.wn.com/view/2016/10/27/Arbitration_preferred_method_of_dispute_settlement_Conclusio/>.

24 Luki (n3).

25 Waqas (n15).

26 [2002] EWCA Civ 303, [2002] 1 WLR 2434, [2002] CPLR 309, [2002] 2 All ER 850.

27 Maluka (n11).

28 Margaret Ross, 'Dispute Management and Resolution' in Greg Gordon, John Paterson and Emre Üşenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press 2010) 591.

29 Ibid.

30 Directive 200S/52/Ee of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. See also European Communities, Green Paper on alternative dispute resolution in civil and commercial law, COM(2002} 196 Brussels, 2002; Counc:i1 of Europe, Alternatives to Litigation between Administrative Authorities and Private Parties, Rec.(2001) 9, (2002).

31 Ross (n27) 591.

in the place where the award is made but also in any other country where the party against whom the award was made has his assets.'[32]

For example, in 1933, the Arabian American Oil Company (Aramco) signed an agreement with the Saudi Arabian government. The agreement stipulated that the exclusive right was granted to Aramco to extract and transport oil from the concession block in Saudi Arabia. Later in 1954, the government of Saudi Arabia and Saudi Arabian Maritime Tankers Ltd signed another contract that was inconsistent with the earlier agreement which had resulted in a dispute between the parties. However, the dispute was managed to be resolved by arbitration in Geneva, 1955.[33]

In another case, the dispute involving government of Libya, British Petroleum (BP), Texaco Overseas Petroleum Company (TOPCO) and Libyan American Oil Company (LIACO) regarding the nationalization phenomenon in Libya was settled through international arbitration on the 7th December 1971.

In 2007, an arbitration award of ICC ruling was enforced between Exxon Mobil and Petroleos De Venezuela, S.A. (PDVSA-Venezuela NOC). The dispute was about the 2007 nationalization of assets by the Venezuelan government in which Exxon Mobil was awarded $908 million; however, the award was finally reduced to around $750 million in favour of PDVSA.

Most of the countries have set up their arbitral institution and drafted their arbitration rules to accommodate parties to an arbitration agreement to settle their commercial disputes. Some of the institutions, to name a few such as, American Arbitration Association (AAA), the Euro-Arab Chambers of Commerce (EACC), the London Court of International Arbitration (LCIA), the Netherlands Arbitration Institute (NAI), the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration (ICC), the United Nations Commission on International Trade Law (UNCITRAL), have come out with their own set of rules to oversee the conduct of arbitration.[34] Any dispute that has been brought up to the respective arbitration institution shall be resolved by its rules and regulation.

It is worth noting that 'any international contract signed by the parties that does not contain an arbitration clause will have recourse to foreign court systems to resolve their disputes.'[35] Therefore, it is essential for contracting parties to incorporate an appropriate arbitration clause into their contracts. This will provide the parties with an 'opportunity of resolving any disputes that may arise in future on a neutral ground rather than on the home grounds of one party or the other.'[36]

Alternative Dispute Resolution in Malaysia

Malaysia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[37] Any arbitral awards rendered in Malaysia are enforceable in more than 148 countries whom the signatories to this treaty. That said, arbitral awards are not binding in countries that are yet to ratify the Convention. In that context, arbitration might not be a preferred choice to resolve the dispute via arbitration in those cases.

Arbitration is becoming more prevalent as an attractive option of dispute resolution forum in Malaysia. It was originally used to resolve the dispute in the construction industry and becoming increasingly popular for other commercial dispute including oil and gas sector. [38]

The Malaysian Arbitration Act 2005 (MAA) is closely modeled on the UNCITRAL Model Law on International Commercial Arbitration 1985 with some amendments in 2006 and the New Zealand Arbitration Act 1996.[39] The MAA 'repealed the old and outdated Arbitration Act 1952 which

32 Luki (n3).
33 Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford University Press 2010).
34 Luki (n3).
35 Ibid.
36 Ibid.
37 Rolf A Schütze, *Institutional Arbitration: A Commentary* (Bloomsbury Publishing 2013) 677.
38 Khutubul Zaman Bukhari, 'Arbitration and Mediation in Malaysia' <http://www.aseanlawassociation.org/docs/w4_malaysia.pdf> accessed 9 February 2017.
39 Schütze (n36) 678

had been based almost word for word on the old English Arbitration Act 1950.'[40] Such repeal 'has increased public confidence in, and adoption of, the arbitral process.'[41] Malaysia is a common law jurisdiction, any decisions made by Commonwealth courts, especially in commercial matters, would be regarded as highly persuasive.[42]

The principal institution that both administers and commonly provides a venue for commercial arbitrations in Malaysia is the Kuala Lumpur Regional Centre for Arbitration (KLRCA).[43] The KLRCA is 'internationally recognised as an experienced, neutral, efficient and reliable dispute resolution service provider.'[44] It provides a forum to resolve disputes pertaining to trade, commerce, and investment.

> The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organization. The KLRCA was the first regional centre established in Asia to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. It was also the first centre in the world to adopt the UNCITRAL Arbitration Rules as revised in 2010. The KLRCA has developed new rules to cater for the growing demands of the global business community, such as the KLRCA i-Arbitration Rules and the KLRCA Fast Track Rules, as well as Mediation and Conciliation Rules.[45]

Besides the KLRCA, arbitrations are also administered by some other professional bodies, such as the Institute of Engineers Malaysia, Kuala Lumpur (IEM) and the Malaysian International Chambers of Commerce and the Malaysia Institute of Architects (Pertubuhan Akitek Malaysia) (PAM).

The IEM was formed in 1959 and was admitted as a member of the Commonwealth Engineers Council in 1962. The Institution is a qualifying body for professional engineers in Malaysia. It appoints arbitrators when the contract used by the parties is an IEM standard term contract. In addition to arbitration, it administers other forms of alternative dispute resolution (ADR).[46]
On the hand,

> PAM was originally established as the Institute of Architects Malaya (IAM) in 1920. PAM was registered with the Registrar of Societies Malaysia on 20 January 1967 under the present constitution. PAM is the governing body for engineers. It appoints arbitrators when the contract used by the parties is a PAM standard term contract. In addition to arbitration, it administers other forms of ADR.[47]

Apart from the IEM and PAM, other related bodies are like Selangor Chinese Chambers of Commerce, Malaysian Rubber Board, Palm Oil Refiners Association of Malaysia, Institution of Surveyors, the Malaysian International Chambers of Commerce. However, it is important to note that none of these bodies are connected to the oil and gas sectors in particular.

While it is true that generally, 'arbitration centers, tribunals or even courts handle all the cases referred to them without limiting the scope of the subjects handled by them,'[48] it is argued that due

40 Rabindra S Nathan, 'Arbitration Procedures and Practice in Malaysia: Overview' (*Thomson Reuters*, 2016) <http://us.practicallaw.com/8-634-5916> accessed 9 February 2017.

41 Nitin Nadkarni and Darshendev Singh, 'Malaysia: An Overview Of Arbitration In Malaysia' (*Mondaq*, 2016) <http://www.mondaq.com/x/469720/Arbitration+Dispute+Resolution/An+Overview+Of+Arbitration+In+Malaysia> accessed 9 February 2017.

42 Ibid

43 Schütze (n36).

44 Ashok Kumar Mahadev Ranai, 'Arbitration Procedures and Practice in Malaysia: Overview' (*Thomson Reuters*, 2011) <http://uk.practicallaw.com/9-507-1479?service=arbitration> accessed 9 February 2017.

45 Nadkarni (n40).

46 Ranai (n43).

47 Ibid

48 Behrooz Akhlaghi, 'Lex Petrolea & International Commercial Arbitration' (*4th Bi-Monthly News & Analysis of the International Law Office*, 2014) <http://intllaw.net/wp-content/uploads/2015/04/Lex-Petrolea-International-Commercial-Arbitration-4th-Bi-Monthly-N-A-November-29-2014.pdf> accessed 9 February 2017.

to the complexity of technical subject of the oil and gas sector, there is a need to set up a special arbitration centre to resolve the disputes, which will be placed under the KLRCA.

According to Ross, 'given the technical nature of disputes that may arise in the oil and gas industries, some negotiations require to be carried out by a team of people who can, collectively, bring the necessary expertise (for example technical, legal, financial) to the dispute and its resolution.'[49] Moreover, taking the case of United Kingdom,

> [it is] observed that the industry has developed its own particular arrangements in terms of dispute resolution where as [dispute resolution] processes might be utilized as a means to an end of achieving strategic advantages over the other party by using the unique cultural dimensions of the industrial practices. This serves the dual purpose of avoiding litigation while at the same time avoiding a breakdown of industrial relations.[50]

For example, there have been some initiatives implemented to bring the operators and oilfield service contractors together on a multilateral, cooperative basis using their respective industry organisations. There are several types of standard forms of conditions of contract published by various professional bodies in the UK North Sea, Canada and the international level that could be adopted as a foundation in drafting oilfield contracts, including, LOGIC (Leading Oil & Gas Industry Competitiveness), Canadian Association of Oilwell Drilling Contractors (CAODC), Canadian Association of Petroleum Producers (CAPP), Association of Independent Petroleum Negotiators (AIPN), International Association of Drilling Contractors (IADC), International Association of Geophysical Contractors (IAGC), Petroleum Equipment Suppliers Association (PESA), International Federation of Consulting Engineers (IFCE) and several other international service organisations.[51] LOGIC, for example, is widely used primarily for offshore operations in the U.K. sector of the North Sea. [52] It is also used widely in Southeast Asia, including Malaysia.

LOGIC is a non-profit subsidiary of Oil & Gas UK and its objective is to promote and ensure 'United Kingdom Continental Shelf (UKCS) competitiveness remains current and was carried forward into the work of the PILOT Taskforce, a collaborative partnership of oil and gas industry operators, suppliers and the UK Government.'[53] LOGIC publishes several standard forms of contracts to be used in marine construction contracts within the petroleum industry.[54] The standard contract is derived from the CRINE (Cost Reduction in the New Era) initiatives, where the operators and contractors work together to produce the standard contracts for the UK Offshore Oil and Gas Industry which today are available in ten forms, four of which are second editions.[55]

For construction contracts, LOGIC has produced a set of General Conditions for Marine Construction (the 'Model Construction Contract'), 2004 Edition. The Model Construction Contract is intended for use in an offshore context and specifically for pipe laying, offshore installation, subsea construction, and inspection, repair and maintenance operations. It is similar in overall form and content of Engineering, Procurement, Construction and Installation (EPCI) contracts, which are frequently used by operators in South/Southeast Asia to deliver 'turnkey' solutions for offshore infrastructure projects.[56] Due to complexities and technicalities of the industry, it could be argued that

49 Ross (n27) 583

50 Maluka (n11)

51 Martin, 'Model Contracts: A Survey of the Global Petroleum Industry' (n25); Owen L Anderson, 'The Anatomy of an Oil and Gas Drilling Contract' (1989) 25 Tulsa LJ 359.

52 Cary A Moomjian, 'Drilling Contract Historical Development and Future Trends Post-Macondo: Reflections on a 35 Year Industry Career', *IADC/SPE Drilling Conference and Exhibition on 7th March 2012 in San Diego, California, USA* (Society of Petroleum Engineers 2012) <http://www.drillingcontractor.org/wp-content/uploads/2012/04/Drilling-Contract-Historical-Development-and-Future-Trends-Post-Macondo.pdf>.

53 LOGIC, 'LOGIC' (*Oil & Gas UK*, 2017) <http://www.logic-oil.com/> accessed 7 May 2017.

54 A Timothy Martin and J Jay Park, 'Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger' (2010) 3 Journal of World Energy Law & Business 4, 31.

55 Helen Franklin, 'Irretrievable Breakdown? A Review of Operator/Contractor Relationships in the Offshore Oil and Gas Industry' (2005) 23 Journal of Energy & Natural Resources Law 1, 3.

56 Toby Hewitt, 'An Asian Perspective on Model Oil and Gas Services Contracts' (2010) 28 Journal of Energy & Natural Resources Law 331, 331.

it is necessary to have a special arbitration centre for oil and gas, which consist of a team of specialists to deal with disputes pertaining to the subject.

In fact, the idea to establish a special arbitration centre for a particular sector is not something new, and it has been done before. The following are the examples of special arbitration centre which only arbitrate specific and technical aspects of a particular subject:

i. Arab Intellectual Property Mediation and Arbitration Society (AIPMAS) - Amman, Jordan;

ii. Court of Arbitration for Sport - Lausanne, Switzerland;

iii. Energy Arbitration Court (EAVB) - Budapest, Hungary;

iv. European Centre for Financial Dispute Resolution (EUROARBITRATION) - Paris, France;

v. Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce - Belgrade, Serbia;

vi. Insurance and Reinsurance Arbitration Society (ARIAS) - London, England;

vii. Muslim Arbitration Tribunal (MAT) - London, England;

viii. World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO) - Geneva, Switzerland;

ix. Dispute Resolution Center of the Federal Association of Engineers and Architects of Costa Rica - San José, Costa Rica;

x. General Arbitration Tribunal of the Buenos Aires Stock Exchange (BCBA) - Buenos Aires, Argentina;

xi. Equine Dispute Resolution (EqADR) - Lexington, USA;

xii. China Maritime Arbitration Commission (CMAC) - Beijing, China;

xiii. Singapore Chamber of Maritime Arbitration (SCMA) - Singapore, Singapore;

xiv. Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (JSE) - Tokyo, Japan; and

xv. Maritime Arbitrators Association of Nigeria (MANN) - Lagos, Nigeria.

The above-mentioned arbitration centres were established to facilitate the complexity of technical subject according to its respective discipline. These 15 arbitration entities can be divided into ten categories as far as their subjective jurisdictions are concerned: Maritime (four entities), sports (two entities), stock exchange (one), engineering and architecture (one), intellectual property (two), and finally Muslim disputes, insurance and reinsurance, foreign trade, financial and energy disputes each have only one arbitration entity. Even though the Energy Arbitration Court (EAVB) is already in existence, the proposed arbitration centre for oil and gas will be different from the EAVB in terms of subject matter, structure and dispute resolution mechanism.

It is also claimed that 'the growth of emerging markets in Asia has created a flow of capital between west and east – often to fund significant oil and gas projects and mega infrastructure developments.'[57] These commercial activities have given an enormous impact on the use of arbitration in Asia for large oil and gas projects.[58] Therefore, by establishing the special arbitration centre, it will help to promote the KLRCA as the choice of arbitration hub, especially within the oil-producing countries such as Saudi Arabia, Kuwait, Canada, United Arab Emirates, and other Organization of the Petroleum Exporting Countries (OPEC).

57 White & Case, 'Oil and Gas Industry Favours International Arbitration for Dispute Resolution' (*White & Case*, 2015) <http://www.whitecase.com/news/oil-and-gas-industry-favours-international-arbitration-dispute-resolution> accessed 9 February 2017.

58 Ibid.

Based on one previous study, when respondents were asked about their preferred institutions, it was 'revealed that institutions are primarily chosen due to their high level of administration, neutrality/ internationalism and ability to administer arbitrations worldwide.'[59] In that sense, it could be argued that Malaysia, particularly the KLRCA has strong potential to be chosen as a preferred arbitration institution for its neutrality and internationalism. The reason is that Malaysia, on the one hand, is a competitive global player in terms of international trade and business. While, on the contrary, it is not a member of OPEC countries. These factors considered as bonus points to the KLRCA.

In 2012, Construction Industry Payment and Adjudication Act 2012 (CIPAA) was passed to mandate adjudication in construction-related disputes to reduce numbers of arbitration cases. The CIPAA applies to all construction agreements, both domestic and international contracts carried out in Malaysia. 'Construction work' is defined broadly, includes water, gas, oil and petrochemical works. The broad definition of "construction" under CIPAA provides a better room of ADR for oil and gas disputes in Malaysia. Unlike the UK, the definition of construction excludes oil and gas activities. This could be considered another plus point for Malaysia to promote the KLRCA as a choice hub for dispute resolution in the oil and gas sectors at the international level.

Conclusion

In conclusion, despite the existence of legal framework embracing alternative dispute resolution which has been already in place, it is argued that the current legal framework not is comprehensive to resolve matters pertaining to oil and gas disputes in Malaysia. A special legal framework is needed to establish a special centre for oil and gas as a roadmap for the industry key players in solving their dispute. The centre 'should include an independent arbitration and supervisory body as an indispensable component for settlement of disputes in oil industry contracts.'[60]

In order to promote KLRCA as a choice of international arbitration hub by foreign industry players in the oil and gas sector, it is essential to encourage the development of an effective ADR framework which to be supported by a special arbitration centre for oil and gas in providing a forum for dispute resolutions, especially that involve complexities and technicalities of the subject matter.

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59 Ibid.

60 Akhlagi (n47).

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Overview of Family Disputes in Administration of Estates: Analysis on Mediation as Effective Dispute Resolution Mechanism

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ABSTRACT

Family dispute is one of the issues that occur in the administration of the deceased's estate. Such dispute may happen at any stage in estate administration, ranging from the application of letters of representation until the distribution of the deceased's asset. The occurrence of family dispute tends to adversely affect the administration and may lead to delay in the distribution which at the same time, rendered the process incomplete. Despite the seriousness of family dispute in estate administration, there is however, no specific method in resolving family dispute apart from the litigation process. Litigation is considered unsuitable in this case due to its inability to address the emotional grief suffered by the parties in addition to its time consuming and relatively expensive cost. Mediation on the other hand, is seen as a potential dispute resolution mechanism thanks to its effective method in addressing the core issues in family dispute. This paper addresses the overview of family dispute as well as analyses mediation in addressing and resolving the issue in the administration of estate. The study undertakes a library based study as a selected research method through the analysis of selected materials including journal articles, textbooks, statutes and cases. The finding from this paper indicates that mediation excels in resolving family disputes

due to its ability in remedying the emotional distress suffered mainly by the beneficiaries. It is suggested that the administrative bodies primarily, should start to take the initiative in introducing mediation in an effort to improve the process of estate administration in Malaysia.

Keywords: administrative bodies, mediation, administration of estate, delay.

1. INTRODUCTION

Family disputes which cause delay in the administration of estate is a serious issue which needs to be resolved as quickly as possible. Continuous delay hinders the beneficiaries from obtaining their

share of the inheritance due to the incomplete process in the administration of estate.[1] Priority should, therefore, be given to the settlement of such disputes. Based on an analysis of the administrative bodies in Malaysia, there appears to be no department which specifically deals with issues pertaining to family disputes in the administration of estate.[2] Although certain administrative bodies such as the Estate Distribution Unit are seen as appropriate platforms to address family disputes, the absence of a suitable approach is seen as the *lacunae* in providing the solution to address the family dispute.[3] One of the suitable mehcanisms in addressing and resolving family disputes is the use of mediation. Therefore, this paper seeks to examine the application of mediation as a means of dispute resolution in family disputes in the administration of estate in Malaysia. This paper also studies the current application of mediation in Malaysia and focuses on the bodies which adopt mediation as a means of dispute settlement and the areas covered

2. OVERVIEW OF MEDIATION

Mediation is a branch of ADR which focuses on reaching settlement through a lenient approach as compared to the traditional process of civil litigation. Mediation is a mode of dispute resolution which has been practised by many countries including Malaysia. In fact, mediation has been practised in *Tanah Melayu* long before the introduction of the civil court system. During this time, mediation was applied in matrimonial matters such as marriage and divorce among the local inhabitants.[4] It was traditionally practised among the Malay society which at that time was under the influence of Islam and Malay custom.[5] Therefore, it is safe to say that mediation is not something uncommon among the Malays, as it has constantly and continuously been practised to date.[6] The application of mediation in Malaysia has evolved, where it has now been recognised as an official mode of settlement. This can be seen through the existence of statutory laws governing mediation.

In Malaysia, mediation is governed under the Mediation Act 2012. However, the provisions under the Mediation Act 2012 is rather limited and focus is only given on general aspects such as agreement, appointment and termination of mediators, costs, and others. From a legal perspective, this piece of legislation is considered to be loose and brief due to the lack of in-depth provisions.[7] From another point of view, the lack of specific rulings in the said Act allows for the full utilisation of mediation without any restrictions by the law. This is in line with the flexibility and adaptability

1 Family disputes in the administration of estate involve feuds between the family members, being the beneficiaries of the deceased's estate. The difference between family dispute in marriage for example, and the administration of estate lies within its area of interest as well as the parties involved. Although administration of estate falls under inheritance law, which is closely connected to family law, no emphasis has been given to settlement via mediation in this specific area. Another noticeable difference is the sharing of jurisdiction by multiple administrative bodies in governing the administration of estate. Unlike matters of marriage and divorce which fall under the jurisdiction of the courts, the jurisdiction for administration of estate is determined by the value and the types of estate, rendering it to be subject to the jurisdiction of either one of these three institutions namely the High Court, the Estate Distribution Unit and ARB.

2 Akmal Hidayah Halim, *Administration of estates in Malaysia: Law and procedure* (Sweet & Maxwell, 2012). The author discusses the lists and jurisdictions of the administrative bodies in Malaysia, together with their procedural aspects.

3 Upon analysis on the lists of the administrative bodies in Malaysia, it was found out that the Estate Distribution Unit has the closest and direct connection to the deceased's family members. Despite its wide jurisdiction, its linear approach disregard of the family dispute policy indicates the absence of approach from the Estate Distribution Unit in addressing family dispute in administration of estate.

4 Raihanah Azahari, "The development of family mediation in Malaysian Muslim society." *European Journal of Social Sciences* 18, no. 2 (2010), at 220-230.

5 Refer to Chapter Two of the thesis on the practice of dispute resolution under the Malay customary practices.

6 Mediation is part of the traditional practice of Malay people long before the introduction of the English court system. See Khan, H. A. (2013). See Hanna Binti Ambaras Khan, "Community Mediation in Malaysia: A Comparison between Rukun Tetangga and Community Mediation in Singapore," *Journal of Literature and Art Studies* 3, no. 3 (2013), at 180-195.

7 Mediation Act consists of 20 sections which contents covers the general ruling regarding mediation process in Malaysia. Mediation practice however, is also subjected to the bylaws, regulations and guidelines from mediation based institutions such as the civil court, KLRCA and MMC.

of mediation as an alternative dispute resolution whereby the scope and the process of mediation is left to be determined by the parties to the session. Such would best be treated as a blessing in disguise, which not only allows mediation to be conducted in a flexible manner but also provides an opportunity for mediation to grow and expand in its application. In the area of administration of estate, where the practice of mediation is still unfamiliar, this can be viewed positively as mediation can be applied without any serious constraints imposed by the relevant legislation.

The technical definition of mediation can be found in the Oxford Dictionary of Law which quotes mediation as:

> "A form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict".[8]

Another definition can be found under the statutory interpretation of mediation under Section 3 of the Mediation Act 2012, which states:

> "A voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute".[9]

The two definitions above highlight several components of mediation including the mediator and the mode of resolution under mediation. Both definitions also stresses on the main function of mediation which is to resolve the dispute between the parties.

2.1 The Roles of Mediator

A mediator confers a role undertaken by a neutral, independent third party in assisting the disputing parties to resolve their disputes. This is one of the distinctive features of mediation where the role of the mediator is regarded as supportive in nature, as opposed to the role of the court judge to decide a case according to his jurisdictional authority. The mediator is assigned among persons who possess knowledge and skills in two specific areas. The first is the expertise in legal areas as the discussion in a mediation session usually involves law-related matters. Mediators should be able to address the legal and technical issues by answering queries and providing explanations to the parties. The second area is expertise in psychology, as family disputes typically involve emotional distress which needs to be addressed using the right approach. In general, the course of mediation and the chances of its success depend on how the mediator leads and controls the session. Aspects such as good communication skills as well as the ability to address and correspond to the issues are considerably important in order to gain trust from the disputing parties.

In Malaysia, there is a specific legal requirement on the appointment of mediators. Under Section 7 of the Mediation Act 2012, the law requires mediators to possess the relevant qualifications, as well as to have experience in mediation, either through actual study or formal training. They are also expected to meet the requirements of the institution in relation to mediators. Since there are several mediation-based institutions in Malaysia, each differ as to their rules and requirements. For example, if a person is a mediator who is registered and attached to the Malaysian Mediation Centre, he needs to comply with the requirements set by the institution.

2.2 Resolution under Mediation

Resolution under mediation is reached through the mutual agreement of both parties. This is based on the nature of mediation which requires both parties to play an active role from beginning to end, which is then concluded via an amicable agreement.[10] This results in a win-win situation

8 *Definition of mediation*, Oxford Dictionary of Law. Eighth Edition, (Oxford University Press, 2015).

9 Mediation Act 2012 (Act 749).

10 Nora Abdul Hak. "Family Mediation in Asia: A Special Reference to the Law and Practice in Malaysia," *IIUM Law Journal* 15, no. 1 (2012).

for both parties and avoids the situation of "the winner takes all" as seen in the litigation process. The settlement in mediation is crafted to satisfy both parties. The ability to shape the settlement in accordance with the needs of the parties clearly signifies the adaptability of mediation as opposed to the strict and binding effects of the court's judgment.

Apart from its resolution, mediation consists of several distinct features as opposed to litigation and other ADR mechanisms. The first is that mediation is flexible in nature. This can be seen in several aspects of the mediation session. For instance, there are no specific procedural rules in mediation as each session may be different from one another. Though every mediation session inherits common features, these practices are not binding and can be personally shaped by the mediator to suit the needs of a particular case.[11]

Theoretically, the initiation of a mediation session does not require a specific place. With the exception of the court-annexed mediation,[12] the choice of venue is left to be determined by the parties; they are free to select an informal location such as restaurants, cafes, or other informal places.[13] This provides a stress-free and smooth environment, unlike the courtroom which may have an intimidating effect on the parties, especially those who are not familiar with the venue.

Final agreement in mediation is not dependent on limited types of remedies such as those available in court. Though the remedies are enforceable by the law and binding in nature, such remedies are limited to what has been provided by the law. The remedies are awarded by the court to the winning side. In mediation, however, the type and nature of solution are not grounded to any specific ruling, as long as such solution is in line with the law. As previously mentioned, the solution is reached upon the mutual agreement of both parties, which means that in mediation, no party will be at the losing end. The flexibility in drafting the solution at the end of the mediation session allows both parties to benefit from the settlement, which will be treated as binding.[14]

In terms of procedure, the Mediation Act 2012 does not provide many rulings regarding this. Therefore, no specific procedural rulings are available for mediation, unlike civil litigation where the rulings under the Rules of Court and Practice Direction must be strictly adhered to. In practice, the mediation procedure is subject to the wishes of the parties as well as to the style of the mediators who are handling the session. Generally, a mediation session consists of several phases, such as the introduction session, joint session, private caucuses, and agreement. These stages are not definitive and are subject to changes that may be imposed by other mediation institutions.[15]

2.3 The Process under Mediation

A mediation session normally begins with an introduction session by the mediator. During this session, the mediator explains the general concept of mediation, for example the role of mediators which is to facilitate rather than to be a judge to the parties. Mediators also typically talk about mediation as being a voluntary process.[16] In other words, the parties are willing to attend the session out of their own accord and wishes, without any compulsion from other parties.[17] The objective is to make the parties understand what mediation is all about in their capacity as laymen. They need to understand that mediation is a whole different session as compared to the court litigation process, yet

11 See Wall Jr, James A., John B. Stark, and Rhetta L. Standifer, "Mediation: A Current Review and Theory Development," *Journal of Conflict Resolution 45*, no. 3 (2001), at 370-391.

12 The court-annexed mediation in Malaysia hold the mediation session in court building as it is handled by the court officers.

13 For instance, the caucuses session between the mediator and one of the parties can be held at locations agreed by both parties

14 Solutions agreed by parties in the mediation session need to be put into writing and signed, as required under Section 6 of the mediation act 2012. Section 14 of the act states that the effect of such agreement is binding upon the parties.

15 Abdul Rani Kamarudin, Norjihan bt Ab Azizi, "Mediation In Malaysia: Is It Facilitative, Evaluative Or Transformative?" *West East Journal of Social Sciences*, (2014).

16 See Chester, Ronald. "Less Law, but More Justice: Jury Trials and Mediation as Means of Resolving Will Contests." *Duq. L. Rev.* 37 (1998), at 173

17 *Ibid* at 190.

it retains the same goal, which is to assist the parties to achieve an amicable solution.[18]

The joint session is a phase where each party will deliver their version of the story regarding the problem at hand. The parties will sit together in the session and each of them will be given the opportunity to express their views regarding the matter. At this stage, the mediator should take charge and must be able to control the parties in order to avoid any unwanted arguments. In practice, the parties in a mediation session may not be on good terms with each other. Therefore, they will have the tendency to disagree with each other's views, which may lead to quarrels breaking out among the parties if the session is not properly controlled. At this time, the mediator will be able to determine the extent of the problem as well as to evaluate the quality of relationship between the parties. With this information at hand, the mediator will then be able to implement a suitable approach to address each party in the caucus session.[19]

After the joint session ends, the mediator will call upon each party separately. This is known as a caucus session, where the mediator will communicate with each party one at a time. At this stage, the mediator will carefully address the issue and propose the parties a guideline to resolve such issue.[20] Options, if available, will be given to the parties, together with an explanation of the implications. The parties will be left to make their own decisions. The solution is arrived at through discussion and agreement by the parties, and not upon the decision made by the mediator. Reaching a settlement is achieved by the active participation of all parties in the mediation session.

2.4 Advantages of Mediation

This section looks at the advantages of mediation and provides justification on its suitability as the means of settlement for disputes in relation to estate administration. Although there are some features of mediation which are similar to another type of ADR, the overall characteristics of mediation, combined with its unique advantages, makes it a suitable form of ADR to handle the nature of circumstances present under such type of dispute. The advantages of mediation can be listed out under four main features, namely privacy and confidentiality, preservation of relationship, unique solutions, and time efficiency. Despite having other advantages which are not listed here, the aforementioned features are considered to be the most relevant to be discussed here to justify mediation as the most suitable ADR to resolve disputes pertaining to the administration of estate.

1. Privacy and Confidentiality

The first advantage is that privacy and confidentiality is maintained in a mediation session. Any information from the mediation session will not be disclosed and made known to others, and will stay only within the knowledge of the parties involved.[21] This way, any form of inquiries and interruptions from third parties, including the court, can be avoided. In the Malaysian litigation system, cases being heard at the High Court, the Court of Appeal and the Federal Court will be recorded and documented in the law reports.[22] These reports are categorised as public documents, which can be accessed by the public.

In contrast, however, there is no documentation of the mediation session due to the confidentiality of information. However, although such confidentiality benefits the parties involved, difficulties occur in analysing the effectiveness of mediation in practice as no real proof of what takes place in a mediation session can be found in any documentation or records. Results of mediation sessions will only be presented in the form of success or failure, without knowing what actually transpired. Such

18 In practice, the parties will be briefed regarding the mediation before the process takes place. This will enable the parties to understand how the mediation works and encourage them to play their parts in the process.

19 Through the caucus session, the mediator will able obtain the information and assess the situation based on each party's view on the matters. See Susan N. Gary, "Mediation and the elderly: using mediation to resolve probate disputes over guardianship and inheritance." *Wake Forest L. Rev*. 32 (1997): 397.

20 *Ibid* at 399.

21 Victoria J. Haneman, "The Inappropriate Imposition of Court-Ordered Mediation in Will Contests." *Clev. St. L. Rev.* 59 (2011), at 513.

22 Case law being heard at the supreme courts category will be documented in several reports such as Malayan Law Reports (MLJ) and Current Law Reports (CLJ).

knowledge could benefit especially researchers for the sake of improving the mediation process. Any information obtained from the mediation session will be dealt with in strict secrecy, which cannot be turned into evidence or be used against the maker of the statement in court.

The result and findings from the mediation will not be made open to the public, unlike the court's decision in court cases.[23] The safeguarding of confidentiality of information benefits the parties in two situations. Firstly, confidentiality of mediation preserves the reputation and good name of the parties. Any findings which could tarnish the reputation of the parties will not be publicised while the mediator is duty-bound to treat such confidential information discreetly.[24] Secondly, the confidentiality of mediation encourages the parties to be fully open during the mediation session, without worrying about the information being leaked outside the session. This allows the parties to be fully honest not only to the mediator but also to himself in delivering his words and opinions. This will avoid the giving of any false information which could ruin the mediation session.

2. Preservation of Relationship between the Family Members

The lenient approach in mediation enables the session to be concluded without ruining the relationship between the two parties.[25] On the contrary, the joint participation and the mutual decision made by the parties in the session may improve their relationship with each other. Throughout the session, mediation seeks to repair and maintain the good relationship among the parties. What may have begun as a sour or damaged relationship could be healed through the unique approach of mediation. This is because success in a mediation session depends on how well the parties can cooperate with each other. A mediation session encourages the parties to communicate with each other as part of the process to heal the damaged relationship.[26] Being able to interact in a positive and harmonious environment soothes the emotional wound between the parties, under the right guidance from the mediator.

Bad relationship among the beneficiaries in the administration of estate is always seen as a cause for family dispute. The damaged relationship between the beneficiaries usually leads to dissatisfaction about another person's portion in the distribution of the deceased's estate. A good, close relationship between family members signifies the love and affection among them. With the existence of good relationship among the family members, they would be keener to accept and recognise each other's portion of entitlement over the estate distribution, thus preserving the family harmony. It is likely that mediation would benefit the parties in dispute as the ability to improve the relationship could be the key to solving many emotional issues among the feuding parties.[27]

3. Unique Solutions

Another advantage of mediation is the ability for parties to arrive at unique solutions. The term 'unique' indicates the type of solution which may be different from what is being offered by the court process. Civil litigation offers limited legal solutions which may not suit the needs of the disputing parties. The type of legal solutions available is determined by the court upon the application made by the parties, and they are bound by the court's decision.[28] In addition, these solutions, also known

23 Cases being heard at the High court, Court of Appeal and Federal court will be recorded and documented into the law reports. These reports are served as a public document where every person have access to it. In mediation however, there is no documentation of the mediation session due to the confidentiality of information. Though such confidentiality benefits

24 See Radford, M. F. (2000). Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters. *Pepp. Disp. Resol. LJ*, *1*, 241.

25 See Chester, R. (1998). Less Law, but More Justice: Jury Trials and Mediation as Means of Resolving Will Contests. *Duq. L. Rev.*, *37*, 173.

26 Mediation is able to address on a wide range on issues, including legal and emotional ones without damaging the relationship between the parties. On the contrary, the interaction between the parties in the mediation enables them to clear any misunderstandings and wrong assumptions and improve the relationship between the two parties. See Foster, Frances H. "The Family Paradigm of Inheritance Law." *North Carolina Law Review* 80, no. 1 (2001): 199.

27 Even if mediation failed to succeed, the result of mediation is less destructive as compared to litigation as mediation aims for an amicable solution between the parties. See Madoff, Ray D. "Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution." Southern California Law Review 76 (2002).

28 Since the court's the court decision binds both parties, the losing party will continue to suffer as the decision only

as remedies, literally correspond to the legal issues.[29] The type of remedies offered by the court is virtually limited as the court's jurisdiction in awarding remedies must be within the scope of the procedural practice of the court's ruling. In other words, such remedies must already be prescribed in the ruling. Another factor to highlight is that the remedies awarded by the court may not be beneficial to both parties. The losing parties will suffer detriment after losing the case, causing serious damage to the relationship between the two parties.

The solution offered under mediation is achieved based on mutual agreement among the beneficiaries.[30] Parties to the mediation session are allowed to propose their own solution or recommendation according to what may benefit both parties. This enables mediation to bring forth a wide selection of potential solutions, some of which may not be available under the litigation process. As the parties amicably accepts the proposed solution, there is no dissatisfaction against one another and there is no concept of a losing party in mediation.[31] Thus, mediation would be suitable to be applied to a family dispute in intestate cases, where arguments may occur due to feelings of dissatisfaction over another party's portion of entitlement over the estate. A specific arrangement on the conduct of mediation can be made in accordance with the wishes of the mediator in hopes of achieving amicable settlement among the disputing parties, by offering solutions that can bring benefit to all.

4. Time Efficiency

Time efficiency is considered to be an advantage of mediation. Appointment for mediation can quickly and easily to be set due to it being less formal.[32] Unlike litigation, where the date fixed for court hearing may take up to several weeks subject to the number of available cases, access to mediation is much less complicated as it does not involve strict procedures. Mediation also excels in quicker settlement of cases, taking less time compared to the court process.[33] This is due to the involvement of the persons within the session whereby mediation focuses on the direct communication between the parties.[34] A court hearing, on the other hand, may involve witnesses who are not parties to the case which will be subjected to examination sessions by the court and lawyers. The more witnesses being called for examination, the longer it takes to finish the court hearing.

The involvement of many individuals in a court case may lead to a higher possibility of the case being postponed. The court needs to ensure that the person being summoned is actually present during the hearing in order to testify. Sometimes, postponement of a case is caused by the failure of the lawyers and judges to commit to the hearing session. Consequently, a new date needs to be fixed and to obtained a new date[35] is rather difficult, as the court needs to consider other factors such as the number of other cases, securing the attendance of parties and witnesses, as well as the availability of the judges and lawyers to deal with the case.

In addition, the settlement reached in mediation is considered as final and is not open to appeal. Court decisions, on the other hand, are not final as they can still be appealed by the losing party.[36] For instance, decisions from the High Court can be appealed to the Court of Appeal and subsequently, to the Federal Court. Cases which are brought up to the appellate courts may take years to settle.

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benefits the winning party. See Ray D. Madoff, "Mediating Probate Disputes: A Study of Court Sponsored Programs." *Real Property, Probate and Trust Journal* (2004), at 697-725.

29 Ibid. p.699.

30 Lela P. Love, "Mediation of Probate Matters: Leaving a Valuable Legacy," *Pepperdine Dispute Resolution Law Journal* 1 (2001), at 255.

31 See Mary F. Radford, "Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters," *Pepperdine Dispute Resolution Law Journal* (2001).

32 Mary F. Radford, "An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters," *Real Property, Probate and Trust Journal* (2000), at 601-667.

33 *Ibid*. at 608.

34 Victoria J. Haneman, "The Inappropriate Imposition of Court-Ordered Mediation in Will Contests" *Cleveland State Law Review*, 59 (2012).

35 Short date refers to a hearing date which set, not long from the application date.

36 For instance, decision achieved at the civil High Court may be appealed by the losing party to at the Court of Appeal and Federal Court respectively. A longer time is thus required if the case is subjected to appeal to the higher court.

Therefore, if there are issues that can be settled outside court, mediation should be considered as the preferred method of ADR.

5. Emotional Benefits

Finally, mediation is capable of providing emotional benefits to the disputing parties. Some family disputes in the administration of estate are associated with emotional disturbance suffered by the beneficiaries.[37] Apart from the sorrow of losing the deceased, the sense of grief and anger sometimes fuels a beneficiary to override others and take matters into their own hands without proper consultation with the rest of the family members.

For instance, a deceased's eldest son applied for letters of representation to become the administrator of the estate, without his siblings' agreement. Such cases have a tendency to turn into a civil suit brought by dissatisfied family members in the event that problems occur during the administrator's administration of the estate. In addition, cases being brought to the civil court normally involve parties who are emotionally tormented over estate issues. At the same time, there are other emotional issues that also need to be addressed. As the function of the court is limited to only addressing legal issues, the remaining ones which are mostly emotional issues are left unattended. Even if a decision is made by the court, settlement of such cases do not resolve the emotional issues and the tormented family members, especially the losing party, are forced to succumb to the reality of the case. It is likely that losing the case will further damage the relationship with the members of the winning side, which more or less results in the weakening of the family institution.

Mediation provides a different approach by specifically addressing the emotional issues which exist among the feuding parties.[38] In addition to the settlement of the main issue, mediation takes notice of the behavioural norms and the extent of communication between the parties.[39] Mediators would be able to identify, highlight and look for a proper solution for issues associated with emotional distress. The element of confidentiality in mediation allows the parties to be more open and honest with their inner state, thus allowing them to express their true feelings while being able to communicate directly with the other parties. Through mediation, the parties are able to express themselves under the supervision of the mediator.[40] This enables them to voice out their true feelings which not only provides a sense of relief but also enables the other party to properly understand the situation from their perspective.

The settlement is crafted in a manner where the parties need to understand, not only the extent of the issues discussed, but also the true reality faced by the other parties. Only by trying to understand one another will mediation have a chance of being successful in achieving an amicable solution. In short, mediation is a suitable mechanism to be applied in addressing emotional issues which cannot be addressed through the litigation process. It is safe to say that mediation cures and provides emotional benefits to the parties. This is why mediation is preferable in solving cases of family disputes in estate administration.

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37 Among the reason behind the suitability of mediation in estate administration is that the disputing parties tend to suffer from the emotional grief which fuels their anger towards others. See Mary F. Radford, "An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters." *Real Property, Probate and Trust Journal* (2000), at 601-667.

38 Possible issues under estate administration include dissatisfaction over the appointment of personal representative as well as to the distribution of the asset. Such issues might be caused by a feud or argument which exists prior to the current dispute.

39 Susan N. Gary, "Mediation and the elderly: using mediation to resolve probate disputes over guardianship and inheritance," *Wake Forest Law Review* 32 (1997), at 397.

40 *Ibid* at 399.

3. IMPLIMENTATION OF MEDIATION INTO THE ADMINISTRATIVE BODIES IN MALAYSIA

In Malaysia, multiple administrative bodies govern estate administration, as opposed to in the United States where the court is the sole body that handles matters related to estate administration.[41] Inevitably, the implementation of mediation in Malaysia should take into consideration the functions of the Estate Distribution Unit and Amanah Raya Berhad as these bodies also deal with family disputes within their jurisdiction. Therefore, it would be practical for mediation to be introduced to each administrative body in Malaysia. For this reason, analysis of the suitability of mediation for each administrative body will be made. The analysis will include identifying the current practice of each administrative body in addressing disputes as well as determining their modes of dispute settlement. Mediation shall be proposed to suit the jurisdiction of each administrative body, either by replacing their current practice or by introducing mediation as a new mechanism for dispute settlement.

When comparing the mode of dispute resolution available to each administrative body,[42] it was found that none of these institutions incorporate mediation as part of their dispute settlement mechanism, with the exception of the civil High Court.[43] In fact, the civil High Court, through its court-annexed mediation program, shares the most resemblance with the United States' mediation model. That being said, the application of mediation by the Malaysian court does not extend to the area of estate administration, as discussed in the previous chapter. It was found that only cases that fall under the scope of contentious probate proceedings will be subjected to a full hearing by the court. On the other hand, matters of estate administration can be both contentious and non-contentious. It is, therefore, important to determine whether mediation should be made applicable to contentious matters or should it also include non-contentious matters as there are possibilities for family disputes to exist even in non-contentious matters.

As for the Estate Distribution Unit, it would require a new mediation framework to be constructed to determine a suitable position for its implementation. After studying the procedures for estate administration under the Estate Distribution Unit, it was concluded that mediation under this administrative body is suitable to be conducted prior to the issuance of an order from the land administrator or letter of administration.[44] Since mediation is considered as a new segment of practice of the land administrator, the implementation of this form of ADR may involve additional resources in terms of manpower, expertise, and cost. The current practice of the land administrator, which deals directly with the beneficiaries, makes it practical and suitable to include mediation as part of the dispute resolution process. The fee structure needs to be in line with the current practice of the Estate Distribution Unit as the government agency that provides affordable fees for its services. This matter will be discussed in the later part of this chapter.

With regards to the ARB, it has a different practice than that of the civil courts or the Estate Distribution Unit in terms of conducting a hearing session. However, in its capacity as a personal representative, ARB often communicates with the beneficiaries either through a direct meeting or other means of communication.[45] Since family disputes do occur in estate administration and such disputes could potentially harm the administration, the idea of implementing mediation into the practice of ARB seems feasible to address such disputes. In this matter, mediation can be conducted once a family dispute is identified in any of the following stages.

The first stage takes place prior to the issuance of letters of representation, while the second stage occurs during the execution and the distribution of asset. Should mediation succeed in resolving

41 Ray D. Madoff, "Mediating Probate Disputes: A Study of Court Sponsored Programs," *Real Property, Probate and Trust Journal* (2004).

42 In general, the high court resolve the dispute through the contentious probate proceedings, while the Estate Distribution Unit involves less formal hearing session which focuses on the brief discussion with the family members as to how the estate is to be administered and distributed. The mode of dispute settlement by ARB encompasses the art of negotiation which can be seen in the will reading session and during the meeting with the beneficiaries.

43 Introduction of court annexed mediation in 2010. However, the jurisdiction does not specifically covers the area of estate administration.

44 Issuance of distribution order or letter of administration in normal situation, referred to issuance of Form E or F.

45 Other means of communication includes emails, telephone calls and letters.

disputes among the beneficiaries, the Corporation will be able to administer the estate smoothly and settle the case within a short period.[46]

3.1 Extension of Court-Annexed Mediation to Probate and Administration Matters

Among the three administrative bodies in Malaysia, the High Court is the only institution with actual experience in handling mediation. Since its introduction in 2010, court-annexed mediation has been practised as part of the dispute settlement process, aside from the traditional litigation practice.[47] The quorum for court-annexed mediation was first established at Jalan Duta Court Complex, Kuala Lumpur, assuming under the name of Kuala Lumpur Court Mediation Centre (KLCMC) and is currently being expanded to other states as well.

The introduction of the court-annexed mediation was part of the judiciary's effort in increasing the rate of disposal of cases. Mediation is concurrently being used to encourage a solution via an amicable agreement between the disputing parties. This form of agreement is preferable compared to the one-sided decision under litigation since both parties can actually consent to such agreement. The flexibility in forming agreements and solutions under mediation allows for an amicable settlement between the disputing parties. Cases under mediation have been proven to be settled in a shorter time compared to the full hearing session.

That being said, the current court-annexed mediation does not cover the area of inheritance matters.[48] Any arising legal issues under inheritance, especially issues pertaining to estate administration under the civil High Court can only be resolved through litigation. Disputing parties have no choice but to proceed via the contentious probate proceedings should they wish their case to be settled. However, the United States mediation model shows that extending the jurisdiction of court-annexed mediation to cover areas of estate administration is possible. Mediation can, therefore, be utilised to address the dispute being brought to the court via the court-annexed mediation.

It should be noted that the application for the court-annexed mediation is limited to cases that fall under the category of contentious probate proceedings. Non-contentious matter involves a process of applying for letters of representation or for other related orders from the court, which does not involve serious issues to be tried. With the increased number of court cases, contentious probate proceedings alone may not be sufficient to resolve these cases. In addition, records from the ARB[49] show that there are estate administration cases that remain unsettled, even after twenty years, and these uncommon cases involve contentious probate proceedings.

With mediation being officially established under the Malaysian court judiciary, it is believed that court-annexed mediation can assist in the settlement of complicated court cases as well expedite the overall process in estate administration. The Practice Direction provides a general guidance regarding mediation by the court.[50] Although mediation is available for every hierarchy of the civil courts, the focus will be given to the superior courts, namely the High Court, the Court of Appeal, and the Federal Court. This is because jurisdiction relating to probate and administration matters falls under the hierarchy of the High Court and higher.[51]

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46 Apart from family dispute, delay towards estate administration may also be caused by the involvement of the third party or insufficient of documentation. Involvement the third party include matters such as caveats, or bureaucracy difficulty. Refer to the Chapter 3 on the causes of family dispute.

47 The court-annexed mediation was formally introduced by the Malaysian Judiciary in 2010 through the issuance of Practice Direction no.5/2010.

48 As stated under the practice direction, among the example of cases which are suitable for mediation are claims for defamation, personal injury, commercial disputes and intellectual property,

49 Based on the file study conducted by the researcher during the attachment program. Files under category of Section 13 of Public Trust Corporation Act 1995 governs application made to the court for probate or letter of administration by the corporation. Among these files consists of unsettled court cases between the beneficiaries which renders the estate unable to be administered and distributed.

50 Refer to the Practice Direction No.5 of 2010 which was issued on 13th August 2010.

51 Appeal cases will be heard at the court of appeal and subsequently Federal Court.

3.2 Implementation of Mediation under Estate Distribution Unit

Similar to the role of the civil High Court, the Estate Distribution Unit plays its part in issuing letters of representation to beneficiaries. In fact, the means of dispute resolution applied by the Estate Distribution Unit resembles the court's practice, which is via the hearing session. The hearing session enables the land administrator to ascertain the facts of the case as well as to identify any arising dispute among the beneficiaries. However, a dispute among the beneficiaries in relation to the estate administration is not handled by the land administrator. In this matter, the focus is only given to the settlement of the matte, normally through the issuance of distribution order or letters of administration.

Limitations in terms of commitment, time, and manpower impede the Estate Distribution Unit from addressing the dispute that arises during the application, other than the administration application itself. Normally, if the land administrator discovered a dispute among the beneficiaries that impedes the hearing or is preventing him/her from issuing a decision, the beneficiaries are advised to discuss and sort out the problem among them. The hearing will have to be adjourned and the beneficiaries are expected to come to the next hearing session with the problem already solved. Otherwise, the disputes and problems faced by the beneficiaries may persist even after obtaining the orders from the land administrator. Estate administration may be affected as long as the dispute is not settled. Therefore, mediation should be introduced under this institution to assist the land administrator in addressing the dispute. This way, the dispute can be addressed and solved via proper means, which upon its success, could prevent potential problems caused by an unsettled dispute from occurring throughout the entire period of estate administration.

3.3 Implementation of Mediation under Amanah Raya Berhad

Although the true concept of mediation has never been practised by the ARB, the corporation did integrate the essential elements of mediation in their dispute resolution practice. The element of discussion, negotiation, and soft approach are parts of the practice in ARB, in dealing with beneficiaries under estate administration. ARB believes that disputes relating to the estate administration are primarily the ones that could adversely affect the process, and should not be taken lightly. Thus, such dispute should be addressed and settled promptly. However, there is no standardisation for to the practice of negotiation and discussion for each ARB branch. Such practice is subject to the availability of the staff who are experienced in conducting such meetings. Such experienced officers, however, are not available in every branch of the ARB. They share a similar problem with the Estate Distribution Unit, which is the lack of capable manpower in holding a proper meeting session with the beneficiaries. According to the feedback by the ARB chief of head office in Kuala Lumpur, an officer from the head office is required to go to the branch from time to time to conduct meetings due to the unavailability of capable officers.

The current mode of dispute resolution by the ARB, which is via discussion, does not always receive the desired result. There are instances where mediation meetings had to be held several times due to failure to reach mutual consent from the beneficiaries. In other cases, even if an agreement over one matter was achieved, an unresolved dispute tends to lead to other issues. This is often due to the bad relationship between family members as they refused to understand each other's position. Therefore, it is vital to ensure that the relationship between beneficiaries is kept in good form. Otherwise, something needs to be done to repair the broken relationship.

Reliable methods to improve the relationship among family members can be found within mediation. This is because mediation enables the disputing parties to understand each other's position, including the hardships suffered by each side. This could create an opportunity for them to forgive and repair the severed relationship. Therefore, the implementation of mediation in ARB could enhance the ability of the corporation to effectively address family disputes and ensure a smooth process in the administration of estate.

4. CONCLUSION

The proposal to implement mediation takes into account the current situation within each administrative body, where it is considered as an additional module to their current practice. The differences in the implementation of mediation are essential to suit the distinct characteristics of each body, which also marks the flexibility of mediation as the suitable mode of dispute resolution. The distinct jurisdictions and procedural characteristics possessed by each administrative body require a proper consideration in implementing mediation. As for the civil High Court, the proposal to include mediation involves the extension of the current court-annexed mediation to succession matters. A review of the court mediation models from other states had shown the practical sides of mediation as well as provided a general guideline on how mediation can be applied to the Malaysian civil High Court, through its court-annexed mediation.

The implementation of mediation by the Estate Distribution Unit and ARB should take into account several aspects, including jurisdiction, procedural, and practical applications. These aspects are important to ensure that mediation can be applied without interfering with the status and authority of these administrative bodies, as mediation in this context is considered as an add-on to their current practices. As for the Estate Distribution Unit, the introduction of mediation means an additional service to its current practice. Therefore, it should be made without burdening the land administrators, considering their lack of officers in handling estate administration. With mediation being practised by the Estate Distribution Unit, family members who are going through a family dispute will have a proper channel to address this problem. In exchange, this would enable them to fully understand and appreciate the decision made by the land administrator once their dispute has been resolved.

As in the case of the ARB, the implementation of mediation marks an improvement to its current method of discussion and negotiation. By having officers who are trained in mediation and have mastered the art of dispute settlement, disputes among family members could be resolved through mediation session or during the meeting process, subject to the situational needs. In the ARB's capacity as the personal representative, achieving mutual agreement among family members will greatly benefit the estate administration process and ensure that the case is completed without delay.

Apart from the implementation of mediation by the administrative bodies, mediation could be promoted through will writing, by adding the mediation clause into the will of the testator. Mediation in this context is considered as conditional upon the occurrence of a family dispute, where agreement among family members seems impossible to achieve. Such inclusion indirectly reflects the love and concern of the testator towards his beneficiaries as to encourage them to solve any problem as quickly as possible.

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EFFORTS TO SAVE SAVABLE MARRIAGE THROUGH RECONCILIATION PROCESS UNDER FAMILY LAW IN MALAYSIA: ISSUES AND CHALLENGES

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It has been a trend in recent years that the divorce rate among Muslims and non-Muslims keep on increasing every year though the percentage slightly varies from group to the other. Divorce rate in Malaysia for both Muslims and non-Muslims had increased from 11.24% in 2001 to 18.67% in the year of 2010. This indicates that the rate of divorce among the married couples is on the rise every year in Malaysia. There are many reasons for the divorce which can be used by the couple as indication of intolerance and marriage breakdown. However, worst still the failure to make reconciliation effort as useful mechanism to resolve marital conflict contributes to the percentage of divorce. This is the scenario in Malaysian family law where the law relating reconciliation process is provided to amicably settle their dispute without going for divorce. However, it does not seem able to save marriages and application for divorce keeps on increasing year by year. Divorce should be the last option resorted to by a marriage couple in solving marital dispute and it should be chosen when there is a necessity for such. Divorce may negatively affecting the life of the couple and the children. To avoid from unnecessary divorce, this study analyse legal provisions, policies and practices on reconciliation process to settle dispute of marriage couple in Malaysia. Both laws applied for Muslim and non-Muslim will be reviewed in this study to identify the strength and weaknesses in these two jurisdiction. Beside the library research, interviews with the practitioners and couple who are involved in marital conflict will be conducted to understand the practical aspects and the issues faced by them in reconciling the marriage couple. It is hoped that this study and those earlier literatures on marriage reconciliation could shed lights to the question of effectiveness of current marriage reconciliation process and how it can be reformed for further improvement.

INTRODUCTION

Reconciliation means "the renewal of amicable relations between two persons who had been at enmity" (Black, 1968). For the purpose of this research, reconciliation process is referred to as series of actions or steps taken in order to restore the amicable relations of the marrying couple who are facing marital discord. Reconciliation is conducted as part of the effort to avoid from unnecessary divorce by married couple. There have been few studies conducted to show the negative effect of divorce and the positive effect of reconciliation of marriage especially for any saveable marriage. Among the study conducted is one by Linda J. White and her associates who conducted a study on the psychological effect on couples who opt for divorce and those who choose to stay and work out their marriage life. The question of their research is whether divorce makes people happier[1]. The study shows that 64 per cent of those who were facing marital breakdown, but continue in their marriage, instead of opting for divorce, end up happily in their marriage 5 years letter[2]. Meanwhile, those who choose divorce, showed somewhat higher number of depressive symptoms[3].

Likewise, many literatures also have shown that in majority of divorce cases, the effect is harmful to the children be it psychological, self-esteem or social relations[4]. Looking into these effects of divorce, family researchers propose that the state should develop and strengthen policies and laws that maximise reconciliation option and avoid divorce if possible and practical[5]. Even Islam teaches the the husband and wife to discuss in harmony between them and come to amicable solution between them. Study on the interpretation of the Qur'ānic verse 128 chapter Al-Nisa'[6], especially the phrase "واصلحا خير" shows that Islam requires for the couple to come to amicable solution in situation where there is dispute between each other and as much try to avoid from divorce[7]. Hence, it is also deduced from this verse that Islam does not promote divorce even though it is permissible. This understanding may further be supported by the hadith of the Prophet Muhammad where he said that "The lawful thing which Allah hates most is divorce"[8]. If the couple could not resolve their dispute in harmony, there is need for the Muslim community or authority to assist the couple in resolving their dispute and reconcile back their marriages.

In Malaysia, the effort to reconcile the marriage under the law is different between Muslim and non-Muslim married couple. While Muslim couple is bound under the Islamic Family Law Act 1985, the mon-Muslim married couple is otherwise govern by the Law Reform Act (Marriage and Divorce) 1976. Although the laws are different for non-Muslim and Muslim for the reconciliation process in Malaysia, both processes applying non-adversary system in managing the dispute between the married couple and thus promoting reconciliation. This study will explore the composition of the reconciliation committee and the process for the marriage reconciliation under the law and how reconciliation process is conducted. Since Islamic Family Law is different in each state, for the purpose of this study, reference for Muslim marriage reconciliation process will be made to the law available in Federal Territories. Findings of the study is characterised under two main themes. The main themes identified for the purpose of this study are "Reconciliation Committee" and "Reconciliation Processes". Study is conducted by reviewing the law for both Muslim and non-Muslim marriages while analysing the application of the law in marriage reconciliation practice.

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1 Linda J. White, Don Browning, William J. Doherty, Maggie Gallagher, Ye Luo and Scott M. Stanley, *Does Divorce Make People Happy? Findings From a Study of Unhappy Marriages* (New York: Institute of American Values, 2002).

2 Ibid, 12.

3 Ibid, 11.

4 Solangel Maldonado, "Facilitating Forgiveness and Reconciliation in 'Good Enough' Marriages", *Pepperdine Dispute Resolution Law Journal*, vol. 13, no. 1 (2013): 105.

5 Charles A. Donovan, "A Marshall Plan for Marriage: Rebuilding Our Shattered Homes", *Backgrounder*, No. 2567, June (2011), 10.

6 "and if a wife has reason to fear ill-treatment from her husband, or that he might turn away from her, it shall not be wrong for the two to set things peacefully to rights between themselves; for peace is best (واصلحا خير)".

7 Muḥammad Ḥusain Masʿud Al-Baghawī, *Tafsīr Al-Baghawī* (Riyadh: Darussalam, n.d.), 206-207.

8 This hadith is graded as authentic by Al-Ḥākim in his commentary of Sunan Abī Daud. Refer to Abī Daud, *Sunan Abī Daud*, ed. Abū Ṭāhir Zubair ʿAlī Zaī' (Riyadh: Darussalam, 2009), 440.

Reconciliation Committee

Qualification of the Reconciliation Committee Members

Under the Law Reform (marriage and Divorce) Act 1976 (Law Reform Act), any non-Muslim divorce application is required to refer to a conciliatory body, unless otherwise stated by the law, for conciliation process. This is stated in section 106 of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter refer to as the "Law Reform Act"). The law provides, in section 106(1) of the Law Reform Act, that a couple may not apply for divorce until the matter has been referred to a conciliatory body.

Non-Muslim marriage couple who are required to undergo reconciliation process will be referred to a conciliatory body as stated in Section 106 of the Law Reform Act. Section 106(3) of the Law Reform Act stated that a conciliatory body refers to a body from either (1) a marriage tribunal, (2) a council set up for the purposes of reconciliation by any appropriate religion, community, clan or association or (3) any other body approved as such by the Minister of Home Affairs. A marriage tribunal as stated in Law Reform Act refers to a committee established and managed by National Registration Department (NRD) which is a department under the purview of the Ministry of Home Affairs. The marriage tribunal shall consist of a chairman and not less than two of other members[9]. In practice, the marriage tribunal members are appointed from those among the NRD staff posted under the Marriage and Divorce Division. NRD has set up a team under the Marriage and Divorce Division for the purpose of conducting the reconciliation process and this team is made available at NRD branches located at every major city in all states. The chairman for the marriage tribunal mostly appointed from NRD's officer who has academic background/experience in counselling. Whereas the other members are appointed from among the administrative assistant under the Marriage and Divorce Division. Criticism has been made on the background of the member of the marriage tribunal because most of them are not those who are well trained in reconciling married couples[10]. Notwithstanding this criticism, NRD has made the effort by requiring their staff who involves in marriage tribunal to attend identified training relating to mediation and managing family dispute. However, there has been no specific training or education programme developed thus far to be part of the professional requirement to be an accredited family dispute practitioners. Therefore, the marriage tribunal members have to learn the required skills and knowledge through separate courses.

For a Muslim married couple, they are require to attend reconciliation session if the divorce is contended by either of the couple. Appointment of reconciliation committee under the Muslim family law is stated in Section 47(5) of the Islamic Family Law Act 1984 (hereinafter refer to as the "IFLA 1984"). The appointment of the reconciliatory committee under the IFLA 1984 is made by the Shariah Court. This process is different from the appointment of marriage tribunal under the Law Reform Act where court has no role in the appointment of the reconciliation committee. The Shariah Court further given authority by the law to determine whether the reconciliatory method applied by the reconciliation committee is appropriate for the couple or not. If not, the Shariah Court may dismissed the committee and appoint new committee[11]. The reconciliation committee shall consist of a chairman and two members. The chairman, as stated in Section 47(5) of IFLA 1984, shall be a religious officer. Currently practiced, the Religious Officer is appointed from among the officer of the Islamic Religious Council in each state based in which state the divorce application is heard of. In Federal Territories, the officer appointed as chairman is normally an officer from the Unit *Rundingcara Keluarga* under the Department of Federal Territory Islamic Affairs. This is one point to note that different from the chairman under marriage tribunal for non-Muslim. Similar issue raised under the Islamic Family Law with the one in Law Reform Act is the qualification for the chairman or members of the reconciliation committee. Family dispute requires individual who has skills in

9 Section 106(4) of the Law Reform (Marriage & Divorce) Act 1976.

10 Zaleha Kamaruddin, *Divorce Laws in Malaysia (Civil and Shariah)* (Kuala Lumpur: LexisNexis, 2005), 113.

11 Section 47(7) of the Islamic Family Law Act 1984.

managing emotional stress and problems of delicate relationship. Although the religious officer has wide knowledge in Islamic Family law, they may not have the experience in managing family dispute. It is found out that the religious officer is required to attend certain training for mediation as part of human capital development. Nevertheless, as stated before, there is no standard training given specifically in area of family disputes. In developed country such as Australia, official family mediators managing divorce cases are required to undergo accredited training programme for family dispute.

Involvement of Family Members

One unique practice in the reconciliation process under the IFLA 1984 is the appointment of family members agreed by the couple as the members for the reconciliation committee. There will be one family member of the wife that is appointed to represent the wife and another from the family member of the husband to represent the husband. In appointing these two members, the court shall give preference to close relatives of the parties who has knowledge of the case surrounding the marital dispute between the couple as stated in Section 47(6) of both laws. The law does not provide any other detail whom from the close relatives may represent the couple. Otherwise, in practice, the Shariah court will choose family members who are Muslim, *mukallaf*, having basic knowledge in Islamic law, having knowledge of the issued between the married couple as stated in the law and in most cases the court prefer man. Although woman from the family members can be appointed, the practice is always to give preference to man.

The above concept of Islamic law for reconciliation in Malaysia is actually has basis from the process of *ḥākam* stated in the Qur'ān where reconciliation is part of a function for a *ḥakam*[12]. This concept provides involvement of the family members of the married couple to reconcile the married couple. Other who is not family members may be appointed as committee on behalf of the couple during the reconciliation process. However, Shariah court in practice will do so only in situation where there is no family members who are qualified to manage the reconciliation and it is preferable if the non-family member is someone who has knowledge on the issues between the married couple[13]. Considering the objective of the committee is to work for the reconciliation of the marriage couple, the committee members should not be limited only to family members. Interview with the Shariah court officer shows that the appointed family members has not able to assist much in the reconciliation. The major reason being that the family member themselves are not providing support towards the reconciliation and promoting divorce instead. Hence, professional mediator may be needed to assist the chairman of the reconciliation committee to work out the reconciliation process.

Appointment of family members as part of the reconciliation committee is among the difference between marriage reconciliation for Muslim and non-Muslim in Malaysia. Under the Law Reform Act, family members are not part of the marriage tribunal, although family members may represent the couple during the reconciliation session[14]. Nonetheless, the involvement of total strangers in the reconciliation sessions under the Law Reform Act has been criticised. The issue raised is because strangers might be judgemental, prejudiced, biased or hostile towards the couple[15]. Despite this presumption on the hostility of stranger involves in a reconciliation process, interview conducted under this study with the married couple who have undergo the reconciliation by the marriage tribunal shows that they are pleased with the officers and the treatment received. There has been no feedback stating that the marriage tribunal officer being hostile or injustice towards the respondents. However, as mentioned hereinabove the main issue on the committee of the marriage tribunal is the skills and knowledge in family dispute resolution.

12 Chapter Al-Nisa' verse 35.

13 Muḥammad ʿAlī Al-Ṣābūnī, *Tafsīr Ayātu Al-Aḥkām min Al-Qur'ān*, vol. 1 (Egypt: Dar Al-Sabuni, 2007), 377.

14 Section 106(5)(c) of the Law Reform (Marriage & Divorce) Act 1976.

15 Mimi Kamariah, *Family Law in Malaysia* (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1999), 188.

Reconciliation Sessions

Role of Court in Reconciliation Process

Both reconciliation processes for Muslim and non-Muslim married couples give 6 months to the reconciliation committee to reconcile the discorded couple[16]. If the reconciliation committee able to reconcile the discorded married couple, the application for divorce will be revoked. If the reconciliation committee, after the series of meetings, is satisfied that the couple could not be reconciled, a certificate or report will be issued stating that the marriage has irretrievably broken down[17]. For non-Muslim case, once the certificate of non-reconcilable issued, only then the couple may submit the petition for divorce in the high court. As can be seen, the involvement of court in reconciliation process is very minimal. The only involvement of the court under the Law Reform Act is the jurisdiction for the court to require the couple applying for divorce to undergo reconciliation if the court perceived that there is possibility of reconciling the married couple even during proceedings[18].

Compare to the Law Reform Act, IFLA 1984 provides the Shariah Court jurisdiction to determine not only the members of the conciliatory committee but also it may determine how the reconciliation process may be conducted. Furthermore, the direction for the parties to be referred to the conciliatory committee is issued by the Shariah Court, as per the wording of Section 47(5), which gives weight to the requirement to attend the reconciliation sessions. Comparing to civil reconciliation procedure, where the instruction to attend the reconciliation session is given by the National Registry Department only, court order to attend the reconciliation sessions as practiced by the Islamic Family Laws has able to give some "force" to the parties in attending the session. Attendance is among the main issue under the reconciliation process conducted by NRD[19] which, based on interview with Shariah court's officer, is not major issue for reconciliation process under IFLA 1984.

Furthermore, the law provides the Shariah Court with authority to dissolve the Conciliatory Committee and appoint a new one if the Shariah Court is not satisfied with its conduct in performing their duties in reconciling the parties[20]. IFLA 1984 further provides wide jurisdiction to the Shariah Court in determining how the reconciliation process by the conciliatory committee is managed[21]. Although both reconciliation processes for Muslim and non-Muslim couple are non-adversary method, the role of court in the Islamic law of reconciliation process is more significant compare to non-Muslim. This law provide monitoring process to the reconciliation committee in ensuring that not only the objective of reconciliation process is achieved but also to ensure that the rights and responsibilities of the husband and wife is protected. This is not available under the Law Reform Act which hence there is no proper mechanism to monitor the process of reconciliation by the marriage tribunal. In practice the court will not enquire or dwelt into the reconciliation process by the marriage tribunal. The Malaysian authority should look into the function of the High Court in the above issue of non-attendance of the couple and no monitoring procedure for the reconciliation process under the Law reform Act.

Management of the Reconciliation Sessions

Previous discussion herein noted the critical issues of non-attendance of the couple for reconciliation process under the Law Reform Act. Most of the cases under the marriage tribunal fail to be reconciled owes its reason to the issue of non-attendance. Finding from this study indicated that marriage tribunal under the Law Reform Act will held the reconciliation sessions minimum of three

16 Section 106(5)(a) of the Law Reform (Marriage & Divorce) Act 1976; Section 47(9) Islamic Family Law Act 1984.

17 Section 47(11) of the Islamic Family Law Act 1984; Section 106(5)(b) of the Law Reform (Marriage & Divorce) Act 1976.

18 Section 55(1) and (2) of the Law Reform (Marriage & Divorce) Act 1976.

19 Nora Abdul Hak, "Reconciliation Provision Under English and Malaysian Family Law: A Comparative Overview", *The Law Review*, (2008): 114.

20 Section 47(8) of the Islamic Family Law Act 1984.

21 Section 47(7) of the Islamic Family Law Act 1984.

sessions regardless of the full attendance of the couple. Once the third session is recorded and there is still non-attendance of all the parties or there is no sign of reconcilable marriages, only than the marriage tribunal will issue the non-reconcilable certificate. Process for the reconciliation sessions under the marriage tribunal is through meetings with both the spouse scheduled by the marriage tribunal. What is noted from this study is that there was no initial discussion between the conciliatory officer and each of the couple personally before the official sessions with all the parties involved. Study has shown that initial discussion or known as intake process in mediation type of ADR is beneficial among others to build trust between the client and the tribunal officer, promote better participation from the clients during the conciliation sessions and to gather relevant information or part of screening process to see whether the reconciliation sessions should continue[22]. This initial stage is not applied by the marriage tribunal which may be beneficial especially in persuading the couple to participate further in the reconciliation process.

Different approach is taken for the reconciliation sessions practiced by the Unit *Rundingcara Keluarga* where they will try to arrange for a separate session at the initial stage. The Chairman of the reconciliation committee will obtain beforehand the information from the couple together with their family members appointed as committee without the attendance of other spouse. The information obtained will help the reconciliation committee to prepare for proposed solutions for the couple and hence assist them during session where both husband and wife together. However, findings for cases under the state of Federal Territories shows that such practice is difficult to be applied while working to reconcile the couple within 6 months. This is because the number of cases handle by the reconciliation committee in Federal Territories are huge while the number of staff from the religious department who are able to conduct reconciliation process is very small. There is need to look into sharing resources from other states which have lower number of reconciliation cases. Authority can also innovate even further by looking into standardisation of members in the reconciliation committee for both Muslim and non-Muslim and hence the human resource can be deployed according to number of reconciliation cases in each state.

Conclusion

It is agreed that not all broken marriages are reconcilable[23]. For cases that is reconcilable, proper planning and strategies are required to ensure the success of the marriage reconciliations efforts. Under this study, it is found that there are issues under the reconciliation process conducted by the marriage tribunal for non-Muslim and conciliatory committee appointed for Muslim couple that need to be reviewed and revisited to increase the success rate for marriage reconciliation. Main issues that worth of highlighted and where immediate reform can be made are qualification of the reconciliation committee, court interference and conciliatory method applied by the conciliatory officer. Professional qualification and training should be made compulsory for marriage tribunal and chairman of the reconciliation committee. This is where government of Malaysia can combine the training and qualification process under one management. There is no need to have two separate family dispute mediators for non-Muslim and Muslim reconciliation committee. As the skills required in managing family dispute is similar, regardless of religion of the couple, government could also looked into sharing resources where discorded couple can be referred to any qualified reconciliation committee. Having standard qualification and requirement for both jurisdiction will able to give both Shariah court and high court the flexibility to refer couple to available reconciliation committee.

Function of the court under the Law Reform Act as persuading factor should be re-looked in ensuring the participation of the couple in cases which show sign of reconcilable. As discussed above, cooperation from the spouse in attending the reconciliation sessions by the marriage tribunal under the Law Reform Act is low. Henceforth, it is suggested that the attendance is issued by the court as

22 David Spencer and Michael Brogan, *Mediation Law and Practice* (Sydney: Cambridge University Press, 2006), 43.

23 Solangel Maldonado, "Facilitating Forgiveness and Reconciliation in 'Good Enough' Marriages", in *Pepperdine Dispute Resolution Law Journal*, vol. 13, no. 1 (2013): 105.

how it is practiced by Shariah court. An order from the court should able to "force" the couple to comply with the requirement to attend the reconciliation sessions. Monitoring aspects should also be established under the jurisdiction of the court so as to ensure that the reconciliation process is properly conducted and rights and responsibilities of the couple are protected and respected.

The attendance issue could be resolve further by reviewing the conciliatory method applied by the reconciliation committee. Further study is requires to suggest for improvement on the conciliatory method. Initial discussion and assessment by the reconciliation committee with each of the spouse personally is among the important stage where the conciliatory officer can identify the level of motivation on the part of the couples to attend the reconciliation sessions and to ensure that the couples are clear on the objective and benefits of the reconciliation sessions. How the sessions are conducted is also important as it may determine whether the couple able to appreciate the benefit of attending the reconciliation session. Marriage Tribunal should consider the Intake process where initial communication with the parties involved is made before arranging for reconciliation sessions. This process is important to assist the conciliatory officer in making the appropriate strategies in obtaining participation from the couple.

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SETTLEMENT OF DISPUTES RELATING TO THE AREA: ROLE OF SEABED DISPUTE CHAMBER OF INTERNATIONAL TRIBUNAL FOR LAW OF THE SEA

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ABSTRACT

The successfulresolution of maritime disputes is intertwined with the development of international legal regime concerning the oceans affairs. Transforming attention from earth based reserves wealth to the mineral resources of the seabed is a growing trend and a great concern of global community. International Seabed Authority, on behalf of all, is empowered to organize, carried out, and controlled the activities in the Area. The current article examined thelegal responsibilities, liabilities and compliance of the concerned entitiesregarding exploration and exploitation of recourse in the Area.It further explores the jurisdiction and scope of the International Seabed Authority (ISA) andSeabed dispute Chamber (SDC) of International Tribunal for Law of the Sea (ITLOS)for resolving existing potential conflictsin the Area between and among the individual, entities sponsored by the governmentin terms of interpretation and application of the relevant rules under the Sea Convention and other related agreements. Finally the aim of the research is to highlight the specific role and competency of Seabed Disputes Chamber for upholding the benefit of all mankind. Finding of the article is that the SDC made significant contribution by adopting several regulations and advisory opinion with the cooperation of other organs of the ISA. However, in order to carry out this research, author consults with the relevant international conventions and their application in resolving maritime disputes relating to the Area under international tribunals and SDC. Researcher further furnishes the information from published scholarly books and articles in the library and from onlineresources.

KEY WPRDS: *Exploration, convention, jurisdictions, mineral resources, interpretation,*

1. INTRODUCTION

The world's ocean covers seventy one percent are about 362 million square kilometers of ocean and the Area in concern comprises sixty four percent of total ocean surfaces. The massive Area under UNCLOS is immensely significant for both costal and land-locked states in terms of exploration and exploitation of resources above and beneath the sea floor. Beside other maritime zones High Seas and the Area is located beyond the limits of national jurisdiction. However, the status of such Area is recognized as a common heritage of mankind and no State shall claim or exercise sovereignty or sovereign rights over any part of the Area.By virtue of the convention, the activities shall be conducted by the enterprisesof the state and Authority or ordinary or juridical persons with nationality sponsored by the states or any group thereto. In this connection, parties are obligated to perform the legal responsibilities and obligations and follow the rules, regulations and procedures adopted by the Authority. They further, required undertaking the liabilities for failure to cause damages by wrongful activities in the Area. However, the article considered shortly the concept of common heritage of mankind, importance of the Area along with the legal regimes for exploration activities and assessed the jurisdictions, functions and effectivity of ISA and Seabed Dispute Chamber.

2. ELUCIDATIOION OF THE TERM AREA

The very term "Area" to which we are concern herein is an expression defined magnificently at the very beginning of the Sea Convention herein referred to UNCLOS 1982 as; the ""Area" means the seabed and ocean floor and subsoil thereof, beyond the national jurisdiction."[1] In other words this is a significant part of the ocean located in deep seabed adjacent to the continental shelf beneath the high sea or the Area is adjoining next to the outer limits of continental shelf. The Area started from the end of the limit or outer limit of the continental shelf toward the ocean floor in forward including Sea Mountain, ridge and deep trenches. Therefore, before determining the Area limits of continental shelf have to be delimitated first. The Area can also be defined as the place afar from the national jurisdiction and where exercises of sovereignty or sovereign rights are unrecognized. Furthermore, this is a geographic location contained world's most part of the Ocean beyond state jurisdiction. Part XI of the convention discussed in detail about the governance, development, rights and liabilities of the enterprises and dispute resolution thereof. The status of this part has given as a common heritage of mankind. Nonetheless, the convention has not defined and interpreted the nature, scope and characteristics of common heritage.

The concept of common heritage has been reflected in the convention after the "Declaration of Principles governing the Sea-bed and Ocean Floor and the Subsoil thereof beyond the Limits of National Jurisdiction" which was adopted by the United Nation General Assembly in 1970 through years of discussion by the Sea-bed Committee on the Malta's proposal of "Common Heritage of Mankind".[2] The concept is still debatable and many International legal experts have diverse arguments for and against it as Goldie, observed that until the question of meaning of the concept is clear "the act of prescription mere sows the dragon's teeth of war of words".[3] The common heritage of mankind was precisely explained by the Sri Lankan Ambassador which was quoted by Mahmoudi as the common heritage of mankind means:

> "The common heritage of mankind is common property of mankind. The commonness of the "common heritage" is a commonness of ownership and benefit. The minerals are owned in common by your country and mine, and by all the rest as well…If you touch the nodules at the bottom of the sea, you

1 Article 1(1), Unite Nations Convention on Law of the sea (UNCLOS) 1982.

2 M.C.W. Pinto, "The United Nations, Sri Lanka and the Law of the sea"

Sunday Island, May13, 2007, http://www.island.lk/2007/05/13/features1.html (last accessed July11, 2017)

3 L. F.E. Goldie, "A Note on some Diverse Meanings of "the Common Heritage of Mankind", *Syracuse Journal of International Law and Commerce*, 10, no.1 (1983): 70, http://surface.syr.edu/cgi/viewcontent.cgi?article=1162&context=jilc

touch my property. If you take them away means to take away my property".[4]

However, the rationale behind the principle was to benefit the mankind without discrimination on the ground of geographical location or status whether littoral or land-locked. The principle intended to ensure the benefits exploited from the Area for the developed and developing countries under an accepted authority known as International Seabed Authority. Furthermore, the Area shall be opened and utilized absolutely for the peaceful objectives with zero harm policy under the convention.[5] Now we are moving toward the significance of the Area in the next section.

3. SIGNIFICANCE OF THE AREA

The Area under High Sea as mentioned in earlier comprising about sixty four percent of the entire Ocean surface and the sea floor with uncountable stockpile of natural wealth with numerous variations. The Oceans including the Area is highly significant for several reasons. Entire mankind is closely connected and heavily dependent on the sea as it is a fundamental source for supplying our oxygen, foods, energy, minerals and other ecological services. Beside the stock of natural resources Ocean contributes to world's largest sea born trade. As regards the basic source of food there are more than 3.5 billion people are depending on Ocean in the current globalized world and by next 20 years the amount would be two times of about 7 billion. It produces around 200 billion tons of fish and shellfish inevery year.[6]According to the report of Food and Agricultural Organization (FAO) Oceans are highly significant in terms of food security and employment about 10-12 percent of the Earth's population directly involved with capture of fisheries across the globe. Report further revealed that approximately 160 million tons of fish generated US$129 billion export value from world fisheries in 2012 which provided 16 percent of total global animal protein and billions of people were secured for nutrition as a ramification. It was recorded that the GNP of costal states also extensively resulting from Ocean resources about 61 percent of world's Gross National Product.[7]Therefore, national economy is now moving forward with exploration and exploitation of Ocean, particularly from the Area, resources for sustainable economic development which is known as blue economy of the time.

Apart from the foodstuff the Area is a place to provide plenty of mineral resources which includes all solid, liquid or gaseous minerals including polymetallic nodules.[8]As far as the solid minerals are concern scientists are estimating that there are 50 quadrillion tons of solid available in the deep seabed. Polymetallic nodules,[9]cobalt-rich ferromanganese crust and polymetallic sulphides have deemed highly economic value that mostly located in the Area. These raw minerals also contain nickel, copper, iron, cobalt, manganese, sands, salt, gravel, gold and silver. In addition, the Ocean reserves an estimated about 20 million tons of gold in its uneven floor.[10]On the other hand liquid mineral comprises rough oil and gas and the Ocean is a mine for those resources. Furthermore, with the objective for generating new cosmetics, medicine, and chemicals the genetic resources from the Ocean are sophisticatedly utilize in the concern industries throughout the world. In organic sea water salt elements such as calcium, carbonic Acid, sulfate, sodium, chloride, magnesium, potassium,

4 Said Mahmoudi, *the Law of the Deep Seabed Mining: A Study of the Progressive Development of International Law Concerning the Management of the Polymetallic Nodules of the Deep Sea-Bed* (Stockholm: Sweden Almqvist &Wiksell International, 1988), 134.

5 Article 140, 141, Unite Nations Convention on Law of the sea (UNCLOS) 1982.

6 Amarachi PaschalineOnyena, "The Deep Ocean, Resources, Exploitation and need for Sustainability", *LinkedIn* May 31, 2017, https://www.linkedin.com/pulse/deep-ocean-resources-exploitation-need-sustainability-onyena

7 "Oceans, Fisheries and Coastal Economies", *The world Bank*, last updated June 5, 2017,http://www.worldbank.org/en/topic/environment/brief/oceans (last viewed July11, 2017)

8 Article 133Unite Nations Convention on Law of the sea (UNCLOS) 1982.

9 "Polymetallic nodules", International Seabed Authority, Courtesy of the Law of the Sea Geosciences Group,. Southampton Oceanography Centre, United Kingdom, 2003,

https://www.isa.org.jm/files/documents/EN/Brochures/ENG7.pdf (viewed July 12, 2017)

10 "Interesting Ocean Fact", *Save the Sea*, http://savethesea.org/STS%20ocean_facts.htm, (viewed July 12, 2017)

strontium, bromine is also significant for those industries.[11]

However, the exploitation of these resources also caused great environmental impact. As International Seabed Authority identified the three main ways to cause environmental harm in the Area are: "exploration for commercial deposit, small-scale and prototype tests of commercial recovery mining systems, and metallurgical processing".[12]The Sea convention intends to regulate the overall exploration and exploitation activities in the Area peacefully and without damaging the marine environment and ecosystem. Therefore, part XI deals with the procedures along with the liabilities of the enterprises and also for the benefit of entire mankind.

2. LEGAL REGIMES FOR EXPLORATION AND EXPLOITATION

The first and foremost law concerning the regulation of exploration and exploitation of mineral resources from the Area is the United Nations Convention on Law of the Sea, (UNCLOS) 1982. It composed a legal framework under which all actions relating to exploration and exploitation, conservation and effective utilization of marine biodiversity from the Area shall be governed. Part XI of the convention has declared the Area is beyond national jurisdiction and is the common heritage of mankind. It also expressed the Principles and procedures for peaceful management of activities together with the Agreement Relating to the Implementation of Part XI of the Convention, 1994 and Implementation of UN Agreement for the Conservation and Management of Straddling Fish Sticks and Highly Migratory Fish Stocks, 2001. The agreement of 1994 entered into force in 1996 concentrated on some difficult aspects which were argued by the industrialized countries connecting with the seabed exploration that outlined in part XI of the Convention. Several issues have been addressed in the agreement involving procedural matters in one hand, like signature, enter into force, application and bindingness, and some fundamental concerns on the other, like issue of expenditure of parties and institutional arrangements, criterion for taking decisions by the Authority, transmit of advanced technology, terms the contract relating to finance, production policies, and further review of the convention. It has also declared that on the occasion of any discrepancy between this instrument and Part XI regarding matters mentioned the provisions of Agreement shall be dominated.[13]As regard the Implementation of UN Agreement, 2001 which shall also be applied with Part XI and Agreement, 1994. The Agreement basically established certain principles for conservation, effective supervision and optimum utilization of the resources within and beyond national jurisdiction interlinked with the seabed exploration and fish stock in the Area.

Apart from the above agreements all the regulations and recommendations approved by the International Seabed Authority (ISA) for effective mining of marine minerals in the Area should be taken into consideration. All these rules, regulations and procedures under the legal structure of UNCLOSE and implementation agreement are concurrently known as Mining Code. There are four recommendations and five regulations have been adopted by the ISA considering the exploration cost, possible environmental impact, administration, mechanism for persistent monitoring, and the harmless procedures for extracting polymetallic nodules, sulphides and cobalt from the Area. In addition Biodiversity Convention also to be observed for preservation, effectual use of biological diversity and sharing output arising out of genetic resources with theworld's community in a reasonable manner. Furthermore, the relevant rules and regulations in terms of pollution, trade and intellectual property adopted by International Maritime Organization (IMO), Food and Agricultural Organization (FAO) and World Trade Organization (WTO), and World Intellectual Property Organization (WIPO) also

11 Amarachi, "The Deep Ocean, Resources", *LinkedIn*, https://www.linkedin.com/

12 "Protection of the Seabed Environment",*International Seabed Authority*, vol.2, March 2008, https://www.isa.org.jm/files/documents/EN/Brochures/ENG4.pdf,(last browsed July 12, 2017)

13 Article 2 Agreement Relating to the Implementation of Part XI of the Convention, 1994

should be maintained.

3. SCOPE AND FUNCTIONS OF INTERNATIONAL SEABED AUTHORITY

The International Seabed Authority (ISA) is an autonomous intergovernmental organization created by the United Nations Convention on Law of the Sea, 1982. The body is referred to as "Authority" under the convention which came into existence in 1994 and started full-fledges action in 1996 having permanent seat in Jamaica.[14]The fundamental objectives of the Authority are to organize and control the exploration operations and administer the development of mineral resources in the Area together with the state parties.[15]The "Authority" shall act in accordance with the powers and functions expressly or impliedly provided by the convention[16]in concert with the Agreement Relating to the Implementation of Part XI of the Convention, 1994. The agreement, however, is a precise revision and updated in terms of execution of exploration activities compared to Part XI of UNCLOS 1982.[17]Therefore, the underlying principles behind the functions of the Authority are considering Mineral resources as the common heritage of mankind and sovereign equality of all its members.[18]

However, the convention empowers the "Authority" to take necessary actions whenever and wherever required in relation to the activities in the Area. It has a supervisory jurisdiction over the performance of the enterprise and other entities with the objective of ensuring compliance and control of the work plan and other rules and regulations of the Authority. In addition, Authority enjoys the power of investigation over the structures and installations for exploration and exploitation activities. It has also power to revise, suspend and terminate the contract subject to Article 14, and 17 of the Annex III of the convention on the grounds of grave, continuous, and intentional violation of the basic conditions of the contract and non-compliance of the binding decision to him by the dispute resolution body. The Authority can suspend or terminate the contract and impose financial penalties. Nevertheless, before confirming penalties the concern party should be given reasonable scope to seek legal remedies under the instruction of the section 5 of the Part XI.[19]As regards the revision of the contract Authority shall smooth the progress of negotiation and consent of the parties in the context where such contract deemed unfair, unreasonable and unattainable to its objectives set in the contract. In further, it has power to grant the opportunities to take part in the activities in the Area without any discrimination and special emphasis shall be given to the developing nations, particularly land-locked and geographically disadvantaged countries.

The Assembly, Council and Secretariat are the three principal organs of the ISA through which it discharge its major functions. The Enterprise which is our concern in this article is an another organ of the Authority engaged directly with the exploration activities in the Area and the Seabed Dispute Chamber also responsible for settling disputes arising out of the activities in the Area between and among the parties. The Enterprise performs its functions according to the article 153 in respect of activities in the Area on the one hand and transport, processing and marketing of the extracted minerals from the Area to International communities. It has exercise its legal capacities provided in the Annex IV of the convention. It shall pursue the convention and contain the rules, regulation and procedures of the Authority, comply the common policies of the Authority and Directives of the Council.[20]In addition Enterprise shall carried out its function according to the approved work plan of the enterprise and in other case joint agreement accepted and reviewed by the council as well as Legal and Technical Commission of the Authority. In short we will summaries here the main functions of the Assembly and the Council.

Assembly is the chief organ of the Authority and all organs are accountable to it. Both Assembly and Council have power to make general policies approved by the Authority covering mainly the

14 Article 156 (1), (4)UNCLOS 1982

15 Article 157 (1), Ibid.

16 Article 157(2), Ibid.

17 Marta Chantal Ribeiro, "What is the Area and the International Seabed Authority?", *Oceanographic Institute - Albert Ier Prince of Monaco Foundation*, May 2013, www.institut-ocean.org (last viewed in July 23.2017)

18 Article 136, 157(3), op.cit.

19 Article 153 (6), & 162 (w),(x) Article 18, 19 of Annex III. UNCLOS 1982

20 Article 153 (1), & 170 (2) op.cit.

issues of relating activities in the Area. It is a duty of the Assembly to create subordinate bodies when necessary and accept the guiding rules and procedures concerning the impartial distribution of benefits come from the Area. Furthermore, Assembly shall conduct research for the purpose of encouragement of global cooperation and advancement legal regime for the exploration and exploitation in the Area. Moreover, there are also entertained disputes in general character and also fixed compensation mechanism for this end.Beside the Assembly, functions of the Council are to monitor the application of this part attract the convention toward the non-compliance of the parties in the activities of the Area. In addition, making directives for the Enterprise, accepting work plane, and exercise control over the activities are some of the functions of the Council. Furthermore, council shall file a proceeding to the Seabed Dispute Chamber for breach of rules, regulations and procedures against the parties and inform the Authority about the decision of SDC along with appropriate recommendations to that effect. It has also power to cancel the Areas for serious harmful to the ecosystem of the Area.[21]

4. JURISDICTIONS AND LIMITATIONS OF SEABED DISPUTE CHAMBER

Seabed Dispute Chamber is a subsidiary body of the Authority established under the convention and it shall exercise its jurisdiction provided by section 5 of the Part XI.[22]It has jurisdiction over the dispute between parties concerning interpretation and implementation of Part XI concerning the activities in the Area and action or inaction of the Authority or state party regarding violation or misuse of this Part or other relevant Annexes or rules and procedures establish by it. However, the term "party" which includes state parties, the Authority, Enterprise if the Authority or Enterprise of the State, and natural and artificial person. It has also power to deal with the problem in terms of explanation and application of the exploration contract or working plan in the Area and with any harmful effect through doing or abstaining from doing any activities directly damaging to the rights of other party.

Furthermore, dispute between the Authority and state sponsored potential contractor come under the authority of the SDC on the grounds of legal question arising in the negotiation process of the contract, rejection of contract for non-acceptance of enforceability, disregarding the binding obligation established by this Part and rules of the Authority and other directives of the organs of the Authority, non-recognition of the control of the Authority over the activities in the Area, failure to submit written statement confirming the observing the obligations bonafidely, non-conformity in terms of transfer of technology used during the exploration activities under the guideline of Article 5 of Annex III[23]and failure to pay fees determined by the Authority.[24]In the event where a liability caused by the Authority in consequence of any wrongful operation which resulted a serious damage in the Area or misuse of employment obligation in respect of gaining secret financial benefit from the activities or through sharing confidential data or information to outsiders the SDC will take necessary action to resolve the dispute. In this context victim of such breach of duty can joint with the proceeding initiated by the Authority against such person to the designated tribunal.

However, the jurisdictional limitations of SDC also remain over the discretionary power of the Authority. Discretion of the Seabed Dispute Chamber shall not be substituted in any way for the Authority. It has no power to declare itself any rules, regulations and procedures of the Authority as inconformity with the convention and therefore, invalid. Nevertheless, it shall be limited within the following issues like taking decision about the claim that certain rules of the Authority would be in conflict to deal a particular case in terms of contractual obligation of the disputants, determine the allegation against the Authority regarding too much exercise and mistreatment of power by the Authority, and settlement of those disputes and claim as a result arising out of breach of contractual obligation between the parties or failure to fulfill obligations of the convention.[25]

21 Article 160.Ibid.
22 Article 14 Annex VI.Ibid.
23 Article 187 (d),(e),(f),Op.Cit.
24 Article 4, (6), 13 (2) Annex III. UNCLOS 1982
25 Article 189,UNCLOS 1982

5. PROCEDURES FOR SETTLEMENT OF DISPUTES

Fundamental doctrine of international dispute resolutionis the adoption of a peaceful approach in the proceedings which would maintain global harmony and safety. In doing so concern parties are at liberty to select any of the following methods like "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".[26]In addition, disputing parties can chose general, regional and bilateral agreement as the governing law for dispute resolution which leads to a binding decision.

However, the nature of the disputes concerning the exploration and exploitation activities in the Area beyond national jurisdiction is different with those problems relating to the delimitation of maritime zones and limits of continental shelf of the concern costal state. The issue of non-compliance is the central source of emerging disputes among the parties under Part XI of the sea convention to the Seabed Dispute Chamber. The parties of the disputes are also clearly defined in the convention as we mentioned in the forging section and they have to follow the two categories of laws, regulations and procedures. In the first instance parties other than Enterprise of the Authority should abide by their national laws and regulations legislated for the peaceful exploration and exploitation of natural mineral resource in the Area. On the second aspect they have to comply the Part XI and relevant Annexes of this convention, agreements and recommendations for the implementation of concern part. The rules, regulations and procedures adopted by the Authority and its subsidiary organs under the mandate of the convention and other relevant International conversions and rules procedure of Relevant of International organizations as we further mentioned in the earlier subtitle.

In order to resolve a dispute arises out of the activities of the Area concerned parties can submit their disputes to any of these three bodies of dispute resolution such as Special Chamber of the International Tribunal for Law of The Sea or Ad Hoc Chamber of Seabed Dispute Chamber or Binding Commercial Arbitration Tribunal.[27]However, the commercial arbitration body has no jurisdiction over the matter of interpretation under Part XI of the convention therefore; the related dispute should be return to the Seabed Dispute Chamber. The Arbitration authority, on the request of the party, can take decision subject to the confirmation according to the rulings of the SDC and in the absence of arbitration clause in the agreement the disputes shall be settled under the rules of UNCITRAL Arbitration Rules.[28]

In the occasion where disputants have submitted their application to the Seabed Dispute Chamber for peaceful resolution of the question the Chamber shall then form an Ad Hoq Chamber of three members to cognize the matter under its competency. During the formation of the Chamber the SDC will consult with the concern parties and take their approval about the member. In case of disagreement as to the formation of the Chamber concern parties shall be required to select one member and third member shall be appointed on the basis agreement by the parties. On the failure of selecting member for the chamber the President of SDC shall appointed require members for it who has no relation with any of the conflicting parties.[29]As regard the special Chamber for rapid conclusion of the dispute International Tribunal for Law of the Sea (ITLOS) may establish a body of three or more competent members as it thinks fit with the consent of the concern parties for dealing with specific categories of disputes. It may also constitute annually a body of five members for swiftly resolving the dispute applying the summary procedure. They heard and resolve the problem as quickly as possible and the decision of the Chamber shall be considered as the decision of the Tribunal.[30]

As far the procedures of the dispute settlement parties are required first of all to communicate to the Tribunal about the special agreement for going to the Chamber or a written application for peaceful end of the problem. After receiving the application, Ad Hoq Chamber of Special Chamber will take provisional actions to protect the interest of the party and impede severe damage of the seabed environment beyond national jurisdiction. At the request of the party the interim order can

26 Article 279,280 UNCLOS, 1982, Article 2 (3) & 33 Charter of the United Nations, 1945,

27 Articles 188, UNCLOS 1982

28 Article 188 (c), Ibid

29 Article 36 Annex III,Ibid.

30 Article 15 Annex VI,ibid.

be removed or modified within two weeks and parties should be given opportunity to be heard. In addition, the whole proceedings of the dispute resolution remain open for all concern parties.[31]Hearing of the dispute should be held with impartial manner if any party failed to prove their case the Chamber will proceed to conclude the decision however, before the pronouncement the Chamber must satisfy itself that the claim has been proved in fact and law. After hearing every party the Chamber will pronounce its judgment by majority opinion and read it in open Court. The decision of the Chamber shall be applicable to the country of the concern party as like as the judgment of the highest court of their territory. However, the judgment should be followed by the parties but it does not create any binding force unless the parties make it binding upon them in a particular dispute.[32]

6. **Role of Seabed Dispute Chamber under ITLOS**

International Seabed Authority (ISA) has provided specific authority in protecting and regulating the mineral resources as well as the marine environment in the Area beyond national jurisdiction. With a view to achieve those objectives Seabed Dispute Chamber of was established under International Tribunal for Law of the Sea for observing the functions given by the convention. However, the SDC has played momentous role regarding crucial, sophisticated and invaluable natural mineral resources in the Area. As a separate judicial body of the Tribunal SDC has an advisory and contentious jurisdiction with special function of explaining the Part XI and other related instrument. The convention has empowered the SDC to oversee the matters relating to the legal obligations of the parties and entities supported by the states. It has been exercised by the Seabed Dispute Chamber at the request of the Assembly or the Council of the ISA. The body adopted four noteworthy regulations relating to the exploration and exploitation of valuable minerals polymetallic nodules, sulfide, and ferromanganese and five recommendations for the enhancement of the related activity with the objective of upholding the common heritage of Mankind or for the benefit of all the countries whether costal or land-locked. These are the remarkable achievements of the SDC which still engaged in persistent improvement process to make a comprehensive regime for the Area.

As regard the advisory opinion SDC approved a historic decision in 2011 by the application of Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd. to the ISA. The Opinion addressed three main issues of the case such as State duties and responsibilities of the party to the convention in terms of sponsorship to the activities in the Area, scope of liability of the party in case of failure to oblige the convention in terms of exploration and exploitation, and essential measures that have to be taken by the sponsoring country for the fulfillment of the obligation under the convention.[33]The SDC observed that obligations have clearly provided in Article 139 of the convention which has to be followed by the states parties concerned. State parties are under a duty to ensure peaceful activities without harming marine environment in the Area and to assist the Authority thereof, and confirming total compliance with the national legislation in relation to the activity by the contractors. Nevertheless, in case of failure by causing harm in the Area through wrongful activities in the operation shall bear the liability and incase of joint agreement shall be born joint and several liability. Therefore, states should be more careful and take precautionary approach toward the contractors which is parallel with due diligence in respect of performance of obligation. It was observed in the case of ***Pulp Mills on the River Uruguay between Argentina v. Uruguay[34]and also reflected in the principle 15 of the Rio Declaration.***

However, the nature of liability, under the convention, of the party sponsored by the state is strict liability and Chamber makes the party liable only when it arises on the ground of failure to perform

31 Article 290, 291 UNCLOS, 1982, Article 25 Annex VI. ibid

32 Article 296.ibid.

33 David Freestone, "Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area", *American Society of International Law*, March 09, 2011, 15(7).https://www.asil.org/insights/volume/15/issue/7/advisory-opinion-seabed-disputes-chamber-international-tribunal-law-sea-

34 Judgment, 187 (Apr. 20, 2010), available at: www.icj-cij.org. (last accessed July 20, 2017)

its obligation of due diligence. The amount of liability would be for the actual damage of the every individual case. However, in this regard Chamber shall consider the regulations of 30 & 32 adopted by the ISA such as Regulations on Prospecting and exploration for PolymetallicNodules in The Area, and Regulations on prospecting and exploration for polymetallic sulphides in the Area.[35]Moreover, the Chamber is absolutely liberal in respect of an interpretation arises before it relating to the general International law then it refer to the International Court of Justice (ICJ) for appropriate interpretation on the matter and ICJ explain such legal question on the basis of Western Sahara in 1975 and Kosovo Advisory Opinion 2010 of ICJ and latter one known as "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo". [36]

In order to achieve the Sustainable Development Goal (SDG) the SDC under ITLOS playing a earth-shattering role in terms of regulating exploration and exploitation activities by adopting several rules, regulations and procedures, promotion of Scientific research and protection of Marine ecosystem. It stipulates the interested parties to conduct and submit assessment of plausible environmental impact with elaborate explanation along with the work plan. "Life bellows the water" is the slogan of SDG 14 for preservation and sustainable utilization of Oceans wealth for sustainable development which is one of the seventeen goals of SDG with 169 goals adopted by the United Nations in 2015 intending to achieve by 2030.[37]ISA with the cooperation of SDC is contributing to the three key targets out of 10 targets of SDG 14 such as "Sustainable management and protection of marine and coastal ecosystems and strengthening their resilience";[38]under this target ISA working for composing an Environmental Regulation to manage the effect of Deep-seabed mining by 2020. Secondly, the target is "Marine Protected Areas and effective management plans"[39]for which ISA trying to develop an Environment Management plans (EMP) and Strategies in The Area for Pacific, Atlantic and Indian Oceans. Finally, "Means of Implementation including financial resources, capacity building and technology transfer and enhance conservation andsustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS)".[40]

7. **Conclusion**

In the context of scarcity of 25 percent earth based resources and growing dependency on three quarters of earth surface known as Oceans in terms of basic food supply herein referred to fishing, exploitation of energy and mineral resources, territorial security, peaceful navigation for international trade and exercise of naval military power; 21st century is perhaps moving toward the witness of more complex and critical situation throughout the world. The South China Sea conflict is an appropriate example here and we found each and every reason mentioned above is present in this dispute. Therefore, in concluding remark we are making few propositions to this context such as ISA through its subsidiary organs and other bodies of ITLOS such as SDC should adopt a comprehensive regime for regulating the activities in the Area together with sponsoring states by intensifying technical cooperation for legislating national exploration and exploitation law in order to govern entities nationally. In addition, it should establish appropriate bodies and adequate binding regulations and easy procedures for all fishing fleet across the Ocean including High Seas for the

35 David, "Advisory Opinion". p.56 see at: httpswww.itlos.org (last browsed July 20, 2017)

36 Ibid. p. 17

37 "United Nations Resolution A/RES/70/1 of 25 September 2015, *United Nations general Assembly,* http://unctad.org/meetings/en/SessionalDocuments/ares70d1_en.pdf (accessed 21.07.2017)

38 "Sustainable Development Goal (SDG) Target 14.2" *Transforming our world: the 2030 Agenda for Sustainable Development ,United Nations,*https://sustainabledevelopment.un.org (last accessed 21.07.2017)

39 Sustainable Development Goal (SDG) Target 14.5, Ibid.

40 SDG Target 14 (a), (c), Ibid, See also: "International Seabed Authority's (ISA) contribution to the United Nations Secretary-General's background note for the preparatory meeting of the United Nations Conference to Support the Implementation of Sustainable Development Goal 14", *United Nations*, 18 November, 2016, http://ssustainabledevelopment.un.orgcontentdocuments12534ISA_submission.pdf(accessed 21.07.2017)

purpose of effective control of overfishing. The regulations adopted by the ISA should monitor extensively and investigate marine damages caused by the entities through wrongful drilling or other exploration activities properly and revise the regulation according to demand of the situation. In case of breach of obligation concern party should compensate accordingly. In this regard all stakeholders should exchange the knowledge about innovating and handling advance technology, mineral sources and procedure for extracting thereof. Therefore, marine scientific research should be extended in order to innovate new effective environ friendly technology and usefulness of the resources in terms of medication and other economic development and developing countries should be given priority to have those technology and other benefit come from the Area. However, the marine environment and marine ecological system is new seriously affected by manmade pollution estimated about 40 percent of the world Oceans. Although the current world is more concern about the environment therefore, ISA and other related bodies including SDC should be sterner regarding implementation of conventions and related regulations in activities of the Area.

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'MEDICAL APOLOGY' AT CROSSROADS: AN EFFECTIVE DISPUTE RESOLUTION MECHANISM VERSUS ADMISSION OF LIABILITY

by

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Abstract

Apology has always been viewed as an important social conduct that is able to provide closure to a conflict situation. The aftermath of disputes and conflicts is usually fuelled with feelings of anger, injustice, mistrust and a tendency to sue. By making apologies which may include statements of regret and empathy, acceptance of responsibility as well as proper explanation of the events leading to the mishap, the severity of the aftermath situations can be significantly reduced. Further, studies have shown that proper apologising at this juncture can also be an effective dispute resolution mechanism that heals and preserves relationships as well as triggering settlement negotiations. However, medical practitioners are rather hesitant to apologise after the occurrence of adverse events fearing that this may be treated as an 'admission of guilt' and any statements made at this point may be admissible in judicial proceedings as evidence of fault or liability. Such implication occurred in the case of Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor [2013] 1 CLJ 699 HC in which the medical practitioner was found liable for negligence based on the apology given by him during the post-surgery consultation with his patient. Nevertheless, in recognition of the immense benefits of apology as an effective dispute resolution mechanism, several jurisdictions around the globe have developed 'Apology Laws' to explicitly preclude apologies made after adverse events as being treated as admission of fault or as evidence to prove liability. This paper seeks to discuss the function and effectiveness of apology in resolving medical disputes against the negative implications it has in the law of evidence. The paper will also provide recommendations for the enactment of 'Apology Laws' in Malaysia based on the experiences of selected countries in preserving the effectiveness of apologies within the parameters of a protective legislation.

Keyword: Admission; Apology; Dispute Resolution; Evidence; Medical Profession

INTRODUCTION

Medical negligence disputes are being brought to the court of law not merely to obtain monetary compensation but also to receive the appropriate explanation on the events that has transpired and acceptance of responsibility by the person who has caused the harm. Nevertheless, litigation has often been viewed as the last resort as its processes tend to be cumbersome and costly. Thus, engaging into methods of 'open disclosure' in providing proper explanation of the events, remedial steps

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for the prevention of future recurrence as well as making statements of regret with empathy will eventually have the ability to defuse the building anger and preserve the cordial relationship between the disputing parties[4]. Apology offered by the medical profession at this juncture may open doors for out of court settlements and eventually, reduce the tension, anger and antagonism on the part of the patient[5]. However, the potential benefits of apology have often been overlooked in the conflict resolution process. This is due to the fact that legal practitioners are always advising their clients not to apologise fearing its adverse effect towards their cases[6], which may be seen as self-incriminating and viewed as admissions of guilt in the court of law. Therefore, the potential advantages of apology in putting a closure to a conflict situation need to be carefully examined against its inherent drawbacks.

THE NATURE & SCOPE OF MEDICAL APOLOGIES

Victims in medical negligence disputes often pursue their claims out of anger and their desire for compensation over their physical and emotional harm. The current adjudication system allow them to be financially compensated for the harm suffered but does not offer them non-legal remedies in the form of explanation, information, and sincere apology from the wrongdoer[7]. Apology has been seen as an important social conduct that has become a tradition in many cultures as it serves as a remedial behaviour that may reduce the negative consequence of the wrongful act and simultaneously, restore the wrongdoer's damaged reputation[8]. In making an apology, a person will recognise that a rule has been broken, reaffirming the value of the rule, and at the same time controlling as well as regulating social conduct by acknowledging interpersonal obligations between the parties[9]. In understanding the nature and scope of apologies, the various definitions of apology need to be examined. The variety of the definitions has emerged due to the difference in the cultural and disciplinary background of the scholars[10]. According to Cohen, the term "apology" has its roots in the Greek word of "logos" which means "speech" or "word" and it is usually associated with formal justification, defense or explanation[11]. It actually refers to any statement or remarks made following any intentional or unintentional injury. For a working definition of apology, it can include "an admission of one's fault combined with an expression of regret for having injured another as well as an expression of sympathy for the other's injury"[12]. According to Lazare, apology is the expression of responsibility for an offense together with an expression of remorse. The offence here refers to violation of any rule, ethical principle or careless behaviour that results in injury or discomfort towards another in the form of hurt feelings, degradation or humiliation[13].

In recent years, there has been a significant interest on the use of apology in settling medical dispute and this has been promoted via formal and informal practices by the inclusion of the conduct of apologies in medical education and clinical practices[14]. Furthermore, some jurisdictions have

4 S D Hodge and N Saitta, "Physician Apologies," *The Practical Lawyer* 57, no. 6 (2011): 35–44.

5 Jennifer K. Robbennolt, "Apologies And Legal Settlement: An Empirical Examination," *Michigan Law Review* 102 (2003): 460–516..

6 Jeffrey J. Rachlinski, Chris Guthrie, and Andrew J. Wistrich, "Contrition in the Courtroom: Do Apologies Affect Adjudication?," *Cornell Law Review* 98, no. 5 (2013): 1189–1243.

7 Ann J. Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients," *Journal of Dispute Resolution*, no. 10 (1987): 111–31.

8 Bruce W. Darby and Barry R. Schlenker, "Children's Reactions to Apologies.," *Journal of Personality and Social Psychology* 43, no. 4 (1982): 742–53.

9 Ibid.

10 Robyn Carroll, "When 'sorry' is the Hardest Word to Say, How Might Apology Legislation Assist?," *Hong Kong Law Journal* 44 (2014): 491–517.

11 Jonathan R Cohen, "Legislating Apology : The Pros and Cons," *The University of Cincinnati Law Review* 70 (2002): 819–72.

12 Jonathan R. Cohen, "Advising Clients to Apologise," *Southern California Law Review* 72 (1999): 1009– 69.

13 Aaron Lazare, "The Healing Forces of Apology in Medical Practice and Beyond," *DePaul Law Review* 57 (2008): 251–65.

14 Michal Alberstein and Nadav Davidovitch, "Apologies in the Healthcare System: From Clinical Medicine To Public Health," *Law and Contemporary Problems* 74 (2011): 151–75.

legislated laws to regulate apologies in healthcare settings to promote the usage of apology by medical practitioner[15]. Medical apology refers to the laws which provide that "a medical practitioner's expression of apology to the patient following a medical error cannot be used as evidence against them in a subsequent medical negligence claim"[16]. According to Lazare, there are four salient characteristics of an apology. Firstly, is the acknowledgement of the offense which includes the details of the wrongdoing such as the identity of the offender as well as a validation that the act committed was not acceptable. Secondly, there must be some form of explanation for such wrongdoing that can either mitigate or aggravate the wrongdoings. Thirdly, is the expression of remorse, shame, forbearance and humility whereby he further explained that:

> "Remorse is a deep sense of regret. Shame is the emotion associated with failing to live up to one's standards, Forbearance is a commitment not to repeat the offense. Humility is the state of being humble, not arrogant. Lack of remorse, shamelessness, unwillingness to address the future and arrogance will undo most apologies"[17]

Fourthly, is the reparation which includes the action plan after which the wrongdoer must execute towards the victim[18]. When a wrongdoer apologise, it may satisfy at least one of the psychological and emotional needs on the part of the victim. Lazare further mentioned that among the psychological and emotional needs are restoring self-respect and dignity of the victim, assuring them that the offense was not their fault and allowing the victim to feel secured that such offence will never happen again while validating the victim's experience[19]. The feeling of remorse is important in offering apologies as in many circumstances, the a remorse wrongdoer will usually be treated more favourably by the victim as well as the legal system. For example, in civil cases, the expression of remorse may affect the amount of damages claimed by the plaintiff and in criminal cases, the fact that the defendant being remorse might reduce the severity of the punishment by the court[20]. There are two types of apology which have different implications in dispute resolution process[21]. The first type is "full apology" which includes statement or an expression of heartfelt regret and remorse for what has happened, sympathy for victim and acknowledgement of the wrongdoing committed[22]. The most important element in "full apology" is acknowledgement of fault and the acceptance of responsibility on the part of the wrongdoer[23]. This type of apology have the effect of a "double-edged sword" whereby it might defuse anger and the desire to litigate on the part of the plaintiff but at the same time such apology can also be construed as an admission of guilt on the part of the wrongdoer[24]. Another type of apology is "partial apology". This type of apology is only concern with expression or statements of sympathy, commiseration, condolences and compassion alone without any expression of admission or taking responsibility over the fault committed[25]. Partial apology has also been referred to as 'safe apology' whereby it does not contain any acceptance of responsibility and acknowledgement of fault. Therefore, there is no legal risk attached to this category of apology from the legal perspective[26].

15 Ibid.

16 Michael A Morse, "Medical Apology Laws, Mandatory Reporting, and Adverse Event Reporting Under the PSQIA," in *HCCA's 13th Annual Compliance Institute*, 2009, 1–25.

17 Aaron Lazare, "Apology in Medical Practice An Emerging Clinical Skill," *Journal of American Medical Association* 296, no. 11 (2006): 1402.

18 Lazare, "Apology in Medical Practice An Emerging Clinical Skill."

19 Lazare, "The Healing Forces of Apology in Medical Practice and Beyond."

20 Robbennolt, "Apologies And Legal Settlement: An Empirical Examination."

21 Chris Wheeler, "Open Disclosure and Apology - Time for a Unified Approach across Australia," *AIAL National Administrative Law Conference*, no. 75 (2013): 18–35.

22 Robyn Carroll, "When 'sorry' is the Hardest Word to Say, How Might Apology Legislation Assist?," *Hong Kong Law Journal* 44, no. 2 (2014): 491–517.

23 Ibid.

24 Debra J. Slocum, Alfred Allan, and Maria M. Allan, "An Emerging Theory of Apology," *Edith Cowan University, Joondalup* 63, no. September (2011): 83–92.

25 Benjamin Ho and Elaine Liu, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice," *Journal of Risk and Uncertainty* 43, no. 2 (2011): 141–67.

26 Prue Vines, "The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?," *Public*

THE ROLE OF APOLOGY AS AN EFFECTIVE DISPUTE RESOLUTION MECHANISM

The profound healing effect of apology can have a very significant and effective role in resolving dispute between the parties. However, the making of apologies has certain legal ramifications attached to it. For example, in a medical negligence dispute, the medical practitioner will usually avoid seeing the patient after the injury has been inflicted. Failure on the part of the medical practitioner and healthcare service provider to apologise can intensify the dispute between the parties[27]. This tend to build up the anger on the part of the patient who is in dire need of explanation of what really happened, justification as well as acknowledgement of responsibility on the part of the medical practitioner. Medical practitioners, on the other hand, fear that by giving too much explanation would eventually increase the likelihood of a lawsuit and used against them in the court of law[28]. However, the effectiveness of apology as a dispute resolution mechanism can be seen as follows:

(1) Defusing the Spur of Litigation

Apology encourages or influences the reconciliation or forgiving process. As anger is the main motivator in triggering medical negligence litigation, medical apologies have been found to be effective in reducing patient's anger, increasing communication between the relevant parties and ultimately, reducing patient's motivation to litigate[29]. In majority of medical negligence cases, the patient do realise that the outcome of the negligence act cannot be reversed. However, in those circumstances, the patients merely want to learn on how and why the incident happened. They also would like to be assured that the medical practitioner will take preventive measures so that the same incident will not happen again in the future[30]. When a medical practitioner apologises, it will promote emotional healing whereby the patient will no longer perceive the medical practitioner as a personal threat and at the same time it will remove the hatred between the patient and medical practitioner[31]. Apology at this stage will also be beneficial to the medical practitioner as it will comfort him emotionally and eradicate the feeling of guilt or self-reproach and eventually, promoting self-respect[32].

(2) Promoting out of Court Settlement

Litigation is a lengthy and tedious process both to the patient as well as the medical practitioner. The substantive law of medical negligence coupled with complex procedural aspect of a tort based civil claim will not assist the patient much in procuring compensation for the injury suffered or even for any psychologically injuries suffered[33]. In some medical negligence cases, the court may take years to come up with a decision after the claim has been being initiated by the patient. This will not only delay the patient's right to get compensation for the loss he had suffered but it will also increase the tension and anger between the patient and medical practitioner. In a settlement discussion, an apology is very much needed before discussion on the amount of the monetary compensation because by apologizing, it will start the healing process on the part of the patient and ultimately encourage settlement discussion[34]. In many instances, when the medical practitioner did not apologize, the relationship between the patient and the medical practitioner tend to worsen. This does not only

Space: The Journal of Law and Social Justice 1 (2007): 1–51.

27 Cohen, "Advising Clients to Apologise."

28 Steven E Raper, "No Role for Apology: Remedial Work and the Problem of Medical Injury," *Yale Journal of Health Policy, Law, and Ethics* 11, no. 2 (2011): 269–316.

29 Slocum, Allan, and Allan, "An Emerging Theory of Apology"

30 David C Szostak, "Apology Not Accepted: Disclosure of Medical Errors and Legal Liability," *DePaul J. Health Care L* 211, no. 367 (2011): 2010–11.

31 Beverly Engel, "The Power of Apology, How to Give and Receive an Apology. And It's Worth It, on Both Ends" 2002.

32 Hodge and Saitta, "Physician Apologies."

33 Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients."

34 Robin E. Ebert, "Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry," *Indiana Health Law Review* 5 (2008): 337–70.

discourage negotiation but will prevent any chance of settlement. At this juncture, encouraging the use of apologies can promote settlement discussions and preserve the emotional well-being of both parties[35]. This is because since there is no more anger, the patient is demotivated to pursue the claim and this will encourage them to settle the matter out of court. Therefore, by defusing anger at initial stage, there will be a promotion of lesser litigation and faster settlement in medical negligence dispute[36]. Consequently, the harmonious and cordial relationship between the patient and the medical practitioner will be preserved.

(3) Effective Tool in Alternative Dispute Resolution (ADR)

Apology has long gained prominence as an effective tool in alternative dispute resolution (ADR) particularly, in mediation. In ADR such as mediation, it offers higher hope and potential to heal the relationship between the parties before the dispute is brought to court[37], as the disputing parties can negotiate with a neutral third party on how to achieve a mutually acceptable resolution of the points in conflict. Although apology can only come from the parties themselves, mediators are recommended to propose for an apology even when it was not initiated by either party whenever appropriate as it can be an effective tool in promoting the resolution of the dispute[38]. Apology at this juncture will reduce anger as well as the hostility between the parties and since mediation process is not restricted to the rules of evidence nor procedure, this would be a great avenue for the wrongdoer to offer sincere apology to the victim as the apology offered cannot be used as an admission of guilt in the court of law should the mediation failed to resolve the dispute[39]. During the mediation process, the parties involved will have the opportunity to make any retraction or correction in statements made, offering statements of regrets as well as apology and this will likely affect the outcome of the dispute resolution process itself.

There are several aspects of the mediation process that promote the making of apologies as the mediation process itself provides an opportunity for direct participation by the parties in the negotiation process and at the same time, allow it to be confidential as well as a meaningful dialogue between the parties without taking into account the legal complications of the apology. Besides that, it will also allow the parties to be clear about the facts, issues and the expectation of both parties. As a neutral third party, the mediator needs to play the very important role to remind the parties that litigation is not the only way to settle their dispute. Mediation will thus, empower the parties to resolve the dispute in accordance to their choice and may provide more psychological benefits to the parties[40]. Since apology may serve various benefits to the parties during the mediation process as it provides a conducive platform for the parties to apologise, this has garnered attention and interest of legal scholars and legislators for apology to be used beyond mediation in the resolution of dispute process[41].

APOLOGY AS AN ADMISSION OF GUILT

Although apology offers immense benefits in the dispute resolution process, the main impediment in the application of medical apology as an effective tool in the resolution of dispute is that it can be self-incriminating and viewed as an admission of guilt on the part of the medical practitioner. Due to this reason, medical practitioners constantly fear that the apology offered by them to their patients will be used against them in the court of law. In Malaysia, even an apology letter which

35 Melissa Barcena, "A Role for Apology in Medical Malpractice: Apology, Forgiveness and Reconciliation" 2013.

36 Benjamin Ho and Elaine Liu, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice," *Journal of Risk and Uncertainty* 43, no. 2 (2011): 141–67.

37 Susan Alter, "Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations," 1999.

38 Deborah L. Levi, "The Role of Apology in Mediation," *New York University Law Review* 72, no. 5 (1997): 1165–1210.

39 Kellett, "Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients."

40 Carroll, "When 'sorry' is the Hardest Word to Say , How Might Apology Legislation Assist?"

41 Douglas O'Hara, Erin Ann, Yarn, "On Apology and Consilience," *Washington Law Review* 77 (2002): 1121 –92,

contains certain admission can be used against the person who wrote that letter as decided in the case of Mammoth Empire Construction Sdn Bhd v Lifomax Woodbuild Sdn Bhd.[42] In this case, the court established the liability of the defendant based on admissions found in an apology letter from the defendant to the plaintiff. This decision reflects that there is still insufficient protection given to apologies in the dispute resolution process in Malaysia. The following are the drawbacks of making medical apologies:

(1) Medical Apology as an Evidence for Negligence

An admission is a statement against a person's own interest, and generally, admission is considered in the court of law to determine the liability of the parties[43]. The rationale for such rule is that, a person will not make a statement against his own self or interest unless the statement is true. In the course of litigation, an apology may constitute an admission because in the normal course of human behaviour, a person will not make a testament against themselves unless they were true[44].

In medical negligence cases, the legal ramifications of medical apologies can be illustrated in the following cases. In the case of Gurmit Kaur A/P Jaswant Singh v Tung Shin Hospital & Anor[45], in which a woman sought treatment from the defendant medical practitioner to remove a fibroid in her uterus. However, it was found later that a hysterectomy procedure was conducted on her which caused her unable to have any more children. The medical practitioner was found liable and the apology given by him was considered as a proof for the negligence committed. Rosilah Yop JC in delivering her judgement stated *"My view, when the Second Defendant had apologized to the Plaintiff, proves that the Second Defendant had admitted to a mistake he had done"*. This can be seen as a clear illustration on how an apology can be viewed as an admission of guilt. Further consequences of an apology in medical negligence claim can also be illustrated in the case of Norizan bt Abd Rahman v Dr Arthur Samuel[46]. In this case, four months after the birth of her fifth child, the plaintiff, discovered she was pregnant again and requested the defendant, an obstetrician and gynaecologist, to terminate the pregnancy and at the same time insert an intrauterine contraceptive device ('IUCD'h). However, while the procedures were being performed simultaneously, the plaintiff's right uterine wall and right artery of the uterus were perforated necessitating an emergency life-saving operation by the defendant to remove her womb and right ovary. The plaintiff claimed that they were informed that this is just a simple procedure and were not informed about any risks. The court in allowing the claim which amounted to RM 220,000 in general damages and RM 3,000 in special damages has also considered the contention by the plaintiff that an apology was made by the defendant and the defendant was not present to answer or deny such claim. The court held that such apology made was considered as establishing negligence on the part of the defendants. Thus, it can be seen from this case that, apology by the medical practitioner may be used by the court in the determination of his liability. It is clear from the judgement of these cases that whenever a medical practitioner apologise, it will be considered as a legal suicide as it will backfire against them as such apology can be construed as an admission of guilt and be considered in determining the liability of the medical practitioner[47].

(2) Apology under the Law of Evidence

From the law of evidence perspective, apology has long been used to prove liability in the case of negligence[48]. Apology made by the one who caused the injury can be considered as statements made out of court and the court may treat them to be inadmissible to establish liability as they can be

42 [2017] 1 MLJ 453

43 Peter H Rehm and Denise R Beatty, "Legal Consequences of Apologizing," *Journal of Dispute Resolution* 1996, no. 1 (1996): 1–16.

44 Lee Taft, "Apology and Medical Mistake: Opportunity or Foil?," *Annals of Health Law* 14 (2005): 55.

45 [2013] 1 CLJ 699 HC

46 [2013] 9 MLJ 385

47 Ebert, "Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry."

48 Jeffrey S. Helmreich, "Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology," *Cornell J.L. & Pub. Pol'y* 21, no. 1 (2012): 567–609.

a form of hearsay evidence. However, apology may be admissible as a statement which falls outside the hearsay rule which is known as "admission by party-opponent". In Malaysia, this is provided in section 18 of the Evidence Act 1950 whereby it is provided that;

> 18. Admission by party to proceeding, his agent or person interested
> (1) Statements made by a party to the proceeding or by an agent to any such party whom the court regards under the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.

Therefore, the fear of apology to be used against the one who offered them is real particularly, when such apology does not fall under the "without prejudice communication" privilege that is to be given to the one who offered apology for the purpose of settlement. Despite the fact that apology can be used against the person who offered them as an admission of guilt, nevertheless, it can never be the sole evidence for the court to find that liability on the person who gave them[49] .

Apology and Medical Professional Indemnity Insurance

Another concern is that the making of medical apologies may void any protection under the professional indemnity insurance if such admission of liability is made. This is a frequent clause in any insurance contract and is usually known as "admission and compromise clause"[50]. It is a duty imposed in the insurance contract that the person insured must give their full cooperation in defending their claim and some insurance provisions requires that the person insured must not voluntarily assume or accept any form of liability in settling a claim[51]. If the insured medical practitioner apologises or admits such fault, he may lose their coverage and they themselves will then be personally liable for damages which have been claimed by the patient in court. The insurance company will use the apology as prove that the insured medical practitioner is in breach of his general duty as agreed in the terms of the insurance contract. Such negative implications on the professional insurance coverage have caused the medical practitioner to refrain from making any sort of apology. Subsequently, the increase in the likelihood to be sued whenever medical apologies are made may at the same time cause a sudden increase in the premium to be paid by the medical practitioner which will ultimately, lead to a professional indemnity insurance crisis[52].

MEDICAL APOLOGY AT CROSSROADS: THE FUTURE DIRECTION

The benefits of apologizing must be weighed against its drawbacks before it can be applied as an effective tool in the resolution of medical dispute in Malaysia. Despite the current laws which had given some protection for apologies in the current legal system, such protection is still not comprehensive and further, there is no legal framework to promote and protect apologies made by medical practitioners. In fact, the treatment by the Malaysian courts on apologies as illustrated earlier has further worsened the situation. Realising the benefits of apology as an effective mechanism in dispute resolution process, some jurisdictions have taken the initiatives in introducing 'Apology Laws' and the 'Duty of Candour' to encourage and protect apology in their legal system.

(1) Apology Laws

Although medical apologies offer much benefit in defusing the desire for patients' to litigate but it also has the effect of being a 'double-edge' sword and be seen as self-incriminating on the party who apologises. In other words, medical apology can be seen as an admission of guilt and be tendered

49 Ibid.

50 Prue Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?," *The Sydney Law Review* 27, no. 3 (2005): 483–505.

51 Cohen, "Advising Clients to Apologise."

52 Peter Cane, "Reforming Tort Law in Australia: A Personal Perspective," *Melbourne University Law Review* 27 (2003): 649–76.

as evidence in court proceedings against the medical practitioner. This problem has led to several countries enacting 'apology laws' that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability.[53] The workings of apology law differs from one jurisdiction to another and according to what type of apology they would like to protect, whether full or partial. It is thus, important to examine the relevant jurisdictions that have implemented apology law for resolving medical disputes.

In the United States of America, there are 36 states which had introduced 'Apology Laws' whether in the form of full or partial apology laws. Although there is no direct link between apologies and the reduction of the cost of medical negligence dispute, it was however, found that after the introduction of the apology legislations, positive implications occurred which include the reduction of cost of a medical dispute process, improvement in patient safety, and restoring trust between the medical practitioner and the patient[54]. In Australia, apology gained attention after the increase in the number of medical malpractice cases[55] as well as medical insurance crisis[56]. In addressing these concerns, the legislators in Australia recommended for a legislation that provides for medical apologies to be a mandatory part of the open disclosure processed and inadmissible for medical negligence cases[57]. Likewise in the United States, the application of apology laws vary in different states throughout Australia[58]. States such as New South Wales, Australian Capital Territory and Queensland enacted the 'full apology law' whereas the rest of the states such as Victoria, Northern Territory, South Australia, Tasmania and Western Australia enacted the 'partial apology law'[59]. The workings of 'full apology law' in Australia require three main elements that concern the position and consequence of such apology, i.e. declaratory element, relevance element and procedural element[60]. For instance, in the Civil Liability Act 2002 (NSW), section 69(1)(a) declares that apology is not an admission of fault or liability. This refers to the first element which is the 'declaratory element'. Secondly, in determining a fault or liability on the part of the defendant, section 69(1)(b) exclude apology from being taken into account as a relevant fact in determining fault. This provision is concerned with the 'relevance element'. Thirdly, with regards to the 'procedural element', from the law of evidence perspective, apology made is inadmissible as evidence of fault and therefore, cannot be used in court against the person who gave it (section 69(2)). Further development took place in Canada whereby the state of British Columbia referred to the New South Wales Civil Liability Act (2002) as the basic foundation[61]. However, the British Colombia Apology Act incorporated not only the essential elements based on the Australian legislation but also included specific provisions for insurance contracts. This is an extension of the protection where the law does not only render such apology inadmissible in court, but also prevents the insurance contract from becoming void if the apology was made[62].

(2) Duty of Candour

Duty of candour imposes healthcare service providers to be honest with patients when things go wrong[63]. In the United Kingdom, this duty has been made in statutory form after the introduction of Regulation 20 of the Health and Social Care Act 2008 (Regulated Activity). Candour can be defined as 'the volunteering of all relevant information to persons who have or may have been harmed by

53 Ho and Liu, "Does Sorry Work? The Impact of Apology Laws on Medical Malpractice," 2011.

54 Carol B Liebman and Chris Stern Hyman, "A Mediation Skills Model To Manage Diselosure Of Errors And Adverse Events To Patients," *Mediation*, no. August (2004): 22–33.

55 Graham Andrew Burch Barr, "Disingenuous or Novel? An Examination of Apology Legislation in Canada" 2009.

56 Vines, "Apologising to Avoid Liability: Cynical Civility or Practical Morality?"

57 Ibid.

58 Barr, "Disingenuous or Novel? An Examination of Apology Legislation in Canada."

59 Wheeler, "Open Disclosure and Apology - Time for a Unified Approach across Australia."

60 Ibid.

61 Barr, "Disingenuous or Novel? An Examination of Apology Legislation in Canada."

62 Carol Carman, "Apology Act Promotes Dispute Resolution," 2006.

63 Nursing & Midwifery Council, "Openness and Honesty When Things Go Wrong : The Professional Duty of Candour," 2015.

the provision of services, whether or not the information has been requested and whether or not a complaint or a report about that provision has been made'[64]. Duty of Candour is aimed to provide open and transparent communication with persons in relation to care and treatment. Specifically, when things go wrong with care and treatment, the duty is able to persons with reasonable support, truthful information and an apology[65]. From the enactment of this statutory duty, a medical healthcare provider is required to give notification in person by one or more representatives of the health service body. In this notification, the healthcare service provider must provide an account, which to the best knowledge of the health service body is true regarding all the facts by which the health service body knows about at the date of the notification. It must be further accompanied by relevant advice and what should be done by the affected person and it must include an apology. This notification must be recorded and the same notification must later be made in form of writing[66]. By having this statutory duty, it will create another safe platform for medical practitioners to apologise without fear and this will eventually promote open communication beneficial to both parties.

CONCLUSION

Apology has been proven as an effective means in resolving conflicts and at the same time preventing litigation. However, there are many barriers which hinder apologies from being given by medical practitioners. This is due to the fact that apology has long been associated as an evidence of guilt which have the possibility of increasing legal liability. However, apology now has gained attention particularly, in medical dispute as it can be highly beneficial to the parties as well as to the dispute resolution process itself. This can be seen by the implementation of various jurisdictions in enacting 'Apology Laws' to ensure the clarity of the consequences of apologies is made within a clear legal framework. Further, the creation and imposition of the duty of candour creates a conducive platform whereby it is safe for the medical practitioner to apologise without the fear of its adverse legal consequences. Although apology cannot be a substitute for monetary compensation, it is nevertheless, a powerful tool that can lead to the closure of an ongoing dispute and facilitate the dispute resolution process for the benefit of the relevant parties. In handling medical disputes in Malaysia, the benefits of apologizing are beyond doubt but in encouraging medical practitioners to apologize, a clear legal framework need to be established to protect the apologies made in certain circumstances for unintentional wrongdoings. The enactment of 'Apology Laws' for the protection of apologies in the legal system will offer various benefits to the parties in dispute. For instance, it will encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of preventing litigation. This is due to the fact that medical practitioners are given the legal platform to make apologies which may have the possibility of disarming the patient's anger. In Australia, it has been found that there is significant reduction in number of new claims for compensation, increased number of closed claims and a reduction as to the proportions of large damage awards after the notable Australian tort law reform which had allowed the doctors to apologise without the fear that it will be considered an admission of guilt. Therefore, there is a need to develop a comprehensive legal framework for the protection of apologies in the Malaysian healthcare setting to promote the usage of apology in the dispute resolution process in gaining its potential benefits. Lessons can be learned from the American, Canadian and Australian experiences in drafting and implementing 'Apology laws' as well as making amendments to the law of evidence in ensuring that apologies made are not treated as admissions of guilt. It is hoped that the establishment of a 'structured apology law' in Malaysia will reduce the number of medical negligence disputes, defuse the spur of litigation and ultimately, preserve the sanctity of the relationship between the medical practitioner and the patient.

64 Robert Francis, "Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry Executive Summary Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry," 2013.

65 Dental Protection, "Duty of Candour," n.d.

66 Somerset Partnership NHS, "Being Open and Duty of Candour Policy," 2015.

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Enhancing Justice through Effective Utilisation of 'Dispute Resolution Mechanisms' in Handling Medical Disputes in Indonesia

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Abstract

Medical disputes amongst medical professionals and their patients are seen to be inevitable, particularly, when patients suffer adverse outcome in medical treatment. The occurrences of death and physical injuries tend to trigger claims in the court of law. Consequently, medical professionals may be subjected to criminal proceedings although their actions in causing the harm may be totally unintentional. The implications of court litigation against medical professionals may adversely affect the reputation of doctors in the long run and this will eventually promote the practice of defensive medicine. Therefore, it is pertinent that court litigation for resolving medical disputes should be taken only as a last resort after fully utilising the existing 'dispute resolution mechanisms' that are available. Presently, there are a variety of 'dispute resolution mechanisms' available in Indonesia to solve medical disputes, for instance, through medical as well as consumer tribunals and various methods of alternative dispute resolution. However, to ensure proper utilisation of these mechanisms for solving medical disputes, the role and inadequacies of these mechanisms should be properly addressed to ensure a more effective, fair and just outcome. This paper seeks to identify and discuss the role of existing 'dispute resolution mechanisms' in handling medical disputes in Indonesia. The adequacies and inadequacies of these mechanisms will be highlighted and the agendas for reform will also be proposed in order to promote the use of these mechanisms as an alternative to court litigation in resolving medical disputes in a more amicable manner within the modern healthcare setting.

Keywords: **Medical Dispute, Dispute Resolution Mechanism, Justice**

A. INTRODUCTION

Disputes are considered to be inevitable in any society. Disputes occurring in hospitals amongst doctors and patients are considered to be quite common in Indonesia[1]and these disputes have been on the rise within the last 15 years.[2] For instance, the Medical Disciplinary Tribunal (MKDKI) has received at least 220 complaints of medical malpractice cases between the years 2006 to 2015.[3] The Medical Disciplinary Tribunal (MKDKI) was established to facilitate the settlement of medical malpractice dispute. However, this tribunal is only concerned with the disciplinary and accountability issues has has the power to impose disciplinary sanctions to doctors who have been found guilty.

1 In Indonesia, dispute arising between patient and medical professional is commonly called *'sengketa medik'* (medical dispute).

2 There is no record on the number of medical dispute which has been brought to court or been settled outside the court system, however according to the report by the media, medical dispute has increased since 2003.

3 The statistic was provided by Hargianti Dini Iswandary, the former Secretrary of Majlis Kehormatan Disiplin Kedokteran Indonesia (MKDKI).

These sanctions may have a deterrent effect on doctors, but may not be suitable for patients who would like to procure monetary compensation. To procure monetary compensation, patients need to proceed with legal action either civil or criminal, whichever is most relevant.

Nevertheless, civil litigation is still not an easyway for the injured patient to claim damages as the burden for proving the doctor's negligence rests on the patient. Such difficulty has caused the patient to resort to criminal litigation which may be easier to prove in terms of evidence. Consequently, more and more medical malpractice disputes are taken to the police and later to the criminal court. The lack of understanding on medical malpractice issues among the members of the society as well as the law enforcement agencies, has led to the presumption that medical disputes should be a criminal rather than civil matter. Criminal prosecution is a nightmare for any doctors and considered disastrous to their reputation and career, which can be seen from what has transpired after the conviction of three obstetricians in the criminal court who were imposed with ten month imprisonment in the late 2013.[4] Presently, the way medical disputes are handled in Indonesia is considered unsatisfactoryfor both the patients and the doctors. The present scenario is also considered as unfair and promotes injustice.

B. RESOLVING MEDICAL DISPUTE

The most common factor in stimulating medical dispute is the occurrence of adverse outcome in medical treatment.[5] In many cases, before filing a legal action the injured patients will make a complaint against the relevant doctor and hospital. This initial communication is made for the purpose of seeking rational explanation pertaining to the loss and its cause. After receiving the necessary explanation from the doctor or hospital, the injured patient may accept the explanation and if the hospital's management, further shows empathetical attitude[6], the intial dispute may completely be resolved. However, if the patient is not satisfied with the response from the hospital against his complaint, it may trigger a legal action in the court of law, and treated as either a civil or acriminal case. Besides facilitating the proses of legal responsibility of the wrongdoer, the court of law also facilitates the dispute settlement process. It is expected that the dispute will be resolved once the relevant party has been found guilty and take responsibility over his wrongdoing. Nevertheless, litigation is not the ultimate way of resolving medical disputes.

C. ALTERNATIVE DISPUTE RESOLTION FOR RESOLVING MEDICAL DISPUTE

Since the enactment of the Health Act 2009 *(Undang-undang Nomor 36 Tahun 2009 Tentang Kesehatan / UU Kesehatan)*, the settlement of medical malpractice dispute should utilize mediation. Section 29 of the Health Act 2009 governs that any dispute involving health professional which arises while delivering the health service must be resolved primarily through mediation. This rule has further been endorsed by the Health Professional Act 2014. Section 78 of the Health Professional Act 2014 mentions:

> In case the health professional has been alleged for having negligently caused damage upon his patient while performing the health service, dispute arises accordingly must be resolved primarily through out of court settlement in accordance with the statutory provisions.[7]

Even though it has been clear that the use of mediation procedure is mandatory for resolving medical malpractice dispute, however, it has not been implemented satisfactorily in practice. It seems that the application of mediation to deal with medical malpractice cases faces various obstacles. In

4 The case which is commonly referred to Doctor's Ayu case is most controversial ever in Indonesia.

5 Such an event in medical jurisprudence is commonly called adverse event which may later be classified into two types, namely preventable and unpreventable adverse event.

6 Empathetical attitude varies from apology to financial settlement either in the form of discharging the medical treatment fees or covering the cost of further treatment.

7 Statutory provision as intended in phrase 'in accordance with the statutory provision' refers to Section 29 of the Health Act 2009 which governs the utilization of mediation.

Doctor Ayu's case for example, the mediation procedure was not exercised, and the disciplinary investigation by the Medical Disciplinary Tribunal (MKDKI) was also not conducted. Instead, the case was directly brought to the police and proceded to the criminal court. Generally, criminal prosecution against medical professional is possible. In line with the principle of equality before the law, any person who is involve in a crime is prosecutable including doctor. Basically there will be no question for prosecuting doctors involving in a crime such as illegal abortion or illegal trade of body organs. However, prosecuting doctors in cases of allege medical malpractice has in fact been controversial and causes several disadvantages.[8] Psychologically, criminal prosecution is a nightmare for every doctor. The lack of law governing medical malpractice issue has made that nightmare more threatening for doctors in Indonesia. The public and the law enforcement agencies tend to presume that medical malpractice cases, particulalrly, those resulting in injury or even death, as a criminal act. In the case of Doctor Setyaningrum (1980) and Doctor Ayu (2013), the accused were prosecuted with Section 359 of the Penal Code. The fear of criminal prosecution has brought about negative implications including the practice of defensive medicine. In such event, doctors tend to recommend unnecessary examination for anticipating error of judgment which may submit them to litigation. Defensive medicine may also take the form of treatment avoidance, especially certain operations with have high risk. All of these defensive behaviours may decrease the quality of health service and reduce public access to health. Therefore, the use of criminal prosecution on medical malpractice cases should be seen as a last resort.

D. THE USE OF MEDIATON AND IST PRACTICAL PROBLEMS

Mediation is *compatible* for settling dispute between doctor and patient due to malpractice. In mediation, the neutral third party (mediator) assist the parties in dispute to make a consensus. The involvement of a mediator in the settlement process of a dispute may occur due to two possible causes, first, based on the initiative of the disputing parties, and second, based on the initiative of the court (the command of the judge). The first method occurs when the parties in dispute makes an early statement of their wish to resort to mediation procedure in resolving their dispute. While, the second methods occurs when the panel of judges of the district court in which the case was filed, instruct the parties in to pursue an amicable settlement with the help of the certified mediator resgistered in the mentioned court. The first method is done outside the court (this refers to out-court mediation)[9], while the second methods takes place inside the court (this refers to in-court mediation/court-connected mediation/court-annexed mediation).[10]

As intended by the Supreme Court Decree Number 1 of 2016 on Court-Annexed Mediation *(Peraturan Mahkamah Agung Nomor 1 Tahun 2016 Tentang Mediasi di Pengadilan)*, the panel of judges in civil trial must order the parties in dispute to exercise mediation first for resolving their dispute. Examination will only be conducted when the disputing parties fail to reach an agreement through the mediation process. As compared to its counter part (in court mediation), the out of court mediation promises a higher degree of confidentiality. The mediation process is conducted in a confidential manner, which is free from publicity. The only third party who knows the dispute is the mediator himself. At times, the process of settlement does not involve a mediator at all. In practice, the hospital's management usually takes the initial step attempt to settle the dispute through negotiation process. In some hospitals, negotiation works well to procure a settlement. The hospitals' management may conduct negotiation with or without the help of lawyers. Likewise, the injured

8 The infliction of ten month imprisonment against three obstetricians in Doctor Ayu case 2013 has stimulated massive protest from doctors from all over the country. This protest culminated in a national strike in 27th November 2013.

9 Out-court mediation can be held in a mediation institution or by an individual mediator.

10 In court mediation/court-annexed mediation is carried out by registered mediators either from the court personel (judges) or external professional mediators.

patients may conduct the negotiation themselves[11] or represented by their lawyers.[12] If negotiation is not favorable, they may resort to an amicable settlement through mediation procedure.

In relation to the above matter, a crucial question is regarding the type of the mediation procedure which is intended by Section 29 of the Health Act 2009, whether it is in court or out of court mediation. This can be seen as follows:

> "Mediation procedure is to be taken in a dispute arising between health professional (as healthcare provider) and and patient (as healthcare receiver). The purpose of this procedure is to resolve the dispute outside the court of law with the help of a mediator selected by both parties in dispute."

Based on the above statement, it can be deduced that that the type of mediation suggested in Section 29 of the Health Act 2009 is an out of court mediation. The next question in relation to this is how the disputing parties should run the mediation whether they should run an informal mediation or the semi-informal one. Informal mediation in this sense refers to the mediation which is made purely based on the initiative and wish of the disputing parties, and not bound by any requirement. This procedure is more flexible and it may be facilitated by a certified or a non certified mediator. While the semi-informal mediation refers to the mediation procedure which is conducted in an institution which provides mediation services case such as National Mediation Center *(Pusat Mediasi Nasional/ PMN)* and Ombudsman which provide mediation service for various cases; or the Consumer Dispute Tribunal *(Badan Penyelesaian Sengketa Konsumen/BPSK)* and Hospital Supervisory Board *(Badan Pengawas Rumah Sakit/BPRS)* which provides mediation service for more specific cases.

The utilisation of mediation in the settlement of medical dispute offers advantages for both doctors and patients. Mediation will protect doctors' resputation since it is conducted in a confidential manner and free from negative publicity in the media. Mediation will also release both parties from technicalities as they face in litigation process. Mediation will release patients from the burden of proof as it requires in civil litigation. Mediation will protect doctors against adverses situation as they may be exposed when the case is under police investigation. More importantly, mediation will be able to protect the cordial relationship between doctor and patient in the future.

It is not wrong to say that mediation is the most suitable mechanism for resolving medical malpractice dispute in Indonesia. That conclusion is supported by at least the following rational consideration:

a) Mediation procedure relies on consensual principle which is in line with the Indonesian culture;

b) As an alternative to litigation, mediation is free from various instrinsic weaknesses as found in litigation process such as complexity in procedure, lengthy and costly;

c) Mediation offers the win-win solution;

d) Mediation opens sufficient room for dialog among the disputing parties; and

e) Mediation has a safeguard that is the mediator who can settle communication problem which may arise between the disputing parties.[13]

It can be said that mediation is the most popular dispute settlement mechanism out side the court system in Indonesia. Mediation has been applied in various institutions including the court of

11 Such a model has oftenly been practiced by the Management of Mitra Keluarga Hospital, Jakarta where the hospital's director conduct the negotiation process directly. In such cases, the hospital's lawyer plays his role behind the scene that is gives guidance on how to do the negotiation appropriealy. This information is based on the explanation of M. Luthfie Hakim in an interview conducted on May 30th, 2014.

12 Such a model has oftenly been practicing in PKU Muhammadiyah Hospital, Yogyakarta. This information is based on the explanation of Doctor Faishol in an interview conducted on November 26th, 2015.

13 Danny Wiradharma, Inge Rusli, dan Dionisia Sri Hartati, *Alternatif Penyelesaian Sengketa Medik,* Jakarta: Sagung Seto, 2011

law, the Consumer Dispute Tribunal (BPSK), Ombudsman, the Hospital Supervisory Board (BPRS) and in mediation institution such as National Mediation Center (PMN), Indonesia Mediation Body (BAMI), and Indonesian Institute for Conflict Transformation (IICT).

In-court mediation procedure was first institutionalized in 2003 based on the Supreme Court Decree Number 2 of 2003 on the Procedure of the Court-Annexed Mediation *(Peraturan Mahkamah Agung Nomor 2 Tahun 2003 Tentang Prosedur Mediasi di Pengadilan)*[14]. This regulation has been amended twice, in 2008[15] and 2016[16]. This procedure constitutes the development of peace agreement *(dading*) which has been practiced since the colonial era.

The objective of the establishment of the court-annexed mediation is to reduce the backlog of cases in the court. The court-annexed mediation procedure is available for civil disputes. Before examining a civil case, the panel of judges has to order the disputing parties to employ mediation procedure for settling their disputes. This order is a must without which the court's decision will be void.

Outside the Health Act 2009 and the Supreme Court Decree 2016, mediation has also been governed in the Consumer Protection Act 1999 *(Undang-undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen)* and the Arbitration and ADR Act 1999 *(Undang-undang Nomor 30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa)*. Section 52 of the Consumer Protection Act 1999 addresses the task and authority of the Consumer Tribunal (BPSK) to handle and settle consumer dispute through mediation method.[17] While Section 6 (3) of the Arbitration and ADR Act 1999 mentioned that in case the dispute or disagreement as intended in Section 2 cannot be settled, based on the written consensus of the parties, the mentioned dispute or disagreement to be settled with the help of one or more experts or a mediator.

Court-annexed mediation as governed in the Supreme Court Decree Number 1 of 2016 as well as in the Arbitrase and ADR Act 1999 is provided for civil dispute in general, while mediation procedure as governed in the Consumer Protection Act 1999 is provided only for consumer dispute.[18] On the other hand, mediation procedure as governed in Section 29 of the Health Act 2009 is to facilitate the settlement of dispute arising in health service that is dispute between health professionals and patients.

The implementation of mediation in medical disputes as intended in Section 29 of the Health Act 2009 comes across various obstacles, including the lack of the operational rule which explains how the mediation should be carried out technically. As already stated earlier, there are some legislations governing mediation such as the Supreme Court Decree Number 1 of 2016, the Consumer Protection Act 1999, and the Arbitrase and ADR Act 1999. Besides that, there are several institutions which run mediation procedure such as the Consumer Dispute Tribunal (BPSK), Ombudsman, and the Hospital Supervisory Board (BPRS). The mentioned institutions are claimed to be relevant for medical disputes. This has created confusion in the practical level with regards to how to operate mediation and where the parties should go for mediation their medical malpractice disputes.

For patients, it is probably not a serious problem. To some extent, the availability of the various options is even an advantage. Patients may choose any choice which is more favorable for pursuing compensation from doctors or hospitals. If they fail in the first attempt, they may do the second one using differenet method. In contrast, these various options could be disastrous for doctors and hospitals. The doctors and hospitals in question can become objects of trial and error made by the patients and their lawyers. They can be exposed to one procedure after another, from one institution

14 Formerly the Supreme Court issued the Circular Number 1 of 2002 on the Empowerment of the Court of the First Instance for Implemanting the Amicable Settlement System *(Surat Edaran Mahkamah Agung Nomor 1 Tahun 2002 Tentang Pemberdayaan Pengadilan Tingkat Pertama Menerapkan Lembaga Damai)*.

15 The Supreme Court issued the Supreme Court Decree Number 1 of 2008 on the Procedure of the Court-Connected Mediation.

16 The Supreme Court issued the Supreme Court Decree Number 1 of 2016 on the Procedure of the Court-Connected Mediation.

17 See Section 52 point (a) of the Consumer Protection Act 1999.

18 In practice, the mediation mechanism as available in the Consumer Tribunal (BPSK) has also been used for resolving medical malpractice disputes.See Rinanto Suryadhimirtha, *Hukum Malapraktik Kedokteran*, Yogyakarta: Total Media, 2011, at p. 45 and 205.

after another following the series of attempt made by the patients in finding out which is the most favorable resolution.

The next obstacle is the mindset of the public and also the law enforcement agencies which are not favorable to doctors. They tend to presume an event sociologically identified as medical malpractice as a criminal act, especially if the patients suffer from injury or even death. As a result, the injured patients tend to file a criminal action against the negligent doctors. The police officers often take the case directly without respecting the statutory provision on mediation. Moreover every case alleged as medical malpractice has always been channeled to Article 359 or 360 of the Indonesian Penal Code only because there is evidence on patients' injury or death. It is true that the injury or death of the patient constitutes the crucial element of criminal offenses as governed in Article 359 (negligent manslaughter) and Article 360 (causing serious injury negligently). However, they cannot be applied excessively in all cases. The excessive application of these two provisions may create criminal injustice especially upon doctors.

E. ENHANCING MEDIATION IN MEDICAL DISPUTE SETTLEMENT

Mediation procedure which is introduced by the Health Act 2009 shows the legal policy of the Indonesian government that encourages the amicable method in medical malpractice dispute settlement. This policy is in line with the global trend on medical malpractice dispute settlement. Mediaton has been popular in advanced countries such as the United States of America, Australia, and Japan.

From historical perspective, mediation is actually not a new issue in Indonesia. The use of amicable method (called musyawarah) for resolving dispute with or without the help of the neutral third party has long been practiced within the Indonesian society. Even, 'the musyawarah' principle which is considered as the essence of mediation procedure constitutes one of the traditional values among the Indonesian society. It therefore can be said that regulating mediation is a form of the reformulation of the local wisdom rather than the adoption of global discurse or adaptation to the development of the international trend.[19]

Although the utilization of mediation for resolving medical malpractice disputes has been mandatory since 2009[20], unfortunately, that statutory provision has not completely been referred by the members of the society as well as the law enforcement agencies. The tendency in the society to litigate alleged medical malpractice cases is still high, while on the other side the law enforcement agencies sometimes tend to ignore them. This was at least proven in the case of Dr. Ayu and her colleages. If the related parties referred to Section 29 of the Health Act 2009 and exercised mediation for resolving the case, legal process would probably not have occurred. Supposed the plaintiff resort to mediation first and in case the mediation failed to resolve it and legal process should occur, the plaintiff may file civil action, not just the criminal one.[21]

Considering some obstacles as already discussed above, all necessary efforts should be taken for enhancing the utilization of mediation within medical malpractice dispute context. Some strategies below are expected to give the solution for addressing problems relating to the implementation of mediation. Empowering mediation can be done through the following steps:

1) Underlining the obligatory nature of mediation

It seems to be very much necessary to remind all stakeholders that the use of mediation is

19 Discourse on mediation or ADR in more general usually refers to the development of such institution in Western countries, especially in the USA.

20 As governed in Section 29 of the Health Act 2009.

21 As happened to Doctor Ayu and her two colleages, both the mediaton procedure as well the disciplinary investigaton were ignored and instead they were brought to criminal litigation which resulted in the conviction of ten month imprisonment based on the Supreme Court Decision in Cassation.

mandatory in resolving disputes arising in health service. Section 29 of the Health Act 2009 has clearly stated that in case the health professional commits negligence while providing health service, the dispute which may arise must be primarily resolved through mediation process. This statutory provision has further been endorsed by the Health Professional Act 2014. Section 78 of the Health Professional Act 2014 mentions that negligence commited by the health professional commits negligence while providing health service must be primarily settled outside the court as intended by the statutory provison. Statutory provision to which this section refers to is section 29 of the Health Act 2009 since the Health Act 2009 constitutes the Umbrella Act for the Health Professional Act 2014.

2) **Clarifying the mediation procedure**

Clarity on the procedure of mediation as intended by the Health Act 2009 is necessary. Section 29 of the Health Act 2009 needs further explanation more than which has been available in its explanatory part. It needs an operational rule in the form of Government Decree (Peraturan Pemerintah) to make it more applicable. Such a rule will ensure the legal certainty and eliminate confusion at the operational level.

Considering that medical malpractice dispute is very specific in the sense that this area comprises of two aspects, namely, medical and legal (medico-legal), it is necessary to make sure that those involving in the settlement of medical malpractice dispute understand the medical malpractice issue well. Therefore, through the stated Government Decree some crucial matters can be settled. The relevant Government Decree may determine the qualification of mediator who may deal with medical malpractice disputes. By virtue of the stated Government Decree, it can be shown that (for example) not all mediators may take the case of medical malpractice but only those who have specific competency. It can further be determined that these competent mediators must be registered in the representative offica of the Ministry of Health *(Kantor Dinas Kesehatan)*.

In order to empower mediation, there is a need to establish special institution to deal with medical malpractice dispute. This institution will receive complaint from the injured patient and carry out the mediation process. Such an institution may be established by various elements of civil society acquiring permit/license from the representative office of the Minstry of Health.

The domain of the mentioned institution is to conduct the out of court mediation. Besides this type of mediation, there is another type of mediation which associates with the court system (court-annexed mediation) which is governed by the Supreme Court Decree Number 1 of 2016. Medical malpractice dispute may also be resolved through the court-annexed mediation. This procedure can function as the second layer of medical malpractice mediation. When the injured patient directly files a civil suit in district court, the court will command the patient plaintiff and the defendant to exercise mediation (court-annexed mediation). The mediation should be conducted by competent mediators who have similar qualification with those who run the out court mediation process. In order to facilitate this idea, the Supreme Court should issue another decree or modified the existing one. The existing Supreme Court Decree governing court-annexed mediation is the Supreme Court Decree Number 1 of 2016.

3) **Adjusting the mindset of the society and the law enforcement agency**

The perception on medical malpractice issues among the members of society as well as the law enforcement agencies need to be changed. They need to undertand clearly on what medical malpractice is and how to deal with it. Since the basic domain of medical malpratice is civil, hence they need to know when an alleged medical malpractice case can be channelled to criminal litigation. Furthermore, when it enters the domain of criminal law, they need to know precisely which legal provisions should be referred to. Before the enactment of the Health Professional Act 2014, alleged medical malpractice cases have always been channelled to either Section 359 or 360 of the Penal Code.[22] It seems that these two provisions have been applied excessively to doctors due to medical

22 See the case of Doctor Setyaningrum (1980) and the case of Doctor Ayu (2013).

malpractice. To some extent the use of these two sections in medical malpractice case is not appropriate since there is another provision under the Medical Practice Act 2004 which is more relevant. The Penal Code is considered as a general act (lex generalis) as compared to the Medical Practice Act 2004 which is more specific (lex specialis). When two legislations are in conflict with one anothetr, the more specific legislation should prevail.[23]

The good understanding on the related legislations and their positions within the legal system will ensure good and proper application of law. In criminal law context, it may prevent unnecessary prosecution which brings about injustice upon doctors. Moreover, giving more respect to the mediation procedure as governed in the Health Act 2009 can promote restorative justice which has been more popular in the era of global justice.

After the enactment of the Health Professional Act 2014, criminal prosecution of dotors due to medical negligence should refer to this new Act. This Act provides that committing gross negligence is subject to criminal punishment. A gross negligence which causes death is subject to maximum five years imprisonment[24] and it is subject to maximum of three years imprisonment[25] if it results in serious injury. By virtue of these statutory provisions, criminal prosecution against doctors due medical negligence cases has strong legal basis and the issue of criminalization[26] of doctors will be seen as legitimate.

It seems that these provisions will face problem in their implementation. It is not easy to prove doctors' negligence. Proving the loss suffered by the patient is probably not a problem since death or serious injury is factual and identifiable. The problem probably arises in proving the doctors breach of duty of care and its causal link with the patient's damage. The breach of duty of care cannot easily be assessed by the public prosecutors or judges based on a mere juridical outlook. Only doctors may do so since they know better the standard of practice[27] and its violations. Furthermore, the issue of causation is another probem. It is not easy to prove the causal relationship between doctor's fault (breach of duty) and patient's damage. Doctor Ayu's case provides a verygood lesson on this problems as even the panel of judges in failed to establish the issue on causation.[28]

F. CONCLUSION

Some forms of Alternative Dispute Resolution especially mediation are suitable for resolving medical malpractice disputes in Indonesia. The use of mediation procedure in medical malpractice cases has been institutionalized in Indonesia through the Health Act 2009. The Health Professional Act 2014 has endorsed the use of mediation as governed in Section 29 of the Health Act 2009. Unfortunately, the implementation of this procedure has not been effective due to several obstacles including the lack of operational rules. The utilization of mediation should be enhanced through some strategic actions including the issuance of a government decree as well as a Supreme Court Decree which may empower the mediation procedure to deal with medical malpractice cases. It is urgent to provide competent mediators which are qualified in medical malpractice issue. It is also necessary

23 It is in line with the Latin legal maxim *"lex specialis derogat legi generali"*.

24 Section 84 (1) of the Health Act 2014

25 Section 84 (2) of the Health Act 2014

26 The existing malpractice system has put doctors in Indonesia in more vulnerable position. Especially after the conviction of Doctor Ayu and her colleages, doctors in Indonesia fight against criminalization.

27 There are several terms used in Indonesia to describe the standard the doctors should comply with while providing medical service such as *standar profesi* (the standard of profession); *standar pelayanan* (standard of service); and *standar prosedur operasi* (standard operating procedure). The doctors' fault is established based on these standards. Doctors are at fault when they fall to comply with these standards.

28 In Dokter Ayu's case, it was concluded based on the expert testimony that the death of the patient was caused by air emboli happening during the performance of sectio cesarean. The accused persons were at fault if their actions have caused the occurrence of the air emboli which then caused the death of the patient. In fact, the public prosecutors found that the accused were wrong in some actions, however there was no direct cause of air emboli that was successfully proven in court. The link between the doctors's wrong and the death of the patient was missing. Supposed the judgment was an acquittal *(frijpraak)*, but unfortunately the judges decided that the accused persons were guilty and inflicted ten month imprisonment against them.

to establish specific institution which provides mediation service for resolving medical malpractice dispute.

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ADR MECHANISMS TO RESOLVE POTENTIAL DISPUTES ON THE PAYMENT OF TAKAFUL BENEFITS UNDER CONDITIONAL *HIBAH*

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ABSTRACT

The application of conditional hibah to the rule of nomination for the payment of takaful benefits under the Islamic Financial Services Act (IFSA) 2013 draws certain legal issues. One of the issues relates to the entitlement of any of legal heirs of the deceased takaful participant to challenge the payment of takaful benefits to the nominee(s) under conditional hibah. In addition, the existence of a statutory provision that indirectly prevents such a challenge further complicates the matter. Hence, this paper examines the extent of the legal heirs' rights to annul such payment and to insist for the distribution of takaful benefits in accordance with the rule of fara'idh (inheritance). The analysis of this study will cover both Islamic law perspective as well as the provision of IFSA 2013. As takaful benefits are meant to provide for the general well-being of those left by the deceased policyholder, the paper predicates that the nomination should be able to be modified to cater the need of at least the policyholder's dependants who might not be named as the intended beneficiary of the conditional hibah. In this context, the paper proposes that ADR mechanisms such as mediation and negotiation should be applied for the payment of takaful benefits so that the rights of the nominee(s) and the legal heirs are well protected and not adversely affected.

Keywords: conditional hibah, takaful benefits, Islamic law, Islamic Financial Services Act 2013, Alternative Disputes Resolution, mediation

INTRODUCTION

A family takaful certificate or personal accident takaful certificate effected by a takaful participant upon his life provides for the payment of takaful benefit upon his death. Such takaful certificate is normally subscribed by the takaful participant for the purpose of preparing financial support for his dependants to ensure that they could survive after his death. In 2003, the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) resolved that takaful benefits could be made as *hibah* (gift) from a takaful participant to a nominee named as the beneficiary under his takaful certificate. This *hibah* is a conditional *hibah* whereby the takaful benefits will be given to the nominee upon the death of the takaful participant prior to the maturity of his takaful certificate. However, if the takaful participant is still alive when his certificate matures, the takaful benefits will be paid to him.[1] This resolution has later been codified in the Islamic Financial Services Act (IFSA) 2013 which repeals the Takaful Act (TA) 1984. Under the new law, a takaful participant is allowed to nominate any individual to receive the takaful benefits upon his death either as an executor (*wasi*) or a beneficiary under a conditional *hibah*.[2] A nominee who is nominated as an executor shall receive and distribute the takaful benefits in accordance with the will of the takaful participant and if there is no such will, the distribution shall be made according to the law applicable to the administration, distribution and disposition of his estate upon his intestacy.[3] On the other hand, a nominee nominated as a beneficiary is entitled to the takaful benefits because his nomination is based on the concept of conditional *hibah*. Based on this concept, the takaful benefits shall not form part of the deceased takaful participant's estate or be subject to his debt.[4] IFSA 2013 does not specify the individual who is eligible to be nominated as the beneficiary; hence the takaful participant is free to determine the beneficiary of the takaful benefits. In addition, the Act also gives full power and effect to the provisions relating to the nomination.[5]

The application of conditional *hibah* to the rule of nomination for the payment of takaful benefits draws certain legal issues that have been debated prior to the enforcement of IFSA until now. Among the issues that are debatable are the status of nomination under conditional *hibah*, whether it is to be construed as a *hibah* or *wasiyyah* (will or bequest) and its legal effect; the status of takaful benefits whether they are part of the estate of the deceased takaful participant or not; and the eligibility to be the beneficiaries.[6] Another issue which has not been discussed in the previous literature relates to the entitlement of any of legal heirs of the deceased Muslim takaful participant to challenge the entitlement of the nominee nominated as a beneficiary to the takaful benefits. Hence, this paper aims to analyse the rules applied in the payment of takaful benefits under IFSA 2013 as well as Islamic law perspective. The paper also highlights issues arising from the application of conditional *hibah* in the payment of takaful benefits including potential disputes that may arise between the legal heirs of the deceased Muslim takaful participant and the nominee(s) and the extent of the legal heirs' rights to insist for the distribution of takaful benefits in accordance with the rule of *fara'id* (inheritance). The paper also explores the suitability of Alternative Dispute Resolution (ADR) mechanisms to be used to resolve any potential disputes. For this purpose, a review of relevant literature on these

1 *Shari'ah* Advisory Council of Bank Negara Malaysia, *Shari'ah Resolutions in Islamic Finance*, 2nd ed. (Kuala Lumpur: Bank Negara Malaysia, 2010), 85.

2 IFSA 2013 Schedule (Sch.) 10 Paragraph (Para) 2(1)

3 IFSA 2013 Sch. 10 Para 6(2)

4 IFSA 2013 Sch. 10 Para 3(2)

5 IFSA 2013 Sch. 10 Para 13(2)

6 Mohd Kamil Ahmad and Joni Tamkin Borhan, "Penggunaan Hibah Bersyarat (Berta'liq) dalam Masalah Pembahagian Manfaat Takaful: Analisis Hukum," *Jurnal Syariah* 25, No. 1 (2017): 51-74; Yusuf Sani Bakar, Muhammad Anowar Zahid & Ruzian Markom, "Effect of Nomination under Life Insurance and Family Takaful," *ISRA International Journal of Islamic Finance* 6, Issue 1 (2014): 67-85; Syed Ahmed Salman, "Contemporary Issues in Takaful (Islamic Insurance," Asian Social Science 10, No. 22 (2014) Nurdianawati Irwani Abdullah and Nazliatul Aniza Abdul Aziz, "Case Studies of the Practice of Nomination and Hibah by Malaysian Takaful Operators," *ISRA International Journal of Islamic Finance* 2, Issue 2 (2010): 67-100; Azman Ismail, "Nomination and Hibah Issues in the Takaful Industry," a paper presented in ISRA Shariah Conference on Takaful, 7 May 2009, Kuala Lumpur; Azman Mohd Noor and Asmadi Abdullah, "Ownership and Hibah Issues of the Takaful Benefits," a paper presented in ISRA Islamic Finance Seminar, 11 November 2008, Kuala Lumpur.

issues entails significant time spent on library research. This includes a study on all the primary and secondary materials relating to the payment of takaful benefits particularly under the conditional *hibah*. Doctrinal analysis is done by examining materials including statutory provisions as provided by the IFSA 2013 and other relevant law and views of Muslim jurists.

FAMILY TAKAFUL BENEFITS AND THE RULES OF PAYMENT UNDER IFSA 2013

Basic family takaful benefits are protections against death or total permanent disability of the takaful participants. Normally, a family takaful plan provides savings and protection against financial loss due to death or permanent disability of the takaful participant. Contribution made by the takaful participant to a family takaful fund shall be managed by a takaful operator. Depending on the takaful model of the takaful operator, the contribution is commonly distributed to two accounts i.e. Participants` Special Account (PSA) and Participants` Account (PA).[7]

The contribution to the PSA is made on the basis of *iltizam bi al-tabarru'* (commitment to donate) to fulfill the obligation of mutual help among takaful participants in case of death or permanent disability. Under this basis, the takaful participant shall make *tabarru'* on periodical basis, subject to agreed terms and conditions stipulated in the takaful certificate. On the other hand, the money paid to the PA is based on the contract of *mudarabah* (silent partnership) or *wakalah bil istithmar* (investment agency) for the purpose of savings and investment. These two accounts are the sources of takaful benefits payable under the family takaful plan upon death of the participant or maturity of the takaful certificate.[8] In a case where the takaful participant dies before the maturity of his takaful certificate, the takaful operator will pay the takaful benefits that consists of death benefits derived from the PSA and the savings plus investment profits accumulated in the PA. However, if the participant survives until the maturity of his takaful certificate, he is entitled to all the savings and investment profits in his PA upon maturity.[9]

Subsection 2 (1) of IFSA 2013 provides, "takaful benefits include any benefit, pecuniary or not, which is payable under a takaful certificate." This definition covers both monetary and non-monetary benefits which is payable under a family takaful certificate or a general takaful certificate. The definition also does not differentiate between takaful benefits payable from the PA and the PSA. With regard to a family takaful certificate, IFSA 2013 does not specify the rules of the payment of takaful benefits upon maturity of the certificate but Schedule 10 of the Act provides specific rules for the payment of takaful benefits upon death of the takaful participant. The Schedule gives right to the takaful participant to make a nomination to determine who should receive the takaful benefits upon his death. In the absence of nomination, the takaful benefits will be paid to the lawful executor or administrator of estate of the deceased takaful participant or a proper claimant[10] who shall receive the takaful benefits as an executor and not solely as a beneficiary.[11]

According to the Schedule, the takaful participant who has attained the age of sixteen years old has the right to nominate an individual to receive takaful benefits upon the takaful participant's death either as an executor or as a beneficiary under conditional *hibah*.[12] The nomination is made by notifying the takaful operator in writing few details of the nominee for example, the name, date

7 The PSA is also known as the Participants' Risk Fund (PRF) and the PA is also known as the Participants' Investment Fund (PIF). Islamic Banking and Finance Institute Malaysia (IBFIM), *Buku Panduan Asas Takaful* (Kuala Lumpur: IBFIM, 2007), 170; Mohd Fadzli Yusof, "Brief Outline on the Concept and Operational System of Takaful Business" in *Takaful (Islamic Insurance): Concept and Operational System from the Practitioner's Perspective* (Kuala Lumpur: BIMB Institute of Research and Training Sdn Bhd, 1996), 12.

8 Badan Petugas Bagi Mengkaji Penubuhan Syarikat Insurans Secara Islam di Malaysia, *Laporan Badan Petugas Bagi Mengkaji Penubuhan Syarikat Insurans Islam Malaysia* (Kuala Lumpur, 1984), 35.

9 Ahmad Mazlan Zulkifli et.al, *Basic Takaful Practices: Entry Level for Practitioners* (Kuala Lumpur: IBFIM, 2012), 359-360.

10 Proper claimant means a person who claims to be entitled to the whole or part of the takaful benefits under a takaful certificate as executor of the deceased tkaful participant, parent or guardian of an incompetent nominee or an assignee or who claims to be otherwise entitled to the takaful benefits under the relevant law. IFSA 2013 Sch. 10 Para 2(1).

11 IFSA 2013 Sch. 10 Para 8(1)(2) & Para 10

12 IFSA 2013 Sch. 10 Para 2(1)

of birth, national registration identity card number or birth certificate number and address of the nominee.[13] The nomination could be made either at the beginning of the contract[14] or at any time during the contract[15] and must be witnessed by another person of sound mind and has attained the age of eighteen years.[16] Besides the nomination, the takaful participant may also assign the takaful benefits to a nominee (known as an assignee).[17] The takaful operator must ensure that the nomination form explicitly states that the takaful participant may assign the takaful benefits to a nominee or designate the nominee to receive the takaful benefits as a beneficiary under conditional *hibah* or appoint the nominee as an executor.[18]

Upon the death of the takaful participant, the takaful benefits will be paid in accordance with the nomination made by the takaful participant in the nomination form. A nominee who receives the takaful benefits as an executor must distribute the takaful benefits in due course of administration of the estate of the deceased takaful participant in accordance with the will of that takaful participant or the law relating to the distribution of estate of deceased person as applicable to that takaful participant.[19] In case of a Muslim takaful participant, the executor must distribute the takaful benefits in accordance to the will of the takaful participant (if there is a will) or the law of *fara'id*. On the other hand, a nominee designated as a beneficiary under a conditional *hibah* will receive the takaful benefits for himself because this type of nomination, notwithstanding any written law, effects the transfer of ownership of the takaful benefits payable to the nominee upon the death of the takaful participant and the transferred takaful benefits shall not become part of the estate of the deceased takaful participant or subject to any of his debts.[20] Nevertheless, if the takaful participant assigns the takaful benefits to an assignee, the claims made by the assignee shall have priority over the claims of the nominee. In this case, the takaful benefits will be paid to the assignee first; if there is balance, then it will be paid to the nominee.[21]

A nomination made by the takaful participant shall be revoked in three circumstances:[22] (a) upon the death of a nominee or all nominees (where there is more than one nominee) during the lifetime of the takaful participant; (b) via a notice in writing given by the takaful participant to the takaful operator; or (c) by any subsequent nomination. It is to be noted that, the nomination shall not be revoked by a will or any other act, event or means.[23] Where there is more than one nominee nominated as the beneficiaries under conditional *hibah*, if one of the nominees predeceases the takaful participant, the takaful operator shall pay the share of the deceased nominee, upon the death of the takaful participant, to the estate of the deceased takaful participant unless there is a subsequent nomination made by the takaful participant in place of the deceased nominee.[24] In the event the nominee dies after the death of the takaful participant but before receiving the payment of the takaful benefits, the takaful operator must pay the takaful benefits to the estate of the deceased takaful participant if the nominee is an executor or the estate of the deceased nominee if the nominee is a beneficiary under conditional *hibah*.[25]

Based on these provisions, IFSA 2013 indicates that the takaful participant is at full liberty to determine the beneficiary of takaful benefits payable upon his death based on the concept of conditional *hibah*. Since the law does not specify the eligibility of the party to be nominated as the beneficiary, the takaful participant may nominate any individual regardless of his relationship with the takaful participant. It should be noted that it is not necessary for the beneficiary to have permissible takaful

13 IFSA 2013 Sch 10 Para 2(1)
14 IFSA 2013 Sch 10 Para 2 (2)(a)
15 IFSA 2013 Sch 10 Para 2 (2)(b)
16 IFSA 2013 Sch 10 Para 2 (3)
17 IFSA 2013 Sch 10 Para 2 (4)(a)(i) & Para 7
18 IFSA 2013 Sch 10 Para 2 (4)(a)(i)(ii)
19 IFSA 2013 Sch 10 Para 6 (2)
20 IFSA 2013 Sch 10 Para 3 (2)
21 IFSA 2013 Sch 10 Para 7 (1)
22 IFSA 2013 Sch 10 Para 4 (1)
23 IFSA 2013 Sch 10 Para 4 (2)
24 IFSA 2013 Sch 10 Para 4 (3)
25 IFSA 2013 Sch 10 Para 5 (4)

interest in the takaful participant or vice versa since the principle of permissible takaful interest is not applicable to this matter.[26] The principle of permissible takaful interest applies to a family takaful certificate issued in respect of a contract of family takaful entered into by a takaful participant on a person covered other than the takaful participant himself.[27] On the contrary, Schedule 10 applies to a family takaful certificate effected by the takaful participant upon his life providing for the payment of takaful benefits upon his death.[28]

ISSUES IN THE APPLICATION OF CONDITIONAL *HIBAH* IN THE PAYMENT OF TAKAFUL BENEFITS

The Islamic scholars are of different views with regard to the permissibility of both conditional *hibah* or *hibah ruqba* and temporal *hibah* or *hibah `umra*. Conditional *hibah* or *hibah ruqba* puts death of either the donor or the donee as the condition for an ownership of the property or subject matter to be transferred to the donee, while temporal *hibah* or *hibah `umra* used death of the donee as a due for the property to be returned back to the donor. Majority of Islamic scholars are of the view that it is invalid to grant ownership of a property that only effective in the future. They are unanimously agreed that *hibah* is valid but the existence of such conditions is considered as void. Temporal *hibah* or *hibah `umra* is permissible and such condition is valid if the donor does not specify that the *hibah* property will be owned by the donee`s legal heirs after the death of the donee. This is the view of Imam Malik, Imam Al-Zuhri, Abu Thur, Al-Syafie and some scholars from Hanbali scholars.[29] In other words, they opined that the *hibah* property is automatically returned to the donor upon the demise of the donee. This temporal *hibah* or *hibah `umra* is also regarded as a loan (*`ariyah*) or not a *hibah* in its true meaning by some other scholars. On the other hand, Imam Abu Hanifah and Imam Malik permitted the temporal *hibah* or *hibah `umra* but invalidate the conditional *hibah* or *hibah ruqba* on the basis that this type of *hibah* is conditional upon something uncertain from the point of view of the tenure it will be carried out.[30]

However, the practise of conditional *hibah* for takaful benefits invited different opinions and views from the scholars and academicians. Some of the scholars agree that takaful benefits may be distributed through conditional *hibah* while some other scholars are against the view. This is due to the fact that there are two different accounts under the family takaful certificates namely the PA and the PSA. Azman Ismail is of the view that giving away takaful proceeds will definitely bring better benefit as the participant need not to pay higher contribution in the sense that if the participant has no savings and at the same time he needs to provide a certain amount for his minor single daughter, he has to provide double amount of money, hence double the contribution or the *tabarru`* amount.[31] He also added that the possibility of the takaful proceeds lead to disputes, hatred, and devouring other`s wealth wrongfully is very small if conditional *hibah* is to be practised. Mohd Shahrulnizam mentioned that, distributing the takaful benefits through the law of succession or *fara'id* might hinder the objectives of takaful which meant to secure the right of the close beneficiaries or immediate family who depend their lives on the takaful participant. For instance, the deceased might have adopted a son who is still dependant on him but not entitled to the estate of the deceased through the law of succession.[32] Nan Noorhidayu, Nurdianawati and Akhtarzaite also supported Azman Ismail`s statement and stated that it is better to make the takaful benefits as *hibah* as it will benefit those who really in need and achieve

26 Similarly, the principle of insurable interest is also not applicable to the beneficiary under a life insurance policy. S. Santhana Dass, *Law of Insurance in Malaysia* (LexisNexis: Singapore, 2014), 352.

27 IFSA 2013 Sch 8 Para 3 (1)

28 IFSA 2013 Sch 10 Para 1

29 Mohd Zamro Muda. "Instruments of Hibah and Wills: Analysis of the Regulations and Applications in Malaysia." In Hibah and Faraid National Convention. 2008. pp.9

30 Mohd Zamro Muda, "Instruments of Hibah and Wills: Analysis of the Regulations and Applications in Malaysia.", 10

31 Azman Ismail, "Nomination and Hibah Issues in the Takaful Industry," a paper presented in ISRA Shariah Conference on Takaful, 7 May 2009.

32 Mohd Shahrulnizam Abd Hamid, "Shariah Issues in Takaful."

the real intention or objective of takaful contribution.[33] Azman Mohd Noor and Asmadi Abdulah also agree that the takaful benefits can be given out as *hibah* to the nominee and pointed out the purpose of takaful benefits is to assist and ease the burden of the participant`s dependants.[34] Thus, the main aim of takaful is defeated is the takaful benefits are distributed among the legal heirs based on *fara`id*. They also added that there might be other persons besides the legal heirs that are more dependants to the takaful participant especially for their maintenance and education for example adopted sons or adopted daughters. Therefore, distributing the takaful proceeds in accordance of *fara`id* would deprive this group of people from getting any benefits out of the takaful proceeds.[35]

Akram Laldin on the other hand allowed the giving of the takaful benefits as *hibah* provided that the benefits are coming from the *tabarru`* fund or PSA as the amount of money is given by the takaful operator and it is not owned by the participant before his death and are not coming from the PA which is considered as part of the takaful participant's inheritance and forming part of his property.[36] This is similar to the conclusion made by the Shariah Committee of *Dallah Albarakah* that, it is permissible to distribute the takaful benefits according to the law of *mirath*, as it is also permissible to distribute the benefits to a particular individuals or parties as specified by the participant on the basis that the benefit is the contribution of other participants to the beneficiary as specified by the participant and not his estate.[37] Nurdianawati Irwani and Nazliatul Aniza suggested that the application of *hibah* shall be determined by the takaful operators depending on the conditions; for instance, *hibah* is applied if the takaful benefits are payable during the lifetime of the participant but bequest or *wasiyyah* is more appropriate if the takaful benefits are to be given after upon the death of the takaful participant.[38] Ahmad Hidayat also perceived that *hibah* is the best solution due to the nature of a *bequest* in Islam, which only allows a maximum of one-third of the property to be distributed in the event of death.[39]

On the other side of the views, Shamsiah Mohamad and Asmak Ab Rahman are of the opinion that the fund in PA belongs to the takaful participant and forms part of the estate upon his death.[40] They also added that, *tabarru`* fund should be managed as an alms or donation accordingly and it is inappropriate to use *waqf*, conditional *hibah* or bequest rules.[41] Yusuf Sani Bakar, Muhammad Anowar Zahid & Ruzian Markom mentioned that to treat the nominee as a trustee is closer to *maqasid al-Shariah* (objectives of Shariah) as the principle of *fara`id* would be appreciated and the deceased`s family members would be supported.[42] Masum Billah is of the view that, proprietorship of takaful benefits treated as *hibah* is not absolute; rather, it is conditional upon the death of the takaful participant before the maturity of the takaful certificate.[43] He stated that this kind of gift does not conform to the Islamic principles. He also stated that the takaful participant can make a will of one-

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33 Nan Norhidayu Megat Laksana, Nurdianawati Irwani Abdullah, and Nazliatul Aniza Abd Aziz, "Shariah issues related to ownership of Takaful Benefit and Hibah in Family Takaful in Malaysia." a paper presented in the 5th Islamic Economics System Conference (iECONS 2013), 2013, 292.

34 Azman Mohd Noor and Asmadi Abdullah, "Ownership and Hibah Issues of the Takaful Benefits," a paper presented in ISRA Islamic Finance Seminar, 11 November 2008, Kuala Lumpur

35 Noor, D. A., and D. A. Abdullah. "Ownership and Hibah Issues of the Takaful Benefit." In ISRA Islamic Finance Seminar (IIFS). 2008.

36 Yusuf Sani Bakar, Muhammad Anowar Zahid & Ruzian Markom, "Effect of Nomination under Life Insurance and Family Takaful," *ISRA International Journal of Islamic Finance* 6, Issue 1 (2014), 75

37 Collection of al-Barakah Fatwas 1981-1997, 173

38 Nurdianawati Irwani Abdullah and Nazliatul Aniza Abdul Aziz. "Case studies of the practice of nomination and hibah by Malaysian Takaful operators." ISRA International Journal of Islamic Finance 2, no. 2 (2010): 96

39 Ahmad Hidayat Buang, "Appreciation of Syari'ah Principles in Property Management in Contemporary Malaysia Society." *Jurnal Syariah* 16 (2008): 563-564.

40 Shamsiah Mohamad & Asmak Ab Rahman, "Isu-Isu Syariah Dalam Produk Takaful Dan Retakaful" in the proceeding Muzakarah Penasihat Syariah Kewangan Islam, Kuala Lumpur Islamic Finance Forum 2008-2009 (Kuala Lumpur: CERT, 2010), 224-225

41 Shamsiah Mohamad & Asmak Ab Rahman, "Isu-Isu Syariah Dalam Produk Takaful Dan Retakaful,

42 Yusuf Sani Bakar, Muhammad Anowar Zahid & Ruzian Markom, "Effect of Nomination under Life Insurance and Family Takaful," *ISRA International Journal of Islamic Finance* 6, Issue 1 (2014), 75

43 Mohd Maʾsum Billah, *Applied Takaful and Modern Insurance: Law and Practice* (Sweet & Maxwell Asia, 2007)

third of the benefits if he intends to nominate someone to get the benefits.[44] Razali Nawawi is also against the opinion of making the takaful benefits as *hibah* because under the Islamic law principle of gift, the subject matter must be in physical possession of the donor when he transfers it to the donee.[45] According to Abdurrahman Raden, the delivery of the subject matter also must be certain, not depending on a possibility or chance like the practice of conditional *hibah*.[46] Akmal Hidayah also argued that, any form of *hibah* after death is considered as a tactic to avoid the Islamic law of succession.[47]

However, despite all of these opinions, the SAC of BNM has made it clear in its 34th meeting, held on 21 April 2003 that takaful benefits can be used for *hibah* since it is the right of the participants.[48] The Council also cited that the status of *hibah* in takaful plan does not change into a bequest since it is a conditional *hibah*, in which the *hibah* is an offer to the recipient of *hibah* for specified period.[49] In the context of takaful, the takaful benefit is both associated with the death of the participant, as well as the maturity of the certificate.[50] If the participant remains alive on maturity, the takaful benefit is owned by the participant but if he dies within such period, then *hibah* shall be executed. The *hibah* shall also be revoked by the participant before the maturity date because conditional *hibah* is only deemed to be completed after delivery is made[51] and participant also has the right to revoke the *hibah* and transfer it to the other parties or terminate the takaful participation if the recipient of *hibah* dies before maturity.[52] The SAC in its 165th meeting, dated 26 January 2016 reiterated the previous resolution on *hibah* in takaful.[53] The SAC opined that the ownership of *hibah* asset is effectively transferred to the *hibah* recipient upon the occurrence of the agreed conditions and it is impossible for the donor to revoke the *hibah* upon the occurrence of the agreed conditions.[54] This is not withstanding that the subject matter of *hibah* has yet to be transferred completely to the donee constructively or physically. The SAC further mentioned that *hibah* which is attached to the condition of the demise of the donor shall only be applicable in the context of takaful.[55] The resolution has now been codified in the IFSA 2013.

It is also interesting to note that IFSA 2013 gives full force to the provisions in Schedule 10 which shall prevail over any other written law. Subparagraphs 13 (1) and (2) of the Schedule state that:

> *(1) This Schedule shall have effect in relation to a takaful certificate which is in force on or after the appointed date, and in relation to a nomination made before, on or after the appointed date, notwithstanding anything contained in the takaful certificate, and nothing contained in a takaful certificate shall derogate from, or be construed as derogating in any manner or to any extent from, this Schedule.*
>
> *(2)This Schedule shall have full force and effect notwithstanding anything inconsistent with or contrary to any other written law relating to probate, administration, distribution, or disposition, of the estates of deceased persons, or in any practice or custom in relation to these matters.*

It is clear that paragraph 13(2) of the Schedule provides that the Schedule shall have full force and effect notwithstanding anything inconsistent with or contrary to any other written law relating to probate, administration, distribution, or disposition, of the estates of deceased persons, or in any

44 Mohd Ma'sum Billah, *Applied Takaful and Modern Insurance: Law and Practice*
45 Razali Nawawi, *Islamic Law on Commercial Transactions* (Centre for Research and Training, 2009).
46 Abdurrahman Raden Aji Haqqi. *The Philosophy of Islamic Law of Transactions* (Univision Press, 1999).
47 Nurdianawati Irwani Abdullah and Nazliatul Aniza Abdul Aziz. "Case studies of the practice of nomination and hibah by Malaysian Takaful operators", 80
48 Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (i)
49 Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (ii)
50 Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (ii)
51 Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (iii)
52 Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (iv)
53 The SAC 165th Meeting, http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=480
54 The SAC 165th Meeting, http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=480
55 The SAC 165th Meeting, http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=480

practice or custom in relation to these matters. In this relation, it could be inferred that provisions relating to the payment of takaful benefits under IFSA are absolute and could not be challenged even if it is inconsistent with other relevant written law in this matter. This paragraph could be seen *inter alia* as a shield to the nomination made by the takaful participant especially in cases where the nominee is to receive the payment of takaful benefit as a beneficiary under a conditional *hibah* and that the takaful benefits shall not form part of the estate of the deceased takaful participant or be subject to his debts.

Nevertheless, it could also be submitted that if one may argue that the schedule is inconsistent with the Islamic law on *hibah* and inheritance which are unwritten law, then there would still be room for the estate beneficiaries to challenge the payment of takaful benefit to the specified nominee under the conditional *hibah*. Moreover, as the recipients normally consist of those persons who are also entitled to inherit the estate of the takaful participant, disputes as to the status of the takaful benefit might arise since the nomination seems to be inconsistent with the Islamic rules of *wasiyyah*. In fact, it has also been argued that it is improper for the takaful benefits from the PA to be distributed on the basis of conditional *hibah* since it should bound by the law of bequest.[56]

On another note, IFSA 2013 does not distinguish between takaful benefits payable from PA and PSA. In this context, takaful benefits from both accounts would be paid in lump sum to the nominee. This leads to questions as to whether the takaful participant is being fair to his legal heirs in general and dependants in particular in giving takaful benefits under conditional *hibah* after his death to a special someone. There have been cases where the other dependants of the takaful participant are dissatisfied with the payment of takaful benefit to the only nominee which has resulted in a conflict between the dependants and the nominee.

Issue on jurisdiction of courts might also exist in matters relating to the determination of *hibah* which has been clearly stipulated to be under the jurisdiction of the Syariah Court. Although the payment of takaful benefit is provided under the IFSA which is a Federal statute, the subject matter approach in determining the court's jurisdiction might open a room for challenge by the estate beneficiaries.

Based on the above, it is observed that potential disputes are very likely especially when the estate beneficiaries are aware of their rights in the estate of the takaful participants. Among the potential disputes on the payment of takaful benefits are the issue of nomination and the status of the takaful benefits which were actively discussed and debated by the scholars. As mentioned in Islamic Financial Services Act (IFSA) 2013, "*a nomination by a takaful participant pursuant to subparagraph 2(1) for a nominee to be a beneficiary under a conditional hibah, shall, notwithstanding any written law, have the effect of transferring ownership, and shall transfer ownership, of the takaful benefits payable to the nominee upon the death of the takaful participant*."[57] It is also clearly mentioned that the transferred benefits shall not form part of the part of the estate of the deceased takaful participant or subject to any of his debts if there is no other credible proof to show that such contributions were paid with an intention to defraud the creditor.[58] Despite the clear provision on the nomination and the status of the takaful benefits in IFSA 2013, scholars are having dissenting views on the issue of the status of the money payable to the nominated beneficiary due to the existence of the two main accounts namely the PA and PSA. Undeniably, there would be a good basis for the estate beneficiaries to insist for the distribution of takaful benefits according to the Islamic law of inheritance (*fara'id*) based on the discussion by the scholars. Hence, the rules on nomination should be able to be modified in order to cater the need of at least the policyholder's dependants that might not be named as the intended beneficiary of the conditional *hibah*.

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56 Mohd. Kamil Ahmad dan Joni Tamkin Borhan (2017). Penggunaan hibah bersyarat (bertaklik) dalam masalah pembahagian manfaat takaful: Analisis hukum. Jurnal Syariah, 25(1), 51 – 74. See also Yusuf Sani Abu Bakar, Muhammad Anowar Zahid dan Ruzian Markom (2013). Effect of nomination under the Islamic Financial Services Act 2013: Is it a return to the decisions of re: Man bin Mihat Decd and Bahadun bin Haji Hassan?. A paper presented in 1st Insurance and Takaful International Symposium 2013, Malaysian Insurance Institute, Kuala Lumpur.

57 IFSA Sch. 10 Para 3 (2)

58 IFSA Sch. 10 Para 3 (2)

On the contrary, literal reading of the paragraph 13(2) of Schedule 10, IFSA 2013 would eventually frustrate such a claim, thus lead to unfairness and injustice as opposed to the main objectives of the takaful benefits namely to provide for the general well-being of those left by the deceased takaful participant. Moreover, litigation is not a proper mechanism to resolve disputes relating to the payment of the takaful benefits as provided under IFSA 2013. This is because the court is bound by the ruling made by the SAC. This is based on section 56 and 57 of the Central Bank Act 2009 which provide as follows:-

> *56. (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter,* ***the court or the arbitrator****, as the case may be, shall—*
>
> *(a) take into consideration any published rulings of the Shariah Advisory Council; or*
>
> *(b) refer such question to the Shariah Advisory Council for its ruling.*
>
> *57. Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and* ***the court or arbitrator*** *making a reference under section 56 [emphasis added]*

Since the ruling on payment of takaful benefit as codified in IFSA 2013 derives from the ruling of the SAC, it shall be binding on the court, thus litigating the matters would be of no avail. It is worth noting that the above provisions are also applicable to the arbitrator and would therefore rule out the possibility of using arbitration as a mechanism to resolve disputes on the payment of takaful benefit under conditional *hibah*.

ADR MECHANISMS TO RESOLVE POTENTIAL DISPUTE ON THE PAYMENT OF TAKAFUL BENEFITS UNDER CONDITIONAL *HIBAH*

The term 'alternative' brings the meaning of another option to resolve disputes other than appearing before the judge or the court. Alternative Disputes Resolution (ADR) brings few advantageous compared to the court settlement or litigation. It brings the parties closer unlike in litigation; the disputants tend to be farther to each other. This is because, litigation leads to a win-lose situation where the winning party rejoices it's winning while the other party wallow in anguish. In order to avoid these situations, effective disputes resolutions came into the picture to satisfy the real needs of the litigants. Unlike litigation, ADR assists the administration of justice system and safeguard speedy justice without compromising the parties` rights and obligations. In a way, ADR offers a win-win situation and settlement where the parties resolve dispute amicably and secure the ongoing relationship.[59] ADR is the supplementary of the existing court system. It provides better access to justice for the nation. This is especially so in cases where litigating the matters is not an option to the aggrieved party.

There are three common types of alternative dispute resolution methods practised in Malaysia which are mediation, arbitration and negotiation. Mediation is a flexible process involving a neutral person who actively assists the disputants to work on negotiated agreement of a dispute or difference. It is a co-operative, collaborative, dispute resolving process where the parties retain control of the outcome.[60] Mediation process is also a voluntary and confidential in nature and the end agreement

59 Oseni, Umar A., and Abu Umar Faruq Ahmad. "Dispute resolution in Islamic finance: A case analysis of Malaysia." (2011). 3

60 D. Mose & B. H. Kleiner, "The emergence of alternative dispute resolution in business today", Equal Opportunities International, (1999)

will not be binding on the parties unless the parties agreed to it. It also allows the parties to reveal or share things which they did not wish to state publicly.[61] Mediation is a contextual alternative for litigation without compromising any side`s litigation strategy or blowing anybody`s cover. Timely mediation can cave 80% of court and counsel costs.[62] The common advantages of mediation are the parties can reach the settlement by the assistance of mediator and settlement is reachable more quickly compared to litigation process.[63] Mediation in Malaysia, particularly in Islamic banking and takaful matters is under the purview of Ombudsman for Financial Services (OFS) formerly known as Financial Mediation Bureau (FMB). FMB is a combination of Banking Mediation Bureau and Insurance Mediation Bureau which merged in January 2005. However, it is to be noted that potential disputes relating to the payment of takaful benefit as set out in Schedule 10 of IFSA 2013 could not be mediated by OFS since such disputes do not fall within the jurisdiction of OFS.[64] Hence the use of private mediator would be necessary to resolve any potential disputes on such matter.

Arbitration is another option available under the alternative dispute resolution (ADR). Arbitration also involves third party or also known as arbitrator to resolve the disputes amicably among the disputants. The disputes will be resolved by an award made by the arbitrator which will bind the parties. Nevertheless, as discussed above, arbitration would not be a proper mechanism to resolve disputes relating to payment of takaful benefit as arbitrator is bound the ruling made by the SAC.[65]

Negotiation on the other hand is an agreement between two or more parties to reach settlement. Unlike arbitration and mediation, negotiation does not involve any third party, traditionally as the negotiation take place directly between the parties and their counsel. However, a third party may be introduced if there is a failure in the negotiation process. This is known as a facilitated negotiation in which the third party acts as a facilitator and communicates with the parties.[66] The negotiator or the facilitator will assist the parties to reach for a settlement without influencing them.[67] This mechanism could be used to resolve potential disputes on the payment of takaful benefits to the beneficiary under conditional *hibah*.

CONCLUSION

The application of the concept of conditional *hibah* to the nomination for payment of takaful benefits as provided in IFSA 2013 gives rise to many legal issues. In addition, such application may also prejudice the right of legal heir of the deceased takaful participant who are not nominated as the beneficiary and may cause disputes between the legal heir and the nominated beneficiary. As takaful benefits are meant to provide for the general well-being of the legal heirs or dependants of the deceased takaful participant, the paper predicates that the nomination should be able to be modified to cater their needs if they are not named as the beneficiary. Therefore, the paper proposes that certain ADR mechanisms such as private mediation and facilitated negotiation should be applied to resolve any potential dispute on the payment of takaful benefits so that the rights of the nominee(s) and the legal heirs are well protected and not adversely affected.

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62 Meyer, Judith, “Mediation Works”, *Dispute Resolution Journal*, Vol. 50 No. 2, 1995: 44- 47

63 U. A Manaf et.al, “The development of Islamic finance alternative dispute resolution framework in Malaysia.” *International Business Management*, (2014) 8(1), 3

64 http://www.ofs.org.my/en/scope

65 Central Bank of Malaysia Act (CBMA) 2009 s 56 and 57

66 CBMA s 56 and 57

67 Berman, G.S., 1995. Facilitated negotiation: An effective ADR Technique. Dispute Resolution. J., 50: 18-29

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Legal Framework for Resolving Misappropriation of Genetic Resources and Traditional Knowledge Dispute in South Africa

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Abstract

Pharmaceutical industries are looking for genetic material to develop their products. The World Health Organization also encouraged them to be using genetic resources in developing their products. The most effective medication and cosmetics without side effect must have natural ingredient from the GR. This led the companies to look for the biological material to develop their products. In order to get the access to the GRs, the holder must give prior inform consent following by mutually agreed term on how benefit derived from the commercialization will be shared between the holder and the companies. Failure to take prior informed consent and mutually agreed term for benefit sharing is what is knew as misappropriation of GRs and TK, in other word Bio-piracy. This cruelty injustice in violation of a provider's country laws and regulations can not be effectively prevented, this is due to the fact that many biotechnological applications do not require large commodities of GRs to export plant and animal species, but merely its genetic code. It is not only the South Africa that is facing such problem but almost all the endowed rich biodiversity countries. This paper aim to critically analyze the legal framework for resolving dispute in access and benefit sharing arising from the utilization of GRs and TK in South Africa.

Keywords:

Dispute Resolution, Genetic Resources, Traditional Knowledge, Misappropriation, and South Africa

Introduction

The term misappropriation of GRs and bio-piracy are often uses interchangeably by the international community[2]. While bio-piracy is not defined under international law, the action Group on Erosion, Technology and Concentration (ETC Group) defines bio-piracy as the appropriation of the knowledge resources of farming and indigenous communities by individuals or institutions seeking exclusive monopoly control (usually patents or plant breeders' right) over these resources

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2 World Trade Organization, Council for Trade Related Aspects of Intellectual Property Rights, (06-1273) IP/C/W/470. Paragraph 2

and knowledge[3]. On the other hand, misappropriation is any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means, which may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person knowledge knows, or is negligent in failing to know, that it was acquired or appropriate means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge[4]. A number of misappropriation of GRs and TK cases have been attraction of intense controversies not later than 1990s[5]. This made the term misappropriation of GRs and TK to be under the discussion in various international organization[6].

Negotiations on an international framework form implementing the convention's objective of the fair and equitable sharing of the benefits arising out of the utilization of GRs was mandated by the CBD's Conference of the Parties in 2004[7].

The negotiation led to the adoption of Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefit Arising from their Utilization which entered into force on 12 October 2014.

Nagoya Protocol is the only current international agreement providing a comprehensive legal framework for addressing bio-piracy, by the virtue of provision in the Protocol on utilization of GRs without the provider country's consent or violation of mutually agreed terms[8].

This paper aim to critically analyze the legal framework for resolving dispute in access and benefit sharing arising from the utilization of GRs and TK in South Africa.

Legal Framework on Genetic Resources and Traditional Knowledge in South Africa

South Africa has enacted elaborate legislations on access and benefit sharing, among which are: the Biodiversity Act 2004, the Bio-Prospecting, Access and Benefit Sharing Regulations 2008[9], and the

3 http://www.ipcommission.org/papers/word/final_report/chapter4wordfinal.doc.

4 WIPO/grtkf/IC_8_5[2]. World Trade Organization, Council for Trade Related Aspects of Intellectual Property Rights, (06-1273) IP/C/W/470. Paragraph 2. Both terms constitute a case in which GRs and TK has been acquired by the user without obtaining Prior Informed Consent of the provider or where there is valid access but the user did not honor the term of Mutually Agreed Term by sharing the benefit arising from the utilization of acquired GRs.

5 Robinson, Daniel, (2010), Confronting Bio-piracy: Challenges, Cases and International Debates, Oxon: Routledges, p. 228. Liang, Bryan A, (2011), Global Governance: Promoting Biodiversity and Protecting Indigenous Communities Against Bio-piracy, Journal of Commercial Biotechnology, Vol. 17, No 03, pp. 248-253. Bardi Marcelo A.G, et al (2011), Traditional Knowledge Products in Latin America and their Misappropriation, Journal of Intellectual Property Law and Practice, Vol. 06, No 01, pp.34-42

6 Mgbeoji Ikechi, (2006), Global Bio-piracy: Patents, Plants and Indigenous Knowledge, Vancouver: UBC Press, p. 336

7 Article 1 of Convention on Biological Diversity

8 Florian Rabitz, (2015), Bio piracy after Nagoya Protocol: Problem Structure, Regime Design and Implementation Challenges, A Journal of the Brazilian Political Science Association, 9 (2). Available at http://dx.doi.org/10.1590/1981-38212014000200010. Using the word comprehensive is some how controversial in this situation as the Nagoya Protocol did not directly used the term bio-piracy throughout the provision of the Protocol, even though the rational behind the adoption of the Protocol is to stop bio-piracy, that was why Bolivarian Republic of Venezuela comment against the adoption of the Protocol because the word bio-piracy is not clearly mentioned in it. The Bolivarian Republic of Venezuela stated that decision of tenth COP did not meet the demand on a strong agreement that can mobilize all in fight against the scourge of bio-piracy. Just like how CBD dealt with the acquisition of GRs in violation of a provider country's domestic laws and regulations and their utilization in breach of contractual agreements between the user and provider countries, Nagoya Protocol dealt with the utilization of GRs without the provider consent or violation of the MAT. See Santilli, Juliana, (2012), Access and Benefit-Sharing Laws and Plant Genetic Resources for Food and Agriculture: The International Regime, Chapter 6 of Santilli, Juliana. *Agrobiodiversity and the Law: regulating genetic resources, food security and cultural diversity*, Earthscan, London.

9 Sandra Clelland, (2008), Bio-Prospecting within South Africa: Indigenous Biological Resources and Traditional Knowledge. Available www.spoor.com/en/News?bio-prospecting-within-south-africa-indigenous-biological-

Amendment to the Biodiversity Act. The purpose of those legislations is to ensure that the South Africa resources are accessed for the purpose that is in the interest of the public, which could include the protection and conservation of indigenous GRs, stimulating economic development and promoting scientific research and capacity in South Africa[10].

Biodiversity Act 2004

This Act came into force in June 2004, and it has objectives similar to those of the CBD which are: (i) regulating the practice of bio prospecting and the exportation of biological resources from the the country for research (ii) setting out the conditions to be fulfilled before this exportation takes place; and (iii) ensuring that the benefits derived are shared with the indigenous communities who provide and hold this knowledge[11].

Bioprospecting is defined under the Act as any research on, development or application of, indigenous biological resources for commercial or industrial application[12]. It is illegal to obtain and utilize any extracts from indigenous plants or animals for commercial use without a permit[13]. However, there is no specific details on who is to issue permits and where to apply. Bio-prospectors must have entered into a benefit sharing agreement in order to use TK and these agreements must include certain information[14].

Thus, the Act mandates that before the application for a permit will be considered the applicant must disclose all information concerning the proposed bioprospecting and the resources that will be used for that purpose[15]. A permit will only be issued if a material transfer agreement regulating the provision of or access to the resources and a benefit sharing agreement that provides for sharing by the stakeholders[16] in any future benefits that may be derived from the relevant bio prospecting has been entered into by the applicant and the stakeholder, and the Minister has approved these agreements[17]. If the stakeholder has provided knowledge that will be used for the proposed bio-prospecting, then a benefit sharing agreement must be entered into between the applicant and the stakeholder and approved by the Minister before a permit will be granted[18].

The Act required a Material Transfer Agreement for indigenous biological resources between the applicant and stakeholder, as well as a benefit sharing agreement, before issuing the permit[19]. Those issuing permits may also facilitate negotiations between the applicant and stakeholder to ensure these are on an equal footing, or may be required by the Minister to ensure the arrangement is

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resources-and-traditional-knowledge/ accessed on 4/4/2017.

10 Jorge Cabrera Medaglia et al (2014), Overview of National and Regional Measures on Access and Benefit Sharing, Challenges and Opportunities in Implementing the Nagoya Protocol, Centre for International Sustainable Development Law, Third Edition, p. 99

11 Section 2 of the Biodiversity Act 2004: Regulations on Bio prospecting, Access and Benefit Sharing titled purpose of the regulation. The objectives mentioned above are similar to the CBD objectives which are (i) conservation of biological diversity; (ii) sustainable use of its component; and (iii) fair and equitable sharing of benefits arising from the utilization of GRs.

12 South Africa's Bioprospecting, Access and Benefit Sharing Regulatory Framework: Guidelines for Providers, Users and Regulators, (2012), Available at <https://www.environment.gov.za/sites/default/files/legislations/bioprospecting_regulatory_framework_guideline.pdf>.

13 Section 76 of Biodiversity Act 2004

14 Section 77 of Biodiversity Act 2004

15 Section 82 (2) (a) of the Biodiversity Act 2004

16 Section 8 of the Regulation on Bio Prospecting Access and Benefit Sharing 2008. Section 83 and 84 of the Biodiversity Act 2004.

17 Section 82 (2) (b) (i) and (ii) of the Biodiversity Act 2004

18 Section82 (3) (a) (b) and (c) of the Biodiversity Act 2004

19 By the virtue of section 82 (a) stakeholder is a person, an organ of state or community contemplated in section 82 (1)(a); or (b) an indigenous community contemplated in section 82 (1)(b)

fair and equitable[20]. Permits are required to engage in bioprospecting or any other kind of research[21].

The Patent Amendment Act 2005

The Patent Act integrates conservation of indigenous biological resources and traditional knowledge into existing patent legislation[22]. The Act incorporated definitions for indigenous biological resources and traditional use, it also requires applicant for patent to disclose the sources of invention if the patent is based on GRs or TK, and to show proper title for access. As required by the Biodiversity Act, the Patent Amendment Act also required an applicant to have material transfer and benefit sharing agreements in place[23]. The patent will be subject to revocation on the ground of submission of false information in relation to the role of traditional knowledge in the agreement[24].

The Patent Act required mandatory disclosure of the origin of TK and evidence of benefit sharing for an invention that is based on or derived from TK[25]. By the virtues of section 30 (3A) and (3B), any patent applicant in South Africa is required to disclose any TK used in the course of developing the invention, and the actual source of origin of the TK; as well as to provide evidence of prior informed consent and/or an undertaking of equitable benefit sharing with the TK holders irrespective of whether the TK is confidential or in the public domain[26]. The purpose of that requirement is to prevent granting of bad patents, which often implicate the misappropriation of biological resources and associated TK in SA[27].

Bio-Prospecting, Access and Benefit Sharing Regulation 2008

This regulation was passed in January 2008 and come into force in April 2008, the regulation provides the details lacking in the Biodiversity Act. It distinguished three types of permits which are: (i) the Biodiversity permit to engage in the discovery phase and/or commercialization phase of a bioprospecting project[28]; (ii) the Integrated export and bioprospecting permit for exporting indigenous biological resources for the purpose of bioprospecting[29]; (iii) the Export permit for research other than bioprospecting for exporting any indigenous biological resource for research other than bioprospecting[30]

Regulations contain application forms for the three types of permits, standard text of the three

20 Section 82 (4)(b) and (4)(c). Report on the Legal Status of Genetic Resources in National Law, Including Property Law, where Applicable, in a Selection of Countries, Open-ended Ad Hoc Open-Ended Working Group on Access and Benefit Sharing, Fifth meeting 2007, UNEP/CBD/WG-ABS/5/5. p. 22-23

21 Jorge Cabrera Medaglia et al (2014), Overview of National and Regional Measures on Access and Benefit Sharing, Challenges and Opportunities in Implementing the Nagoya Protocol, Centre for International Sustainable Development Law, Third Edition, p. 100

22 Ibid

23 EP Amechi, Leveraging Traditional Knowledge on the Medicinal Uses of Plants within the Patent System: The Digitization and Disclosure of Knowledge in South Africa, PER/PELJ 2015(18)1.

24 Ibid

25 Section 30 (3A) and (3B) Patent Amendment Act 2005. Emeka Polycarp Amechi, Using Patents to Protect Traditional Knowledge on Medicinal Uses of Plants in South Africa, 11/1 Law, Environmnet and Development Journal (2015), p. 52, available at http://www.lead-journal.org/content/15051.pdf.

26 WIPO 2008 http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_13/wipo_grtkf_ic_13_7.pdf para 64.

27 Patents Amendment Bill B17B-2005 para 4 (memorandum on the objects of the Bill). WIPO 2014 http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_inf_11. Pdf 10 para 68.

28 The authority in charge of this permit is Minister of Environmental Affairs and Tourism, and the cost of this permit as at 2012 is Rand 5000 (c.$440). Sandra Clelland, (2008), Bio-Prospecting within South Africa: Indigenous Biological Resources and Traditional Knowledge. Available www.spoor.com/en/News?bio-prospecting-within-south-africa-indigenous-biological-resources-and-traditional-knowledge/ accessed on 4/4/2017.

29 The authority in charge of this permit is the Minister of Environmental Affairs and Tourism, the cost of this permit as at 2012 is Rand 5200

30 The authority in charge of this permit is Member of Executive Council (MEC) responsible for Environmental Affairs in the Province where resources is located. The biological resources may not be sold, donated or transferred to a third party without written consent of the authority in charge of the permit. The cost of this permit is Rand 100

types of permits, a model mutually agreed term, and a model Benefit Sharing agreement, including a long list of possible monetary and non monetary benefits. Procedures of appealing against decisions are also outlined.

Having a local counterpart is necessary for obtaining a permit. The permits are given for a maximum of five years, and an annual status report required. It is not necessary to obtain a separate permit for each species to be accessed, more species per permit are allowed. Bio trading without a permit may be criminally charged.

Amendments to the Biodiversity Act 2009

The amendment to the Biodiversity act came to force in September 2009, some new definitions are included, such as the discovery phase of bioprospecting (no permit necessary if carried out in South Africa, but notification required) and the commercialization phase of bioprospecting (permit necessary).

Provisions are included on the renewal and amendment of permits. Furthermore, the Amendments state that a commitment has to be signed that, when there is commercialization in the future, you have to go through the application process again.

The Ministry of Environment which is the one of the authority in charge is of the opinion that the biggest challenge of access and benefit sharing in South Africa is monitoring and ensuring compliance after GRs have left the country. The staff of the Ministry said an attempts are made to streamline the process of access, instead of applying for various permits, applicant would only have to apply once for all permits[31]. Some definitions in the law, for instance that of bioprospecting[32], have to be clearly precise likewise other terms and concepts in the Act.

Dispute Resolution on Genetic resources and Traditional Knowledges in South Africa

It is better to figure out where the dispute lied in GRs and TK before discussing how the law address it or whether it is sufficient. It is well established principle in IP that any GRs and TK should be accessed in accordance with PIC and MTA[33]. Obtaining access to genetic resources and traditional knowledge without authorization is what is known as "misappropriation" meaning the use of GRs in violation of access conditions and/or deriving benefits from GRs without equitable benefit-sharing[34].

Based on the discussion above, GRs and TK disputes will occur in the following circumstance: a) patenting of inventions based on GRs and TKs without authority, where there is no prior informed consent or mutually agreed term b) Extraction of GRs or TKs without benefit sharing where there is prior informed consent and mutually agreed term c) Breaching the terms and conditions of the material transfer agreement or benefit sharing agreement.

31 The booklet South Africa's Bioprospecting, Access and Benefit Sharing Regulatory Framework. Guidelines for Providers, Users and Regulators (Department of Environmental Affairs, 2012). Jorge Cabrera Medaglia et al (2012), Access to Genetic Resources and Benefit Sharing Challenges and Opportunities in Implementing the Nagoya Protocol, Centre for International Sustainable Development Law, Second Edition.

32 Bioprospecting is broadly defined under the Act as any research on or development of application of indigenous biological resources for commercial and industrial exploitation and includes: (i) the systematic search, collection or gathering of such resources or making extraction from such resources for purposes of such research; (ii) the utilization for purpose of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; (iii) research on, or the application, development or modification of any traditional use for commercial or industrial exploitation. Some other terms that need precise definitions are: commercialization, Confidential information, indigenous biological resources, indigenous communities, traditional use, indigenous knowledge, research and prior informed consent.

33 Article 15.1, 15.3 and 16.1, 16.3 of Nagoya Protocol. Article 15.2 and 16.2 of Nagoya Protocol provided that the member states to the protocol shall take steps to address situation of non compliance. It should be noted that any addressing of non compliance can be done in the member state ABS legislation which is only applicable in their country due to the fact that IPR is territorial in nature.

34 Sarnoff J, et al (2006), Analysis of Option for Implementing Disclosure of Origin Requirements in Intellectual Property Applications, UNCTAD, Geneva, Switzerland.

It's difficult for the providers' country to enforce access and benefit sharing regulation outside their jurisdiction even if they have specific legislation on ABS[35]. Meaning that definitely GRs and TK that have been accessed in accordance with PIC and MAT can be violated when resources are researched and developed in a foreign country[36].

The dispute resolution is less given focus in the South African regulations on GRs and TK. The laws regulating GRs and TK in South Africa only defined offences and penalties for the contravention of any provisions of the South African Biodiversity Act 2004[37]. The only means of resolving the disputes in through the court and it is criminal in nature looking at the word used in the provision of the Act i.e conviction, imprisonment and fine etc.

The Act specifically address penalty for two offences which are offences against administration of the Bioprospecting Trust Fund[38] and non compliance to the condition of the permit and contravention of any provision of the Act[39]. The material transfer agreement and the benefit sharing agreement is a negotiation between the provider and the users, any breach of such agreement warrant civil action or settling such issues amicably by the both party.

Further more as it is discussed above, access to genetic resources where granted, must be on mutually agreed terms subject to the provisions of CBD[40], such mutually agreed terms is commonly by way of contract between the provider and recipient[41]. Under the Nagoya Protocol, the parties must strictly comply with the mutually agreed terms and they shall encourage providers and users of genetic resources and or traditional knowledge associated with genetic resources to let their mutually agreed terms cover dispute resolution including; (a) The jurisdiction to which they will subject any dispute resolution processes; (b) The applicable law; and/or (c) options for alternative dispute resolution.

The party shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdiction requirements, in cases of disputes arising from mutually agreed terms. The parties should give rooms for access to justice, the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.

Conclusion

Misappropriation of GRs and TK in violation of provider country's legislation and regulations can not be predominantly be prevented, despite the fact that number of provider countries have law criminalizing the unauthorized export of their GRs and TK. This is due to to the fact that many biotechnological applications do not require bulk commodities of a particular GR but merely its genetic code in this digitalized era to get the extraction of GRs and TK and transmit it to third countries with minimal risk of detection.

In a given agreement, before executing it or after execution, the parties might breach the term and the condition of the contract which might result to civil action or amicable dispute resolution between the parties

If that is the case, it is of much essential for the provider country to enhance their ABS legislation by providing provisions on how dispute on GRs and TK will be resolved in accordance with the provision of Convention on Biodiversity and Nagoya Protocol.

The only means of resolving the disputes in through the court and it is criminal in nature looking at the word used in the provision of the Act i.e conviction, imprisonment and fine etc

South African ABS should not only criminalize contravention of any provision of the Biodiversity Act 2004 but also provides a means of settling disputes on GRs and TK amicably. South African ABS legislation should cover dispute resolution including; (a) The jurisdiction to which they will subject any dispute resolution processes; (b) The applicable law; and/or (c) options for alternative dispute

35 N Chishakwe SADC: Access to Genetic Resources, and Sharing the Benefits of their Use International and Sub-Regional Issues in Young (n55) at 32.

36 Ibid

37 Section 41 and 42 of the Biodiversity Act 2004

38 Section 40 of the Biodiversity Act 2004

39 Section 41 (a) – (g) of the Biodiversity Act 2004

40 Article 15(4) of CBD

41 See document UNEP/CBD/COP/4/22.

resolution, in compliance with the provision of Nagoya Protocol and to be more fair to both providers and the users.

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Finding a Comprehensive Dispute Resolution Mechanism for Compensating Obstetric Injuries in Malaysia: Issues and Challenges

by

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Abstract

Victims of obstetric injuries usually suffer life-long disabilities that tend to deprive them of years of enjoyment in life, independence and productivity. As these injuries occur on the victims early in life, the costs of medical and nursing care are usually enormous. This subsequently imposes stressful and heavy burden on the family members who will resort to litigation as means of procuring monetary compensation. However, proving that such injuries were attributable to negligence is not an easy task and the affected parties are usually subjected to various hazards of litigation including excessive cost, delays and inconsistencies of outcome. The many hurdles of pursuing a medical negligence suit in court has discouraged victims of obstetric injuries from obtaining adequate compensation. The 'name, blame and shame' culture in litigation tend to destroy the relationship of trust and confidence between a doctor and his patient and this ultimately, hinders any possibilities of amicable settlements and future rehabilitation. The quality of healthcare system may thus, be compromised as doctors become more and more defensive in their practice and constantly, submitting themselves to the 'conspiracy of silence.' Further, as the premium for medical indemnity insurance for obstetricians escalate, many obstetricians tend to leave the practice leading to reduced availability of obstetric care. Hence, the inherent difficulties in establishing negligence and the hazards of litigation have triggered the move by many jurisdictions to find alternative methods in compensating for birth injuries. Presently, in Malaysia, several incentives have been made to encourage affected parties to avoid litigation in gaining compensation for birth injuries. This includes the creation of several platforms for the affected parties to channel their complaints as well as encouraging out of court settlements through mediation, arbitration and the payment of ex gratia. However, the absence of any specific laws governing the practice of ex gratia poses a threat of unjust interchanges between the affected parties and the withdrawal of cases in exchange of such payment deters proper disclosure of adverse events. Thus, it is imperative that a comprehensive dispute resolution mechanism for obstetric cases is introduced in Malaysia, which is capable of delivering timely as well as adequate compensation to victims of obstetric injuries in a less adversarial manner and at the same time, ensuring that the quality of healthcare is not compromised in any aspects.

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Introduction

Tort litigation since time immemorial has been utilized as redress mechanism for victims of obstetric injuries.[3] However, while the two main goals of tort litigation are to provide just compensation to victims of injuries and deter its future occurrences, the present operation of the tort system seems to be ineffective in achieving such objectives. Tort compensation might have been a useful remedy in the past or in resolving conflicts in certain areas of private law, but the application of tort to the rapidly evolving medical field has not seemed not seem to bring out the desired result. Cumbersome, inefficient, and capricious in its operation,[4] the all-or-nothing approach of the tort system fails to strike a balance between adequately compensating the victims and equitably punishing negligent conduct. This inefficiency has unfortunately, produced inadequately compensated victims, inequitably overburdened doctors, and consequently, inefficient deterring solution to discourage neglectful conduct.

Such failures are rather obvious in obstetric cases where claims are most abundant, the resulting injuries are most severe, the causation are most indiscernible, the blame is most intense, and the awards are most expensive. All of these highlight the deficiencies of the traditional tort approach to do justice between disputing parties, and generates doubt as to its efficiencies as a compensatory mechanism for the injured as well as a deterring method in regulating the society's behaviour. Given the many problems and hurdles brought forth by the tort system, the relevancy of tort is dubious in today's medico-legal scenario.

As the nature of relationship between doctor and patient change, so ought the law. With the pendulum swinging very much in favour of autonomy, it is questionable whether the traditional approach of fault and blame are still the ideal way to deal with conflict. The adversarial concept of apportioning justice and proclaiming winners and losers had allegedly provided an unsteady foundation for the solution of the sensitive and complex medico-legal problem. Quality of healthcare are thus compromised as the intrusion of a coercive rule governing the doctor-patient relationship injected a sense of suspicion and excessive caution replacing what was once mutual trust and respect.[5]

Reform must be made to the system, and research must be undertaken to construct a thoughtful system which harmonizes the relationship between law, medicine and the society. Unlike any other form of personal injury, in bridging the gaps between the medical and legal responses to quality crisis, the law needs to tread a little more cautiously, so as not to destroy the balance between providing sufficient compensation for the injured, maintaining a healthy relationship between patients and doctors and at the same time, promoting the right behaviour towards improving the quality of the healthcare system as a whole.

The Inadequacies of Obstetric Litigation

Malaysia is amongst many other countries that employ the law of torts as the main vehicle for compensating victims of medical catastrophes, including those involving obstetric injuries. The many difficulties in pursuing a medical negligence suit in court had, however, discouraged many victims of birth injuries from obtaining adequate compensation, which are essential for the victims' medical treatment, rehabilitation and everyday expenses of living with disabilities.

Many believe that the cornerstone of the problem is the mistaken impression that the problem of compensating victims of medical injuries might be solved by "finding and holding accountable a few

3 Under Roman law, medical malpractice was a recognized wrong. Around 1200 AD, Roman law was expanded and introduced to continental Europe. After the Norman conquest of 1066, English common law was developed, and during the reign of Richard Coeur de Lion at the close of the 12th century, records were kept in the Court of Common Law and the Plea Rolls. These records provide an unbroken line of medical malpractice decisions, all the way to modern times. See Sonny Bal, "An Introduction to Medical Malpractice in the United States," *Clinical Orthopaedics and Related Research*, Vol. 467, No. 2 (2009): 339–347.

4 Anderson, "The Woodhouse Report on Compensation for Personal Injury in New Zealand," *Auckland University Law Review*, Vol. 1, No. 2 (1696): 1-15.

5 Daniel Shuman, "The Psychology of Compensation in Tort Law," *Kansas Law Review*, Vol. 43 (1994): 39-77.

bad apples in the medical profession."[6] Built upon the principle of "corrective justice", compensation in the tort system is afforded to victims of medical injuries so as to 'correct' or repair the losses incurred through the faults of doctors and healthcare providers.[7] Thus, establishing fault on the healthcare provider became the main point of tort litigation as compensation can only be afforded to the victims when there is someone to push the blame to.

However, finding faults caused adverse effect on the ideal goal of justice the tort system is seeking to provide. Too much emphasis on fault became the main obstacle to the objectives of the tort system. Despite a mechanism employed to provide compensation to medically-injured victims, the tort system hardly compensate, due to the high threshold of evidence set forth in the system; and when it does compensate, the compensation are often insufficient, as a big portion of the awards was swallowed up by the lengthy and costly administrative overhead.[8] The focus of tort system on individual fault is often justified as serving the 'deterrence' goal, but instead it gives rise to defensive medicine and conspiracy of silence, fostering a hostile environment between patient and doctors, thus completely missing the incentives on improving patient safety and deterring future conduct.

Being adversarial in nature, the tort system creates enmity between parties, causing the medical provider to respond defensively instead of learning from their mistakes. *Hoffman* (2005) explains the legitimacy of such frustration;

> "Often, the people who sue have substantial injuries but dubious liability claims, while many people with legitimate claims cannot even assert them. As a result, many doctors are angry and resentful toward patients who bring frivolous claims, and many patients with legitimate but unredressed grievances are disgusted by their lack of access to justice. The sad result is a breakdown in confidence and trust between doctor and patient. And that produces a perception of poor quality health care, as well as a dysfunctional community."[9]

Furthermore, the complex nature of obstetric cases had often produced unpredictable results as winning or losing the case highly depends on whether enough evidence can be procured to link the injury to any substandard care by the obstetric team. Not only that this inconsistency yields unjust outcomes for victims, it also triggers a cycle of insurance fluctuations, which ends up in higher obstetric cost, reduced availability of obstetricians, and diminution of obstetric services for pregnant women. *"Society, therefore, bears the ultimate burden of our inefficient and costly tort system through higher medical costs and a reduced number of health care providers."*[10]

Incentives to Avoid Litigation

Nonetheless, while the court remains the main platform for victims of birth injuries to obtain compensation, there exists other alternative routes supplementing the role of torts as compensatory mechanism, providing incentives for the victim to be compensated for their loss, as well as attain financial assistance for coping with their disabilities. These incentives are made to run concurrently with the tort system in order to complement the flaws in the existing system. This includes providing the patients with platforms to channel their complaints with the unsatisfactory medical service, and encouraging out of court settlements through mediation, arbitration, and payment of *ex gratia.*

Enhancing Patient's Complaint Mechanism

6 Paul Weiler, "The case for no-fault medical liability," *Maryland Law Review,* Vol. 52 (1993): 101-143.

7 See Ernest Weinrib, "Corrective Justice," *Iowa Law Review*, Vol. 77 (1992): 403-425.

8 Randall Bovbjerg, Frank Sloan & Peter Rankin, "Administrative performance of no-fault compensation for medical injury," *Law and Contemporary Problems*, Vol. 60, No. 2 (1997): 71-115, at p. 1.

9 David Hoffman, "The medical malpractice insurance crisis, again," *The Hastings Center Report*, Vol. 35, No. 2 (2005): 15-19, at p. 15.

10 Julian Bobbitt, Maureen O'Connor & Alexander Easley, "North Carolina's proposed birth-related neurological impairment act: A provocative alternative," *Wake Forest Law Review*, Vol. 26, No. 4 (1991): 837-878.

A number of channels are provided for patients to lodge complaint about unsatisfactory medical practice in Malaysia, some of these channels are set up under regulatory institutions of the government, some belong to the professional self-regulatory bodies and some consists of non-governmental organizational bodies involved directly with the health sector. These bodies will investigate the complaints lodged and accordingly, take actions against the doctors in the forms of reprimand, suspension, and striking the doctor's name off the register.

This, however, does not solve the problem at hand, because these bodies mainly "deal with complaints of ethics and professional behaviour, not cases of malpractice or negligence."[11] Most importantly, these bodies only take disciplinary actions against the doctor, but do not provide compensation to the injured patients.[12]

Arbitration and Mediation as a Less Formal Alternative to Court Litigation

A settlement out of court can speed up the process of resolving a medical negligence claim. Out of court settlement can be made possible by opting for alternative dispute resolution like arbitration and mediation. These two mechanisms have long been embraced by Malaysia to facilitate settlement outside courtroom at lower cost and faster pace. The Arbitration Act 2005 and The Mediation Act 2012 which came into force on Aug 1, 2012 are among the many efforts of the government to enhance the efficiency of alternative dispute resolution in Malaysia.

An arbitration process is less complex than court litigation, where cases are conducted in a more informal manner. Arguments for both parties are submitted before a chosen impartial party, usually an expert in the field of discussion.[13] As the technicalities of court proceedings are removed, the time and cost taken to settle disputes are reduced, although not significantly. However, while the course to arbitration is favourable in resolution of disputes concerning commercial and labour law, the same might not be the case for medico-legal cases. [14] Despite being conducted in private between disputing parties, the adversarial nature of tort litigation is retained in arbitrations. Compensation can only be afforded when fault is established on another party, thus it does not offer too much of a solution to the impending problem. There is also a fear of unjust and biased decision by the arbitrator as the 2005 Act is silent on supervision of arbitrary conduct of an arbitrator and appeals procedure against an award made under the Act.[15]

Compared to arbitration, mediation seems to offer a more friendly approach to the resolution of medico-legal disputes. Unlike arbitration, the role of a mediator is to facilitate settlements between disputing parties by way of interactive bargaining.[16] Negotiations are done in private and without prejudice, and settlements will only be achieved when both parties agree to the terms discussed, after careful considerations of all the risk and benefit involved. Mediation is often regarded as one of the

11 Nik Rosnah Wan Abdullah, "The Malaysian medical professionals: Serving the public interests?" Working Paper No. 2003-9, September 2003, Faculty of Economics & Administration, University of Malaya.

12 According to a study by C. Vincent (1994), obtaining financial compensation is the main motivation why patients sue doctors. See Charles Vincent, Angela Phillips & Magi Young, "Why do people sue doctors? A study of patients and relatives taking legal action*," The Lancet*, Vol. 343 No. 8913 (1994): 1609–1613.

13 Section 13 of The Arbitration Act 2005 provides autonomy to the parties to decide on matters relating to the appointment of the arbitral tribunal, subject to any rules of arbitration that may be adopted.

14 Solmaz Khodapanahandeh and Siti Naaishah Hambali, Efficiency of Using "Alternative Dispute Resolution" Method in Medical Negligence Claims," *Advances in Natural and Applied Sciences*, Vol. 8, No. 13 (2014): 1-5.

15 There is no appeals procedure against an award made in Malaysia under the Arbitration Act 2005. The only recourse is to set aside the award. The application to set aside an award has to be made within three months of the receipt of the award. The application to set aside the award is made in the High Court of Malaya in respect of West Malaysian disputes and the High Court of Sabah and Sarawak in respect of East Malaysian disputes. The grounds for setting aside such an award are set out in Section 37 of the Act and include the following: the award is contrary to the public policy of Malaysia, there was fraud or a breach of the rules of natural justice and such applications do not form an automatic stay of enforcement of the award as it must be made by application. Sunil Abraham, "Arbitration Guide: Malaysia," *International Bar Association*, April 2012, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=1B17C5AC-3A6B-4B20-9BCE-B85BD419A124> (accessed 25 July, 2017).

16 Puteri Nemie Jahn Kassim, "Mediating Medical Negligence Claims In Malaysia: An Option For Reform?" *Malayan Law Journal*, Vol. 4 (1998): cix-cxxvi.

most potential alternative to litigation, as it facilitates prompt, flexible and inexpensive solution to disputes. Nonetheless, the benefits of mediation can only manifest when both parties to the forum are standing on equal footings. Mediation between parties of unequal level of sophistication and different amount of resources might result in an inequitable settlement as the less-positioned party's interest is left unprotected by the loose and informal mediation setting. Parties to highly technical obstetric cases can hardly be considered to be on equal footings, and thus, unless something is done to protect their interests in such negotiations, victims of obstetric injuries would barely benefit from mediation. While it may offer an ideal solution to simple medico-legal disputes, mediation might not work in cases involving obstetric injuries which are highly complicated in nature, involving high claim of awards, and one which information are often insufficient to base a settlement negotiation.[17]

Currently in Malaysia, both arbitration and mediation are available alternatives to tort litigation for those who prefer a less formal dispute resolution process. Nevertheless, these alternative dispute resolutions can only be an option when both parties mutually agree to submit their dispute to the alternative platforms. For an effective dispute resolution to take place, it is crucial that both parties must come with clean hands and bona fide intentions in coming to an amicable settlement. Even though it might not ideally cater for complex medico-legal cases, it certainly has the potential to encourage a friendlier and effective resolution of disputes which are focusing on honest negotiations and fruitful conciliation between disputing parties.

Payment of Ex Gratia

Ex gratia payment is another form of out-of-court compensation afforded to victims of medical injury. It is a sum of money paid by one party to another out of goodwill or grace, and without liability being established or admitted. It facilitates early settlement outside court between disputing parties, given in exchange to the plaintiff's agreeing to withdraw their claim against the defendant and/or to waive their legal right to assert such claim to the court in the future for the matter disputed.[18] The grant of *ex gratia* is completely voluntary, and the offer of *ex gratia* can be made in any stage of the trial. The party being offered an *ex gratia* settlement, usually the plaintiff, is also at liberty to choose whether to accept such payment in exchange for an out-of-court settlement.

The grant of *ex gratia* offers a speedier and simpler alternative to tort compensation, and has been widely used in Malaysia to facilitate an early out-of-courtroom settlement. From 2006 to 2010, the Ministry of Health has spent an amount of RM 2,184,406.21 out of RM 12,919,083.12 to be paid out as *ex gratia* payment to victims of 'potential' medical negligence[19] occurring in public hospitals in Malaysia. Unlike arbitration or mediation, the process of *ex gratia* settlements are relatively simpler and speedier, and the doctor is not compelled to personally meet the plaintiff and deliberate over the matter. Offer and arrangement of ex gratia can simply be made by exchanging correspondences between parties, and it may as well be done by their representing lawyers or officers in charge of medico-legal matters. This may be one of the reasons why *ex gratia* settlements are popular compared to methods of alternative dispute resolution such as arbitration and mediation, as doctors are generally known to have demanding schedule, and most probably do not prefer having their medical judgment questioned or scrutinised by persons outside their field of expertise. The plaintiff would also benefit from the straightforward and prompt process, where financial compensation can be obtained without having to fight their way through the complex court procedure, which in the end would not guarantee a just result.

However, as the name implies, the grant of *ex gratia* is basically a form of gratuity payment out of goodwill, with the defendants having the upper hand. The choice of granting *ex gratia* or the amount of settlement offered is entirely a decision of the defendant, after consideration of the benefits and risks that might implicate him. Plaintiffs are left with little room to negotiate and assert their case,

17 Ibid.

18 The grant of ex gratia usually comes with a settlement agreement signed by both parties to seal their settlement arrangements, or an indemnification agreement signed by the plaintiff indemnifying the defendant of all his conduct in the disputed matter. Such agreements are legally binding and enforceable by the law.

19 "Ministry of Health Malaysia Annual Report 2010," Ministry of Health Malaysia, 2010, http://www.moh.gov.my/images/gallery/publications/md/ar/2010.pdf.

sometimes compelling them to settle for an inadequately minimal amount. The absence of any specific laws governing the practice of *ex gratia* leave the plaintiffs' interest unprotected and pose a threat of unjust interchanges between parties, with the plaintiffs being pushed further in a less-advantageous positions. Besides, while ex gratia settlements might offer a speedier and simpler access to financial compensation, it does not afford incentives for apology nor does it provide platforms for the plaintiffs to obtain sufficient explanation behind the occurrence of the tragedy. Except for an arguably minimal financial recourse, ex gratia could hardly be considered as a "dispute-resolution" mechanism nor does it alleviate the victims from the mental and emotional pain associated with the incident.[20] The withdrawal of cases in exchange of such payment and the lack of incentives for explanation would also deter disclosure of adverse events occurring in medical practice. Undisclosed and unchecked medical errors or near misses would not only allow future re-occurrence of such mistakes, but it also impedes the opportunity of learning for overall betterment of the system.

The Need for a Comprehensive Dispute Resolution for Obstetric Cases in Malaysia

Patient safety and the prevention of harms are mutual goals sought by all involved in the healthcare industry, be it the patients or providers.[21] Unfortunately, consensus ends when bad outcomes occur. The adversarial atmosphere dominating our dispute resolution system pitches the party against each other in an effort to protect individual interest at stake. The name, shame and blame culture hampers collaborative relationship between a doctor and his patient, causing the once mutual goals to be compromised during the process.

This negative blame culture is more ostensible in cases involving catastrophic injuries to young children which often leaves them disabled for the rest of their lives, because in such cases, the feelings of being aggrieved are far more endemic than other types of personal injury litigation.[22] In medicine, especially Obstetrics, emotions run high on both sides. Parents whose child was inflicted with such disastrous injuries have a strong psychological need to be heard and have their grievance understood,[23] while doctors feel victimized and appalled at the overwhelming indictment from what may have resulted from a very minor mistake on his part. As a result, often in an obstetric litigation, doctors regard being sued as a personal attack on their credibility, and parents view the doctor's errors as inexcusable failures of their implied promise of perfection.[24]

Such problem manifested as the eligibility of compensation for obstetric injuries is attached to the establishment of fault on the medical provider. Despite desiring for a more friendly approach to resolve disputes, it is crucial that adequate compensation are rightly afforded to victims of obstetric injuries. Regardless of the precise nature of the injury, it will likely require years of treatment and rehabilitation therapy, and the medical expenses associated with obstetric injuries are not cheap. Whilst compensation would not be able to reverse the tragedy, it is a proven mechanism to alleviate the harm and ameliorate the loss associated with the incidence. Financial compensation can provide for the victims to help them cope with the injury, resuming their life and becoming a full and active

20 An article in the American Academy of Orthopaedic Surgeons referred to a survey where money was fourth on the list behind disclosure, desire for apology, and prevention of future errors as grounds for wanting to sue for medical malpractice. See David Sohn and Jay Jayasankar, "Medical Liability Reform: Is Alternative Dispute Resolution the Answer?" *American Academy of Orthopaedic Surgeons,* Vol. 5, No. 12 (2011): 41.

21 Gary Balcerzak and Kathryn Leonhardt, "Alternative Dispute Resolution in Healthcare: A Prescription for Increasing Disclosure and Improving Patient Safety," *Patient Safety & Quality Healthcare*. (2008): 44-48, <https://www.psqh.com/julaug08/resolution.html> (accessed 27 May, 2017).

22 In other cases of personal injuries – for example, workplace injuries or injuries caused by accident – the blame culture is not as apparent. An accident is often regarded as inevitable, or accidental, and workplace injuries are typically regarded as an inherent risk that comes together with the profession.

23 Campbell Bridge, "Mediation of Personal Injury Litigation- Why It Works" (paper presented at the 2nd AMA Conference on Rediscovering Mediation in the 21st century, Kuala Lumpur, Malaysia, February 25, 2011), http://barcouncil.org.my/conference1/pdf/15.MEDIATIONOFPERSONALINJURY.pdf

24 Michael Warshauer, "Mediation of a medical negligence case from the plaintiff's perspective," (Paper presented for an audience of lawyers as part of the Continuing Legal Education programme). <http://www.warlawgroup.com/files/24.MediationMedNeglCase.pdf>. (Accessed 26 July, 2017).

member of the society.

Thus, in affording adequate compensation for victims of obstetric injuries while retaining the mutual goals of improving the quality of healthcare as a whole, an alternative dispute resolution process must be introduced so as to avoid the negative effect of litigation. There are variety of processes that could be used for alternative dispute resolution. However, there is no one size-fits-all solution to the problem at hand. Not all available methods of alternative dispute resolution would be appropriate for all medical litigation cases, but consideration should be given to a system which disburses prompt compensation to eligible victims, and at the same time goes in harmony with the paramount goals of medicine; such as "enhancing communication, increasing understanding, easing the exchange of information, focusing on the human side of a dispute, giving an opportunity for conciliation and restoration of relationships, an opportunity for healing, and an opportunity for a cost-effective and timely resolution."[25]

The Potentials of No-Fault Compensation in Offering a Comprehensive Solution for Obstetric Cases in Malaysia

The prevailing trend amongst many jurisdictions around the globe has moved towards considering the adoption of no-fault schemes as an alternative in compensating victims of medical injuries. An ideal no-fault compensation for medical injuries would be one that guarantee adequate compensation for all medically induced injuries without the hassle of proving fault, while improving doctor-patient relationship towards increasing the quality of the healthcare services at large.

In achieving such ideals, policymakers of the scheme eliminate the fault element in compensation and provide a fixed level of pecuniary compensation to medically injured victims based on a predetermined schedule of injuries. With the elimination of fault, the burden of compensatory payment is distributed among those within the same profession by way of professional indemnity insurance, or alternatively by the community at large, by way of general levies.

The no-fault compensation system has been viewed by many as a potential alternative to its fault-based counterpart, providing a fairer, speedier and more adequate compensation for medically injured victims. The elimination of fault was devised to provide easier access to compensation, and injuries are compensated based on a predetermined schedule, promoting constancy, fairness as well as efficiency in terms of time and money.

The Removal of the Fault Criterion Allows for Faster Distribution of Compensation with Minimized Cost

No-fault schemes are designed with the main objective to reduce administrative cost and delay associated with tort litigation. The cost of administering the tort system are high due to individualized and case-by-case determinations of fault and lump sum findings of damages under indeterminate guidelines,[26] especially in cases of obstetrical negligence where causation is complicated and examinations are highly technical.

Thus, by removing the fault criterion, the no-fault scheme offers compensation to larger group of people at lower cost and shorter time as it spares the victim from the stressful length of time and the high cost of adjudicating the case in the court of law trying to establish blame on specific individuals. Instead, the scheme arranges an administration system where filing of claims are made easy without hassle, and compensations are delivered according to a predetermined schedule. This eventually saves a large amount of money on legal cost, of which can be channelled to deserving victims. This is evident from the data on countries that have implemented no-fault schemes where averagely eighty per cent of the total revenue was disbursed to victims as compensation awards and another twenty per

25 Puteri Nemie Jahn Kassim, "Mediating Medical Negligence…"

26 Puteri Nemie Jahn Kassim, "Medical negligence litigation in Malaysia: Current trend and proposals for reform," *Medical Defence Malaysia*, 2007, <http://mdm.org.my/downloads/dr_puteri_nemie.pdf> (accessed 27 July, 2017).

cent was used as administrative cost.[27] [28]

The whole process from claiming to receiving compensation is also significantly faster as there is no need to wait for the court to preside and determine the issue of causation and accountability.[29]

Elimination of the Blame Culture Fosters a Collaborative Environment between the Parties to Bring About Effective Dispute Resolution

Another benefit that no-fault compensation schemes seek to offer is improving relationship and strengthening collaborative doctor-patient relations, thus enhancing patient safety towards increasing the quality of the healthcare services at large. Being too focused on personal blame and individual deterrence, this relationship aspect which is crucial in healthcare quality had been critically missing in the current compensatory system. No-fault compensation, on the other hand, considers the wellbeing of both parties, eliminates the confrontational nature between patients and doctors in an aftermath of injury, and fosters an environment where both patients and physicians mutually collaborate to solve the problem at hand.

Recognizing the importance of the medical community's co-operation in preventing future recurrence of mistake, no-fault schemes are designed not only to provide compensation to injured victims, but as means to reduce doctors' defensiveness, "thereby allowing for a more inclusive and sincere analysis of errors and near misses to take place."[30] D.E. Seubert (2007) explained how the no-fault scheme works to achieve both goals;

> "A no-fault system encourages health care professionals to identify the system malfunction and take a proactive approach to fixing it….at the same time, where a patient has suffered harm, the no-fault system must assure appropriate compensation. Such an approach accomplishes two goals: first, the patient is compensated for the injury, and, secondly, society's health care is upgraded and enhanced by fixing an error in the system. Such an error may in fact be a physician with a deficit. The no-fault process can identify this deficit and allow for physician retraining and rehabilitation."[31]

Conclusion

The many problems encircling our medico-legal atmosphere demonstrate an urgent need for a less

27 See Stephen Todd, "Treatment injury in New Zealand," *Chicago-Kent Law Review*, Vol. 86, No. 3 (2011): 1169-1216, at p. 1212, and Kaj Essinger, "The Swedish Medical Injury Insurance Report 2009-02-20," The Swedish Patient Insurance Association/Patientförsäkringsföreningen, 2009, <http://www.patientforsakring.se/resurser/dokument/engelska_artiklar/Report_on_the_Swedsih_Medical_Injury_Insurance.pdf> (accessed 27 July, 2017).

28 The difference is significant if we were to compare it with the administrative cost of the fault-based system, where it is estimated that the tort system in the United Kingdom disburses about fifty-five per cent of the compensation award to injured victims, and the remaining forty-five per cent was swallowed up in the administration of the fault-based system. In the United States, it was twenty-eight per cent as compensation and a huge seventy-two per cent goes to the lawyer and administration. See Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th Ed.). (Cambridge, New York: Cambridge University Press, 2006), at p. 397, and Kaj Essinger, "The Swedish Medical…"

29 Observation on Swedish scheme shows that an average claim took six month from its initiation to final determination, while in Denmark it was one year or lesser. In a fault-based system, the whole process of obtaining compensation might take years to complete. In Malaysia for instance, the entire litigation process for medical negligence case requires an average of about a minimum period of 15 years, and may take up to 25 years, from date of injury to the conclusion of the case. See David Studdert, et al., "Can the United States afford a "no-fault" system of compensation for medical injury?" *Law and Contemporary Problems*, Vol. 60, No. 1 (1997): 1-34, at p. 4, and The Patient Insurance Association. "Patientforsikringen Annual Report 2010," *Patientforsikringen*, 2010, at p. 18. <http://www.patientforsikringen.dk/en/Udgivelser-og-tal/~/media/Files/annual%20reports/2010.ashx> (accessed 27 July, 2017).

30 *Ibid,* at p. 135.

31 Seubert, D.E., Cohen, L.T., & LaFlam, J.M. (2007). Is 'no-fault' the cure for the medical liability crisis? *American Medical Association Journal of Ethics*, 9(4), 315-321, at p. 316.

adversarial and friendlier alternative in resolving disputes involving obstetric cases in Malaysia. In affording adequate compensation to victims of obstetric injuries, it is crucial that the relationship of mutual trust and confidence between patients and the medical providers remain unaffected during such process so as not to hamper future co-operation and rehabilitation goals. While arbitration, mediation and *ex gratia* settlements might offer potential alternatives for the impending problem, the positive benefits of no-fault compensation system should be given due consideration. Proposals for introducing a comprehensive dispute resolution mechanism for obstetric cases must be one which is capable of delivering early and adequate compensation to victims of obstetric injuries while inculcating a supportive environment where learning can take place in improving the quality of the healthcare sector as a whole.

MEDIATION v. *SULH*: A COMPARATIVE STUDY

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Abstract

One of the functions of law is for the settlement of dispute which led to the development of mediation and sulh in alternative dispute resolution (ADR) process. Mediation is a process whereby both parties intend to reach consensus in resolving a dispute through an agreement between the parties whereby mediator become an assistance in terms of communication and negotiation. Meanwhile, sulh can be defined as a harmonise way to settle dispute between the parties which consists of negotiation, mediation, conciliation and compromise of action. There are some similarities and differences between mediation and sulh that can be seen from the perspective of its legality, types of dispute, as well as their process and outcome. The advantages of mediation and sulh are clear in the dispute resolution. Therefore, this paper seeks to study the similarities and differences between mediation and sulh by comparing them from various perspectives.

Keywords: *mediation, sulh, comparative study, benefits.*

INTRODUCTION

Mediate means "to try to end a disagreement between two or more people or groups by negotiating to achieve mutual resolution of the point of conflict that everyone can agree on."[3] According to section 3 of the Mediation Act 2012, mediation has been defined as "a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute." The function of a mediator is only to facilitate the parties to find a common ground to resolve their dispute[4] and he has no right to force the parties to accept the terms of agreement without their consent.[5] The

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3 Abdul Rani bin Kamarudin & Norijihan bt Abdul Aziz, *Mediation in Malaysia: Is it Facilitative, Evaluative or Transformative?* West East Journal of Social Sciences, April 2014, v3 no. 1.

4 See section 3&9, *Laws of Malaysia, Mediation Act 2012,* Malaysia, 2012

5 Abdul Rani bin Kamarudin & Norijihan bt Abdul Aziz, *Mediation in Malaysia: Is it Facilitative, Evaluative or Transformative?,* West East Journal of Social Sciences, April 2014, v3 no 1

primary function of the mediator is to facilitate communication regarding the dispute between the parties.[6]

Sulh means "termination of a dispute."[7] The term *sulh* derived from the word "*salaha"* which have variety of meanings such as right, good and proper,[8] this term can be further referred to as a peaceful settlement between the parties instead of litigation. According to *Majalla* which is the Ottoman Code, it defined *sulh* as "a contract to end the dispute by consent."[9] Thus, *sulh* refers to the amicable settlement of dispute which sometimes bind the parties as a contract that consists of negotiation, mediation, conciliation and compromise of action.[10] However, some scholars distinguished between conciliation (*sulh*) and mediation (*wasaatah*) in terms of its nature.[11]

HISTORICAL BACKGROUND

Previously, in Malaysia, mediation has not been introduced formally in dispute resolution systems. Mediation was only establish through conciliatory body known as Reconciliation Tribunal in order to settle matrimonial disputes by virtue of Law Reform (Marriage and Divorce) Act 1976.[12] Bar Council managed to set up Malaysian Mediation Centre (MMC) on 5th November 1999 in order to promote mediation and provide services for all kinds of commercial and matrimonial disputes.[13] This center provides mediator if parties opt for a non-judge mediator.[14] Then, an official mediation in civil court has been introduced in 2011 after former Chief Justice Tun Zaki Tun Azmi attended Chief Judges' Conference at Ho Chi Minh in 2009. Initially, 30 judges of the Session Court and the High court were trained to serve as mediators under this system.[15] Currently, this system is called court-annexed mediation whereby mediation is incorporated into the civil court procedure. Thus, mediation in Malaysia can be categorized into two types which are judge-led mediation and mediation by a non-judge mediator where it will be chosen by the parties.[16]

On the other hand, the practice of *sulh* can be traced from the history of the Prophet. It can be seen in several important occasion such as during the conclusion of Hudaibiyah's Agreement in which their dispute was resolved peacefully with a mutually accepted agreement.[17] Although the content of this agreement seems not in favour of the Muslims, it has prevented a war between the Muslims and Musyrikin from Makkah and at the same time has brought positive implication to the spreading of Islam in Makkah including the conversion of Quraisy leaders such as Khaled Al Waled to Islam. Another good example of *sulh* can be seen during the relocation of *hajr aswad* at the *kaabah* whereby Prophet Muhammad becomes a mediator between the tribes.[18] In Malaysia, the practice of *sulh* can be divided into three stages which are during pre-colonial period, during the period of British colonialisation and after the independence. During pre-colonial period, Malay customary practice

6 Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review,* Law Business Research Ltd., London, 2014, Chapter 34

7 Hanis Wahed, *SULH: Its Application in Malaysia,* Journal of Humanities and Social Science, Malaysia, Jun 2015.

8 *Mu'jam Al 'Arabi al Asasi,* Arab League

9 Dr. Said Bouheraoua, *Foundation of mediation in Islamic Law and Its Contemporary Application*, Malaysia

10 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013

11 Dr. Said Bouheraoua, *Foundation of mediation in Islamic Law and Its Contemporary Application*, Malaysia.

12 Dato' Tan Yeak Hui & Asghar Ali Ali Mohamed, *Mediation/conciliation in the Malaysian Courts:With Emphasis on Settlement of Labour Disputes,* Hui & Mohamed, Malaysia, pg4

13 Khutubul Zaman Bin Bukhari, *Arbitration and Mediation in Malaysia,* Malaysia.

14 Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review,* Law Business Research Ltd., London, 2014, Chapter 34

15 Bernama, *Mediasi berjaya selesaikan kes mahkamah,* Utusan Malaysia, Malaysia, Ogos 2011.

16 Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review,* Law Business Research Ltd., London, 2014, Chapter 34

17 Tan Yeak Hui & Asghar Ali Ali Mohamed, *Mediation/conciliation in the Malaysian Courts:With Emphasis on Settlement of Labour Disputes,* Hui & Mohamed, Malaysia, pg4

18 Siti Noraini Binti Haji Mohd Ali, Zulkifli Hassan, *Perlaksanaan Sulh Dan Keberkesanannya Di Mahkamah Syariah Selangor,* Malaysia

influenced the Islamic law to apply *sulh* in all disputes. *Imam*, *ketua kampong*, *kadi* and *ulama* play their important role as a mediator to settle local disputes. Although English law developed well and became the main law in Malay states during period of British colonialisation, *sulh* had been allocated in Article 32 of the Malacca Law and in Pahang Code of Law.[19] After independence, the position of Islamic law was enhanced and *sulh* is currently governed by Syariah Judiciary Department Malaysia (JKSM) and every state has jurisdiction or power to enact enactments in order to apply and conduct *Majlis Sulh.* For instance, *sulh* is conducted in Selangor by virtue of Syariah Court Civil Procedure Enactment 2003 (Selangor) (SCCPE 2003) and Syariah Civil Procedure (*Sulh*) Rule 2001 (SCCPSR 2001). During *majlis sulh,* the session will be guided by a *sulh* officer appointed by the court.

MEDIATION v. *SULH*

Similarities and differences between mediation and *sulh* can be seen from several perspectives including its legality and establishment, parties, types of dispute, as well as the process and procedure.

Legality and Establishment

In Malaysia, mediation was introduced formally in 2011 whereby it managed to settle 1986 cases from January until June 2011.[20] In 2012, The Mediation Act 2012 was passed and served as the primary law that govern mediation in Malaysia. The main objective of this legislation is to promote and encourage people to practise mediation in their dispute resolution process.[21] This legislation also provides a framework for mediation process from its commencement until the formation of settlement agreement. Besides that, the practice of mediation can be sourced from the Malaysian Mediation Centre (MMC) Code of Conduct set up by the Bar Council which specified the conditions for the appointment of mediators.[22] In addition, the establishment of mediation also can be found in the Legal Aid (Amendment) Act 2003 that governs the mediation service conducted by Legal Aid Bureau since 1970.[23]

The basis of *sulh* can be found in several verses from the Quran, *inter alia*;

> "They ask you, [O Muhammad], about the bounties [of war]. Say, "The [decision concerning] bounties is for Allah and the Messenger." So fear Allah and amend that which is between you and obey Allah and His Messenger, if you should be believers."[24]

After the battle of Badr, some tribes claimed that they should get more spoils because they have played more important role in the war. Then, Allah revealed the legislative command of *sulh* whereby the spoils of war belongs to Allah and the Prophet Muhammad, therefore no clan can claim those properties as theirs. From this verse, we can conclude that Allah commands us to reconcile and to practice *sulh* among all Muslims.[25] During the period of Saidina Umar, consensus was achieved whereby the spoils of war will be considered as the properties of the state where the owners had to pay tax which shall be used for the interests of Muslims.[26]

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19 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013

20 Bernama, *Mediasi berjaya selesaikan kes mahkamah,* Utusan Malaysia, Malaysia, Ogos 2011.

21 Parliament of Malaysia, *Laws of Malaysia, Mediation Act 2012,* Malaysia, 2012

22 Christina SS Ooi, *The Role Of Lawyers In Mediation: What The Future Holds,* The Malaysian Bar, Malaysia, 23 August 2005

23 Abdul Rani bin Kamarudin & Norijihan bt Abdul Aziz, *Mediation in Malaysia: Is it Facilitative, Evaluative or Transformative?,* West East Journal of Social Sciences, April 2014, v3 no 1

24 Al-Quran Al-Karim, 8:1

25 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013

26 Mohamad Akram Ladin, *Introduction to Shari'ah & Islamic Jurisprudence.* Cert Publications, Selangor, Third Edition, 2014.

In addition, another verse that enjoin *sulh* is from Surah Al-Hujurat which concerns peaceful reconciliation process;[27]

> "And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly. The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy."[28]

This verse related the story of Imran and his wife named Umm Zayd. Imran did not give the permission for his wife to visit her family. His wife in return requested to be taken away while Imran was away but were prevented from doing so by his cousin. This resulted in a quarrel between Umm Zayd's family and his cousin. Upon hearing the dispute, Prophet Muhammad sent an envoy to settle it through *sulh* after Allah revealed this verse.[29] Another basis of *sulh* also can be seen from the following verse; Surah Al Nisa':

> "And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess. But if you do well and fear Allah - then indeed Allah is ever, with what you do, Acquainted."[30]

According to this verse, some scholars stated that it focuses on a proper settlement in marital based on the word *"wa as-sulh khair"* which means amicable settlement is the best. Subsequently, Ibn Ashur claimed that this verse can be extended to all situations besides marital disputes.[31]

In Malaysia, the establishment of *sulh* can be found in Syariah Court Civil Procedure Enactment 2003 (Selangor) (SCCPE 2003).[32] Numerous judges and syarie counsels has relied on this enactment to settle disputes such as in the case of *Zailan bt Mohamad v. Mohd Ariff b. Ali.* The practice of *sulh* is based on the principles of Islamic law as section 245(2) of the SCCPE provides that the court shall practice Islamic law if there is lacuna in this legislation.[33] The Syariah Civil Procedure (*Sulh*) Rule 2001 (SCCPSR 2001) provide further details for the application of *sulh* in Selangor.

Mediators & Parties

In a mediation session, the mediator will play the most important role. He must have the knowledge on the relevant fields and he must not have any personal or financial interest in the case. Parties must consider their financial status before appointing a mediator. The mediator will be officially appointed and his remuneration will be determined upon the agreement of both parties.[34] Lawyers also play an important role to advice the parties about the subject matter of the dispute including the

27 Siti Noraini Binti Haji Mohd Ali, Zulkifli Hassan, *Perlaksanaan Sulh Dan Keberkesanannya Di Mahkamah Syariah Selangor,* Malaysia
28 Al-Quran Al-Karim, 49:9-10
29 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013
30 Al-Quran Al-Karim, 4:128
31 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013
32 Siti Noraini Binti Haji Mohd Ali, Zulkifli Hassan, *Perlaksanaan Sulh Dan Keberkesanannya Di Mahkamah Syariah Selangor,* Malaysia
33 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013
34 Parliament of Malaysia, *Laws of Malaysia, Mediation Act 2012,* Malaysia, 2012

prospect of mediation in settling the dispute.[35]. During a mediation session, several elements must be presence including neutrality, individual responsibility, and mutual fairness.[36] As for the disputing parties, it can either be individual persons, entity or a group of claimants.[37]

As for *sulh,* JKSM provide *Sulh* Work Manual 2002 and the Ethical Code of Sulh Officer 2002 in order to facilitate *sulh* officer and mediator with proper guidelines. These guidelines were introduced to protect the rights of the parties as well as to maintain the credibility of *Majlis Sulh* and *sulh* officer.[38] Any misconduct by a *sulh* officer may fall under Civil Servant Rules (Behaviour) 1993. The gist of this manual can be divided into two sections which are the ethical rules for *sulh* officer and procedure for *sulh* officer to guide parties in *Majlis Sulh*. The officer must act justly and observe confidentiality in conducting *sulh*. Besides that, they also need to be neutral, avoid having conflict of interest, skilled in mediation and have the ability to conduct *sulh,* friendly and he also have the duty to ensure the security of parties during *Majlis Sulh.*[39] Apart from that, they cannot be a witness or advisor to any parties that have undergone *Majlis Sulh* with them and they are not allowed to advertise their expertise.

Moreover, the *sulh officer* need to commence *Majlis Sulh* with a briefing session (*ta'aruf*) where parties can ask questions regarding to *syarak* and Islamic family law in order to ensure both parties understand the law and its processes[40]. According to Chapter 3 of the manual, it stated about the order of speeches of the parties. Therefore, during this session, the parties are required to respect the other party and they also need to show good manner at all time and they only can communicate with the presence of the *sulh officer*. Like mediation, *sulh* also can be conducted by *syariah* lawyers, Legal Aid Department, and Family Support Authorities in order to facilitate parties in the process of *sulh.*[41] Basically, the parties are known as offeror and offeree since both parties intend to achieve win-win settlement compared to court adjudication which will have a losing party. Most of the jurists agreed that the parties must have the legal capacity to ensure the validity of *sulh* in concluding the *sulh* contract.[42]

Types of Dispute

The earlier practice of mediation in Malaysia can be seen in resolving financial dispute. This type of dispute is conducted by Insurance Mediation Bureau before it was replaced with the Financial Mediation Bureau. Its main function is to resolve between consumers and financial service provider and it has jurisdiction over insurance or *takaful* claims, credit card claims and banking disputes.[43] The mediator for this dispute is guided by Central Bank's Guidelines on Claims Settlement Practices and Guidelines on Unfair Practices Insurance Business.[44] Recently, the Central Bank of Malaysia has introduced new scheme in settling financial dispute.

Mediation has also been used in settling community dispute. This mediation service is provided

35 Christina SS Ooi, *The Role Of Lawyers In Mediation: What The Future Holds,* The Malaysian Bar, Malaysia, 23 August 2005

36 Christina SS Ooi, *The Role Of Lawyers In Mediation: What The Future Holds,* The Malaysian Bar, Malaysia, 23 August 2005.

37 *Mediation Dictionary,* Nancy Peterson, 2007.

38 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013.

39 Jabatan Kehakiman Syari'ah Malaysia, Ethical Code of Sulh Officer 2002, Malaysia, 2002.

40 Siti Noraini Binti Haji Mohd Ali, Zulkifli Hassan, *Perlaksanaan Sulh Dan Keberkesanannya Di Mahkamah Syariah Selangor,* Malaysia.

41 Zainul Rijal Abu Bakar, *Sulh in the Malaysian Syariah Courts,* Malaysia's leading law publisher, Kuala Lumpur 2011.

42 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013.

43 Tan Yeak Hui & Asghar Ali Ali Mohamed, *Mediation/conciliation in the Malaysian Courts: With Emphasis on Settlement of Labour Disputes,* Hui & Mohamed, Malaysia, pg 4.

44 Abdul Rani bin Kamarudin & Norijihan bt Abdul Aziz, *Mediation in Malaysia: Is it Facilitative, Evaluative or Transformative?,* West East Journal of Social Sciences, April 2014, v3 no. 1.

by National Unity and Integration Department. This service is concerned into multi-racial dispute with the purpose to maintain the harmony in society. Currently, the procedure for this type of mediation is governed by the Community Mediation Operating Procedure.[45]

Furthermore, mediation has been used extensively in resolving family dispute. This dispute resolution system has been used primarily by non-Muslim marriages in Malaysia.[46] The process of mediation in family disputes is governed by the Legal Aid Act 1971 and the Legal Aid (Mediation) Regulations 2006.[47] By virtue of this legislation, the minister has power to direct the Director General of Legal Aid to help the relevant person by providing mediation service according to Section 29A of Legal Aid Act 1971.

Sulh on the other hand can be used for various types of dispute. Hudaibiyah's treaty is one example of mediation and *sulh* between Muslims in Madinah and Musyrikin from Makkah, this mutually accepted agreement improved their diplomatic relation and at the same time prevented wars between the parties.[48]

In Malaysia, *sulh* has been practiced widely in marital disputes. According to the annual report by Selangor Judiciary Department (JAKESS) 2006, 90% of cases were settled through *Majlis Sulh.*[49] Among the example of cases regarding marital disputes that were settled through *Majlis Sulh* are *Norlia Bte Abd Aziz v. Md Yusof bin A Rahman*[50] and *Zailan bt Mohamad v. Mohd Ariff b. Ali.*[51] *Sulh* has been effective in resolving marital cases because during this process the family relationship will be preserved. Therefore, *sulh* will be able to resolve minor differences and issues before it escalates to become a greater conflict. Allah directly emphasized about *sulh* in order to handle family matter such *nusyuz, hadanah, and harta sepencarian* as highlighted in Surah al-Nisa':

> "And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess. But if you do well and fear Allah - then indeed Allah is ever, with what you do, Acquainted."[52]

Process & Procedure

The practice and procedure of mediation in Malaysia is governed by the Mediation Act 2012. Part II of this Act stated about the commencement of mediation process with a written invitation by one of the parties to resolve their dispute by way of mediation. The process of mediation will be deemed to start upon the acceptance of the invitation by the other party of the dispute and they will later indicate their willingness by way of drafting a mediation agreement.[53] Part VI of the Act requires the mediators and parties involved to observe confidentiality of the details disclosed during the mediation session. The mediators also has the duty to act independently, fairly and impartially and at same time recommend options for the parties to reach a satisfactory resolution. Then, the mediator may order each party to submit the brief facts of the dispute, supplemented by any document that are

45 Hanna Ambaras Khan & Assoc Prof Dr Nora Abdul Hak, *Community Mediation In Malaysia: A step Forward?,* Research Gate MLJ, April 2014, pg 8.

46 Najibah Mohd Zin, Muzakarah Pakar Maqasid Syari'ah Pengharmonian Undang-undang, Institut Kefahaman Islam Malaysia, pg 3.

47 Abdul Rani bin Kamarudin & Norijihan bt Abdul Aziz, *Mediation in Malaysia: Is it Facilitative, Evaluative or Transformative?,* West East Journal of Social Sciences, April 2014, v3 no 1.

48 Hanis Wahed, *SULH: Its Application in Malaysia,* Journal of Humanities and Social Science, Malaysia, Jun 2015

49 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013

50 [2004] 5 MLJ 538.

51 Unreported civil case No. 12/2000, Syariah Court of Petaling Jaya

52 Al-Quran Al-Karim, 4:128

53 Hon.Richard Faulkner, What It Can Offer to Malaysia, R.Faulkner, 2000

considered as vital submission as well as additional information or document.

Unlike mediation, there are some elements or principles that must exist for the validity of a *sulh* process. The parties must pronounce *sighah* at the *Majlis Sulh* whether in written form or orally before the *sulh* officer officially commence the *sulh* proceedings.[54] Secondly, parties are considered as the most important element in all proceedings and they are known as offeror and offeree. Most of the jurists agreed that the parties must have the legal capacity to ensure the validity of *sulh* especially during the time of the conclusion of the*sulh* agreement whereby the parties have sound mind and not a bankrupt. Thirdly, it is vital for the parties to identify their subject matter of dispute in order to proceed with *sulh* as only dispute that concern the rights of mankind (*musalah 'anhu-mahal al-niza')* can be settled by this means such as debt, property and inheritance. Meanwhile, only the court has the right to take action for matters that concern the rights of Allah such as *hudud* and *qisas*.. Lastly*, sulh* requires the alternatives to the subject matter of dispute *(musalah 'alayhi – badal al sulh)* be able to be determined and ascertained if the subject matter of the dispute has been destroyed or utilized to prevent doubt.

CONCLUSION

Mediation and *sulh* shares the same purpose which is a platform for the disputing parties to settle their dispute amicably and at the same time preventing litigation. By resolving dispute at this juncture, the negative implications of court litigation such as time and cost consuming can be avoided by the parties. However, the key of success or mediation of *sulh* lies on the expertise and skills of the mediators and the *sulh* officers. Therefore, to ensure both mediation and *sulh* process to be effective, it is important for this third party to be neutral, impartial and to equip themselves with the relevant skills and knowledge in handling the dispute.

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Oxford University Press, 394

54 Nora Abdul Hak, Sa'odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013

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How ICT Impacts the Judicial Business of the Malaysian Courts

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Abstract

Nowadays, the information and communication technologies (ICT) have impacted the way people connect, communicate and carry out their business in multiple areas of life, such as education, health, telecommunication, commerce, banking and finance, government services, and recently, the judicial business. Courts in many jurisdictions, including Malaysia, have increasingly adopted ICT in their business. Some of the applications include e-filing of court documents, case management system, queue management system, audio/video conference system, court recording and transcription system, advocates portal and mobile app. Given that such ICT adoption is rather new in Malaysia, and scarce literature available on the subject matter, this study investigated how the ICT adoption impacts the judicial business of the Malaysian courts. Engaging in full qualitative research, the study involved both library based research and fieldwork. The fieldwork comprised five multiple-embedded case studies, involving eighteen interviews with the relevant stakeholders of information at the courts, being the judges, court administrative officers, IT officers and the lawyers. The interviews were transcribed and then loaded into ATLAS.ti the qualitative data analysis software for analysis purpose. The study found that ICT impacted the judicial business in four areas: legal, technical, organizational and social. In each area impacted aforementioned, both positive and negative impacts were identified. This could be owing to the double-edged nature of ICT itself: at one end, it brings about benefits and advantages, at another end it poses risks and threats. The research findings would contribute to the body of literature and knowledge on the subject matter of ICT adoption at the courts. Additionally, the findings are expected to assist the policy makers in better management of the technologies at the courts and the potential risks arising from such adoption.

Keywords: *ICT adoption, Legal implications, Judicial business, Malaysian courts*

1.0 Introduction

Nowadays, the information and communication technologies (hereinafter "ICT") have impacted the way people connect, communicate and carry out their business in multiple areas of life, such as education, health, telecommunication, commerce, banking and finance, government services, and recently, the judicial business. Courts in many jurisdictions, including Malaysia, have increasingly adopted ICT in their business. Numerous literature have pointed out that ICT carry a huge impact in how things get done, in both positive and negative ways. It is the aim and direction of this paper to highlight the impacts of ICT adoption within the context of the judicial business of the Malaysian courts.

This paper is divided into four main parts: the first part conceptualizes the ICT adoption in the judicial business. The second part outlines on the research questions and objectives, while the second

part provides an account of the methodology undertaken in this study. The final part, which is the main discussion in this paper, is the deliberation of the findings of the study, aiming at highlighting how ICT impacts the judicial business of the Malaysian courts.

2.0 Conceptualizing ICT in the Judicial Business

Within the context of the judicial business, the ICT applications adopted in the Courts comprise two broad categories: the ICT which are adopted by the users within the court system itself, and the ICT which facilitates the exchange of information between the courts, parties and the general public.[1] The ICT within the courts is further divided into three categories: (1) basic technologies used in the courts system, (2) technologies for the administrative staff, and (3) technologies supporting judges.[2] Basic technologies include computer hardware and software for routine office works such as computer, printer, scanner and word editing software. Whilst technologies for the administrative staff comprise of automated registers, digital cause books, case management systems (hereinafter CMS)[3] and queue management system (hereinafter QMS)[4], technologies supporting judges incorporate electronic filing system (hereinafter EFS)[5], audio and visual conference system (hereinafter AVS)[6] and court recording and transcription system (hereinafter CRT)[7].

As for the second classification in respect of exchange of information between the courts, parties and the general public, this classification is further divided into two types: (1) electronic information provision for the one-way dissemination of information by the courts, and (2) official electronic communication which is essentially the official two-ways communication between the courts, the parties and the general public. The following Figure 1 summarizes the categories of ICT in the Courts.

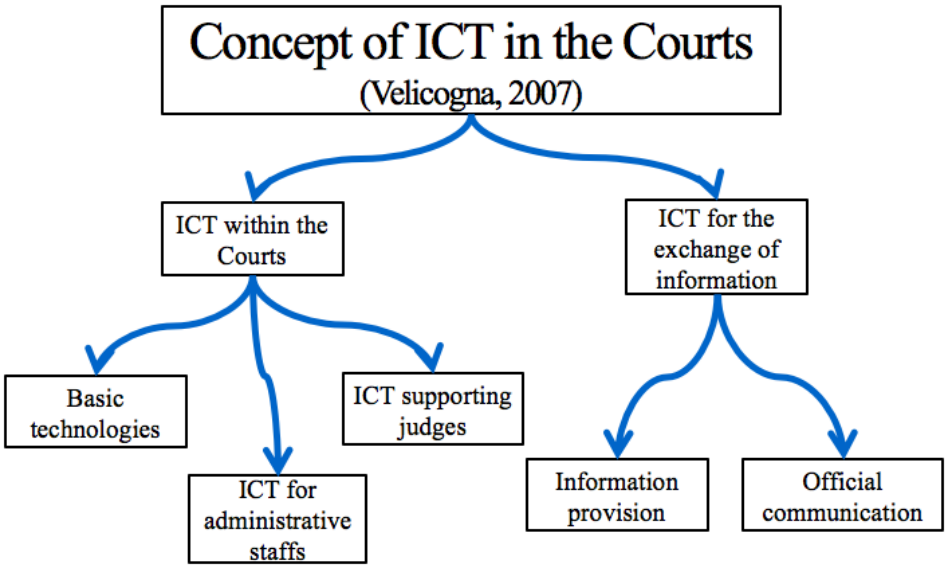

Figure 1. ICT in the Courts

1 Velicogna, M. (2007). *Use of information and communication technologies (ICT) in European judicial systems*: Council of Europe Publ., p. 20.

2 Ibid.

3 CMS is a software system integrated with EFS for creation of electronic database, management of cases and monitoring of performance.

4 Electronic queue system to manage lawyer's attendance crowd and facilitate holding of hearings before Registrars.

5 The electronic transfer of legal documents to and from court through internet.

6 Use of audio and video conference system for trial proceedings.

7 Audio visual recording system to record trial proceedings.

The experience in several jurisdictions around the world suggests numerous legal and non-legal implications arising from ICT adoption in the courts. For instance, Lederer argues that the impact of ICT on the administration of justice is questionable.[8] Hulse suggests that such technologies give rise to the encroachment to the privacy of the parties and documents following the access to the court records, real-time broadcast, real-time transcripts and real-time evidence.[9] Similarly, Argy and Mason contend that ICT at the courts also impact the admissibility and treatment of digital or electronic evidence.[10]

Within the context of Malaysia, numerous past literature had discussed the overview of the ICT applications in the courts. Nevertheless, such literature has provided descriptions of the technical aspects of the ICT at the courts. For instance, Hassan outlines the various types of ICT applications available at the Malaysian courts system without delving into the implications of such applications.[11] Additionally, Saman examines the ICT applications at the courts from the information management perspective.[12] Meanwhile, Mohamed provides an overview of the development of the electronic court system in Malaysia which however, does not extend to the implications of the system itself.[13]

Scarce research found that the ICT adoption at the Malaysian courts had given rise to numerous problems and implications, comprising both legal and non-legal aspects. For example, Hamin, Othman and Mohamad have emphasized that the nature, operations and implementation of the electronic filing system at the Malaysian civil courts have led to a variety of implications for the legal, economic, organizational and behavioural aspects, suggesting a wide impact on the judges, court administrative officers, IT officers and the lawyers.[14] Similarly, Hamin, Othman and Mohamad have also pointed out that the ICT adoption at the courts has also posed numerous security implications, such as authentication, non-repudiation, privacy, confidentiality and data integrity implications.[15]

In light of the above-mentioned issues and problems, this paper aims to highlight the numerous aspects in which ICT impacts upon the judicial business at the Malaysian Courts.

3.0 Research Questions and Objectives

\This paper aims to address to address the issue of: in what ways does the ICT impact upon the judicial business of the Malaysian Courts? Accordingly, the paper examines the impacts of ICT adopted at the Malaysian Courts in the delivery of judicial functions.

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8 Lederer, F. I. (2004, Winter). Courtroom Technology: The Courtroom 21 Project: Creating The Courtroom Of The Twenty-First Century. *Judges' Journal, 43*, 39, p. 41. See also Lederer, F. I. (2004. Spring). Courtroom Technology: For Trial Lawyers, The Future Is Now. *Crim.Just., 19*, 14, p. 16.

9 Hulse, R. (2009). *Real Time Technology, Trials and the Question of Privacy, Courtroom 21 White Paper*. www.legaltechcenter.net/, p. 15.

10 Argy, P. N., & Mason, S. (2007). *Electronic evidence: disclosure, discovery and admissibility*: LexisNexis Butterworths, p. 11.

11 Hassan, K. H., & Mokhtar, M. F. (2011). The e-court system in Malaysia. *International Proceedings of Economic Development and Research, 13*, 240-244, p. 241. See also Hassan, K. H., Yusoff, S. S. A., Mokhtar, M. F., & Khalid, K. A. T. (2012). The use of technology in the transformation of business dispute resolution. *European Journal of Law and Economics*, 1-13, p. 4.

12 Saman, W. S. W. M., & Haider, A. (2013). E-court: Information and communication technologies for civil court management *Technology Management in the IT-Driven Services (PICMET), 2013 Proceedings of PICMET'13:* (pp. 2296-2304): IEEE, p. 2299.

13 Mohamed, D. (2011b). Electronic court system (E-court): development and implementation in the Malaysian courts and other jurisdictions. *The Law Review*, 476-489, p. 480.

14 Hamin, Z., Othman, M. B., & Mohamad, A. M. (2015). Implications of the Electronic Filing System: Some Observations from Malaysia *4th International Conference on Law and Society 2015*. Universiti Sultan Zainal Abidin, Terengganu, p. 3.

15 Mohamad, A. M., Hamin, Z., & Othman, M. B. (2012b). Security Implications of ICT Adoption in the High Courts of Malaysia. *International Journal of Future Computer and Communication, 1*(3), 256-259.

4.0 Methodology

Engaging in full qualitative research, the study involved both library based research and fieldwork. The library-based research comprised document analysis of various sources such as written rules and decided cases, legal textbooks, academic articles, government reports and many others. In examining the documents, various aspects were focused on such as potential for criminality, evidentiary and procedural aspects as well as economic and social aspects.

The second stage of the study involved fieldwork, which comprised five multiple-embedded case studies: in Kuala Lumpur, Penang, Kuching, Kota Kinabalu and Putrajaya. The case studies involved 18 interviews with the relevant stakeholders of information at the courts, all were chosen following the purposive sampling based on their respective occupational roles: being the judges, court administrative officers, IT officers and the lawyers. The interviews enquired into the experience of the respondents in dealing with the ICT applications at the Courts, and their perception as to the benefits and risks entailing the use of such applications. The questions posed to the respondents were highly significant in identifying the impacts of the ICT applications at their respective Courts. The purposive sampling of the respondents in the five case studies is produced in Figure 2 below. The interviews were transcribed and then loaded into ATLAS.ti the qualitative data analysis software for analysis purpose.[16]

Figure 2. Purposive sampling of the respondents

5.0 Findings

The study found that ICT impacted the judicial business in four areas: legal, technical, organizational and social. In each area impacted aforementioned, both positive and negative impacts were identified.

5.1 Legal Impacts

The ICT applications used in the courts involve electronic and digital documents and information. Some of the technology applications engaged is computer hardwares and softwares, as well as the Internet and the World Wide Web.[17] Numerous literature have highlighted the potential for criminality involving these technologies such as hacking, spamming, computer-related offences and software piracy.[18] The potential crimes could be coming from outsiders, as well as insider cyber-threats in

16 Mohamad, A.M. (2013), "Using ATLAS.ti 7 for Researching Into the Socio-Legal Implications of ICT Adoption in the Malaysian Courts" Proceedings of ATLAS.ti User Conference 2013 : Fostering Dialog on Qualitative Methods, online, available at https://depositonce.tu-berlin.de/handle/11303/5140.

17 Muniandy, L., & Muniandy, B. (2012). State of Cyber Security and the Factors Governing its Protection in Malaysia. *International Journal of Applied Science and Technology, 2*(4), p. 4.

18 Arief, B., Adzmi, M. A. B., & Gross, T. (2015). Understanding Cybercrime from Its Stakeholders'

response to the technologies themselves.[19]

In relation to hacking, the regulating provision is the Computer Crimes Act 1997 (hereinafter CCA 1997). Section 3 of the CCA 1997 provides for unauthorized access to computer materials, or more commonly known as 'hacking'. Such an offence occurs when a person causes a computer to perform any function with intent to secure access to any program or data held in any computer, the access he intends to secure is unauthorized, and he knows at the time when he causes the computer to perform the function that is the case.[20] Meanwhile, section 5 of the CCA 1997 deals with the unauthorized modification of the contents of any computer. Under this section, which is similar to Section 3 of the UK's Computer Misuse Act 1990, a person is said to have committed an offence of unauthorized modification if he does any act which he knows will cause unauthorized modification of the contents of any computer.

Despite the danger and serious legal implication of intrusion into the court's system, it was discouraging to find that only less than half of the respondents in general opined that hacking or hacking with ulterior motive could potentially arise from the use of ICT in the courts within the meaning of Sections 3 and 4 of the CCA 1997. The same respondents who viewed there was potential of hacking in the courts further agreed that such crime could potentially be committed by an insider, but not an outsider. This opinion was grounded on the fact that the courts' system was developed using the intranet and not the internet. Hence, they believed that a person outside of the court's vicinity would not be able to access into the system.

With the adoption of ICT in the courts, new laws have been created. When the Rules of Court 2012 came into existence in August 2012 replacing the Rules of High Court 1980, and the Criminal Procedure Code was amended in 2012, legal provisions were made available to address some ICT applications in the courts such as the e-filing for civil cases and the AVC for both civil and criminal cases. The evidence gathered from the case studies conducted for the purpose of the research showed that the users were more willing to adopt the ICT application of e-filing in civil cases, as Order 63A makes it compelling to resort to e-filing with the use of the word "shall" in rule 4 of Order 63A, which reads: "Where a specified document is required to be filed … it ***shall*** be so filed using the electronic filing service …"[21]

However, the Registrar still has the liberty to allow part or any class of documents to be filed other than using the electronic filing service.[22] This provision eliminates the rejection by some of the lawyers who previously contended that there were no written rules that make it compulsory for the courts to impose e-filing procedures on the lawyers. This situation showed that the users became more willing to engage in the use of ICT in the courts when specific provisions were in place to regulate such use of ICT applications. While there are other governing modalities available in the form of soft laws, it seemed that for the case of the ICT adoption in the courts, these governing modalities were not favourable, as the users preferred to follow hard laws.

Unfortunately, todate, there are still no specific written provisions to regulate certain ICT applications in the courts, such as the CMS, QMS and AVC. Similarly, before the creation of the new Rules of Court 2012 in August 2012, there was no specific provision for e-filing of court's documents. Such absence of any legal provisions for ICT applications would lead to a feeling of uncertainty among the users of such applications in terms of how and why would they be using the system if it was not regulated by any laws. Additionally, the absence of the required legal sanctions or provisions to regulate the use of ICT in the courts further led to the sporadic adoption of ICT applications amongst the courts within the same jurisdiction. The situation during that time was that, the implementation of e-filing at both courts of Kuala Lumpur and Kuching, Sarawak were mostly motivated by the Practice

Perspectives: Part 1--Attackers. *IEEE Security & Privacy*(1), 71-76, p. 72. See also Kuppusamy, M., & Santhapparaj, A. S. (2006). Cyber-laws in the new economy: The case of Malaysia. *Asian Journal of Information Technology, 5*(8), 884-889, p. 885.

19 Hamin, Z. (2000). Insider Cyber-threats: Problems and Perspectives. *International Review of Law, Computers & Technology, 14*(1), 105-113, p. 108.

20 Section 3(1) of Computer Crimes Act 1997.

21 O. 63A, r. 7 (1)

22 O. 63A, r. 7 (4)

Directions of the courts and the initiative of the judges and court administrative officers, with the assistance of IT officers and with the co-operation of the lawyers.

On another note, encroachment on privacy rights is another significant legal impact arising from the implementation of ICT in the courts. Privacy protection would be pertinent as it would ensure that personal information about customers collected from their electronic transactions is protected from any disclosure without their permission.[23] Also, such basic controls would be essential in safeguarding the right to privacy in which it would be able to control and prevent the risk of any unlawful or unethical use of the information or data.[24]

The other legal risk that may inevitably arise when a document is electronically processed and stored is insecurity of the data and protection of private information in the courts' databases.[25] Writings before the creation of the Personal Data Protection Act 2010, it is argued that not only there is a risk that a third party could intercept the courts' system by way of hacking, the private information stored in the system also could be vulnerable.[26] Accordingly, it is imperative that all communication between the contracting parties be restricted to the parties involved in that particular transaction, to the exclusion of intrusion by any third party who is not involved.[27] This in turn, ensures the preservation of confidential information in such a transaction for the benefit of the parties. Any release of the confidential information is detrimental to the parties, and with the use of ICT in the courts, the risk of exposing this information is even greater. However, the confidentiality of information within the court transactions exist when a document or statement is made though the rolling of the CRT application in the courts, and when judges have ordered the documents or statements to be struck off from the courts' records. As highlighted by Hulse in the case of ICT recording in the UK courts, such information can be struck off from the official record of the recording, and certain motions can be blocked from being released.[28] However, such a facility is not available in the Malaysian courts. Once the recording captures such document or statement being made in the court, there is no facility to delete the recording, albeit being struck off by the judge.

5.2 Technical Impacts

Traditionally, security issues involving the courts would mean qualified guards watching over the accused persons, the protection of the security of the courts, proper record keeping and management of the court documents and court buildings as well as the security of the court officers. With the advent of the ICT into the courts setting, the security infrastructure has become more complex.[29] Depending on the various ICT applications adopted in the courts, different security implications could entail, particularly contributed to the handling of personal and sensitive data of the litigants to the court proceedings. Admittedly, computer technologies and the internet – just as with other means enhancing capabilities of human interaction – can be misused and abused for criminal activities.[30] While computer-related crime or computer crime is a comparatively long-established phenomenon,

23 Suh, B., & Han, I. (2003). The Impact of Customer Trust and Perception of Security Control on the Acceptance of Electronic Commerce. *International Journal of Electronic Commerce, 7*(3), 135-161, p. 140. See also Eltoweissy, M. Y., Rezgui, A., & Bouguettaya, A. (2003). Privacy on the Web: Facts, challenges, and solutions. *IEEE Security & Privacy, 1*(6), 0040-0049, p. 0042.

24 Hutchinson, D., & Warren, M. (2003). Security for Internet Banking: A Framework. *Logistics Information Management, 16*(1), 64-73, p. 66.

25 Hulse, R. (2009). *Real Time Technology, Trials and the Question of Privacy, Courtroom 21 White Paper*. www.legaltechcenter.net/

26 Mohamad, A. M., Hamin, Z., & Othman, M. B. (2012b). Security Implications of ICT Adoption in the High Courts of Malaysia. *International Journal of Future Computer and Communication, 1*(3), 256-259, p. 257.

27 Richmond, D. R. (2005). Key Issues in the Inadvertent Release and Receipt of Confidential Information. *Defense Counsel Journal, 72*(1), 110-120, p. 114.

28 Ibid.

29 Pfleeger, C. P., & Pfleeger, S. L. (2002). *Security in computing*: Prentice Hall Professional Technical Reference, p. 116.

30 Goldman, J. (2009). Courts and Information Technology: A Predictable Uneasy Relationship. *Loy. L. Rev., 55*, 235, p. 235.

ICT adoption in the courts is inherent to contemporary cybercrime.[31]

After acknowledging the risks associated with the use of ICT in the courts, the administration had begun to develop risk management strategies to address the risks involved. For example, in the event of power failure which could hamper the smooth implementation of the ICT applications, the courts were ready to proceed with hearing the cases even without CMS, QMS, or CRT as the manual approach to hearing cases could still be adopted. In this regard, less than half of the respondents pointed out that proper risk management strategies were important in addressing such risks.

In this context, in January 2015, the Malaysian courts achieved a milestone in the risk management policy following the ICT adoption in the courts. The Chief Registrar's Office of the Federal Court in Putrajaya issued the ICT Security Policy 2015.[32] The Policy aims to ensure the smooth operations of the ICT adoption in the courts and minimize damage and loss of the technological assets of the courts.[33] The Policy also seeks to protect the interest of the parties who rely on the information system from failure or drawbacks in terms of confidentiality, availability, accuracy of information as well as communication.[34] Further, one of the aims of the Policy is to increase the awareness on the ICT security on part of the users, the consultants and the vendors, and to improve the management of risks arising from the ICT usage in the courts.

5.3 Organizational impacts

Extant literature pointed out that ICT introduces more efficiency into the judiciary, reduces delay, improves the economy, and promotes confidence in the justice system through the use of technologies.[35] In addition, Walker advocates that technologies would lead to an improvement in the quality of the process, improved transparency of the way the judiciary works, increase in the citizen's level of access to the judiciary and increase in the confidence of the citizens and business in the judicial system.[36] In addition to this, it is also believed that these technologies will contribute towards improving the quality of justice.[37]

From the investigation of the use of ICT applications in the courts, it was found that there had been increased productivity and efficiency of the courts on the part of the judges, court administrative officers and lawyers. For instance, on the part of lawyers, the security device issued to registered users of the e-filing system allowed the lawyers to engage in filing court documents from any location without having to run to the court's registry.

It is a known fact that backlog of cases is one of the major problems facing the Malaysian judicial system. Numerous literature have highlighted this situation. Accordingly, this is admitted by the respondents in the case study. With the adoption of ICT applications such as the e-filing system and the CMS, all the respondents agreed that there had been a significant decrease of backlog of cases since implementing the ICT applications, as such, the evidence has shown the important role of ICT

31 Mohamad, A. M., Hamin, Z., & Othman, M. B. (2012b). Security Implications of ICT Adoption in the High Courts of Malaysia. *International Journal of Future Computer and Communication, 1*(3), 256-259, p. 258.

32 ICT Security Policy of the Chief Registrar's Office, Federal Court of Malaysia, online, available at http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/1_%20PKPMPM-BTM-ISMS-P1-001-DASAR%20KESELAMATAN%20ICT%20PKPMP%20V%202_6mac-signed.pdf accessed 26 March 2015.

33 Rule 2 of the ICT Security Policy of the Chief Registrar's Office, Federal Court of Malaysia.

34 Ibid.

35 Kiskis, M., & Petrauskas, R. (2004). ICT Adoption in the Judiciary: Classifying of Judicial information. *International Review of Law, Computers & Technology, 18*(1), 37-45, p. 39, and Jackson, S. (2010). Court-provided trial technology: efficiency and fairness for criminal trials. *Common Law World Review, 39*(3), 219-249, p. 223.

36 Cerrillo, A., & Fabra, P. (Eds.). (2009). *E-Justice: Information and Communication Technologies in the Court System*. United States of America: Information Science Reference, p. 10. See also Walker, C. (2000). Criminal Justice Processes and the Internet. In Y. Akdeniz, C. Walker & D. Wall (Eds.), *The Internet, Law and Society* (pp. 317-348). Great Britain: Pearson Education Limited, p. 184

37 Carnevali, D. (2009). E-Justice and Policies For Risk Management. In A. Cerrillo & P. Fabra (Eds.), *E-Justice: Information and Communication Technologies in the Court System*. United States of America: Information Science Reference, p. 16.

in addressing the problem of backlog of cases in the judiciary.

Following the backlog of cases, another problem faced by the courts is the increasing number of ageing list of cases, which essentially refers to cases which have been left unresolved over a certain period of time. The longer the case takes to settle, the longer the case stays in the ageing list. A long ageing list evidently indicates the poor performance of the judicial system in handling the cases. With the adoption of ICT applications such as the e-filing system and the CMS, the majority of the respondents agreed that there had been a faster system for the disposal of cases since implementing the ICT applications.

Another implication is the potential loss of status in one's social group as a result of adopting a product or service, looking foolish or untrendy. The transformation from a conventional system of judiciary into the adoption of modern ICT inevitably raised the issue of acquisition of skills or reskilling and readiness of the court officials and legal practitioners.[38] In this regard, it is contended that the successful implementation of the technologies requires the concerted effort from the judges, court administrators, court users, IT officers and information technology experts.[39]

With new technological applications being used in the courts, the users would need to undergo specific training sessions to build their skills in actually using these technologies. All the respondents admitted that they had to undergo training sessions on how to use the ICT applications in the courts. In undergoing the training, some respondents were not satisfied with the quality of training given, hence called for more intensive training in this regard.

5.4 Social impacts

Admittedly, the financial impact of the implementation of ICT in the courts is considerable. However, financial risks could occur, which indicate the potential monetary outlay associated with the initial purchase price as well as the subsequent maintenance cost of the product.[40] Within the context of the courts, the setting up full electronic trials would inevitably mean the involvement of additional costs, and it may prove to be a factor inhibiting their more widespread use of ICT in the courts.[41] In Sarawak alone, the Federal Government has spent RM1.9 billion in upgrading the ICT systems of the courts,[42] while in West Malaysia, the setting up of the computerized system in the courts costs about RM69 million.[43]

Evidence from the case studies indicated both ways in relation to costs, i.e. the ICT adoption at the courts enhanced the financial expenditure, while at the same time reduced costs as well. With the adoption of ICT applications, the issue of enhancement of costs would be inevitable. Funding was needed needed to install the ICT applications in the courts, registration fees to start using some of the ICT applications, and expenses associated with the storage and processing of the technologies, not to mention the costs of repairs in cases of hacking or intrusion into the system. In this respect, more than half of the respondents took the view that high expenditure was one of the major factors in considering the adoption of such technological applications. On the other hand, with the enhancement of costs at the beginning stage of the ICT adoption in the courts, in the long run, there had been significant reduction of costs on part of the judges, court administrative officers and lawyers. For instance, more than half of the respondents (11 out of 18) agreed that AVC saved time and costs for the judges and lawyers given the ability of AVC to hold proceedings at the same time at difference locations.

Additionally, psychological implication could denote the fact that the selection or performance

38 Lupo, G., & Bailey, J. (2014). Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples. *Laws, 3*(2), 353-387, p. 360.

39 Wong Peck. (2008). *E-Justice – Transforming the Justice System*. Australian Institute of Judicial Administration Law & Technology Conference, Sydney, p. 1.

40 Bansal, A., Kauffman, R. J., Mark, R. M., & Peters, E. (1993). Financial risk and financial risk management technology (RMT): issues and advances. *Information & management, 24*(5), 267-281, p. 270.

41 Macdonald, R., & Wallace, A. (2004). Review Of The Extent Of Courtroom Technology In Australia. *Wm. & Mary Bill of Rts. J., 12*, 649, Weibel, M. M. (2002). Primer on Courtroom Technology. *ABIJ, 21*(6), 16, p. 18.

42 Nais, N. (2009, August 17). Impressed, Nazri Wants All Courts to go Electronic, *New Straits Times*.

43 Veera, S. (September 2). New Courts, New System to Speed Up Cases.

of the producer will have a negative effect on the consumer's peace of mind or self-perception.[44] Essentially, a person faces the risk of potential loss of self-esteem (ego loss) from the frustration of not achieving an intended goal. Within the context of ICT adoption in the courts, this impact could apply when a user believes that he or she feels potential loss of self-esteem for his or her failure to complete a task intended by such technology, for instance electronic filing of documents, case management system and handling of electronic evidence.

Among the judges, court administrative officers and lawyers engaging in the use of ICT in the courts, not everyone was receptive to the idea of ICT replacing the traditional work routines. They were usually senior officers of the courts and legal practitioners who were accustomed to paper-based court system. Evidently, the transition from the paper-based court system to ICT-based and paper-less one, was rejected by such users at the initial introduction of the system in the courts. The research found that some judges were reluctant to adopt the ICT and preferred to stick to the paper-based system. On this note, it was reported that there were judges who refused to adopt the technological systems in their work.

Finally, with the implementation of ICT applications in the courts, the roles played by the judges, court administrative officers and lawyers engaging in the use of such applications and also the IT officers or the vendors who provided the system have become important. This in turn, promoted the growth of the ICT industry in Malaysia. Engaging in cross-case analysis, it was found that the IT officer was the same for the Court of Kuala Lumpur and Penang, and another IT officer was the same for the Court of Kuching, Sarawak and Kota Kinabalu, Sabah. Each of these developers was the ICT company which had some experience in the provision and installation of ICT applications in various government agencies in Malaysia.

6.0 Conclusion

This paper has reported the findings of the case studies which comprised five units of analysis, namely, the Federal Court in Putrajaya, the Courts of Kuala Lumpur, Penang, Kuching, Sarawak and Kota Kinabalu, Sabah. The findings have revealed that there were two broad categories of implications: legal and non-legal. From the perspective of the former implications of ICT in the courts, the findings have revealed numerous legal implications particularly the potential for criminality arising from such use of the technologies in the courts. Such criminality would be particularly related to the provisions of the CCA 1997. Moreover, another legal implication which arose in light of the absence of parallel legal provisions for most of the ICT applications in the courts were the CMS, the QMS, the AVS and the CAP. Nevertheless, there are laws created to specifically provide for certain ICT applications, such as the EFS pursuant to the passing of Order 63A of the RC 2012.

The non-legal implications revealed from the research data can be divided into three types: technical, organizational and social. From the viewpoint of the technical implications of ICT usage in the courts, the evidence from the research indicated that numerous implications were in existence. Accordingly, the evidence from the research has also revealed that there was enhancement of risk management strategies being in place to address the technical risks of ICT usage in the courts. With regards to the organizational implications, the findings of the present study have revealed that there was a considerable number of implications on the part of the organization, beginning with the users' participation in the formulation of the organizational infrastructure for the ICT in the courts. The findings have further revealed the different organizational implications, particularly in the increased productivity and efficiency of the courts. Such implication was indicated by numerous situations revealed from the research data, for instance, the decrease in the backlog of cases and the reduction in the ageing list of the cases in the courts. In addition, the findings have indicated numerous social implications connected with the ICT implementation in the courts, comprising the enhancement of costs for the installation of the technological applications in the courts. Another implication was the reduction of costs involved with the ICT usage in the courts, such as the CRT and the AVS.

44 Featherman, M. S., & Pavlou, P. A. (2003). Predicting e-services adoption: a perceived risk facets perspective. *International journal of human-computer studies, 59*(4), 451-474, p. 457.

In conclusion, the study found both positive and negative impacts owing to the ICT being adopted in the courts in four areas of legal, technical, organizational and social. This could be owing to the double-edged nature of ICT itself: at one end, it brings about benefits and advantages, at another end it poses risks and threats. Considering the scarcity of resources on subject matter, particularly in Malaysia, the research findings would contribute greatly to the body of literature and knowledge on the subject matter of ICT adoption at the courts. Additionally, the findings are expected to assist the policy makers in better management of the technologies at the courts and the potential risks arising from such adoption.

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www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/1_%20PKPMPM-BTM-ISMS-P1-001-DASAR%20KESELAMATAN%20ICT%20PKPMP%20V%202_6mac-signed.pdf accessed 26 March 2015.

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DUTY OF *AL-MUḤTASIB* AND PROTECTION OF *MAQĀṢID SHARĪʿAH*: A SPECIAL REFERENCE TO THE AML/CFT LAW IN MALAYSIA

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Abstract

*Money laundering and terrorism financing (ML/TF) are serious crimes. The law governing Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) in Malaysia is the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) (AMLATFPUAA). It is the duty of the government to protect the maqāṣid sharīʿah and not jeopardize the maṣlaḥah of the citizens. Also, the government has a duty to eradicate these financial crimes which are prohibited in Islam. The Competent Authority (al-muḥtasib) has been appointed under the AMLATFPUAA in order to combat these commercial crimes. The al-muḥtasib in the context of AMLTAFPUAA may refer to the Competent Authority as well as the enforcement agencies. The Central Bank of Malaysia (BNM) can be considered as being the al-muḥtasib as the role of the BNM is to promote monetary and financial stability in Malaysia. Meanwhile, the enforcement agencies are responsible for the prevention, detection and investigation of ML/TF offences. Therefore, the objective of this research is to examine the function of al-muḥtasib under the AMLATFPUAA and its relation to the protection of the maqāṣid sharīʿah under Islamic law. The methods of qualitative legal research will be employed in preparing this paper by analyzing the primary and secondary legal sources vis-à-vis the primary and secondary Islamic law sources. This paper is significant as it makes an exploration of the Islamic law perspective in relation to the AML/CFT law in Malaysia. This paper suggests that the powers given to al-muḥtasib in combating ML/TF in Malaysia is in line with sharīʿah principles. Therefore, rigorous enforcement of regulations by the authorities is necessary to combat these organized crimes. *

Keywords: *Al-Muḥtasib; Maqāṣid Sharīʿah; AML/CFT; Competent Authority; Enforcement Agencies*

INTRODUCTION

The crimes of money laundering and terrorism financing are global phenomenon that not only threaten country's economic activities, but also pose a major threat to international peace and security. The International Monetary Fund (IMF) states that money laundering and terrorism financing are financial crimes that become a threat to integrity and stability of the financial sector which discourage foreign investment and distort international capital flows.[1] The United Nations Office on Drugs and Crime (UNCD) also reported that the estimated amount of money laundered globally in one year is 2-5% of global gross domestic product (GDP), or $800 billion - $2 trillion in current US Dollars.[2] Meanwhile, although there is no exact figure for the accurate amount of terrorism financing offences, it is also reported that more than $140 million in terrorists' assets have been frozen across some 1,400 bank accounts worldwide.[3]

A comprehensive legal or regulatory framework should be implemented in order to combat these financial crimes. The law enforcement authorities play a role to ensure adequate and proper investigation for these financial crimes. In this respect, the Financial Action Task Force (FATF)[4] provides that the Financial Intelligence Unit (FIU) plays a central role in a country's AML/CFT legal framework to provide support to the enforcement authorities in battling these financial crimes. In Malaysia, the FIU is established within the Financial Intelligence and Enforcement Department (FIED) in the BNM for the comprehensive analysis on the financial intelligence relating to the offences of these financial crimes. Thus, the BNM is the Competent Authority which disseminate to its Enforcement Agencies to conduct an investigation under Part V of the AMLATFPUAA. Hence, combating these financial crimes are not only enshrined in the international standards imposed to all the States,[5] but also become one of the objectives in sharīʿah. Sharīʿah recognize that protection of the people from any criminal wrongdoing is for the *maṣlaḥah* or protection of public interest. The purpose is also to preserve the five objectives of sharīʿah which are the protection of religion, life, progeny, property, and intellect. In this relation, the Competent Authority and Enforcement Agencies performed their major roles as *al-muḥtasib* in order to protect the *maṣlaḥah* and objectives of the sharīʿah of the citizens from the offences of these financial crimes.

This study therefore examines the function of *al-muḥtasib* under the AMLATFPUAA and its relation to the protection of the *maqāṣid sharīʿah* from Islamic point of view. This paper begins on the international standards applicable in combating these financial crimes. Then, this paper emphasizes on the national AML/CFT policies and co-ordination applicable in Malaysia. This research also provides on the relationship of Competent Authority and Enforcement Agency as *al-muḥtasib* to uphold the objectives of *maqāṣid sharīʿah*. The paper also illustrates on the significant aspect on the role of the Competent Authority and Enforcement Agencies as *al-muḥtasib* and its protection under *maqāṣid sharīʿah* in combating these financial crimes.

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1 See "The IMF and the Fight Against Money Laundering and the Financing of Terrorism", International Monetary Fund Factsheet, 31st May 2017, https://www.imf.org/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism?pdf=1 (Accessed on 20th July 2017).

2 See "Money-Laundering and Globalization", United Nations Office on Drugs and Crime, https://www.unodc.org/unodc/en/money-laundering/globalization.html (Accessed 20th July 2017).

3 See "Tracking Down Terrorist Financing", Council on Foreign Relations, https://www.cfr.org/

4 The FATF is an inter-governmental body established in 1989 for the purpose of to set standards in combating financial crimes. In this relation, the FATF becomes a mandate and recognition to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation. The FATF also provides a legal and regulatory standard for other related threats of the global financial system. See further about FATF in http://www.fatf-gafi.org/

5 Where Malaysia is no exception

INTERNATIONAL STANDARDS IN COMBATING MONEY LAUNDERING AND TERRORISM FINANCING

A robust legal and regulatory framework is necessary in combating these financial crimes. All jurisdictions around the globe require to have their comprehensive legislations and regulations in combating these financial crimes. Consequently, all legislations on AML/CFT in all jurisdictions are generally in '*pari materia*' with each other as all countries are obliged to follow an international standard in combating these financial crimes as set out by the FATF.[6]

Financial Action Task Force

In international level, the FATF set out the *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (FATF 40 Recommendations) as a universal and international recognition for a comprehensive and essential preventive measurement in combating these financial crimes. The FATF 40 Recommendations become a model as a fundamental legal and regulatory framework for all the countries and jurisdictions as it was endorsed by the United Nations Security Council (UNSC) in 2005.[7] Thus, the country that have weak preventive measurements in combating AML/CFT offences will be identified by FATF as a 'High Risk and Non-Cooperative Jurisdictions'. As at 23rd June 2017, the FATF has identified two countries which are the Democratic People's Republic of Korea and Iran as 'High Risk and Non-Cooperative Jurisdictions'.[8] This identification is made by FATF in order to address deficiencies by High Risk and Non-Cooperative Jurisdictions in complying with the FATF 40 Recommendations as well as to encourage all jurisdictions to comply with the AML/CFT standards.

Malaysia is no exception to follow this FATF 40 Recommendations. Malaysia has enacted the AMLATFPUAA in order to comply with the FATF 40 Recommendations which is generally in *pari materia* with all other countries' jurisdictions.[9] The FATF has demonstrated Malaysia as a country with a strong legal and regulatory framework in her preventive measurement for the overall level of compliance and its effectiveness in combating these financial crimes.[10] Thus, the FATF has granted Malaysia to become a full membership of the FATF during the result of the outcomes of the Plenary Meeting of the FATF at Paris on 17-19th February 2016. This membership is granted after Malaysia addressing its effectiveness during the FATF Mutual Evaluation to assess the levels of implementation and compliance of the FATF 40 Recommendations which is later adopted in the *Anti-Money Laundering and Counter-Terrorist Financing Measures – Malaysia Mutual Evaluation Report on September 2015* (Malaysia MER 2015) The FATF further states that the one of the significant outcomes in the Malaysia MER 2015 is based on the inter-agency co-ordination and policy frameworks in its supervision and investigation by the legal authorities.

AML/CFT Policies and Coordination in the FATF 40 Recommendations

The FATF 40 Recommendations provide that countries should have their national AML/CFT policies to ensure the policy-makers, the FIU as well as the law enforcement authorities, to provide an effective mechanism concerning the development and implementation of AML/CFT in the countries.11 In addition, the implementation of adequate regulation and supervision is paramount in combating these financial crimes. The FATF 40 Recommendations provides that the legal authorities should take

6 Norhashimah Mohd Yasin, *Legal Aspects of Money Laundering in Malaysia from the Common Law Perspectives*, (Selangor, Malaysia: LexisNexis, 2007) 13.

7 Norhashimah Mohd Yasin, "*Pari Materia* Aspects of AML/CFT Legislation: Special Reference to Malaysia", *Current Law Review*, Vol. 4, 84-105, (2003): 85.

8 "Public Statement - 23rd June 2017," Financial Action Task Force, http://www.fatf-gafi.org/publications/high-riskandnon cooperativejurisdictions/documents/public-statement-june-2017.html (Accessed on 19th July 2017).

9 Norhashimah Mohd Yasin, *Pari Materia* Aspects of AML/CFT Legislation: Special Reference to Malaysia, 85

10 "Anti-Money Laundering and Counter-Terrorist Financing Measures: Malaysia Mutual Evaluation Report, September 2015," Financial Action Task Force, http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Malaysia-2015.pdf. p. 8.

11 See Recommendation 2 of the FATF 40 Recommendations.

necessary legal or regulatory measurement to curb the financial crimes in the financial institutions.12 In this respect, the FATF 40 Recommendations states that competent authority should have adequate authority to organise or govern, and ensure compliance by financial institutions in combating these financial crimes.13 Also, in combating these financial crimes, the FATF 40 Recommendations provide that the countries should establish a FIU that serves as a national centre for the receipt and analysis of suspicious transaction reports (STR) and other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis.14

In addition, the law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of national AML/CFT policies.[15] Thus, the law enforcement authorities should develop a pro-active parallel financial investigation when pursuing an investigation of money laundering, associated predicate offences and terrorist financing offences.[16] Also, in conducting investigations, the competent authority should be able to obtain all necessary documents and information during the investigation, and in prosecution and related actions.[17] The FATF Interpretive Note to Recommendation 29 determines that countries should ensure that the FIU has regard to the 'Egmont Group Statement of Purpose and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Financing of Terrorism' which set out as an important guidance on the role and functions of the FIU.[18] The FIU in all jurisdictions should apply for membership in the Egmont Group.[19] In this regard, Malaysia official commencement and operational date for FIU was on 8th August 2001 and official date of entry to the Egmont Group was on 1st July 2003.[20]

NATIONAL AML/CTF POLICIES AND COORDINATION

AML/CFT regime in Malaysia is based on a well-coordinated and integrated inter-agency strategy. Thus, the BNM as the Competent Authority is regularly reviewing its policy document to prevent or mitigate money laundering and terrorism financing's risk. As at July 2017, the BNM has produced Policy Documents to all Reporting Institutions[21] under AMLATFPUAA to ensure that the Reporting Institutions understand and comply with the requirements and obligations imposed under AMLAFTPUAA and FATF 40 Recommendations. The Policy Documents listed are as follows:

(a) Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Banking and Deposit-Taking Institutions (Sector 1);

(b) Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Insurance and Takaful (Sector 2);

(c) Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3);

12 Recommendation 26 of the FATF 40 Recommendations
13 Recommendation 27 of the FATF 40 Recommendations
14 Recommendation 29 of the FATF 40 Recommendations
15 Recommendation 30 of the FATF 40 Recommendations
16 Ibid.,
17 Recommendation 31 of the FATF 40 Recommendations
18 FATF Interpretive Note to Recommendation 29
19 Ibid.,
20 "MALAYSIA - Financial Intelligence Unit - Malaysia (UPWBNM)," Egmont Group, https://egmontgroup.org/en/content/financial-intelligence-unit-malaysia (Access on 21st July 2017).
21 See the interpretation of the 'Reporting Institutions' in Section 3(1) of the AMLATFPUAA and First Schedule of the AMLATFPUAA for the list of the Reporting Institutions in Malaysia.

(d) Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Electronic Money and Non-Bank Affiliated Charge & Credit Card (Sector 4); and

(e) Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – DNFBPs and Other Non-Financial Sectors (Sector 5).

Financial Intelligence in Malaysia

As stated earlier, the FATF provides that all countries should establish a FIU for the analysis of the STR reports and other information for the offence of financial crimes. In this respect, Part III of the AMLATFPUAA provides the provisions on the 'Financial Intelligence' in Malaysia. This Financial Intelligence serves as the main component in the operational and law enforcement authorities in combating these financial crimes.

Competent Authority

The AMLATFPUAA gives an interpretation of 'Competent Authority' as "a person been appointed under Section 7(1) of the AMLATFPUAA".[22] Then, Section 7(1) of the AMLATFPUAA provides that the Minister of Finance may appoint a person to be the Competent Authority and performed its functions as Competent Authority under AMLATFPUAA.[23] The Competent Authority appointed by the Minister of Finance then may authorise any of its officers or any other person to perform its functions under the AMLATFPUAA.[24]

BNM as the Competent Authority

Pursuant to Section 7(1) of the AMLATFPUAA, the Minister of Finance has appointed the BNM as a 'Competent Authority' under the *Anti-Money Laundering (Appointment of Competent Authority) Order 2002*[25] with effect from 15th January 2002. Also, in the High Court case of MBF Factors Sdn Bhd v. Hong Kim Confectioner Sdn Bhd & Ors,[26] the judge states that:

> "...It is to be noted that the Minister of Finance has appointed BNM to be the "competent authority" under s 7(1) AMLATFA. BNM as the competent authority may authorise any person to perform any function under AMLATFA".[27]

Section 8(2) of the AMLATFPUAA further states that the BNM as the Competent Authority may exercise its powers in respect of Reporting Institutions carrying on any or all of the activities listed in the First Schedule and should exercise its power to:

(a) to receive and analyze information and reports from any reports include reports issued by the Reporting Institutions[28];

(b) send a report to an enforcement agency if it is satisfied or has reason to believe or suspect that a transaction involves proceeds of an unlawful activity or a serious offence is being, has been or is

22 Section 3(1) of the AMLATFPUAA
23 Section 7(1) of the AMLATFPUAA
24 Section 7(2) of the AMLATFPUAA
25 P.U. (A) 19-20 of 2002.
26 MBF Factors Sdn Bhd v. Hong Kim Confectioner Sdn Bhd & Ors [2014] MLRHU 1 (HC)
27 Ibid., p. 27.
28 Section 8(2)(a) of the AMLATFPUAA

about to be committed;[29] and

(c) send any information derived from an examination under Part IV to an enforcement agency if it has a reason to suspect that a transaction involves proceeds of an unlawful activity or a serious offence is being, has been or is about to be committed.[30]

In addition, Section 8(3) of the AMLATFPUAA further provides that the Competent Authority under AMLATFPUAA may compile statistics and records; give instructions to Reporting Institutions in relation to any report or information received under Section 14[31] of the AMLATFPUAA; and create training requirements and provide training for any Reporting Institutions in respect of their transactions and reporting and record-keeping obligations under Part IV of the AMLATFPUAA.[32]

Financial Intelligence and Law Enforcement Agencies

The International Monetary Fund stated that establishing an FIU is an important step in combating financial crimes.[33] As such, the FIU established by the State should be based on criminal policy considerations and consistent with the supervisory framework as well as a legal and administrative framework of the country.[34]

In Malaysia, the FIU was established within the Financial Intelligence and Enforcement Department (FIED) in BNM.[35] The FIED in Malaysia serves a purpose to manage and provide comprehensive analysis on the financial intelligence received relating to these financial crimes. The Competent Authority will disseminate to the respective Enforcement Agencies for further investigations whenever receive the report from the Reporting Institutions pertaining to STR and cash transaction report (CTR) as specified under Section 14 of the AMLATFPUAA. The Enforcement Agencies thereafter conducted an investigation pursuant to Part V[36] of the AMLATFPUAA.

Enforcement Agencies for Investigations of AML/CFT Cases

Section 3(1) of the AMLATFPUAA provides an interpretation of 'Enforcement Agency' as:

> "includes a body or agency that is for the time being responsible in Malaysia for the enforcement of laws relating to the prevention, detection and investigation of any serious offence".

29 Section 8(2)(b) of the AMLATFPUAA

30 Section 8(2)(c) of the AMLATFPUAA

31 Section 14 of the AMLATFPUAA is the report by the Report Institutions to the Competent Authority for (a) any transaction exceeding the amount specify by the Competent Authority; (b) any transaction where the identity of the person involved, the transaction itself or any other circumstances concerning that transaction gives any officer or employee of the Reporting Institution reason to suspect that the transaction involves proceeds of an unlawful activity or instrumentalities of an offence; (c) any transactions or property where any officers or employee of the Reporting Institutions has reason to suspect that the transaction or property involved is related or linked to, is used or intended to be used for or by, any terrorist act, terrorist, terrorist group, terrorist entity or person who finances terrorism.

32 Section 8(3) of the AMLATFPUAA

33 *Financial Intelligence Units: An Overview*. Edited by Paul Gleason and Glen Gottselig, (International Monetary Fund Publication Services, 2004) p. 4.

34 Ibid., p. 4-5

35 FIED in Malaysia is part of the BNM. Thus, the FIED is the Competent Authority which is the regulator a supervisor of the financial institutions in Malaysia. See Malaysia MER 2015, p. 29.

36 Part V of the AMLATFPUAA is on provisions in relation to the investigation conducted by the Competent Authority and Enforcement Agencies where (a) the Competent Authority has reason to suspect for the commission of an offence under Part III or IV of the AMLATFPUAA; (b) an Enforcement Agency having the power to enforce the law under which a related serious offence is committed has reason to suspect the commission of an offence under any of other provisions of AMLATFPUAA; or (c) an Enforcement Agency has reason to suspect the commission of a terrorism financing offence, or an offence under Section 4A or Part IVA of the AMLATFPUAA.

In this respect, the Competent Authority may in writing, authorise any Enforcement Agency or its designated officers to have access to such information as the Competent Authority may specify for the purposes of performing the Enforcement Agency's functions.[37]

In addition, the implementation of AML/CFT regime is coordinated by the National Coordination Committee to Counter Money Laundering (NCC) which is the body established in 2000 for the purpose of coordinating, implementing and monitoring the development of the national AML/CFT initiatives. As at July 2017, a reference to the official website of AML/CFT under BNM[38] and the Malaysian MER 2015[39] provides that there are 16 domestic NCC members which comprises of Ministries and government agencies from supervisory and regulatory authorities, law enforcement agencies and policy-making ministries[40] which is listed as follows:

(a) *Attorney General's Chambers*

perform its function as a legal advisor to government; which undertakes legislative drafting; conducts prosecutions; central authority for mutual legal assistance and extradition.

(b) *Bank Negara Malaysia*

The Competent Authority under the AMLATFPUAA. AML/CFT and prudential regulator and supervisor of banking and insurance sectors, money services business, non-bank card issuing entities.

(c) *Companies Commission of Malaysia*

Regulates incorporation of companies, business registration and promotes ethical market conduct. A law enforcement agency investigating predicates offences in relation to the offence of money laundering.

(d) *Immigration Department of Malaysia*

Administer immigration and passports and all border crossings.

(e) *Inland Revenue Board of Malaysia*

Administration the tax system including cross-border tax matters. The Inland Revenue Board of Malaysia perform its role as a law enforcement agency for investigating predicates offences and related matters in money laundering.

(f) *Labuan Financial Services Authority*

Regulates and supervises Labuan International Business and Finance Centre and Designated Non-Financial Businesses and Professions sectors. Labuan Financial Services Authority is also the registrar for legal person, legal arrangement and non-profit organisations incorporated and/or registered in Labuan. The Labuan Financial Services Authority also have a role as a law enforcement agency investigating predicates offices and its related matters under money laundering offences.

(g) *Malaysian Anti-Corruption Commission*

Administer Malaysian's anti-corruption efforts (prevention and enforcement). The Malaysian Anti-Corruption Commission also has a role as a law enforcement agency in investigating its predicates

37 Section 9(1) of the AMLATFPUAA.

38 AML/CFT (Anti-Money Laundering and Counter Financing of Terrorism) at http://amlcft.bnm.gov.my/index.html

39 Malaysia MER 2015, p.p 29-30.

40 The Malaysian MER 2015 also states that "in addition to the 16 members of the NCC, other relevant authorities and representatives are also participating in the NCC working groups. For example, the Prime Minister's Department, which regulates a small number of non-profit organisations, is a member of the NCC's working group., p. 30.

offences and its related matters under money laundering.

(h) *Ministry of Trade, Co-operatives and Consumerism*

Regulates and investigates offences in relation to domestic trade, co-operative and consumerism, including offences in relation to intellectual property. A law enforcement agency investigating predicate and money laundering offences.

(i) *Ministry of Finance*

Appoints the AML/CFT Competent Authority and empowered to provide for subsidiary legislation to invoke new Reporting Institutions and include new predicate offences under the AMLATFPUAA. It is also responsible for regulating and licensing the gaming industry, including licensing the single casino.

(j) *Ministry of Foreign Affairs*

Responsible for Malaysia's international diplomacy and engagement with foreign states and organisations. Plays a role in relation to targeted financial sanctions which include application of basic expenses for sanction entities/individuals and application for listing or delisting to Sanction Committees.

(k) *Ministry of Home Affairs*

The Ministry of Home Affairs is the competent authority responsible and empowered for designating persons or entities[41], including non-Malaysians, that meet the specific criteria for designation as stipulated in Resolution 1373[42] of the United Nations Security Council Resolution, whether the designation is made following a domestic process initiated by Malaysian authorities or is based on a foreign request.[43]

(l) *Ministry of International Trade and Industry*

Regulates strategic trade law, including measures to combat proliferation financing. The Strategic Trade Secretariat (STS) is under the Ministry of International Trade and Industry. The STS coordinates the implementation of the Strategic Trade Act 2010 and is authorized to issue permits for strategic items.

(m) *Registrar of Societies*

Responsible for the registration, regulation and supervision of the majority of non-profit oganisations.

(n) *Royal Malaysia Police*

Malaysia's principal law enforcement agency which is responsible for investigating predicate offences, money laundering and terrorism financing. Royal Malaysia Police Special Branch is responsible for Malaysia's security intelligence function.

(o) *Royal Malaysian Customs Department*

Administers and enforces customs laws and the cross-border currency reporting requirements. A law enforcement agency investigating predicates and related money laundering offences.

(p) *Securities Commission Malaysia*.

AML/CFT regulator and supervisor for the capital market including compliance with the AMLATFPUAA. A law enforcement agency investigating predicates and related money laundering offences.

41 See Section 66B of the AMLATFPUAA for a legal provision in declaration of specified entities by the Ministry of Home Affairs

42 Resolution 1373 of the United Nations Security Council Resolution: Threats to international peace and security caused by terrorist acts

43 See Malaysia MER 2015, p. 156.

THE RELATIONSHIP OF COMPETENT AUTHORITY AND ENFORCEMENT AGENCIES IN *AL-MUḤTASIB* AND *MAQĀṢID AL-SHARĪʿAH*

The history of *al-muḥtasib* begins when the *al-muḥtasib* plays a role as a guardian of the public which enforce the law in the early period of Islam. A brief role of the *al-muḥtasib* in the Quranic verses and a brief history of *al-muḥtasib* is highlighted in this section. This section later follows on the aspect of the objectives of *maqāṣid sharīʿah* under the Islamic law.

A Brief Role of *Al-Muḥtasib* in the Qurān

The role of *al-muḥtasib* is rooted in the obligations of the Muslim to promote good and forbid evil as revealed in several Quranic verses. Allah has mentioned in Sūrah Āl-ʿImrān (3): 104 that "Let there become of you a nation that invites to all that is good, enjoin the doing of what is right and forbid what is wrong. Such are they who shall prosper". Sayyid Quṭb in *Fī Ẓilāl al-Qur'ān* stated that it is imperative that a phrase of "enjoin the doing of what is right and forbid what is wrong" is done through a real authority which is able to undertake the task of advocating what is good and remove the evil.[44]

Another verse of Qurān is revealed in Sūrah Āl-ʿImrān (3): 110 that "You are the best community that has ever been raised for mankind; you enjoin the doing what is right and forbid what is wrong…". Also, Sayyid Quṭb in *Fī Ẓilāl al-Qur'ān* stated that this verse stated about the leadership of mankind as the best nation which have the power to enable to enjoin the doing of all that is right and forbid the doing of all that is wrong.[45]

Also, Allah has revealed in Sūrah Al-Tawbah (9): 71 states that "The believers, men and women, are friends to one another: they enjoin what is right and forbid what is wrong…". Sayyid Quṭb in *Fī Ẓilāl al-Qur'ān* stated that to achieve the goals of promoting what is good, enjoining what is right and fighting what is wrong and evil requires close ties within the community, mutual solidarity and true co-operation.[46]

The Brief History of *Al-Muḥtasib*

The history of Islam shows that *al-muḥtasib* is a state-appointed official which have a duty to ensure that persons or bodies do not violate the laws or regulations by the state.[47] The *al-muḥtasib* which is also called as *'amil al-sūq* and *sāhih al-sūq* was the inspector of public places in the pre-modern Middle East and North Africa which patrolled public places and have a duty to enforce any violation of laws.[48] This tradition occurred at the time of Caliph Umar when two men working for Caliph Umar over the *sūq* of Medina where al-Sā'ib b. Yazīd and ʿAbd Allāh B. ʿUṭba b. Masʿūd where al-Sā'ib stated that he was *'amil al-sūq* Medina at that time.[49] This was the first occurrence of a term which became an official designation which was later replaced by the word *'al-muḥtasib'*.[50]

In the study of *al-muḥtasib* during the medieval Islamic cities, *sāhib al-sūq* (the Master or Inspector of the Market) is regarded as a religious office and the inspector which is now called *al-muḥtasib* which performed the functions of a night-watchmen (*'asas or tuqqaf al-layl*).[51] A*l-muḥtasib* duty concerned in pre-

44 Sayyid Quṭb, *Fī Ẓilāl al-Qur'ān (In the Shade of the Qur'an)*, Translated and edited by Adil Salahi & Ashur Shamis, (The Islamic Foundation & Islamonline.Net, Leicester, United Kingdom, Volume II, Sūrah 3) *p.* 165

45 Ibid., p. 170

46 Sayyid Quṭb in *Fī Ẓilāl al-Qur'ān (In the Shade of the Qur'ān),* translated and edited by Adil Salahi, (The Islamic Foundation and Islamonine.Net, Leicestershire, United Kingdom, Volume VIII, Sūrah 9) p. 204.

47 Kamal Halili Hassan, "Employment Dispute Resolution Mechanism from the Islamic Perspective", *Arab Law Quarterly*, Vol. 20, Issue 2, 181-207, (2006): p. 186.

48 Roy Mottahedeh and Kristen Stilt, "Public and Private as Viewed through the Work of the *Muhtasib*", *Social Research*, Volume 70, No. 3, (2003) 735-748: p. 735.

49 R.P. Buckley "The Muhtasib", *Arabica*, Volume 39, Issue 1 (March 1992), 59-117: p. 60.

50 Ibid., p. 61.

51 Abbas Hamdani, "The Muhtasib as Guardian of Public Morality in the Medieval Islamic City", *Digest of*

venting crimes; for instance whether the coins used were genuine or counterfeit and supervised the maintenance of public facilities.[52] The *al-muḥtasib* performed its duty based on the complaint made, which was accompanied by inquiry, supported by force, and may be enforced by punishment based on penalties and laws applicable.[53] In this relation, the duties of *ḥisbah* perform its obligation which its duties were largely concerned with markets and trade generally.[54] The institution of *ḥisbah* refers to the office in which the officer, called *al-muḥtasib* has the task to promote good and prevent evil.[55] The role of *al-muḥtasib* as a custodian of public morals and inspector of the markets makes the nature of this institution truly Islamic.[56] *Al-muḥtasib* is regarded as a duty performed to bring a conditional change for the purpose of to protect the society.[57]

The Objectives of Sharīʿah (*Maqāṣid Sharīʿah*)

Al-Ghazālī wrote that the purpose of law is divided into two types which are for the purposes pertaining to Hereafter (*dīnī*) and pertaining to this world (*dunyawī*).[58] The worldly (*dunyawī*) purposes are further divided into four categories which are: for the preservation of *nafs* (life); the preservation of *nasl* (progeny); the preservation of *ʿaql* (intellect); and the preservation of *māl* (wealth).[59] Further, al-Shāṭibī in his book on *al-Muwāfaqāt* states that the fundamentals of jurisprudence are definitive in nature and not just speculative.[60] Al- Shāṭibī puts that:

> "The Muslim community – and, indeed, all religions – are in agreement that the Law was established to preserve the five essentials, namely, religion, human life, progeny, material wealth and the human faculty of reason. Moreover, knowledge of these universals is also considered essential by the Muslim community".[61]

Also, the purposes of the law should be in accordance with *maṣlaḥa* or public interest. Al-Shāṭibī's concept on *maṣlaḥa* is to preserve its necessities and needs of mankind as well as for an improvements with regard to religion, life, progeny, property, and intellect.[62] Al-Shāṭibī' also wrote that necessities are preserved by rulings concerning the general *maṣlaḥa* of all people.[63]

The Role of the Competent Authority and Enforcement Agency under Al-Muḥtasib in Securing Financial Control under Maqāṣid Sharīʿah

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Middle East Studies, 92-104, (2008): p. 104.

52 Ibid.,

53 H.F. Amedroz, "The *Ḥisba* Jurisdiction in the Ahkam Sultaniyya of Mawardi". *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, e-Journal of the Royal Asiatic Society of Great Britain and Ireland, -Cambridge University Press, (January 1916), 77-101, p. 77.

54 H.F. Amedroz, "The Hisba Jurisdiction in the Ahkam Sultaniyya of Mawardi (Continued from the January Number, p. 101)". *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, e-Journal of the Royal Asiatic Society of Great Britain and Ireland, -Cambridge University Press, (April 1916), 287-314, p. 288.

55 Muhammad Al-Buraey, *Administrative Development: An Islamic Perspective*, (London, England: Routledge & Kegan Paul, 1985): p. 262.

56 Ibid., p. 263

57 Ahmed Abdelsalam, "The Practice of Violence in the *Hisba* Theories", *Iranian Studies*, Volume 38, Number 4, 547-554, (2005): p. 548.

58 Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād*, (Petaling Jaya, Selangor: Islamic Book Trust, 2002): p. 238.

59 Ibid.,

60 Ahmad al-Raysuni, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, Translated from Arabic by Nancy Roberts, (Kuala Lumpur, The International Institute of Islamic Thought, Islamic Book Trust, 2006): p. 137.

61 Ibid.,

62 Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century*, "Studies in Islamic Law and Society", founding Editor Bernard Weiss, edited by Ruud Peters and A. Kevin Reinhart, (Leiden, The Netherlands, Brill, Volume 31, 2010): p. 272.

63 Ibid.,

Al-muḥtasib is the person that have an authority in enforcing the laws to the public. In this regards, the *Al-muḥtasib* may be referred to the Competent Authority under Section 7(1) of the AMLATFPUAA and Enforcement Agencies as interpreted in Section 3(1) of the AMLATFPUAA. In support to this reference, Norhashimah and Hadi (2011)[64] states that *al-muhtasib* in the AMLATFPUAA may be referred to the Competent Authority as well as an Enforcement Agencies which are vested with wide powers in monitoring financial institutions in Malaysia from the risk of money laundering and terrorism financing offences.[65] Therefore, the AMLATFPUAA provides that the Competent Authority refers to the FIED in the BNM. Meanwhile, the Enforcement Agencies are all those agencies to investigate or conduct investigations related to the 'serious offence'[66] as specified in the Second Schedule of the AMLATFPUAA.[67]

In this relation, some important criteria of *maqāṣid sharīʿah* is identified and observed by many authoritative scholars which is regarded as a measure to determine as an objective of the *maqāṣid sharīʿah.* These criteria to achieve for the protection of *maqāṣid sharīʿah* is based on the following criteria which are: -

(a) stability and consistency;

(b) apparent criteria;

(c) sustainable and measurable;

(d) comprehensive and general;

(e) not subject to abrogation; and

(f) recognition in all religions.[68]

Stability and Consistency

Maqāṣid sharīʿah has significant role in developing sustainable economy and financial stability of the country. This important criterion is in one of the objectives of *maqāṣid sharīʿah* which is for the protection of wealth. Thus, fighting an abuse in financial crimes is one of the significant aspects in *maqāṣid sharīʿah*. In this relation, the BNM as the Competent Authority is having the principal objects to promote monetary stability and financial stability to the sustainable growth of the Malaysian economy.[69] One of the primary functions of the BNM as the Competent Authority is also to regulate and supervise financial institutions which are subject to the laws enforced by the BNM.[70]

Thus, in protecting the financial institutions in Malaysia in fighting these financial crimes, the Reporting Institutions in Malaysia are obliged to perform their obligations under Part IV of the AMLATFPUAA. In the event where the Reporting Institutions have failed without reasonable excuse to comply with the AMLATFPUAA, the Competent Authority shall obtain an order against the Reporting Institutions' officers or employees to enforce the compliance.[71] Also, for the suppression

64 Norhashimah Mohd Yasin and Mohamed Hadi Abd Hamid, "Public Interest as the Paramount Consideration in Sentencing for Money Laundering Offences: A Comparative Analysis", *Shariah Law Reports Articles*, Vol. 2, (2011) xxxiv: p. 6

65 Ibid.,

66 See Section 3(1) of the AMLATFPUAA for an interpretation of 'serious offence' means (a) any of the offences specified in the Second Schedule; (b) an attempt to commit any of those offences; or (c) the abetment of any of those offences.

67 See further Second Schedule of the AMLATFPUAA for the details of list of serious offences under AMLATFPUAA.

68 Ahcene Lahsasna, *Maqāṣid Al-Sharīʿah in Islamic* Finance, (Kuala Lumpur, Malaysia: IBFIM, First Edition,2013): p.p. 13-14.

69 Section 5(1) of the Central Bank of Malaysia Act 2009 (Act 701).

70 Section 5(2)(c) of the Central Bank of Malaysia Act 2009 (Act 701).

71 Section 22(2) of the AMLATFPUAA

of financing of terrorist acts, the Penal Code[72] provides that the punishment for the property use to commit a terrorist act shall be punished with:

> (a) If the act results in death, with death; and
>
> (b) In any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years and shall also be liable to fine,
>
> And shall also be liable to forfeiture of any property so provided or collected or made available.[73]

Apparent Criteria

One of the criteria of *maqāṣid sharīʿah* is clear without any ambiguity.[74] In this relation, the purpose of the AMLATFPUAA is obvious where the Preamble of the AMLATPUAA provides that:

> "An Act to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence, and for matters incidental thereto and connected therewith".[75]

Thus, the purpose of the AMLATFPUAA is clear which provides the laws in combating these financial crimes. The functions of *al-muḥtasib* for Competent Authority and Enforcement Agencies in conducting an investigation is also provided in AMLATFPUAA, for instance in receiving information and report from the Reporting Institutions; conduct an investigation under Part V of the AMLATFPUAA; power of freezing, seizure and forfeiture under Part VI of the AMLATFPUAA as well as power of Competent Authority to compound offences under Section 92 of the AMLATFPUAA.

Sustainable and Measurable

The criteria of sustainable and measurable means to achieve the objective of *maqāṣid sharīʿah* is conceptually precise and clear, for instance for the protection of wealth. In combating these financial crimes, the functions of *al-muḥtasib* under AMLATFPUAA is to protect the stability of the financial system in Malaysia. Section 29 of the AMLATFPUAA provides the duty of *al-muḥtasib* or the Competent Authority and Enforcement Agencies to commission of an offence of these organised crimes, to enforce the laws as well as to conduct an investigation for the suspect of commission of an offence.[76] Also, the Competent Authority and Enforcement Agencies are obliged to co-ordinate and co-operate with any enforcement agency in and outside Malaysia, with respect to an investigation into any serious offence or foreign serious offence, or any terrorism financing offences.[77] In addition, Section 30(1) of the AMLATFPUAA provides that the Competent Authority or relevant Enforcement Agencies have the power to appoint its employee or any other person to be an investigating officer.[78] This investigating officer then been granted a power to exercise its functions, for instance to detain any property, document or information in the course of an investigation;[79] power to examine persons during an investigations;[80] search of a person not exceed twenty-four hours without the authorization of a magistrate;[81] and to conduct an investigation without a search warrant.[82] Also, an Enforcement

72 Act 574
73 Section 130N of the Penal Code (Act 574).
74 Ahcene Lahsasna, *Maqāṣid Al-Sharīʿah in Islamic Finance*, p. 13.
75 Preamble of the AMLATFPUAA
76 Section 29(a) of the AMLATFPUAA
77 Section 29(3) of the AMLATFPUAA.
78 Section 30 of the AMLATFPUAA
79 See Section 31 of the AMLATFPUAA
80 See Section 32 of the AMLATFPUAA
81 See Section 33 of the AMLATFPUAA
82 See Section 31(1) of the AMLATFPUAA

Agency has a power to issue an order to freeze any property of any person or terrorist property.[83]This shows that the concept of *ḥisbah* is relevant in combating these financial crimes. This co-ordination and co-operation between the *Al-muḥtasib* or Competent Authority/Enforcement Agencies and *ḥisbah* or investigating officer shows that the ultimate objective *maqāṣid sharīʿah* achieved to mitigate any risk of an abuse for financial crimes. Combating these financial crimes have its significant challenge. However, the co-operation and co-ordination for effective mechanism and measurement taken by the *al-muḥtasib* should be able to deter any form of abuse for illegal gains from these illicit crimes.

Comprehensive and General

The objectives of *maqāṣid sharīʿah* is comprehensive and general in nature regardless of possible change of conditions, locations and circumstances.[84] This is because it is related to the benefit of human being and not specifically related to one particular group of people.[85] In this relation, combating these financial crimes is obliged to all the Muslims. The obligation to report crimes is not only an obligation to an individual, but it is also extended to the institutions be it private or public.[86] In this respect, the creation of *ḥisbah* is a religious committee under the State's authority in regulating and supervising any act of the illicit earn or ill-gotten money[87]. In relation to the AML/CFT law in Malaysia, Section 5 of the AMLATFPUAA provides for the protection of informers who discloses to an Enforcement Agencies his knowledge or belief that any property is derived or has been used in connection with a money laundering offence.[88] Then, the information and the identity of the person giving the information shall be secret between the officer and that person and all other circumstances relating to the information and place it was given.[89] In this aspect, it shows that the duty in combating these financial crimes is not only imposed to the *al-muḥtasib,* but also to individual that having knowledge in the commission of an offence to protect these financial crimes.

Not subject to abrogation

The objectives of *maqāṣid sharīʿah* is based on the preservation and protection of the five protection of religion, life, intellect, lineage and property.[90] Then, sharīʿah also emphasize the noble values of justice (*al-ʿadl)*.[91] In this relation, Dr Yūsuf al-Qaraḍāwī have categorized the value of justice in three categories which are; fair in the dispensation of punishment and adjudicating of cases (*al-ʿadl al-qanūni*), be it to the commoner or to those in high appointments or nobility; social justice (*al-ʿadl al-ijtimāʿī*) especially those concerning the division of wealth; and justice in Islam is applicable internationally (*al-ʿadl al-duwali*) which is applicable in all situations pertaining relationships and interactions in all nations.[92] Thus, concerning on combating the money laundering and terrorism financing in AMLATFPUAA, the commission of an offence is retrospective and extra-territorial which is apply to any serious offence, foreign serious offence or any unlawful activity whether committed before or after the commencement date.[93] This purpose is to protect for any infringements of the law and for the enforcement authorities to dispense justice when bring the matters to court of laws for the commission of an offence under AMLATFPUAA and in other jurisdictions, or vice-versa.

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83 Section 44(1) of the AMLATFPUAA

84 Ahcene Lahsasna, *Maqāṣid Al-Sharīʿah in Islamic Finance*, p. 14.

85 Ibid.,

86 Abd El-Rehim Mohamed Al-Kashif, "Shari'ah's Normative Framework as to Financial Crime and Abuse", *Journal of Financial Crime*, Vol. 16, No. 1, 86-96 (2009): p. 93.

87 Ibid.,

88 Section 5(1) of the AMLATFPUAA

89 Section 5(2) of the AMLATFPUAA

90 Ahcene Lahsasna, *Maqāṣid Al-Sharīʿah in Islamic Finance*, p. 14.

91 Dr Yūsuf Al-Qaraḍāwī, *Introduction to the Study of Islamic Law (al-Madkhal li-Dirāsat al-Sharīʿah al-Islāmiyyah)* translated by Azman Ismail, Md. Habibur Rahman & Ahmad Auzie Mohd Arshad, (Kuala Lumpur, Malaysia, IBFIM, 2013): p. 72.

92 Ibid., p. 75-76.

93 Section 2(1) of the AMLATFPUAA.

Recognition in all religions

The objective of *maqāṣid sharīʿah* is recognized in every religion as it is applicable to all human beings to ensure their existence and well-beings.[94] In relation to the AML/CFT, the laws in all jurisdictions are in *pari materia* which shows that combating the laws in combating these financial crimes are applicable in all the world. All countries in the world have to correspond with the Recommendation 2 of the FATF 40 Recommendations where should ensure their policy-makers, the FIU, law enforcement authorities, supervisors and other relevant competent authorities performed its function in combating these financial crimes. The Competent Authority and Enforcement Agency in Malaysia are always committed in combating these organised crimes by having a good level of compliance in domestic as well as regional and international co-operation in fighting these financial crimes. Also, at the international level, Malaysia is participating in various regional and international initiatives in its global fight against these financial crimes; for instance, by achieving good level of compliance with the FATF 40 Recommendation as well as members of the Asia/Pacific Group on Money Laundering (APG) and Egmont Group of Financial Intelligence Unit.

CONCLUSION

Malaysia is committed to protect its financial stability by having a robust legal framework in combating these organised crime. The FATF has commented that Malaysia has actively developed its strategies in combating these financial crimes for instance by updating its legal frameworks, policy documents as well as performing overall good levels of compliance with the FATF 40 Recommendations. Also, the investigations levels by the legal authorities which is the BNM as the Competent Authority and a range of Law Enforcement Agencies performing their various functions as essential components in combating these financial crimes. This shows that Malaysia has performed its good enforcement and implementation to have preventive measures and deter any risk of money laundering and terrorism financing.

From the Islamic point of view, committing financial crimes are prohibited in Islam. The responsibilities to maintain a public safety and protection of wealth is part and parcel of head of the country's responsibilities. Thus, in maintaining this level, the co-operation from all legal authorities is indeed relevant. The BNM and Enforcement Agencies as the legal authorities in combating these financial crimes is indeed performing its level as *al-muḥtasib* for the protection of *maqāṣid sharīʿah* under Islamic law. The responsibility of Competent Authority in performing its function to uphold the objectives of Shariah in performing its deterrent against any form of financial crimes is one of the main intentions of the AML/CFT legislation. Thus, in combating these illicit crimes, the power given to *al-muḥtasib* is in line with *sharīʿah* principles. Therefore, continuous enforcement by these Competent Authority and Enforcement Agencies is necessary to combat these financial crimes as well as to protect the financial stability of the country.

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94 Ahcene Lahsasna, *Maqāṣid Al-Sharīʿah in Islamic Finance*, p. 15.

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THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: ETHICAL CONCERNS AND REGULATIVE MEASURES

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INTRODUCTION

Third party funding in international arbitration is a relatively new phenomenon and thus has largely remained under-regulated. Although various attempts have been made to define the phenomenon accurately, no one definition is exhaustive or universally accepted which adds to the complexity.

This paper aims at explaining the phenomenon specially focussing on the practices as prevailing Singapore and Hong Kong. The various circumstances where parties opt for third party funding, ethical concerns arising out of it and the regulatory mechanisms have been dealt with in detail.

Part I of the paper describes the various arrangements and alternatives which are come under the umbrella of third party funding. An analysis is also provided of the systems prevailing in major international arbitration hubs that is Singapore and Hong Kong thus exploring the differences in these systems.

Part II explores the circumstances in which parties choose third party funding. Along with a case analysis, the various implications of the same have been explained in cases where impecuniosity drives a party to undertake third party funding as opposed to it being a strategic decision.

Part III gives a detailed account of the various ethical concerns surrounding the process with a two-fold analysis of the public policy concerns and the conflicts of interest.

Part IV suggests the regulatory mechanisms which must be put in place to solve grey areas of ethical concerns as well as make the phenomenon more certain and unambiguous. Guidelines for arbitrators have been explained along with a proposition of a regulatory body for funders to ensure that some gaps can be filled.

For third party funding to propel the phenomenon of arbitration forward and popularise it as a just and accessible dispute resolution mechanism, support from major international seats of arbitration must also be accorded along with proposed regulations.

ABSTRACT

Third Party Funding (TPF) in International Arbitration is a relatively recent development. This research aims at providing an all-encompassing insight into this upcoming issue in International Arbitration.

A brief introduction of the working of TPF is presented along with an overview of the widely used practices on the subject in international arbitration hubs like Singapore, Hong Kong and other major seats. A comparison is also offered between the practices of these hubs by analysing their pros and cons. This is followed by a vivid description of all the parties involved and their respective positions in the arbitral proceedings. The research deals with questions such as requirement of TPF and the various circumstances where it may be used. Further, analysis has also been provided to particular cases of impecuniosity of either of the parties, risk-hedging practices, and the indirect but effective increase in chances of success of a third party funded claim owing to it having passed through a rigorous screening process granting more legitimacy to the case. The immediate result of TPF has been analysed as it being a boost to the practice of arbitration as well as providing a greater access to justice.

The ethical concerns iterated time and again over TPF have also been examined from all necessary positions. The research contains details of the various scenarios that might arise in cases of conflict of interests between the arbitrator, claimant and funder. Issues of access to privileged information and privacy concerns have also been addressed along with an inquiry into disclosure agreements, security for costs and exercise of control over crucial matters.

Despite the growing popularity of the trend there has been limited sincere effort in carving out concrete measures to frame regulations. Therefore, this research also proposes certain directives to not only help streamline the process but also help in increasing the confidence of the funders into arbitration and incentivize more funders to join in. Regulating TPF becomes extremely essential owing to its potential to change the dispute resolution scene making it more conciliatory, open, inclusive and just.

Keywords-*Third Party Funding, Ethical concerns, Security for Costs, Disclosure requirements, Regulatory body*

WHAT IS TPF?

Third party funding is a phenomenon which is gaining increased popularity in both litigation as well as arbitration. This article primarily focuses the phenomenon as it occurs in arbitration. Third party funding can be defined as a tripartite arrangement wherein the funding for the case is not borne by the party itself but a third party funder. Essentially the nature of this agreement is tripartite because unlike an unfunded claim where only the party and the advocate have an arrangement, in third party funded claims, the funds are provided by an independent third party which may or may not have an interest in the claim apart from the pecuniary benefit. The two basic essentials of a third party funding are that the funder must have an identity distinct from the party and the and secondly the funder's return on investment must be from the arbitral award. The situation, however differs in cases where the funded party is the petitioner and when it is the defendant. In cases where the funded party is the petitioner, the funder gets a percentage of the proceeds from the award when the claim succeeds. As opposed to this is the situation wherein funded party is the defendant. In this case, the third party funder receives a pre-determined payment similar to an insurance premium. The funder is also entitled to an extra payment in case the dispute is decided in favour of the defendant as per the terms of the contract.[1]

There are also situations in which the third party funds law firms and therefore all cases represented by the law firm which can closely be seen as extensions of portfolio management cases.[2]

Another arrangement of third party funding is by assignment of claim wherein the entire claim is sold by the party to the funder and then the funder pursues the claim as the party itself. Although this structure varies slightly from classical third party funding arrangements, it follows the basic guiding principles and is thus classified as an alternative arrangement for third party funding. [3]

The three parties involved in a third party funding are the client that is the funded party, his attorney and the funder. The client receives the funding for the claim and makes the payment out of the proceeds awarded to him on the success of the claim. This implies that the funder need not pay any amount to the funder from his own pocket; the only payment to be made is calculated as a percentage of the award. The attorney argues and presents the case to the arbitrator. The third party provides the funds for the continuation of the claim. Any arbitration claim will also have an arbitrator who adjudicates the matter. This arbitrator is decided upon by the consent of both the parties to the claim. The importance of the selection process of the the arbitrator comes into the fore because it is ideal to disclose possible conflicts at this stage to avoid unenforceability of the award owing to questions of independence and impartiality of the arbitrator.

Although one may argue that since both third party funding and insurance contracts are risk hedging instruments, there significant differences between the two primarily on two levels. There is a close link between third party funded claims and insurance premiums in cases where the funded party is the defendant. However even in this case the two concepts significantly differ. Only the portion of predetermined payment to the funder by the defendant-funded party resembles insurance premium. While both the transactions are meant to hedge the risks associated with dispute settlement the most basic difference that arises out of the nature of these two transactions is that insurance is provided by an insurance company against a premium paid by the funded party. In contrast to this, there is no payment made by the funded party prior to the decision of the tribunal. [4]Secondly, irrespective of the result of the case the insured party needs to pay an amount for having the risk hedged. As opposed to

1 Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, 36 Cardozo L. Rev. (2015), 861

2 Nieuwveld Lisa B and Shannon Victoria, Third Party Funding in International Arbitration Kluwer Law International 2012, 3-13

3 Terrence Cain, Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater, Chi.-Kent Law Review (2014), 89

4 Nieuwveld Lisa B and Shannon Victoria. Third Party Funding in International Arbitration Kluwer Law International 2012, 133-134

this, the funded party pays only on success of the funded claim. Thus, there is an assurance to return for the insurance company but none for the third party funder.

Third party funding must also be distinguished from contingency fee arrangements with the lawyers. In contingency fee arrangements, the lawyer agrees to share the proceeds of the award as a part of his fee. Thus, essentially there are only two parties in this arrangement-the client and his lawyer. As opposed to this, in third party funded claims, since an additional party is added the arbitrator's independence may come into question because while evaluating the various conflict of interests because it is possible that the losing non-funded party may question the impartiality and fairness of the arbitrator or create problems at the enforceability stage.[5]

Third party funding significantly differs in its nature from a loan agreement[6] for two primary reasons. Firstly, because the final amount payable in a loan agreement that is the interest on a loan as well the principal amount due is pre-determined. In third party funding on the other hand although the percentage of proceeds is fixed, the actual arbitral award differs according to the arbitrator's decision and therefore the return of the funder cannot be predetermined. This distinction becomes more evident in case the funded party is a defendant because then the funder will also be entitled to an extra payment contingent on success of the claim.

Secondly the amount payable in a loan agreement is not contingent on the happening or non-happening of a certain event. The amount is payable and cases of default of payment are backed by a sanction. In a third party funding arrangement on the other hand, the amount becomes payable depending on the success of the claim. This implies that the funder may or may not get a return on his investment.

Although, on the face of it each party's role seems to be clearly defined, there is more often than not an overlapping of responsibilities and powers vested in each party to determine the course of the claim. These possibilities of overlapping interests lead to various conflicts which have been dealt with in a later part of the paper.

Of course in cases where these claims receive funding, there is a direct involvement of the party and thus a lot can be gained from their diverse experience and fresh perspective. Being solely interested in the quantum of the award they aid the counsel in increasing the win-ability of the case. Not only is access to justice increased in general by giving opportunities to parties with meritorious claims who can personally not fund their claims to go ahead with the claim but also gives a boost to the phenomenon of arbitration.

The flip side of the coin presents the loopholes in the current system. Although not justified, a benefit of doubt must be extended to the phenomenon because it is relatively new and largely under-regulated. Some argue that it shall lead to an increase in frivolous claims however that can be easily countered because firstly the arbitrator understands whether the matter brought before it has merit or not and also the filtering and selecting processes for funding these claims is so rigorous that non-meritorious claims would not be entertained by the funders in the first place. [7] While the lawyers are governed by a code of ethical conduct, the third party funding arrangements are highly unregulated and thus the funders and not bound by codes to ethical conduct.

5 Kalicki Jean E, Third-Party Funding in Arbitration: Innovation and Limits in Self-Regulation (Part 1 of 2), Kluwer Arbitration Blog (13 March, 2012) http://kluwerarbitrationblog.com/blog/2012/03/13/third- party-funding-in-arbitration-innovation-and-limits-in-self-regulation-part-1-of-2.

6 Jason Lyon, Revolution in Progress: Third-Party Funding of American Litigation, UCLA Law Review (2010) 571, 58

7 Khouri S and Bowman S, Third Party Funding in International Arbitration-a panacea or a plague? A discussion of risks and benefits (Transnational Dispute management,2011), 3-9

WORKING OF ARBITRAL INSTITUTIONS IN SINGAPORE AND HONG KONG SINGAPORE

Singapore put into effect a bill on 1 March 2017 as the Civil Law (Amendment) Act 2017 (Act). The act aims to abolish the common law torts of champerty and maintenance and also ensures that third-party funding is not contrary to public policy or illegal where it is provided by eligible parties and in prescribed proceedings.

The act further details that:

- The eligibility criteria for a funding party (under the act) states that the principal business of the party should be funding of dispute resolution cases and it must have a paid up share capital of not less than $5 million.
- Third party funding can only be utilized in international arbitration proceedings, and court litigation and mediation arising out of such proceedings.

The Act's coming into force was accompanied by related amendments to Section 107 of the Legal Profession Act (Cap. 161) (LPA) and the professional conduct rules for lawyers in Singapore (the Legal Profession (Professional Conduct) Rules 2015 (LPRCR).[8]

The amendments to the LPRCR concern two principal areas:

- Disclosure: practitioners must now disclose to the court or tribunal and to every other party to proceedings:
    - The existence of any third-party funding contract related to the costs of such proceedings.
    - The identity and address of any funder involved, at the date of commencement of proceedings, or as soon as practicable after the third-party funding contract is entered into.
- Financial interest: practitioners are prohibited from:
    - Holding financial or other interests in.
    - Referral fees, commission, fees or any share of the proceeds from, Third-party funders which they have introduced or referred to their client(s), or which have third-party funding contracts with their client(s).

The Act amends the LPA to clarify that the restriction in Section 107 does not prevent solicitors from:

- Introducing or referring a third-party funder to a client, provided the solicitor does not receive any direct financial benefit (excluding their usual fees, disbursement or expense for the provision of legal services to the client).
- Advising on or drafting a third-party funding contract for such client or negotiating the contract on their behalf.

8 Natalie Tan, Third Party Funding – A Step in the right direction for Singapore? Singapore International Arbitration Blog (25 November, 2016) https://singaporeinternationalarbitration.com/2016/11/25/third-party-funding-a-step-in-the-right-direction-for-singapore/

- Acting on behalf of the client in any dispute arising out of such contract.

HONG-KONG

A new legislation has permitted third party funding of arbitration costs and expenses seated in Hong Kong, also incorporating proceedings of the ancillary court and related mediation. This includes legal fees and other costs of the arbitration, such as the fees of the tribunal and expert witnesses, and the administration costs of arbitral institutions. Funding is also permitted for arbitrations seated overseas and those without a seat of arbitration, although in such cases, the legislation states that the funding is limited to the costs and expenses of services provided in Hong Kong.

To facilitate information sharing with funders, the new Hong Kong legislation allows for the disclosure of confidential information relating to an arbitration for purposes of having, or seeking, third party funding. Recipients of the information are required to maintain confidentiality over such information.

In practice, the level of control exercised by funders varies. Some funders are content to take a largely passive role, while others expect to play a more active role. The Hong Kong legislation provides for the drawing up of a Code of Practice governing the conduct of third party funders.

The current draft of the Code expressly provides that:

- A third party funder is required to undertake in the funding agreement that it will not control or direct the funded party as to the conduct of the arbitration, or
- To influence the funded party's lawyers to cede control or conduct of the arbitration to the third party funder.

Concerns over potential conflicts of interest such as those between the funders and the arbitrators have led to disclosure becoming a significant issue. This issue has been addressed with the help of the new legislation which mandates the party receiving the funds to disclose the fact that it is receiving funding apart from the fact that who is the third party funder to both the tribunal as well as the opposing party. Although the disclosure of the funding agreement has not been mandated. [9]

SINGAPORE vs. HONG KONG

The Hong Kong legislation provides that the doctrines of maintenance and champerty no longer apply to the third party funding of "arbitration". This includes arbitrations under the Arbitration Ordinance, whether international or domestic, and any proceedings before the court, an emergency arbitrator or mediator that are covered by the Arbitration Ordinance. The law also permits funding of the costs and expenses of services that are provided in Hong Kong in respect of arbitrations which are seated outside Hong Kong, thereby permitting the funding of the fees of Hong Kong based lawyers regardless of the seat of the arbitration.

Singapore has abolished the torts of maintenance and champerty altogether, legislating that third party funding agreements for "prescribed dispute resolution proceedings" are no longer contrary to public policy or otherwise illegal. Prescribed dispute resolution proceedings include international arbitrations and related court and mediation proceedings. Domestic arbitrations are not included, although the Government has indicated that the third party funding framework may be extended to other categories of dispute resolution proceedings after a period of assessment. Unlike in Hong Kong, the legislation does not include express provisions dealing with foreign-seated arbitrations.

9 John Choong *et al.* Third Party Funding of Arbitrations Permitted in Hong Kong, Lexology (14 June, 2017) http://www.lexology.com/library/detail.aspx?g=01ecd944-fb93-4227-85dc-664dfc781a3f

Regulation of funders

Both jurisdictions have been careful to ensure that the third party funding industry will be closely regulated. In order to benefit from the legislation in Singapore, a funder must be a "qualifying third party funder". This means that the funder must:

- Carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which it is not a party (that is, the funder must be a professional funder);
- Have access to funds immediately within its control, including within a parent corporation or the third party funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore; and
- Invest those funds, pursuant to a third party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings.

Crucially, a third party funder that fails to comply with these requirements will not be able to enforce its rights under a third party funding agreement, although a third party funder can apply for relief where it can show its non-compliance was accidental or inadvertent, or because it would otherwise be just and equitable to grant relief.

In Hong Kong, the manner in which funders will be regulated remains somewhat uncertain:

- An advisory body will be appointed to monitor and review the new legislation;
- An authorized body will be established to issue (and amend or revoke if appropriate) a code of practice setting out the practices and standards with which third party funders will be expected to comply;
- The code of practice will not be issued prior to public consultation on the issue, but "may" contain provisions dealing with, among other things, the content of third party funding promotional material, the content of funding agreements, minimum capital requirements for funders, complaint procedures, and procedures for addressing conflicts of interest; and
- A failure to comply with the code of practice does not, of itself, render any person liable to judicial or other proceedings but may be taken into account if relevant to a question being decided by a court or arbitral tribunal.

Disclosure of third party funding arrangements

Both jurisdictions have also provided for the disclosure of third party funding arrangements.

In Hong Kong, a funded party must notify the tribunal and every party of the existence of a funding agreement and the identity of the funder either upon commencement of an arbitration, or if the agreement is made after commencement, within 15 days of it being made.

In Singapore, there are proposals to amend the Professional Conduct Rules to require lawyers to disclose the existence of a third party funding agreement and the identity of the third party funder to the court or tribunal and to every other party to proceedings "as soon as is practicable."[10]

10 Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016, Ministry of Law Singapore (30 June, 2016)

Liability for adverse costs and security for costs

Hong Kong has not given tribunals the express power to award costs against third party funders. However, the Government has accepted the Hong Kong Law Reform Commission's recommendation that this issue be further considered in the initial three-year period following implementation of the legislation.[11] On the question of whether the tribunal should be empowered to order security for costs against a third party funder, the Government again accepted the Law Reform Commission's recommendation that this was not necessary given that the powers of a tribunal to order a funded party to give security for costs (which will likely be paid by the funder anyway) afforded adequate protection. In Singapore, these questions do not appear to have been specifically addressed.[12]

REASONS FOR OPTING FOR TPF AND THE VARIOUS IMPLICATIONS OF CHOOSING TPF

Third party funding is a recent development and is only going to grow in the near future owing to the increase in the popularity of arbitration as a dispute redressal mechanism.

The various reasons why third party funding is gaining increased esteem is because it is primarily seen as a means of increasing access to justice to those who do not possess the financial ability to fund their claim. It also helps the funded party hedge the risks associated with an arbitration claim arising primarily out of uncertainty.[13] Another significant distinction of third party funded claims is that these claims are vetted by the potential funders to analyse the strength of the case. The funders provide funds only to claims that have the possibility of getting a higher award so that they can re-claim their "prize". This vetting process helps the client counsel to not only work on and improve the merits of case but also get an opportunity to defend their stance before the actual arbitration proceedings start. This acts as a preparation stage and thus irrespective of whether the funder decides to fund the claim, the client benefits from the experience.

Issues pertain to the ethical concerns and the conflict of interests of the funded part and the funder, the attorney and the funder, funder and arbitrator and funder and the other(non-funded) party. All these conflicts are dealt with separately in the latter half of the paper. It is believed that more than the concern of the prevailing conflict of interests, it is of greater significance to plug these loopholes and fill these gaps. A step in this direction would be by regulating the third party funding industry.

Thus, we see that the phenomenon of third party funding is not only significant in the context of international arbitration owing to increased popularity but also an area of academic research to fill certain gaps putting the regulatory mechanisms in place.

The various circumstances under which third party funding is undertaken can be analysed from the perspective of both the funder as well as the client.

Looking from the perspective of the funder, the major, if not only, consideration that drives him is the monetary incentivisation. It thus logically follows that cases where damages are not involved are not funded. This also eliminates possibilities of funding claims that will not yield a high return from which the funder can draw a proportion and have a return on his investments. The funder takes into consideration the chances of his client winning the case. This plays a significant role in determining his quantum of return on investment. Another objective criterion analysed by the funder is the ability of the non-funded party to pay the damages because in assessment of claim by the arbitrator, it is taken into consideration whether and to what extent the other party can pay damages.[14]

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11 Third Party Funding for Arbitration Report, The Law Reform Commission of Hong Kong (October 2016), Paragraph 7.31

12 Ronnie King & Rob Palmer, Third party funding of arbitration in Singapore and Hong Kong: a Comparison, Ashurst (13 February, 2017) https://www.ashurst.com/en/news-and-insights/legal-updates/third-party-funding-of-arbitration-in-singapore-and-hong-kong-a-comparison/

13 *supra* note 8

14 Giaretta Ben, Third Party Funding in International Arbitration, Ashurst (13 January, 2017) https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/

Various circumstances under which the party to a conflict approaches the funder are:

1. The most basic reason why any party approaches a third party funder is when funding the claim is not financially feasible for the client and thus third party funding allows greater access to justice. Parties generally prefer arbitration as a dispute settlement mechanism over other forms of dispute resolution in case the deterrence of high costs is removed. Thus by allowing for regulated third party funding, boost is given to arbitration as a whole. This is not only beneficial for the parties opting for arbitration but also for the judicial systems as there is a reduction in litigation suits and thus a paradigmatic shift from litigation to arbitration as mechanisms for dispute redressal. [15]

2. The funded party may also approach third party funding to lay-off certain risks associated with the arbitration proceedings pertaining to costs and legal expenses.

3. The client might approach funder for receiving the benefit of added legitimacy to the claim. The due-diligence that is so rigorously carried out by the funder for deciding whether or not to fund a claim that cases which actually receive funding are also the ones which essentially carry with themselves a higher probability of converting into a winnable claim.

A peculiar situation arises when the impecuniosity and the subsequent inability of the party to fund the claim has arisen due to the acts of the other party. The law on this point has been discussed in the judgement of Essar Oilfields Services Ltd v Norstock Rig Management Pvt Ltd.[16] In this case, the respondent relies on third party funding for financing his claim and the arbitrator directs the applicant to recover the costs of the third party funding as a part of "other costs" envisaged under Section 59(1)(c) of the Arbitration Act 1996. The arbitrator explains that although under Section 63 the recoverable costs are free to be determined by the parties, in the current case such was not the scenario. Thus in accordance with Section 63(3) the tribunal is empowered to award recoverable costs as it deems fit. The arbitrator, while assigning reasons to awarding third party funding costs as recoverable "other costs" explains that the it was primarily due to the acts of the applicant that the respondent had to rely on third party funding and that it was only fair in the interests of justice that the applicant be made to pay for the costs of such funding.

The applicant challenged the award under Section 68(2)(b) contending that the tribunal had overstepped its powers and there was thus a serious irregularity in the award. The respondent, on the other hand contended that the applicant had lost his right to object under Section 73(1) because the application was out of time and no reasonable justification provided for the time lag.

The application was rejected because of it was held that the arbitrator had not overstepped his powers in interpreting "other costs" and the provisions of Section 68(2)(b) have been designed only to address cases where there has been gross miscarriage of justice and a blatant disregard of processes followed in arbitral proceedings. The judgement also hinged on the fact that a functional definition of "other costs" must be accepted thus allowing for different cases to be adjudicated differently rather than trying to apply a one-size-fits-all definition especially in the contemporary reality where third party funding is increasingly becoming the norm.

Various reasons drive a party to undertake third party finding and thus the arbitral award, costs award and other decisions of the arbitrator must also be taken considering the same.

15 ibid

16 2016 EWHC 2361

ETHICAL CONCERNS

Having looked at situations in which third party funding is employed both out of necessity and choice, larger questions of ethical concerns surrounding the third party funding debate must be explored with greater detail along with the proposition of regulatory mechanisms that must be put into place in order to fill such gaps and resolve such contentious concerns.

Since the number of parties involved in the arbitration proceedings when at least one of the parties opts for a third party funding the claim increases, the probable complications as well as the possibilities of conflict also increase. The third party has an identity independent of the party and thus another added layer of complexity increases the possibility of conflict of interests.

The ethical concerns of third party are essentially two-fold. While one aspect finds third party funding as illegitimate and incongruent with public policy, raising concerns of age-old customs of maintenance and champerty, the other aspect concedes to its legitimacy but concerns itself with internal conflicts, disclosure requirements and awarding of recoverable costs.

The common characteristic of maintenance and champerty is that the finding party does not have an interest in the case. While maintenance is the provision of financial assistance in a matter that the funding party has no interest in, without expecting to sharing the proceeds of the final award; champerty is the provision of financial assistance in order to share the proceeds in event of the success of the claim. The main reason why these acts are regarded as opposed to public policy is to prevent frivolous claims from being filed. On close analysis, however, it is clear that any claim that receives third party funding is probabilistically more favourable for the funded party. Had the claim not been meritorious it would not have received funding. Thus the filtering process is so rigorous that trifling claims are filtered out such that only meritorious claims receive funding. In light of this, it will be incorrect to apply archaic provisions of common law in the context of third party funding in international arbitration.[17]

The concepts of maintenance and champerty date back to medieval English customs of drawing distinctions between the role of a barrister and a solicitor. Traditionally, a barrister was not paid for his services in order to ensure that the quality of advocacy and loyalty towards the client was not prejudiced by the amount of payment received in exchange for their services. Gratuitous payments were made as per discretion of the client but there was a legal bar on accepting a "fee" for a service rendered. Solicitors, on the other hand, were responsible for dealing with the financial transactions. This distinction however no longer exists in practice and therefore as England has already allowed "alternate business structures and self-regulation for third party funding".[18] Contingency-fee arrangement wherein lawyers claim a part of the award as their fee contingent on the success of the claim are still struck by public policy concerns however the argument of extending these concerns to third parties seems logically fallacious.

Third party funders exercise a direct or indirect control over the decision making process depending on the funding agreement. However, there is no 'quality of service' being compromised owing to their interest in the award as is the case with an attorney contingency agreement. Since the basic reason for prohibition of contingency-fee arrangements and invocation of principles of maintenance and champerty is the possibility of the lawyer's quality of service being compromised owing to his added interest in the claim is inapplicable in cases of third party funding, applying the same standards of maintenance and champerty defeats the purpose. [19]

Although, third party funding should not be struck with provisions of maintenance and champerty, blanket provisions allowing or disallowing third party funding on these grounds, in any jurisdiction might be dangerous. Each case must be viewed objectively on the basis of its own merits to accurately analyse the reason for opting for third party funding as well as the nature of agreement. In situations where the funded party could not have carried forward with the claim had he not been

17 Nieuwveld Lisa B and Shannon Victoria, Third Party Funding in International Arbitration (Kluwer Law International 2012), 41-42

18 Shannon Victoria, "Reshaping Third Party Funding", Tulane Law Review 91(2017), 454

19 ibid

funded, should viewed with lesser strictness owing to the reason for opting was necessity and not a strategic one. In cases where the funding agreements are such that they are unfairly exploitative or where the third party funder pays for the attorney and/or exercises a high degree of control over major decisions like which direction and strategy the attorney should apply, what should be the minimum threshold settlement etc. should be strictly viewed in light of being contrary to public policy.

Usury is another public policy concern cited by scholars and institutions. It refers to an arrangement entered into by the parties whereby the party granting the loan charges a rate of interest higher than that allowed by law. [20]However, for usury to be a concern, a parallel must be drawn between a loan agreement and third party funding. There is a clear distinction in these two arrangements as has already been described in the first section of the paper. Since the payment to the third party is contingent to the success of the claim and not absolute, as opposed to a loan agreement, a third party funded claim cannot be struck by the public policy concern of usury.

The second aspect of ethical concerns relates to the relationship between the various stakeholders in a third party funding arrangement and their conflicting interests. Conflicts may arise between the arbitrator and funder in cases where in the third party funder manages the portfolio of the law firm representing the client as he may face the same arbitrator multiple times. The arbitrator may be a part of the law firm whose portfolio is being handled by the third party. It is also quite possible that the arbitrator is the member of the investment advisory panel of the third party funder firm or is a consultant to the funder.

The attorney and funder may have a conflict of interest with respect to the waiver of attorney-client privilege. Since the funder provides the money to pursue the claim he directly and indirectly wields a certain amount of influence which may interfere with the attorney-client privilege. The third party may demand full disclosure of information to which the attorney is privy in order to decide to fund the claim or not. This gets slightly problematic when during vetting process, the party seeking funding reveals all information and the third party decides against funding the claim because the information to which the funder is privy can be misused and this is one of the essential gaps that must be filled while drafting regulatory mechanisms. The interests of the third party and funded party may come into conflict in deciding the direction that the case shall progress in. The funder would want the case to progress in way such that his return increases whereas the client may be driven by different motivations and sometimes they might come into clash. These two conflicts rest at the heart of the problem pertaining to how much control the third party can exercise in decision making.

ARBITRATOR AND FUNDER:

The relation between an arbitrator and a third party funder is the one which is subject to the most scrutiny. It involves issues of disclosure, confidentiality, past records and acquaintances. The foremost issue is disclosure. Although most of the arbitral institutions have made it a norm that the funded party should let out the details of the funder as soon as is practicable. Some arbitral institutions go on to make a rigorous conflict analysis and background check of the funder and the arbitrator to prevent any future complications involving arbitrator bias. Opposing parties are not allowed to have the details of the confidential funding agreement of the person in front if the details are irrelevant to the dispute at hand.

Although the rules require an arbitrator to be independent and to disclose any conflicts of interest, an arbitrator may not know that he has been indirectly appointed by the same third-party funder in multiple arbitrations. If the arbitrator does not know that a claimholder receives funding from a third party, he may not disclose his holdings in the third-party funding corporation or his law firm's involvement in cases funded by such corporations. If such conflicts emerge during the arbitral process, a new arbitrator may have to be appointed, thereby disrupting the proceedings. If the award has already been issued, the conflict may cause the award to be annulled or to be denied recognition or

20 Nieuwveld Lisa B and Shannon Victoria, Third Party Funding in International Arbitration, Kluwer Law International (2012), 43

enforcement. The potential effects of non-independence are great. Because of the potential disruption of the arbitration and the possibility of annulment, non-recognition, and non-enforcement of the award, conflicts of interest should be addressed prior to the appointment of the arbitrator.

ATTORNEY-CLIENT PRIVILEGE:

"The attorney-client privilege covers communications made between privileged persons, in confidence, for the purpose of obtaining or providing legal assistance for the client."21

Privileged persons are the counsel and certain agents or technical advisors who facilitate attorney-client communication. However, the disclosure of privileged communications to anyone other than a privileged person, generally waives the privilege and the relevant communication is subjected to disclosure. 22

An exception to the rule that privilege is waived by communication of privileged information to a non-privileged person, is the "common interest" doctrine. Under this doctrine, a court may allow material to remain privileged despite disclosure to a third party, as long as that third party has a sufficiently close "common interest" with the disclosing party, the disclosure is made in confidence, and the disclosure is made within the context of that common interest. It is not always easy to define exactly what will qualify as a "common interest" sufficient to maintain privilege in the face of a disclosure.

The availability of this exception does not require parties to be co-defendants or to be represented by the same lawyer. It does require that parties have a common interest and agree to share information regarding that common interest with each other on a confidential basis.

Thus, while some commentators are confident that the "common interest" exception provides sufficient comfort to shield discussions with sources of TPF behind privilege,[23] significant caution appears to be warranted, both due to the paucity of reported decisions in this area and significant harm that can result when the attorney client privilege is lost. Indeed, waivers of privilege can be found to extend well beyond any specific documents shared, to include additional documents that may never even have been turned over to a third party.

THE DEGREE OF "CONTROL" TO BE PERMITTED TO A THIRD-PARTY FUNDER:

Another sensitive area is the issue of control rights. Third party funders, especially in common law jurisdictions may seek to avoid the acquisition of control rights since they have not as yet done away with doctrines of champerty and maintenance and thereby fear that excessive interference could render their funding agreements unenforceable.

Funding agreements, in anticipation of conflict over an important strategic decision regarding the claim, can provide for rights securing a return on investment to the funder should the funded party opt for a decision contrary to the one by a neutral expert called in for the specific situation. Two classic examples of such a conflict would be whether a particular settlement offer should be accepted or whether a claim should be discontinued.

The issue of control is a sensitive one and thus international arbitration has been targeted by certain funders seeking to exercise greater influence than permissible in in domestic courts as these public policy rules or rules of legal ethics are not applied and extended to international arbitration proceedings. Also to be noted is that certain funders who are present in jurisdictions that restrict funder control seek to achieve control by subjecting the funding agreement to laws which are lenient

21 Commission on Ethics 20/20, White Paper on Alternative Litigation Finance, (American Bar Association), 35-38.

22 Commission on Ethics 20/20, White Paper on Alternative Litigation Finance, (American Bar Association)

23 T. Warren, Preserving Attorney-Client Privilege: How Companies Maintain Confidentiality of Documents and communications when using a Third-Party Litigation Funder, Directorship (March 9, 2011)

in that regard.[24]

ADVERSE COSTS AND SECURITY FOR COSTS:

This is an issue unique to arbitration. Since Australian and English courts already possess the powers to make costs orders against funders. It is appropriate for arbitral tribunals to have the power to award costs against a funder, provided:

- The funding agreement for that arbitration contains a clause to pay any adverse costs award (noting that not all funded clients will choose to contract for such an obligation; for example, the client may wish to bear the risk itself, or obtain an ATE insurance policy from another provider); and
- The adverse costs order arises in relation to costs incurred in a period in which the arbitration was funded by the third-party funder in question (noting that not all proceedings are funded from the outset; it is inequitable for costs to be ordered in respect of matters arising prior or after the period of funding).[25]

This position is consistent with International Bar Association ("IBA") Guideline 6(b), which requires the presence of a

direct economic interest in . . . the arbitration: If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.'[26]

Since the IBA has deemed that funders may be identified with the funded claimant, it is arguable that they may be deemed to have agreed to arbitration also. However, many, if not most, arbitration decisions have found that the funder did not agree to be bound to the arbitration agreement. The funder therefore cannot necessarily be required to pay any adverse costs award. There is considerable potential for uncertainty in this regard, and for unnecessary applications seeking security for costs.[27]

Regarding security for costs, it is considered to be part of the funder's commitment and it is, as such, provided for in the funding agreement. Security for costs may depend on whether the client is asking for it.

REGULATORY MECHANISMS

Having analysed the several aspects of ethical concerns that arise and are an inherent in the phenomenon of the third party funding, the various ways to fill these loopholes and resolve these concerns must be examined.

The three stakeholders due to which potential conflict arises are the arbitrators, attorneys and the funders. While every attorney is bound by ethical codes of conduct and are thus regulated, the International Bar Association has proposed certain guidelines for the arbitrators to follow in order

24 Aren Goldsmith and Lorenzo Melchionda, Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask), Int'l Bus. L.J. (2012), 53

25 Susanna Khouri and Olivia Gayner, Singapore and Hong Kong: International Arbitration Meets Third Party Funding, Fordham International Law Journal, 1045

26 IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6(b).

27 Susanna Khouri and Olivia Gayner, Singapore and Hong Kong: International Arbitration Meets Third Party Funding, Fordham International Law Journal, 1045

to resolve conflict by disclosure. However, the main party due to the entry of which there is a need to look into potential conflicts and disclosure requirements remains largely unregulated and thus a vacuum is observed. Several explanations cited for the under-regulation is that funders do not traditionally fit in any of the roles prescribed in the process of arbitration and the practice of third party funding is still in its nascent stages. The rate at which it is growing is unprecedented and there is thus an urgent need to devise a regulatory regime.

One of the unexplored avenues of regulatory regimes is the creation of an international body which will regulate the entry of funders in the market by issuing licences, prescribing a code of conduct and placing sanctions on non-compliance with the same. The structure of this may be construed as one similar to any professional organisation regulating the entry of professionals within it.

The need for this regulatory mechanism can be identified in the situations where the arbitral award is not enforced due to questions of his independence and impartiality and the entire onus of non-disclosure and misinformation falls either on the arbitrator or the funded party. The gap here is that it is usually that the funder, in the funding agreement, adds clauses which restrict disclosure to the requisite extent.

All aspects of the degree of control a funder can have while the arbitration proceedings are going on can be regulated by specifying the kind of access a funder will be given. This regulation can be put in place by the proposed body. The documents essential to the case and the privileged information of the client to which only the attorney is privy can be accessed by the funder only if the regulatory body permits him to do so. It is usually so that the funder has a greater bargaining power, especially in cases where the reason for funding is the impecuniosity of the party. The funder controls the strings of the purse and therefore an unregulated scenario might lead to exploitation of the party or jeopardising interest of the party so that the funder can get a higher return. These possibilities of serving personal interests can also be curbed if it is written in black and white the certain limits to which the funder can access information. Failing to meet these requirements must warrant a sanction because in the absence of one, the regulation becomes a directive thus having mere persuasive value and bringing back the situation to square one.

The advantages that can accrue of this proposed suggestion are:

1. Creating an exhaustive database of all funders entitled to fund claims in international arbitration can help resolve basic issues of evasion of accountability and can negate reasons and vested interests of not disclosing.
2. There will be clarity on the kind of control funders will have on the decision making process during the arbitration proceedings.
3. The issue of waiving off attorney-client privilege will be resolved by allowing limited access to privileged information, documents and meetings.

Thus this regulatory mechanism not only ensures impartiality in the arbitrator's decision making but also addresses issues of relations inter-partes. Thus the funding agreement drawn out cannot be unfairly favourable for the funder, who more often than not has a higher bargaining power especially in cases where the impecuniosity of one party necessitates him to opt for third party funding.

This proposition can also suffer from various drawbacks like:

1. It is highly unmanageable to regulate an industry which has not only largely remained unregulated but also has no barrier on entry. There is no specific mechanism to regulate entry on the basis of a professional qualification. Thus to get this system in check, the barrier qualification must be put in place.

2. The whole reason for promoting third party funding in particular and arbitration in general is the faster and more effective access to justice. Putting stricter checks and balances might discourage people from opting for arbitration as a dispute resolution mechanism.
3. There will be a general disincentivization for funders from entering the third party funding market. This might act as a self-defeatist measure.

However, the drawbacks of the proposed system must be seen in context to not only the urgent need of a formalised system but also the advantages that will accrue by following the proposed system.

The drawbacks can easily be mitigated because the proposed structure will not entail a one-size-fits-all mechanism. The regulations will be over-arching framework in which each case will be decided as per its merits at stages of arbitration as well as the enforcement.

Regulatory mechanisms can be classified into three basic categories:

1. Procedural- These address concerns of how to regulate the degree of control the funder exercises over the decision making process, access to certain documents and the potential waiver of attorney-client privilege. The proposed structure is thus a procedural regulatory mechanism

2. Transactional- include regulatory mechanism specifically from the point of view of the funder and his other transactions being affected by this arrangement. This regulation can be achieved through the licensing and compliance with disclosure requirements as prescribed in the proposed structure.

3. Ethical - this relates to solving conflicts of interests among the various parties to an arbitration proceeding. The IBA guidelines as described below fall under this category. [28]

There already exists a mechanism that ensures independence and impartiality of arbitrators with respect to disclosure requirements. The international bar association has prescribed for certain conditions and classified the same into lists- the red list, the green list and the orange list, based on the severity of the disqualifying conflict.

Another notable observation is that the disclosure that has been made in no way leads to disqualification nor does it tilt the presumption towards becoming a ground for the same.

The various circumstances mentioned which lead to possible conflict situations due to the existence of third party funding are explained as below:

1. The red list of the guideline document refers to serious cases of conflict which might lead to disqualification. The red list is further classified as the non-waivable red list and the waivable red list. While the circumstances enumerated in the former lead to direct disqualification of the arbitrator, the ones in the latter may be waived off at the option of the parties.

(a) Non-waivable red list- The arbitrator has a direct controlling influence on either of the parties or entities in the proceeding or a significant personal financial interest in the award. If the arbitrator or his firm derives significant financial income from the award, it is ground for automatic disqualification.

(b) Waivable red list- The arbitrator has had prior involvement in the case in the form of giving advice, a close family member of the arbitrator has a significant financial interest, and the arbitrator is a lawyer

28 Shannon Victoria, Judging Third Party Funding, UCLA Law Review 63, (2016), 10

in the same firm as the counsel or a firm whose portfolio is handled by the third party funding either side.

2. Orange list- includes circumstances which give rise to doubts in the minds of the parties regarding the independence and impartiality of the arbitrator. The cases included here relate to situations wherein the arbitrator has served as a counsel for or against either of the parties in the past three years, or served as an arbitrator to a dispute where either of the two parties was present in the past three years. Cases of third party funding most implicitly find a place here because guideline 3.2.2 mentions of situations where the the legal organisation to which the arbitrator belongs, renders services to either of the parties. There can be situations wherein the third party renders financial assistance and is in the form of a partner at that particular law firm. Friendship or enmity of the arbitrator with any of the entities pertaining to the proceedings is also described under this list.

3. Green list- enumerates circumstances where although objectively there exists no conflict but when viewed subjectively form the point of view of the parties, there might be circumstances giving rise to a conflict of interest. Some circumstances include the arbitrator expressing legal opinion upon a point in question or having a professional or social (and not personal) relationship with any entity in the proceedings. [29]

Although disclosure is of utmost importance a balance must be struck between disclosure requirements and maintaining confidentiality while ensuring fair treatment to all parties. While disclosure is essential, expectation of transparency might be problematic. It is necessary to distinguish these two concepts because while disclosure implies the extent of information released by the party within the arbitration proceeding whereas transparency requires information to be made public. Transparency requirements might also be compulsory in cases where the funding companies are listed and public. [30]

Incentivised disclosures always work better than straight-jacketed requirements which jeopardise the chances of success of a clam. In this context, arbitrators should not consider third party funding while allocating security for costs because this will in fact discourage the parties to disclose the presence of a third party. However, if there is no consideration to whether a claim is funded while deciding security for costs, third party funders will not be averse to disclosure because it does not directly jeopardise their interests.

Thus the most effective form of regulatory mechanism is thus voluntary disclosure for the parties and arbitrators and the creation of a body to regulate actions of the funders.

CONCLUSION

Considering the analysis brought forth in this paper with regards to the reasons for opting for third party funding, ethical concerns and voluntary incentivised disclosure, the article presents a controversial solution to the existing loopholes in the system. The proposed system of a regulatory body for funders controlling professional entry of potential funders, limiting the access to privileged information and placing checks and balances for ensuring that higher bargaining power of the funder does not jeopardise the interests of the funder.

The proposition has been analysed with both its pros and cons along with an in-depth analysis of each stakeholder's interests and position pre and post the implementation of the solution.

lthough this a paradigmatic shift from the current system where lesser accountability is assigned

29 IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of IBA Council (2014)17-27 www.ibanet. org/Publications/publications_IBA_guides_and_ free_materials.aspx

30 Nieuwveld Lisa B and Shannon Victoria, Third Party Funding in International Arbitration, Kluwer Law International, (2012), 127-158

to the funder, it is expected that such a system can solve various issues regarding waiver of attorney-client privilege and unfair funding arrangements which although might not have a bearing on the ultimate arbitral award but takes away from the funded party the right to pursue the claim in a manner and direction he expected to. Thus the proposed regulations do not seek to solve the problems arising out of conflicts arising inter-parte because there is a well-established system of disclosures as a part of most academic literature which aim at providing a case based disclosure system as opposed to a one-size-fits-all system. It seeks to ensure that funding arrangements between the funded party, attorney and the funder is fair and accountability can be fixed for non-compliance and exercise of higher bargaining power.

Thus this article makes a humble attempt to suggest a two pronged regulatory mechanism to cover situations of pre-arbitration proceedings, the actual proceedings and the enforcement stage.

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Outsourcing Justice and the Emergence of Consumer Ombudsman Regulatory Framework in the United Kingdom

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ABSTRACT

This study aims to examine the phenomenon of outsourcing access to justice in the consumer goods and service industry. It is argued that one of the primary functions of any government is the provision of access to and delivery of justice. However, in the consumer goods sector, regulatory reforms have enabled the government to outsource this function to private ADR service providers or consumer ombudsman. The paper adopts doctrinal methodology through the analysis of consumer ombudsman regulations and annual reports of private ADR entities in the United Kingdom. The study finds that outsourcing justice to consumer ADR entities through appropriate legal framework is capable of ensuring the attainment of consumer protection objectives and enhances access to justice, without jeopardising the interest of businesses and consumers. Literature on outsourcing focuses on legal services outsourcing to private law firms to represent government interest. Outsourcing justice is unique as an emerging trend in consumer protection and dispute resolution with minimal government intervention. In an era of privatisation of government services and pursuit cost saving measures, alternative regulatory model is suitable through outsourcing consumer protection regulations to ADR entities.

Keyword: consumer, outsourcing, ombudsman ADR, United Kingdom

1. INTRODUCTION

Outsourcings of governmental functions to private contractors have become significant feature of contemporary democratic institutions. Primarily a positive collaboration with private investors, the phenomenon can be seen in all sectors including, national security, education, housing infrastructure health, regulatory enforcement among others.[1] The justice delivery system has been immune from outsourcing due to its vantage position in upholding the rule of law which is a constitutional reserve of the judiciary. According to Paul, outsourcing is one of the situations where the boundaries between public and private sectors are tested. Therefore, the author suggests that there must be clear justification for outsourcing to the private sector. [2]

Recent regulations in the United Kingdom have ushered the emergence of outsourcing justice to self-regulated and private ADR entities in the goods and services sector. This paper examines the legal framework for justice outsourcing in the United Kingdom with special reference to protection of consumers. Accountability of private entities and review of administrative decision are some of the

1 Kimberly N Brown, "' We the People,' Constitutional Accountability, and Outsourcing Government," *Indiana Law Journal* 88, no. 4 (2013): 10.

2 Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press, 2007).

major arguments against outsourcing. Does the use of private ADR entities guarantee the protection of consumers without jeopardizing the interest of businesses? The paper discusses the role of ADR entities, structural reforms and some of the legal innovations for monitoring the entities. The article assesses the accountability policy framework and review mechanism for ADR entities under the consumer protection regime in the UK.

2. OUTSOURCING JUSTICE: AN OVERVIEW

Privatization and outsourcing is "the practice of delegating public duties to private organizations." The concept came to the fore of public policy in the 1980s under the Margaret Thatcher as a mean of reducing budget deficit in the face of decreasing government revenue.[3] Justifications for outsourcing include the potential for private entities to deliver public services, effectively, efficiently and a lower cost without jeopardising public interest.[4] Thus, where the government is capable of delivering better services, at the same cost effectively privatization of such services will be useless.

Despite the economic benefits, public accountability of private entities engaged in outsourcing remains a questionable aspect of outsourcing of government services.[5] Although the economic benefits for outsourcing in certain sector is acceptable to the public,[6] more proof is required to justify economics of outsourcing justice delivery, administration and enforcement. The ubiquity embedded in the outsourcing of rule of law, ADR and access to justice requires appropriate policy framework to serve public interest.[7]

In the context of this study, public accountability means the ability of citizens to seek explanation or justification for administrative decisions or query its performance. Therefore, this requires transparency in the policies, procedure, expenditure, decision and review of its decision.[8] The fears over outsourcing and accountability are also strengthened general non-application of Freedom of Information Act to private entities. Outsourcing of government services must not undermine public accountability and accessibility. However, the elements of transparency and accountability can be made applicable through an appropriate framework for outsourcing. The next section discusses the outsourcing of consumer ADR in the United Kingdom.

3. CONSUMER ADR OUTSOURCING IN THE UNITED KINGDOM

Under the consumer regulations in the UK, private ADR entities are authorised to perform one of the most important services offered through the justice system. Consumer dispute resolution landscape has become an open market with about 33 ombudsman institutions and certified ADR entities.[9] These ombudsmen are spread across for different services and trade in both public and private sectors. In the private sector, consumer ADR entity is authorized by regulators to independently resolve complaint between consumers and registered companies within the specific industry or trade. In other words, the entities are self-regulated in their procedure, resolution and enforcement of consumer complaints. This policy is premised on ADR regulations issued in the EU[10] which recommends key changes in the consumer ADR landscape to accommodate ADR entities. The aim is to enhance availability of quality ADR centers and access to justice for consumers within the EU.[11]

3 John D Donahue, *The Privatization Decision: Public Ends, Private Means* (Basic Books, 1991), 3.

4 Sarah L Stafford, "Outsourcing Enforcement: Principles to Guide to Self-Policing Regimes," *Cardozo L. Rev.* 32 (2010): 2293.

5 Jody Freeman, "The Private Role in Public Governance," *New York University Law Review* 75 (2000): 543–1843.

6 Stafford, "Outsourcing Enforcement: Principles to Guide to Self-Policing Regimes."

7 Freeman, "The Private Role in Public Governance."

8 Mark Bovens, "The Concept of Public Accountability," in *The Oxford Handbook of Public Management* (Oxford University Press, USA, 2005), 182.

9 "Annual Report 2015-16, Ombudsman Association (OA)" (Ombudsman Association United Kingdom., 2016), http://www.ombudsmanassociation.org/docs/OA_Annual_report_15-16_loRes.pdf.

10 Alternative Dispute Resolution Directive 2013/11/EU.

11 Pablo Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, ed. Pablo Cortes (Oxford

There was an initial attempt by the UK government to consider public funding of a selected consumer ADR entity to fill the gap of ADR services in specific sectors. Through a procurement call, the government received several submissions from existing private ADR entities that are willing to fill the gap.[12] Thus the government withdrew the tender and in its place made consumer ADR an open market for qualified service providers. The competent authority for the issuance of ADR approval was designated across various sectors. This birthed the legal framework for consumer ADR outsourcing in the United Kingdom.

In 2015, the protection of consumers form unwholesome and unfair business practices in selected sectors ranging utilities, energy, aviation and service sector was transferred effectively to private ADR activities.[13] The entities are popularly known as "Consumer Ombudsman" or similar names to signify their complaint handling abilities which seek to imbibe the characteristics of ombudsman concept. Ombudsman is known as case handler who investigates and resolves complaint from the public.[14]Under the UK regulation, certain sectors which are already regulated or possess established requirement for its activities are excluded from private ADR entities. For example, the Financial Ombudsman Service and the Legal Services Ombudsman remain under public coverage.

Legal status is given to private ombudsman institution pursuant to the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015 which came into force on 9th July 2015 and the European Union (EU) Regulation No. 524/2013.[15] The regulation designates the UK Secretary of State as the competent authority to approve any body or institution as an ADR entity while the secretary has in turn appointed the Chartered Trading Standard Institute (CTSI) to exercise this function on his behalf.[16] Applications to become an approved ADR entity must be made pursuant to the requirements set out in the regulation and relevant rules of trade sector regulators.[17] Depending on the nature of the trade sector, an ADR entity may need to apply to other entities such as the Financial Conduct Authority, Civil Aviation Authority, Gambling Commission, Gas and Electricity Markets Authority and Office of Communications.[18] This is important in order to ensure compliance with additional requirements, best practices and peculiarities in the trade sector. In other words, the competent authority must be satisfied that the applying entity meets the requirement to deliver dispute resolution services in the sector or industry.

In other to actualise the EU directive on consumer ADR, the government passed the Notwithstanding the emergence of BREXIT, it is not certain that the development in the UK consumer ADR regulation will be reversed. Under the regulation, the CTSI as the competent authority and the sector regulators have the duty to maintain a list of approved ADR entities.[19] In addition, certain information about the ADR entity must be supplied to the authority and maintained by the authority during application and after approval.

The approval framework for ADR entities in the UK is shown in Figure 1 below. The information include name, contact details, website address, fee (if any), the sectors and categories of dispute, type of dispute (domestic or cross border), mode of conducting the ADR procedure, nature of ADR outcomes and ground for refusal to deal with a dispute.[20]

University Press, 2016).

12 "United Kingdom-London: Arbitration and Conciliation Services 2014/S 223-394225 Prior Information Notice Services," n.d., http://ted.europa.eu/udl?uri=TED:NOTICE:394225-2014:TEXT:EN:HTML&tabId=1.

13 "Retail Ombudsman Set up to Aid Consumer Disputes," *British Broadcasting Corporation*, December 7, 2014, http://www.bbc.com/news/business-30368193.

14 Richard Kirkham, "The 21st Century Ombudsman Enterprise," *Buck, T., Kirkham, R., & Thompson, B. The Ombudsman Enterprise and Administrative Justice*, 2011, 1–13.

15 "CTSI Requirements and Guidance on Seeking Approval as a Consumer ADR Body Operating in Non Regulated Sectors." (United Kingdom), 3, accessed May 2, 2017, https://www.tradingstandards.uk/media/documents/local-authority-services/adr/adr_guidance_v1_4__12_6_2015_updated_12_june-10.pdf.

16 Ibid.

17 Regulation 9, *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation* 2015.

18 First column of Part 1 and Part 2 of Schedule 1, *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation* 2015.

19 Regulation 10, ibid.

20 Schedule 4, ibid.

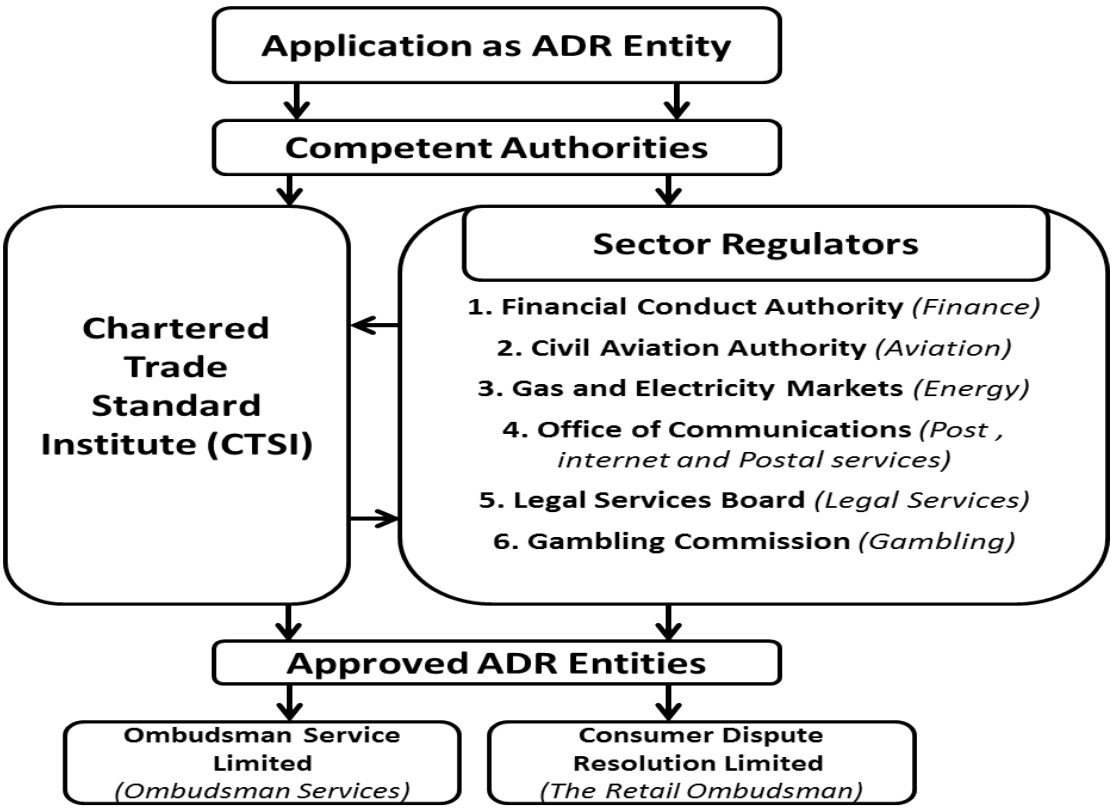

Figure 1 Framework for ADR entity Approval

Similarly, any approved entity must publish on its website an "annual activity report" within a month after its first anniversary.[21] The nature of relationship between traders/businesses and ADR entities, the UK Department of Business, Innovation and Skill responds that some sector regulators will mandate traders to use ADR in the resolution of complaints while it will be voluntary in other sectors.[22] Sector regulators mandate traders in financial service, energy and telecommunication to use institutional ADR and ombudsman schemes to resolve consumer disputes. On the other hand, voluntary schemes exist in sectors which are not prone to consumer mandated to belong to an ADR scheme without specifying which scheme of the many certified ADR entities. However, subsequent amendment to the regulations requires traders to give consumers details of certified ADR entities and inform the consumer whether they are a member of any ADR scheme.[23] In other words, traders are not obliged to participate in ADR procedures unless it is required under the law regulation the business of their trade association. There have been arguments that mandatory consumer ADR could open floodgates for complaints, drive cost up for traders, and increase reluctance of traders in enforcing outcomes of informal resolution methods.[24] On the other hand, traders may voluntarily join any ADR scheme with the hope of minimizing court actions, avoid reputational damage, relieve their customer department from complicated cases and demonstrate higher standard in customer services.[25]

21 Schedule 5, ibid.

22 "Government Response to the Consultation on Implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation 2014," accessed April 13, 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf.

23 "Alternative Dispute Resolution Regulations 2015: Guidance for Business," 6, accessed April 13, 2017, https://www.businesscompanion.info/sites/default/files/ADR business guidance inc ODR Dec 2015.pdf.

24 Pablo Cortes, "The New Regulatory Framework for Consumer Alternative Dispute Resolution," in *The New Regulatory Framework for Consumer Dispute Resolution*, ed. Pablo Cortes (Oxford Univ Press, 2016); Christopher J S Hodges, "Consumer Ombudsmen: Better Regulation and Dispute Resolution," in *ERA Forum*, vol. 15 (Springer, 2014), 593–608.

25 V Bondy, M Doyle, and C Hirst, *The Use of Informal Resolution Approaches by Ombudsmen in the UK and*

ADR entities may not refuse to deal with a consumer dispute which it is competent to except for reasons stated in the regulation as follows:[26]

a. The consumer has not taken first step resolve the compliant directly with the trader.

b. the dispute is either frivolous or vexatious.

c. the dispute has been previously submitted or under consideration by another ADR entity.

c. the value of the claim must not fall below or above the threshold set by the body.

d. the complaint has not been submitted within the time period set by the body, provided not less than 12 months from the date the trader is unable to resolve the complaint.

e. the dispute reported could impair the effective operation of the body.

Prior to the coming into force of the ADR entities consumer complaint are largely based on internal mechanisms. In the words of Kate Palmer, she observes as follows:

> Consumer complaints about shopping used to be the preserve of customer service call centres and, occasionally – if the consumer was persistent – the small claims courts. But this year, for the first time, unresolved complaints can be referred to a dispute resolution body.[27]

Customer complaint desk in businesses are not transparent and largely protect their employers thus affecting neutrality. In addition, pursue of consumer dispute in Small claims court is cumbersome and time wasting. The next section will examine and illustration operations of two among the ADR entitles in the UK. They are the Ombudsman Services (OS)[28] and The Retail Ombudsman (TRO) which were licensed to resolve consumer complaints and dispute. Both institutions are expected to operate within the relevant laws to resolve disputes between consumers and trader.

4. ACTIVITIES OF CONSUMER ADR ENTITIES IN THE UK.

For the purpose of this study, the activities of two certified ADR entities i.e. The Retail Ombudsman and the Ombudsman Services (OS) will be discussed.

4.1 Ombudsman Services Limited

In the consumer goods and services sector, Ombudsman Services (OS) is arguably the largest provider of ADR services covering consumer disputes in the UK. The company is registered under the name "Ombudsman Service Limited" as a not-for profit organization and limited by guarantee for the purposes of resolving disputes communications, energy, property and copyright industries.[29] The extent sector coverage of any given ADR entity depends on the approval by competent authorities and industry regulators.

Established since 2003, it has its governance structure based on its article of association led by a Chief Ombudsman. In 2015, it was granted regulatory approval by the competent authorities under the new rule. The terms of reference states the relationship between the ombudsman, traders and consumes to include, the receipt of unresolved complaints, settlement of complaint, administer remedies, and make recommendations to participating companies about services and policies. The

Ireland: A Mapping Study (London: Hot off the Press, 2014).

26

27 Kate Palmer, "New Retail Ombudsman Can Investigate Your Shopping Complaint - but It Comes with a Catch," *The Telegragh*, January 19, 2014, http://www.telegraph.co.uk/finance/personalfinance/11333939/New-Retail-Ombudsman-can-investigate-your-shopping-complaint-but-it-comes-with-a-catch.html.

28 The Ombudsman Services had existed since 2003 and was given effect under the Regulation.

29 http://www.ombudsman-services.org

most common complaint types received by the ombudsman include: disputed charges, quality of customer service, inaccurate invoices, refund of overpayment, Pursuant to paragraph 10.6, no punitive award or remedy shall be given by the Ombudsman:

> No Award or remedy shall;
>
> (a) contain a punitive element; or
>
> (b) be of greater amount than, in the reasonable opinion of the Ombudsman, is appropriate;
>
> > (i) to return the complainant to the position they would have been in if the complaint had not occurred; or
> >
> > (ii) to provide redress in relation to losses and inconvenience suffered as a consequence of the acts or omissions of the participating company in respect of which the Award or Remedy is made.[30]

Similarly, the remedies provided by the OS must only be to the extent of returning the complainant to pre-purchase position or redress for the loss.

The funding of the OS is at no expense to the public purse or complainant but rather from subscription charges paid by the participating businesses and traders. However, this does not imply that the independence and impartiality of the ombudsman is jeopardized.

With about 631 employees, OS received 172,068 complaints between April and December 2015 and resolved 52, 763 cases. 20 percent and 15 percent were from energy and communication sectors respectively.[31] 2 percent of the cases were closed at pre-investigation stage, 7 percent at early resolution, 67 percent on mutually acceptable settlements and 24 percent based on ombudsman decision.[32]

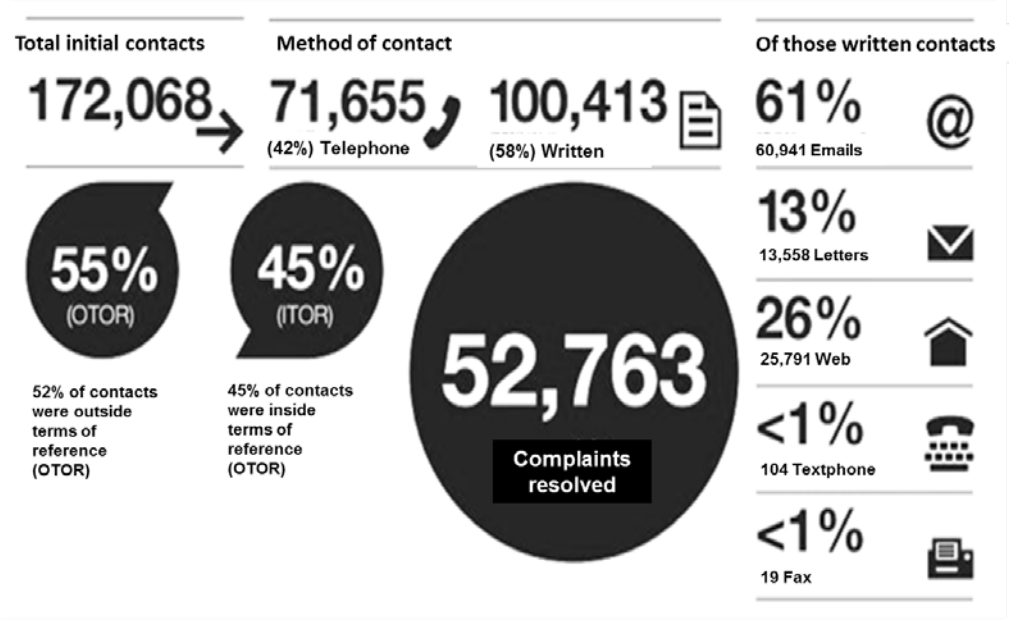

Figure 2 shows the summary of complaint between April and December 2015 including mode of contacts.

30 "Terms of Reference - Ombudsman Services UK 2015," accessed April 17, 2017, https://www.ombudsman-services.org/docs/default-source/miscellaneous-links/os-post-oct-tor.pdf?sfvrsn=2.

31 "Annual Report and Accounts 2015, Ombudsman Service UK," 2015, https://www.ombudsman-services.org/docs/default-source/annual-reports/os-accounts-ar-2015.pdf?sfvrsn=2.

32 Ibid., 9.

Figure 2 Ombudsman Services UK, report 2015.[33]

Online contacts are very instrumental for consumer complaints in modern societies.[34] As shown in figure 2, online tools such as email and web constituted 87percent of the total written complaint submitted to the ADR entity - ombudsman services.

The Ombudsman Services have proven to be good for both consumers and businesses based on the reports, assessment and reviews of its services.

4.2 The Retail Ombudsman (TRO)

The second approved UK ADR entity to be examined in this paper is The Retail Ombudsman (TRO) which is a not-for-profit company registered in the UK as Consumer Dispute Resolution Limited. In January 2015, the company began to offer consumer ADR services in selected sectors in the UK. However, it was given regulatory approval by the UK Chartered Trading Standard Institute (CTSI) on 5th May 2015.

The TRO Executive team is headed by Dean Dunham – the Chief Ombudsman and 40 full-time staffs comprising of complaint handlers and ADR officials who are mostly barristers and Solicitors. The ADR officials are personnel with knowledge of law and expertise in the field of out-of court settlement of consumer disputes. These personnel are judged competent by the Chief Ombudsman who administers written examination on them to measure their competence.[35] The TRO is supervised by an Independent Standards Board which ensures that the TRO does not operate against its ethos standards, terms of reference and rules. In addition, it serves as the last recourse for consumers who are dissatisfied with the outcomes of ombudsman decisions.

Retailers with membership under the TRO scheme includes several sectors such as aviation, domestic gas, funeral services, cosmetics & beauty services, retail stores, restaurants, utilities among others. Complaint by a consumer is handled appropriately where it is against registered members of the TRO scheme. Consumer need to inquire whether their retail store is a member of the scheme in order to be assured of a "security blanket" and protection from TRO.[36] Therefore, consumers complaints against non-members may be difficult thus are treated based the business agrees to abide by its terms of references. According to the Chief Ombudsman, Funding of the TRO is based on an annual subscription fee of 2000 British Pounds and 45 pounds for each case to be paid by the companies in the scheme.[37] This has enabled the company to uphold transparency, independence and free service to consumers.

Within its first month of operation in January 2015, the TRO has registered over 3000 retailers as members. Similarly, about 312 complaints were received during a weekend after Christmas online shopping boom.[38]

In line with the reporting obligations under the Alternative Dispute Resolution for Consumer Dispute Regulation 2015, the TRO published its "annual activity report" which highlighted the nature of complaints received, membership, average length of ADR procedure, compliance with ADR

33 Ibid., 8.

34 Omoola Sodiq Olalekan, "The Relevance of Online Dispute Resolution in the Islamic Finance Industry in Malaysia: An Exploratory Study," *Masters Dissertation* (International islamic University Malaysia, 2015); Sodiq O Omoola and Umar A Oseni, "Towards an Effective Legal Framework for Online Dispute Resolution in E-Commerce Transactions: Trends, Traditions and Transitions," *IIUM Law Journal* 24, no. 1 (2016): 257–81; Colin Rule, Louis F Del Duca, and Daniel Nagel, "Online Small Claim Dispute Resolution Developments-Progress on a Soft Law for Cross-Border Consumer Sales," *Penn St. Int'l L. Rev.* 29 (2010): 651.

35 "The Retail Ombudsman - Executive Team," accessed May 2, 2017, https://www.theretailombudsman.org.uk/about-the-retail-ombudsman-uk/executive-team/.

36 "Retail Ombudsman Set up to Aid Consumer Disputes."

37 Ibid.

38 Rebecca Smithers, "Retail Ombudsman Receives 300 Complaints over Its First Weekend," *The Guardian*, January 7, 2015, https://www.theguardian.com/money/2015/jan/07/retail-ombudsman-consumer-compaints.

outcomes among others.

5. MECHANISMS FOR ACCOUNTABILITY AND ACCESSIBILITY OF CONSUMER ADR ENTITIES IN THE UK

The discussion has identified the mechanisms for ensuring effective outsourcing of consumer protection activities in the UK to include presence of effective regulatory governance. ADR

5.1 Regulatory Governance

The presence of a principal governing law is a *sine qua non* for the establishment of Consumer ADR entity in any environment. The existence of a principal enactment serves as the basis for the operation of other subsidiary legislation for ombudsman operation and conduct. The Consumer ADR Regulation in the United Kingdom is the principal enactment that gives effect to the ADR entities.

5.2 Licensing of Consumer ADR entities

The licensing requirements for ADR entities shows that the process is transparent and seeks to ensure that ADR entities are effective and have the capacity to deliver complaint handling services to the chosen sector. This also ensure to crate competition in the consumer ADR industry among other benefits.

5.3 Reporting and Periodic assessment

Consumer ADR regulation requires ADR entities to submit annual or periodic report to appropriate regulators or superior institutions. The report must show the extent of the compliance with the essential characteristics of an ombudsman and principles of ADR.

This report ensures that a regular assessment of the ombudsman activities with emphasis performance indicators and statistics of complaint, procedures, compliance, appeals and other relevant information. In addition, financial records for the institutions are also required to ensure accountability and transparency.

The report must be made available to all stakeholders including regulator, businesses, consumers, civil societies and all interested parties. Non-compliance with reporting obligations could attract sanctions.

5.4 Employment and Divestment of Consumer ADR Funding

The UK outsourcing model is unique in its ability to create entities which are capable of funding itself by subscription from traders and businesses. Record shows that there are about 33 ombudsman institutions for various sectors in the UK and Ireland with each entity employing about 631 persons most of whom are lawyers with expertise in dispute resolution.[39] This ability to create opportunities for law entrepreneurs who invest in ADR entities and the empowerment of lawyers is more particular to self-regulated ombudsman models as practiced in the UK.

5.5 Scope and jurisdiction of consumer ADR entity

The scope of the consumer ADR entity depends on the sector requirement and excludes financial or monetary limits. This ombudsman is devoid of jurisdictional issue but where the complaint may be referred to the appropriate body if it was wrongly submitted. Consumer Complaints will be heard as long as consumer compliant emanates from the sector specified in the terms of reference for the specific sector. The scope or jurisdiction with respect to subject matter must be as defined in its enabling document.

The discussion on ombudsman in the United Kingdom shows that ombudsman institution

39 "Annual Report and Accounts 2015, Ombudsman Service UK," 9.

provides ADR services for specific sectors and not all kind of disputes. This is in line with the exigencies and technical requirement of specific industry or sector,

5.6 Market inspection and Investigative powers of Consumer ADR entity

Periodic Market inspection is one of the most important features of government regulators. This power is not included in the approval granted to ADR entities but remain the reserve of the regulators in the sector. Therefore, the regulators rely on the periodic report and statistics submitted by the ADR entities to initiate large scale investigation into recurring complaints.

5.7 Compliance and Enforcement

Under a self-regulated ombudsman regime, compliance is driven by the memorandum signed between ADR entities and the eligible trader. Through the mandatory reporting provision, ADR entities are able to report problems with enforcement of its decision to the regulators while ensuring that the regulators continue to be responsive in the interest the consumers and the continued development of the industry.

5.8 Consumer ADR and Government linked companies

Consumer ADR regulations are not covered any form of company providing consumer goods and services for the general public. This is irrespective of whether the business is publicly owned by the state or a private company.[40] Therefore, where government services are offered through a government corporation to the consumer users must be adequately protected under the law.

5.9 ADR mechanisms and Appeals Process

The UK practice involves the use of multi-tiered ADR mechanisms including initial negotiation between consumers and trader. Where negotiation fails, mediation and settlement is pursued on behalf of the consumer. Only consumers have the right of appeal the ombudsman decision to the regulators under the UK model while both under the South African model, both the trader and the consumer have the right of appeal.

6. CONCLUSION

This paper has submitted that outsourcing of justice under the consumer protection in the United Kingdom is appropriate for enhancing access to justice for consumers. The article has argued that the current framework in the UK has succeeded in allaying the fears of accountability and transparency of private contractors through licensing requirements and reporting mechanisms. By accommodating the licensing of several ADR entities, the competition in the consumer ADR market is poised to be gainful for both the business and consumers. The evaluation of specific consumer ombudsman companies has revealed that the existing model is a cost effective outsourcing which has delivered efficient ADR services. Compliance and enforcement concerns are ascertainable due to the regulatory oversight of competent public institutions. The paper finds that if an effective framework is adopted, outsourcing of justice in the consumer goods and services sector could be the new face of ADR services in other parts of the world beyond the UK. Indeed, if adequate monitoring is not put into

40 George V Carmona et al., "Ensuring Accountability in Privatized and Decentralized Delivery of Public Services: The Role of the Asian Ombudsman," in *Strengthening the Ombudsman Institution in Asia: Improving Accountablity in Public Service Delivery through the Ombudsman* (Asian Development Bank, 2011), 89.

Averting Posthumous Conflicts over Inheritance: Takharuj Negotiation

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Abstract

The principles of Islamic law of inheritance are more comprehensively explained in the primary source of the Islamic legislation than any other jurisprudential issues. The detailed explanation of the distribution to the surviving heirs prevents any probable conflict after the demise of the testator. However, the conflict sometimes arises not from the prescribed methods of distribution but from the estate, especially when it involves immovable properties. To avoid this conflict, Muslim scholars have provided a very comprehensive solution through the concept of Takharuj negotiation. This paper, therefore, seeks to explain the legal formwork for negotiation through Takharuj from the classical books of Islamic Law and Jurisprudence. The paper extensively discusses the legality of Takharuj and the processes of negotiation with typical examples of distribution of bequeath under the Islamic law of inheritance. The research adopts qualitative doctrinal approach by revisiting classical books. The paper finds that any posthumous conflicts can be avoided through takharuj negotiation.

Keywords: Takharuj, negotiation, relinquisher, Sulh

Conceptual Analysis of Takharuj

Takharuj is defined as a composition that is entered into by joint heirs to property, whereby some waiver their shares in return for some type of payment. In other words, the heirs agree to give one or more of them an amount of money or property to relinquish his share of the inherited property. If the property given is not from the estate itself, the agreement amounts to a sale contract, while if it

is part of the estate, it is referred to as a contract of division or partition (taqseem). If the amount given is smaller than the deserved share of the inheritance, the deal is, then, a form of gift (hibah) from the relinquisher.[1]

Takharuj has in another way been defined as a principle where a beneficiary withdrawn or waiving of his/ her rights or opted out himself/herself from accepting the inheritance either in part or in full with one of the beneficiary or a few of the beneficiaries by accepting a certain payment (‘iwad) whether from the inherited property, or other properties, or without payment.[2]

There are other legal terms used by the jurists that have common denominators with Takharuj; these terms are sometimes used synonymously. These terms include: Sulh, qismah, al-bai’u. Having fastidiously looked at those words, it reveals that the term Sulh is much broader than Takharuj. It can be simply said that every aspect of Takharuj falls under Sulh and the reverse is not the case, because Sulh is applicable in the law of inheritance in the same way is applicable in other areas. Takharuj is exclusively meant for the law of inheritance to sort out any probable misunderstanding. Therefore, takharuj the rules and conditions for validity and invalidity of sulh are either established for takharuj[3]

Legality of Takharuj

Takharuj contract is considered permissible by all Muslim jurists.[4] The proofs for the legality of takharuj are deducted from Quran and rulings that were issued by the companions of the Prophet. Allah says:

> “O believers! Do not consume one another’s wealth through unlawful means; instead, do business with mutual consent; do not kill yourselves by adopting unlawful means. Indeed Allah is Merciful to you.”[5]

It is evident in the above verse that unlawful consumption of people’s wealth is strictly prohibited, and the only means through which consumption is allowed is mutual consent from the parties involved without the use of force.[6]

Takharuj or Tasalih among the beneficiaries on the basis of relinquishing one’s right from inheritance is, therefore, a deal that indicates mutual consent among the heirs aimed at the realization of the high goal of sharia (*maqasid al-Shariah*). Takharuj doctrine can therefore be included among the permissible sale provided the conditions of sales are complied with.

Consensus of the Companions

Yahya related to me from Malik that he heard Rabia ibn Abi Abd ar-Rahman say, ‘’I heard that the wife of Abd ar-Rahman ibn Awf asked him to divorce her. He said, ‘When you have menstruated and are pure, then come to me.’ She did not menstruate until Abd ar-Rahman ibn Awf was ill. When she was purified, she told him and he divorced her irrevocably or made a pronouncement of divorce which was all that he had left over her Abd arRahman ibn Awf was terminally ill at the time, so Uthman ibn Affan made her one of the heirs after the end of her idda with three wives of Abd ar-Rahman”. It was reported that she contentedly agreed to be given 83, 000 dirham on the basis of negotiation or conciliation over a quarter of her portion.[7]

Umar’s verdict was passed in the presence of the companions of the Prophet (s.a.w) without disapproval from any of them; this affirms the consensus of the companions on the legitimacy of

1 http://investment-and-finance.net/islamic-finance/a/al-takharuj.html accessed on the 5t July, 2017. see Muhammad Abu Zahrah, Ahkam al-Tarikat wa al-Mawarith, (Cairo: Dar al-Fikr al’Arabi, 1963), 127, see

2 < http://investment-and-finance.net/islamic-finance/a/al-takharuj.html> accessed on the 5t July, 2017

3 Nataij al-Afkar fi Kashfi al-Rumuz wa al-Asrar, vol.8, 461.

4 Al-Marghinani, al-Hidayat Sharh Bidayat al-Mubtadi, vol.3, 200

5 Surah al-Nisa, verse 29

6 al-Qurtubi Ibn al-Arabi, Ahkam al-Quran, (Beirut, Dar al-Kutub al-‘Ilmiyyah:2003), vol. 1, 532.

7 Al-Bayhaqi, Sunan al-Kubra (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), vol.7, 594.

Takharuj or *Tasaluh*.[8] Ibn Abbas has been reported saying that some beneficiaries are allowed to withdraw from their portion or waive their rights or even opt themselves from accepting the inheritance either in part or full with other beneficiaries by accepting some payments (‘*iwad*) either from or outside the property in order to avoid the complexity in sharing.[9] In another narration, Ibn ‘Abbas said, one of the two beneficiaries is allowed to waive his right or inheritance.[10]

Conditions for the validity of Takharuj

Conditions Related to Negotiators

i- **Eligibility** (ahliyyah): people involved in *Takharuj* must be eligible to participate in negotiation; the parties must be of sound mind and must be of legal age. This means that the individuals involved in Takharuj must not be insane, underage and must not be under intoxication.

ii- **Originality** or **permission** to act on behalf the beneficiaries: the relinquisher (mu-takharaj) on the basis of negotiation is the only person that can enter into the agreement or through the permission given by one of the beneficiaries. Permission can be granted to an authorized agent or a guardian. The permissibility of Takharuj is agreed upon by Muslim jurists if carried out through an authorized agent or a guardian. For the validity of Takharuj carried out by the authorized agent and guardian two conditions must be ful-filled: (i) it must cause no tremendous damage or harm to the right of the minor, insane. A minor cost is, however, excused for the fact that Takharuj is like a sale contract.[11] (ii) the share of the juvenile individual or the insane must not be deducted for the fact that takharuj is considered as charitable donation. And neither the guardian nor authorized agent has the right to give charitable donation with the insane individual’s portion. [12]

Conditions Related to the Property

i- The inheritance on which Takharuj negotiation is made must be readily available, legally permissible and free from other people’s right like debt.

ii- The inheritance must be known as Takharuj over unknown object that is its identification accessible is not valid. However if the identification is beyond the realm of possibility, it is allowed to conduct Takharuj over the unknown.[13]

iii- The property over which Takharuj is conducted must be a valuable asset, beneficial, pos-sible to be delivered.[14]

iv- Delivery of the countervalue (taqabudh) before the separation of the parties involved if the property is sarf-based like the exchange of gold-for-gold or silver-for-silver.[15]

8 Al-Ghamidi Muhammad Nair, al-Takharuj Ahkamuhu wa Suwaruhu fi al-Fiqh al-Isami, (Makkah: Umm al-Qurah University), 199.

9 ibn Hajar al-Asqalani, Fath al-Bari, Sharh Sahih al-Bukhari, (Beirut, Dar al-Kutub al-‘Ilmiyyah:2003), vol.4, 464.

10 ibid

11 al-takharuj baina al-warathat, 202

12 ibid

13 Abdul al-Rahman al-Gharyani, Mudawwanat al-Fiqh al-Maliki wa Adillatuhu, (Beirut: Muassasat al-Rayyan, vol.3, 716

14 Al-Maghribi, Muhammad Muhammad, Mawahib al-Jalil Sharh Mukhtasar al-Khalil, (Beirut: Dar al-Kutub al-Ilmiyyah, 1995), vol.3, 315.

15 Hashiyat al-Dusuqi ma’a al-Sharh al-Kabir, vol. 3, 315

v- Meeting conditions of sale of debt if the inheritance has the sale of debt to the third party (non-debtor). This is based on the view of the scholars who permit the sale of debt to third party like the Maikis and Shafi's.

Conditions of Takharuj in the Hanafi School of law

The Hanafis distinguishes between when the inheritance is immovable and when it is movable goods or between gold and silver or when real estate, goods, gold and silver are combined altogether. The following are the explanations of each situation:

i- When the inheritance is of real estate and goods without involving gold and silver: when the inheritance includes immovable and movable goods without gold and silver, Takharuj becomes valid when the beneficiaries exclude one of them from the inheritance in exchange for a certain amount of money, whether what is given is equal, more or less than his portion in the inheritance. Because it is compared to sale which is equally acceptable either less or more price.[16]

ii- When the inheritance is comprised mainly of gold and silver: the beneficiaries may either negotiate with *mukharaj* (the person upon whom the Takharuj is conducted) with from the same genus[17] or the negotiation is conducted from a different genus[18] in the former situation, the equality of the species and delivery on spot are conditioned and the latter situation, the equality is a condition and the species must be delivered on spot though.

iii- When the inheritance is comprised of gold, silver, movable and immovable properties, negotiation is invalid if conducted on gold or silver except if the relinquisher receives more than his portion from the gem, because the addition that should be given to him is the return of the right waived from the rest of the inheritance in avoidance of riba (usury). As a case in point, if the portion of a wife from gold is 10 out of 80 Dinar, and she also has a share from the movable and immovable properties, if is conditioned that she must be given more than 10 Dirham. The rationale behind this is that she must not receive additional share in compensation for relinquishing her right in other properties to other beneficiaries. The delivery on spot and equality are conditioned, otherwise the negotiation would be rendered invalid.[19]

Situation of Takharuj Negotiation from the Malikis

The malikis distinguish between when what is given to the relinquisher is within the property and the compensation is outside the inheritance.

Negotiation within the property

i- Giving the relinquisher smaller or bigger than the deserved share of the inheritance is permissible, whether the inheritance is comprised of both movable and immovable commodities or gold and silver or they are combined together. Because it is basically permissible for the relinquisher to take his share completely or some part of it or leaving the remaining portion as gift for other heirs on the condition that the property from which his share would be given are available or possible to see. However, it is not allowed if the property is unavailable due to the remoteness of the place or difficulty in seeing it owing

16 Shamsuddin Ahmad, Nataij al-Afkar fi Kashfi al-Rumuz wa al-Asrar, (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), vol. 8, 461.

17 If the inheritance happens to a gold and mukharij is negotiated with by gold.

18 This occurs in a situation where the inheritance happens to be gold but the negotiation (takharuj) is conducted with silver.

19 Nataij al-Afkar, vol.8, 462

to a hindrance.[20]

ii- It is also permissible when the compensation given to the relinquisher is much bigger than his portion in the basic inheritance on the following conditions:

(a) The inheritance (property) must be made available at the time of negotiation to avoid engaging in riba al-nasiah.[21]

(b) The inheritance must be known because the negotiation over an unknown object would result in deception.

(c) If there is any outstanding debts attached to the inheritance.

Compensation out of the Inheritance Given to the Relinquisher

It is permissible to conducting negotiation by giving the relinquisher some compensation outside the inheritance with the following conditions:

i- The beneficiaries should know all the properties to be inherited to avoid negotiating over the unknown. However, if knowing the quantity of the inheritance or its accessibility seems impossible.

ii- The inheritance should be actually or abstractly made available, like when the property could be made available within two days because the exchange is permissible with a condition and for the fact that this stands in position of the available property.[22]

Situation of Takharuj by the Malikis

The Malikis distinguish between when the negotiation is based on Sulh with confession or avowal[23] and Sulh with denial or disavowal[24]:

i- If the negotiation is based on avowal and the compensation given to the relinquisher is not part of the inheritance, the negotiation is regarded as a contract. If the compensation given to the relinquisher is derived from the main inheritance, delivery on spot and equality are conditioned; because the negotiation is likened to the exchange.[25] If the compensation is, however, based on a part of the inheritance, it is considered as rebate and the law of rebate is to be applied.[26]

ii- in a situation of Sulh with denial, the negotiation becomes invalid by the Maliks, though they exempt a situation where the compromise is reached among the beneficiaries, especially in a case of necessity.[27] They, however, state that the compensation given to the relinquisher must be derived within the inheritance.[28]

20 Hashiyat al-Dusuqi, vol.3, 310

21 Riba al-nasiah a type of riba that exists in, or results from, a sale transaction which unduly benefits one the counterparties in the form of a surplus or extra amount due to delay of delivery of his side of the transaction. More specifically, riba al-nasi'ah arises in loan transactions (on the basis of future repayment of more than the principal) as well as sale transactions (on the basis of deferred price).

22 Al-Dardairy Ahmad, al-Sharh al-Saghir 'ala Aqrab al-Masalik ila Madhab al-Imam Malik, (Beirut: Dar al-Ma'arif, 1978), vol.3, 415-417.

23 This is called Sulh 'an iqrar. The defendant confesses to a right against him. The plaintiff then compromises upon something

24 This is known as Sulh 'an inkarin…

25 Mughni al-Muhtaj, vol.2, 232-233

26 Al-Shafi', al-Umm, vol.4, 417

27 Al-Hawi al-Kabir, vol.6, 368

28 Al-Nawawi Muhyidin ibn Sharaf, Raudat al-Talibin, (Riyadh: Dar 'Alam al-Kutub wa al-M'arifah,2003), vol.4, 193.

Situation of Takharuj as viewed by the Hamblis

The Hambalis opine that the general principles of Sulh are applicable in the negotiation of Takharuj which might be over a contract, gifts and rebate. It is, however, allowed to offer compensation within and outside the inheritance. If the compensation is completely offered within the inheritance, it is known as istifa'[29] and some part is given, it is known as istifa' li ba'd. If compensation is given to the relinquisher outside the inheritance, it regarded as sale and the principles of sale have to be applied.[30] In this regard, the principle of exchange must be taken into account if the negotiation is based on exchange of gold or silver.[31]

However, it is permissible if the relinquisher receives compensation more than what he deserves from a different genus, because it is considered sale within the right of the claimant, for believing that what he has received is compensation. Meanwhile, it is permissible to make the compensation much greater.[32]

Different Forms of Takharuj negotiation with Examples

Examples 1

There are various forms through which Takharuj negotiation may be conducted and each form has its way of sharing. The following forms indicate practical examples of how Takharuj negotiation can be conducted.

1- One of the beneficiaries (mukharij) can negotiate with another person (mukharaj or relinquisher) among the heirs. In this form mukharij would receive all the portion of the relinquisher by providing compensation outside the inheritance. Therefore the relinquisher's portion would be returned to mukharij. The method of sharing can carried out through the following steps:

i- Normal sharing of the inheritance among the heirs inclusive of the relinquisher for knowing the number of his share,

ii- When the portion of the relinquisher is known, it would be added to the portion of the mukharij (negotiator). For example, a wife dies leaving behind a husband, one daughter, a mother, one full paternal uncle, and the husband negotiates with the uncle to be excluded from the inheritance by granting compensation from his own (husband) money.

Fig. 1

	24		
Husband $^1/_4$	6	6+2	having added the uncle's share, the husband's shares becomes 8
Daughter $^1/_2$	12	12	
Mother $^1/_6$	4	4	
Uncle (residual bequest)	2	00	

The above illustration indicates how the uncle relinquished his right with compensation in the opposition of inheritance. Having added the uncle's share which to the husband's, the husband's share

29 Istifa' literally means to receive in full and technically, it is used in a contract of sale, and the deal is complete only when the buyer has taken delivery object of sale in full and in a satisfactory manner. See Khan, Muhammad Akram. Islamic economics and finance: a glossary, Routledge, 2004.

30 Al-Insaf, vol.5, 214215

31 Al-mughni, vol. 7, 7.

32 Ibid

becomes 8.

Examples 2

This can occur in situation when one of the beneficiaries agree to be a particular portion from parts of the inheritance to pave the way for easy sharing of the properties left behind the deceased. Therefore, the leftover would be shared among other heirs.

Example: when a woman dies leaving behind a husband, one son, and one daughter and left a house that is worth 6000 dollars and a land worth 2000 dollars. Based on the negotiation, the husband (mukharaj) relinquishes his portion from the house by exclusively receiving the car. The table below indicates how the sharing is to be conducted.

Fig.2

Husband 1/4	2	2000	00
Son	4	4000	4000×1000=4000
Daughter	2	2000	2000 × 1000 = 2000

Invalidation of takharuj negotiation

The negotiation on the basis of Takharuj becomes valid when conducted as previously explained. However, there are certain situations where the negotiation can be invalided as mentioned by al-Kasani; these situations are as follow:

i- Takharuj negotiation would be invalidated if eventually discovered that the deceased is debt and the heirs have no other means to pay it off, because precedence must be given to the debt of the sharing of among the heirs. However, if the beneficiaries are ready to clear the debt out of the inheritance, the negotiation remains valid.[33]

ii- Emergence of a will after the negotiation could bring about the invalidation of Takharuj, because the consequently lead to re-division of the inheritance.[34]

iii- Emergence of a new heir not previously known either during the negotiation or sharing of the bequest invalidates Takharuj negotiation in that his share must be taken into consideration.[35]

Conclusive remark

It is evident from the exposition that Islamic law has provided an optimal solution to the likely conflicts that usually occur among the beneficiaries in the course distribution of inheritance left behind by the deceased. This solution paves the way for fair distribution and prevents the complexity that in distributing of bequeath as a consequence of inherent avarice of human being. The paper has shed light on the legal rulings of Takharuj negotiation and the different forms through the negotiation could be effectively conducted with several marginal issues attached to the topic. It is found that Muslim jurists unanimously assent to the permissibility of Takharuj negotiation provided the stipulated conditions are complied with, particularly mutual consent among the beneficiaries. It has also been found the validity and invalidity of Takharuj negotiation depends on the type of species the inheritance consists of

33 majallat al-Ahkam al-'Adliyyah, 756.
34 abu Zahrah, Ahkam al-Tarkat wa al-Mawarith, 281-282.
35 ibn 'Abidin, Hashiyat ibn 'Abidin, vol. 270.

The Role of Shari'ah Councils in the Resolution of Matrimonial Disputes in the UK: Issues and Challenges

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Abstract

Shari`ah Councils came into existence in response to the need for Muslims to abide by Islamic law. They were instituted with deep-rooted aspirations, among others to govern family matters and resolve any disputes in accordance with the Shari`ah. The councils mainly adopt mediation and arbitration as modes of intervention and resolution of family and matrimonial dispute. As a quasi-judicial body, with no formal recognition Shariah Councils experience some drawbacks. The major anticipated problems are due to the absence of formal recognition from the state and the legal system on the establishment of Shari`ah Councils. This consequently entails many other legal, procedural and administrative issues which are the concern of the paper. This piece that formed part of a doctoral study identifies and analyses the possible issues, problems and challenges arising therefrom. They are particularly the operation of Shari`ah Councils, the personnel and the enforcement of decisions among the Councils. Apart from being weakened by the lack of recognition, these are aspects that require attention by the Shari`ah Councils in order to improve their credibility and competency as religious dispute-resolution institutions. While formal recognition is an official matter where only the state and the law of the land can decide, the Shari`ah Councils, at least, would still need some form of greater recognition and support from the Muslim community. The study convincingly demonstrates that there are indeed areas for improvement and issues to address as examined in this paper. The established Shari`ah Councils should work collectively to bring improvements, the achievement of which should be able to produce a best-practice guideline sufficient to lobby for a firmer or more stable future as one of the ADR providers in the UK.

Keywords: Shariah Councils, mediation, arbitration, quasi-judicial, recognition

1. Introduction

The efforts to establish religious institutions or Shari`ah Councils were initiated as early as the 1970s and 1980s.[2] They were instituted with deep-rooted aspirations, among others to govern

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2 Samia Bano, "Complexity, Difference and Muslim Personal Law': Rethinking the Relationship between Shari`ah Councils and South Asian Muslim Women in Britain" (PhD thesis, University of Warwick, 2004) 116; Shaheen S. Ali, *"Authority and Authenticity: Sharia councils, Muslim women rights and the English courts," Child and Family Law Quarterly* 113 (2013): 125-126. Ali especially relates the existence of many Muslim organisations such as Union of Muslim Organisations (1970), Muslim Parliament of Britain (1992), the Muslim Council of Britain (1997), the British Muslim Forum (2005), the Muslim Arbitration

family matters and resolve any disputes in accordance with the *Shari`ah* as well as to safeguard the religion from the secular environment.[3] In fact, driven by strong conviction towards the religion, many Muslims believe that English family law and legal principles cannot bring about a genuine resolution of matrimonial disputes for Muslims living in Britain.[4] Therefore Shari`ah Councils are pursued in order to advocate 'the moral authority of the Muslim community'[5] and for the Muslim experts to proactively assist the Muslim community.

The history of their establishment, as recorded in Nielsen, refers to the view of Shari`ah among two generation groups: the younger, educated and secularised generation and the older generation. While the former feels that it is the duty of everybody in the community, the latter is convinced that such duty should be carried out by the Islamic law scholars.[6] To fulfil this role there has to be some form of guiding or authoritative institution. It is to meet this requirement that a number of Muslim groups have come together in Britain to form a UK Islamic Shari`ah Council[7] whose function is to deal with individual cases, most frequently of marital breakdown.[8]

The terms '*Shari`ah* courts'[9] or '*Shari`ah* Councils' seem to carry a similar connotation and 'can be used interchangeably'.[10] However, Bano notes in her exploratory report that 'there is no single authoritative definition of Shari`ah Councils.'[11] They are essentially bodies comprised of Muslim religious authorities or *Shari`ah* scholars who collectively hear disputes and decide cases according to the Islamic law in matters relating to religious and personal affairs of Muslims in the UK.[12] Positioning their role as 'parallel quasi-judicial institutions',[13] the Shari`ah Councils have fulfilled an essential task by providing the legal set-up to resolve Muslim family issues according to Islamic law and have become an important point of resort for the Muslim community. There are at least three main established *Shari`ah* Councils in Britain located in Birmingham and London[14] – the Muslim Law (Shariah) Council UK in Wembley, West London,[15] the Islamic *Shari`ah* Council in Leyton, South London, and the Birmingham *Shariah* Council. The three *Shari`ah* Councils function independently of each other.[16] They are neither unified nor do they represent a single school of Islamic

Tribunal (2007) and most significantly, the numerous Shari`ah Councils: Ali, "*Authority and Authenticity,"* 126; there was also a well-referred to report by Denis MacEoin, *Sharia Law or 'One Law for All'?* (Institute for the Study of Civil Society, Civitas, 2009) of as many as 85 Shari`ah Councils have been operating in the UK. Although, it is doubt the statistic provided in this report might have included the unknown and 'back-door' Shari`ah councils.

3 Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (United Kingdom: Ashgate Publishing Limited: 2005), 57.

4 Samia Bano, "Shariah Councils and the Resolution of Matrimonial Disputes: Gender and Justice in the 'Shadow' of the Law" in *Violence Against Women in South Asian Communities: Issues for Policy and Practice*, eds. RK Thiara and AK Gill (London: Jessica Kingsley Publishers, 2010), 195.

5 Samia Bano, *Muslim Women and Shari`ah Councils: Transcending the Boundaries of Community and Law* (Hampshire: Palgrave Macmillan 2012) 120; Bano, "Muslim Personal Law", 132; see also the Islamic Sharia Council's website <http://www.islamic-Sharia.org/about-us/about-us-7.html> accessed 23 May 2011.

6 Jorgen S. Nielsen, "Emerging Claims of Muslim Populations in Matters of Family Law in Europe," Centre for the Study of Islam and Christian-Muslim Relations (CSIC), November, 1993, (10) 6.

7 Nielson, "Emerging Claims".

8 Nielson, "Emerging Claims".

9 Shah finds that they are frequently referred to as 'Muslim courts'. Prakash Shah, "Transforming to Accommodate? Reflections on the Shari'a Debate in Britain," in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et al. (United Kingdom: Ashgate Publishing Limited, 2009), 79-80.

10 Raffia Arshad, *Islamic Family Law*, (London: Sweet & Maxwell, 2010), 34.

11 Samia Bano, *An Exploratory Study of Shari`ah Councils in England with respect to Family Law* (England: University of Reading, 2012), 4-5, http://eprints.soas.ac.uk/id/eprint/22075.

12 The Islamic Shari`ah Council, <http://www.islamic-sharia.org/index.html> accessed 6 June 2013; The Muslim Law Shariah Council, accessed 6 June 2013, http://www.shariahcouncil.org/?page_id=23; The Birmingham Central Mosque, accessed 6 June 2013, http://www.centralmosque.org.uk/1/services/personal#shariah.

13 Sohail Warraich, "Migrant South Asian Muslims and family laws in England: an unending conflict" (MA diss., University of Warwick, 2001) cited in Samia Bano, "Islamic Family Arbitration, Justice and Human Rights in Britain," *Law, Social Justice and Global Development Journal* 1 (2007): 19; Jemma Wilson, 'the Shari`ah Debate in Britain: Shari`ah Councils and the Oppression of Muslim Women' (2010) 1 ASLR 46, 48.

14 Arshad, *Islamic Family Law*.

15 <http://shariahcouncil.org/About%20Us.htm> accessed 5 May 2011; <http://shariahcouncil.org/Home.htm> accessed 9 February 2011, <http://www.muslimcollege.ac.uk>

16 Just in the same way that there is more than one Beth Din for the Jewish community in the UK.

jurisprudence; instead, they are different bodies with some representing different schools of law.[17]

2. Internal Issues and Challenges

This paper considers and analyses the possible issues, problems and challenges arising therefrom. The major anticipated problems are due to the absence of formal recognition from the state and the legal system on the establishment of Shari`ah Councils. There is also the absence of the power of enforceability over decisions issued by Shari`ah Councils. The paper also examines the internal issues and challenges surrounding Shari`ah Councils, particularly the operation of Shari`ah Councils, the personnel and the enforcement of decisions among the Councils.

2.1 Organisational Issue: Lack of Adequate Facilities and Proper Training

One of the main contributing factors of a competent judicial authority is a well-equipped institution in terms of facilities, workforce and training. As an institution dealing with private (and most of the time stressful) matters, there needs to be a proper court setting – a conducive environment, especially to conduct sessions like mediation, counselling and arbitration. Facilities also mean a sufficient workforce to manage workloads and all other managerial works. Bano revealed that 'a large number of samples show that women complained of the process being 'incoherent' and 'time-consuming.'[18] The absence of recognition and support from an official level arguably leaves Shari`ah Councils without state support and therefore with insufficient resources to adequately cover everything, let alone to have a proper office building.[19] Moreover, the status of Shari`ah Councils as institutions built on charity, being individual in character and voluntarily run mean that resources are extremely limited and individually managed.[20] If Shari`ah Councils want to become competent religious dispute-resolution institutions and win formal state recognition, they must be well equipped, not only in terms of facilities but also workforce.

There are also no clear rules on organisational and staff development or training requirements. Bano's study provided no information as to the type of training scholars received.[21] The nature of this training was not disclosed to the researcher.[22] The role of female counsellors or mediators is significant in dealing with the delicate characteristic of family issues. Therefore, females, as well as trained and qualified counsellors, mediators or arbitrators are equally important and crucially needed. However, none of these requirements is currently being fully observed at the Shari`ah Councils. It is argued that the ISC as well as other Shari`ah Councils are lacking not only female scholars but also adequate proper training for the existing staff members. It is a difficult fact to accept that the non-

17 Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964) and for information on the differences between the schools see David Pearl, *A Textbook on Muslim Law* (Kent: Croom Helm, 1979); Bano, *"Islamic Family Arbitration,"* 294-295.

18 This mostly refers to their dissatisfaction and frustration when every time they approached the Shari`ah Council for an update of the case they hardly received any responses. Bano, "in the 'Shadow' of the Law'"203.

19 The research fieldwork demonstrates that some of these Shari`ah Councils do not even have a proper office. At one of the Shari`ah Councils visited during the fieldwork, the arbitration session was conducted in one of the rooms in a mosque which happened to be located close enough to hear the sound of trains passing by every now and then. It was quite unpleasant – more like having casual 'coffee-shop' arbitration with such disturbance. The researcher even at some points missed the discussion between the scholars and parties because of the sound of the trains. This is not revealed to damage the Council's reputation but rather to show sympathy from a real account.

20 One of the important facts to highlight is that the ISC runs its business based on charity and without unreasonable charges. The judges and the female counsellor at the same time engage with other social obligations. There are probably fewer permanent scholars since the scholars, for instance, at the ISC's headquarters, have their duty rotation.

21 Bano, *Transcending the Boundaries*, 107, 119.

22 Bano, *An Exploratory Study,* 6. Maulana Raza also admits that 'no training has been provided to the scholars. .. In fact there is no provision of any training for working at Shari`ah Council. This is the new experiment in this country. ... So even if I say that someone go to al-Azhar and get training for the Shari`ah Council in this country, they don't have any syllabus to offer to give training to someone who can work in this country as a member of the Shari`ah Council. Hopefully, we are hoping that now we have been working with Shari`ah Council for 20 years. Shari`ah Council should sit together and they should design a training course in the light of the experience we have now received by working at Shari`ah Council. So we are now in a position to bring something on paper and to offer some training also. So that should be done. We will cooperate': interview on 17 January 2012.

recognition has left Shari`ah Councils 'weakened' in many respects. Taking into account the available sources and the existing Shari`ah Councils, the researcher found that perhaps the ISC is to date the most established Council, with better facilities, workforce and management, even though there are still areas for improvement.

2.2 The Absence of a Uniform Standard Operating Procedure

The absence of a standard operating procedure is among the major drawbacks of Shari`ah Councils. The Shari`ah Councils are bodies independent of each other and which operate individually,[23] which means that their procedures are different.[24] Nevertheless, studies on the three main Shari`ah Councils show that there are no considerable discrepancies in the way cases are managed and processed from the stages of application to issuance of decision. They are arguably similar with only small differences in the detail. However, the important point to raise here is that Shari`ah Councils do not appear to have a properly documented standard manual of operation to be followed uniformly by all Shari`ah Councils.[25] The differences most probably derive from the history of the establishment of these Shari`ah Councils where they were instituted based on different community needs and backgrounds in places where there were demands. However, this was the situation many decades ago. Today, it should be among the aims of Shari`ah Councils to reform their grounds and work collaboratively, particularly when a number of the established Shari`ah Councils have been proven to produce a good volume of work and have been acknowledged by the community and state agencies. Today the Shari`ah Councils are receiving much public attention and are being scrutinised from every corner – clients, government, feminist groups and the media. Thomson, for example, suggests that if Shari`ah Councils are to function more effectively and professionally, there needs to be a systematic and standardised process just in the same way that the Employment Tribunal System has been designed to provide a recognisably similar service throughout the UK.[26] Responding to this need, recent developments evidence that effort is being undertaken by major *Shari`ah* Councils to unify the procedures. An initial meeting was carried out recently at London Central Mosque[27] which aimed at bringing the procedure closer[28] to the nature and requirements of English law. With the establishment of a board of *Shari`ah* Councils in mind, preparations are deemed necessary, particularly on dealing with important aspects such as a standard procedural guideline. Whether one likes it or not, the non-uniformity of procedure, in effect, discredits any efforts to gain legal recognition.

Another similar issue that requires further attention is the lack of properly documented clear rules to be followed uniformly among the Shari`ah Councils. Among the most important aspects that require clear documentation are the Islamic laws on marriage and divorce, ancillary relief and custody. Given the reality of current financial situations, especially in the West where people have complicated ways and systems of owning things, it is suggested that a clear rule should be available for the religious authorities and lawyers who are working closely with clients, particularly relating to Islamic family law. Some Muslim lawyers have been arguing over the lack of clear guideline regarding the Islamic law position on matters relating to finances and maintenance (ancillary relief).[29]

23 Amra Bone, a female Shari`ah scholar at the BSC in Birmingham. Interview, 5 December 2012.

24 Samia Bano, "In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Shari'a Debate' in Britain," *Ecclesiastical Law Journal* 10 (2008): 296-297.

25 For instance, a panel at the ISC in Leyton, London, will hold a collective agreement to make any decision relating to their operations, including procedure. Even though the ISC does not have to submit to any written procedure, the standard procedures adopted are presumably understood by all of its scholars and representatives.

26 Ahmad Thomson, "Accommodating the Islamic Dissolution of Marriage Law within English Law" (paper presented at the seminar of *Dissolution of Marriage*, London, September 10, 2006); interview 27 March 2012.

27 The idea was discussed at a meeting held by the director of the Islamic Cultural Centre among scholars from the Shari`ah Councils as well as 3 barristers. Three Shari`ah councils were represented at the meeting. They were The Islamic Shari`a Council Leyton (ISC), The Muslim Law (Shariah) Council UK, Ealing (MLSC) and a Shari`ah council from Dewsbury. Other three or five more expressed their agreement to the decision at the meeting. Interview with Dr Suhaib Hasan (Islamic Shariah Council in Leyton, London, 11 April 2011).

28 ibid.

29 There is also no figure set out for maintenance for children. In comparison, on child maintenance the civil law allocates for

A Muslim female barrister raises her dissatisfaction that:

> Nobody sat down and decided any of this yet they are saying we will accept all the cases ... Some of them (Shari`ah Councils) argue that the child gets child benefit from the state so why should the husband pay ... Our issue is complicated. It is not as straightforward as saying the house is in my name, not in your name. What if you got a husband and wife who have been married for 25 years and the husband always pays the mortgage and the house is completely in his name but the wife used to buy the food, and she cooked the food with her own money and she used to feed the husband and the children with her own money. Is she not entitled to the house, not a penny? The Shari`a court here generally would say the house is in the husband's name, that is in the husband's name, the wife gets three months *`iddah*, money for the children, nothing else. I doubt they would decide that the house should be sold and the money given to the wife.[30]

The absence of formal guidelines on the qualities and characteristics required of religious scholars among the Shari`ah Councils, even though they mirror the requirements under the Islamic law, might reduce the weight attached to them. Arshad suggests that Shari`ah Councils must be equipped with all the necessities either in terms of the workforce or the facilities so that 'it does not seem just as a building where divorces are issued.'[31] Shari`ah Councils should be looked at as 'a place of authority, a place of respect'.[32]

2.3 Absence of Independent Legal Advice at the Shari`ah Councils

The Shari`ah Councils are claimed to not provide or be supported with legal representation to advise and speak on behalf of the clients or illiterate parties.[33] They have in fact been condemned for not providing such facilities.[34] Taking the debate surrounding English family mediation, Brunch raises concerns of the possibility for negotiations to take place in private, 'without the presence of partisan lawyers and without access to appeal'.[35] From the standpoint of a formal courtroom, legal representation can be extremely important – for instance, in disputes involving money or property. Legal representation is absolutely crucial to protect clients from any misleading information, disclosure or fraud from the other party who may try to take advantage of the family's wealth. It is among the judges' concerns in the civil courts that parties may be cheated. They will therefore ensure that parties consult a lawyer regarding their interests. However, it should be remembered that Shari`ah Councils are not courts. Not only that they are not recognised as courts by the English legal system, Shari`ah Councils also operate as non-adversarial dispute-resolution institutions compared to a formal court where legal representation is required in most cases. Therefore, the current status of the Shari`ah Councils seems to be an impractical forum for lawyers. However, it is highly recommended for the parties to have legal advice before commencing their cases and throughout the proceedings at the Shari`ah Councils. It should apply just as similarly as the normal practice of professional mediation where clients seek legal advice either from their solicitors or independent legal advisors for clients who do not appoint solicitors. The role of legal advice is equally important, as cases involving Muslims are more complex, involving the intricacy of both English and Islamic laws. Having regard to the importance of legal advice, it is therefore suggested that the Shari`ah Councils place at least one professional competent and independent legal advisor at their office. The duties of a legal advisor are clearly to advise the parties of their legal rights, the procedures and requirements, and the legal consequences of their actions in terms of the English legal system, particularly clients who are in civil marriages. With such support, proper steps can be suggested by Shari`ah Councils to the clients should their cases end up in the courts. Considering the financial situation of most of the clients, not

a child some 15% of the father's monthly net income. However, there is no precise guideline, for example, the saying in the Islamic law as to the percentage on this matter except from following just the basic of child maintenance and three months *`iddah*.

30 Interview with a Muslim Family Law Barrister, February 2012.

31 Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).

32 ibid.

33 This concern was raised by Arshad during the interview.

34 See for example, Carol S. Brunch, 'And how are the children? The effects of ideology and mediation on child custody and children's well being in the United States' (1988) (2)(1) International Journal of Law and Family 106, 120.

35 Brunch, "And how are the children?," 120 ; Bano, "in the 'Shadow' of the Law," 204.

only will these facilities save costs compared to seeking legal advice outside Shari`ah Councils but clients can also be monitored if they undergo a similar procedure and receive advice from a similar advisor at a Shari`ah Council. Inevitably it will be a huge call for Muslim lawyers to respond to community needs and perform their social responsibility. 'What we need are a number of lawyers that would either be willing to work for free or just for basic expenses to help these women have a voice.'[36] On the other hand, the requirement of legal representation in itself would force or strongly encourage Shari`ah Councils to become more formal. This would give more weight and credibility to Shari`ah Councils as a place of authority.

2.4 Incompetence of Solicitors to Advise on Matters Relating to Islamic Family Law

The issue of legal advice and representation leads to another question of availability of lawyers well-versed in Islamic family law. However, as the above discussion focuses on the claims over the lack or inexistence of legal representation, this part in contrast explores the incompetence of legal advisors and representation. A study by Shah-Kazemi revealed that:

> In nearly all the interviews, the women believed that where mediation was appropriate, only Muslim mediators would have the sufficient understanding to grasp the issue at stake, because of the distinctive and dynamics of family life in the Muslim social context. Many interviewees went further and stated the importance of the Muslim mediator being knowledgeable in matters of the Shari`ah: it was not simply a question of religious identity but knowledge of Muslim family law.[37]

Khurram Bashir also commented that:

> The challenge remains unaccomplished until Muslim leadership, scholars and educationalist train a whole generation of mediation consultants who are well versed in Shari`ah and Islamic scholarship.[38]

Expertise in Muslim family law is now more in demand as the number of cases referred to lawyers increases. This could be due to awareness among Muslim couples of the English law's requirements or the complexity of cases where legal assistance becomes essential. Whatever the reason, lawyers in the future could be facing a 'flood of cases'. Advising and assisting clients on their rights, including those in accordance with Islamic law, is part of the lawyers' pledge of 'meeting the clients' needs'. However, not all non-Muslim solicitors and professional mediators are aware of those needs, and even if the awareness is there, the expertise is questionable. In this regard, Ahmad states:

> Since Islam is a relatively new feature in the English landscape, empathising with Muslim clients may seem a challenge to those who know little about Islam. If you are in a position not only to understand but also to advise your Muslim client as regards the Shari'a as well as English law, all the better for you and for your client. It is therefore essential for a family lawyer to ascertain what forms of marriage and divorce his or her client have gone or should go through.[39]

Arshad also indicates that the English legal system has actually already prepared for such cultural and religious interaction. Referring to the legal system's accommodation to foreign divorce, she states:

> At first glance, the complexities in the interpretation of the effective and ineffective *talaq*, the differences in the major school of thought on the grounds of *faskh* and the intricacies in the varied methods in which a Muslim couple can divorce may seem as completely separate and even irrelevant to English law.

36 Interview with Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).

37 Sonia N. Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shari`ah* (The Nuffield Foundation, 2001), 75.

38 Khurram Bashir Amin, "Tahkim, Arbitration: Resolution of Matrimonial Disputes between Spouses through Arbitration" (paper presented at the seminar of *Muslim Personal Law*, Islamic Cultural Centre, London, August 22, 2004.

39 Ahmad Thomson, "Islamic Family Law for Lawyers," *Family Law Week* 1-2 (22/01/2007); Raffia Arshad, 'Practice Trends: Islamic Family Law', Practice Trends 151 (2007): 521, Raffia Arshad, "Children: an Islamic perspective," Practice Trends 151 (2007): 1187.

> However, the very fact that English law recognises foreign divorce makes understanding the Shari`ah ever incumbent upon a family practitioner with a Muslim client base.[40]

It is a fact that not many lawyers or mediators, or those working in legislative and judiciary bodies, are well versed in every detailed aspect of Shariah law and this becomes a problem in the case of Muslim clients. In fact, as demonstrated above, some lawyers refer their clients to religious authorities such as Shari`ah Councils for assistance and advice. The Shari`ah Councils should be allowed not only to continue servicing the community as Islamic judicial institutions governing and resolving Muslim family issues but also to help the state resolve family crises and save the institution of the family. This role, arguably, cannot be offered by the state court or professional mediators who do not have adequate knowledge and therefore are not competent.

As demonstrated from the cases, as well as the observation on mediation sessions at the ISC and the BSC, counsel's comment or advice which is connected with a person's faith or religion may have a significant impact on the parties' decision on their future relationship. Such a comment or advice could prevent a divorce, encourage mutual solution, restore a relationship or, most importantly, bring parties back to understanding their responsibilities as spouses and parents, as commanded in the religion. Undeniably, religion proves to be among the significant factors in facilitating a peace process among Muslims, making them inclined to reflect on matters surrounding their life in accordance with God's commands. By this it is argued that Shari`ah Councils remain significantly important to be given a central role, particularly for the Muslim community. Shari`ah Council scholars are argued to be the most suitable and competent authorities to take the role of resolving disputes involving religious issues compared to professional mediators. Furthermore, the majority of clients, especially women, have expressed the benefit of having Muslim advisors or someone who is well versed in the religion.

2.5 Diversity of Opinions and Schools of Law (*Madhahib*)

The plurality in Islamic jurisprudence and the different application of or adherence to the school of law between Shari`ah Councils[41] leads to 'disparities in the way Shari`ah Councils operate and the decision they reach.'[42] This was claimed to encourage 'forum shopping'[43] where a client 'will contact a number of Shari`ah Councils to ascertain their school of law before making an application.'[44] This apparently becomes one of the reasons for the hostile reactions towards Shari`ah Councils by the state and certain groups alleging, without due understanding, that Islamic law is unsettled,[45] or as similarly commented by a former Archbishop of Canterbury, 'unfinished business'.[46] Such reaction worsens with the approach that 'because of these diversities, the [UK] should be wary of legally recognising aspects of Islamic family law.'[47] 'If the British government enshrines one interpretation of Islamic family law into its legal apparatus, it will confer authority over the interpretation while excluding other legitimate interpretation',[48] thereby 'undermining the pluralism inherent in Islamic jurisprudence.'[49] Ahmed further concluded that such thinking has unfortunately influenced the state approach toward recognising Islamic family law and in fact created the understanding that if recognition is given to one

40 Arshad, *Muslim Family Law*, 132.

41 Bano, "in the Shadow of the Law," 188.

42 Ali argues that even though the majority of Muslims in Britain adheres to one school of tradition ie the Hanafi, 'the apparent homogeneity is not reflected in their differing practice of Islam and varying understandings of Islamic law': Ali, *"Authority and Authenticity,"* 125; Charlotte Proudman, "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry," *Family Law Week* 30/01/2012.

43 ibid.

44 ibid.

45 David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998).

46 The former Archbishop of Canterbury comments that 'Sharia law is not, as is often supposed, a monolithic system of static rules; it is rather a method of jurisprudence admitting of diverse traditions of interpretation.' Williams, 'Archbishop's Lecture, para 3; J Chaplin, "Legal Monism and Religious Pluralism: Rowan Williams on Religion, Loyalty and Law," *International Journal of Public Theology* 2 (2008): 421.

47 Samer Ahmed, "Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognising Islamic Law in the United Kingdom," *Yale Journal of International Law* 33 (2008): 494.

48 Ahmed, "Recent Development," 496.

49 Ahmed, "Recent Development," 491-492.

particular interpretation, the state will undermine plurality in Islamic jurisprudence. It is unclear from where such assumption derives. The researcher believes that this issue should not be approached in such a way. In fact, the researcher doubts that the promotion of Islamic legal pluralism is the reason for the state not conferring recognition to aspects of family law. That approach shows a shallow thinking and is a weak argument. It is suggested that the practical solution must come from among the Shari`ah Councils on the matter of diversity of opinion in Islamic jurisprudence.

The differences in following different schools of law are normal phenomena between Islamic scholars and it was already an established activity.[50] The differences in opinion in various schools are a healthy feature of Islamic law. Discussion on this issue stemmed from the apparent dilemma and problem highlighted in the previous chapter where the differences in schools of law denominated or adhered to by Shari`ah Councils or the particular scholar have led to a situation called 'forum shopping'. A major drawback created by the absence of legal enforcement can be seen in various other problems. The most unfortunate consequence is that parties may submit their cases to other Shari`ah Councils that can satisfy their interests through the 'forum shopping' activity. Once more, this is not to argue against the activity; however, a system of monitoring is important to consider in the current social situation of Muslims in this country and the intricacy, fragility and sensitive area of family, marriage and divorce. Some parties are taking advantage of the Shari`ah Councils' varying *madhhab* adherence and may disrespect or refuse to follow/abide by decision of a Shari`ah Council that does not meet their expectation and 'shop' for another that is more appealing or advantageous to their interests.

Not only does this incur more costs for the parties but also increases the case load of the Shari`ah Councils. Furthermore, the adherence to different schools of law among the Shari`ah Councils[51] to a certain extent contributes to forum shopping. On the one hand, it creates flexibility in the judicial exercise among the Shari`ah Councils and the scholars, while on the other hand it seems a choice made at their own cost.[52] This situation could be manipulated by unsatisfied clients to abandon decisions issued by one Shari`ah Council and try their case with another Shari`ah Council. It is suggested that there should be alliances between the Shari`ah Councils such as a Shari`ah Councils union or a board of Shari`ah Councils[53] to combat unnecessary forum shopping. Decisions issued by one Shari`ah Council are enforceable at and by other Shari`ah Councils. This is especially the case if the parties apply to their preferred Shari`ah Council after making an informed decision following forum shopping. Furthermore, such effort should be able to significantly reduce 'bounced' cases going back and forth between the Shari`ah Councils. Not only that, it can also educate the public about the complex implications of forum shopping and give due respect to religious institutions whose authority and recognition comes from the communities themselves. Combating forum shopping can also be done through training Muslim counsel in various *madhabs* and making them capable of providing a more flexible solution to suit the parties.

3. Conclusion

The above discussions have demonstrated issues and challenges faced by the Shari`ah Councils in serving the Muslim community. For these particular issues, the early part of the discussion highlighted inadequate facilities, lack of competency (probably due to lack of training and skills), and procedural discrepancies among the Shari`ah Councils as being some of the reasons that potentially weaken the Shari`ah Councils' role as ADR bodies and their standing in the community. In fact, these issues directly or indirectly contribute to the state's constant refusal to grant recognition. The lack of recognition in the majority of the Shari`ah Councils' deliberations and mediated arrangements is translated into other problems and issues faced by the Shari`ah Councils and Muslims. The current

50 For example, see Ido Shahar, "Legal Pluralism and the Study of Shari`a Courts," *Islamic Law and Society* 15 (2008): 112.

51 Bano, "Muslim Personal Law," 115.

52 Nevertheless, in practice the Shari`ah councils actually adopt a more open and flexible approach when faced with issues of diversity of opinions and schools of law.

53 This idea was in fact shared with the researcher during an interview session with scholars from the three Shari`ah councils; the ISC, the BSC and the MLSC.

reality conveys a very clear message of 'one law for all' and until plurality of religious practice (especially in family law) is accommodated, prospective Muslim couples in the UK are strongly advised to have both their marriage formalities registered.

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Dispute Resolution between the Sunni & the Shiite: Myth or Possibility?

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ABSTRACT

The threat of terrorism is not limited to the conflict-zones in the Middle East and North Africa (MENA) region. It has affected many of the world's most peaceful countries, with terrorist attacks occurring in France, Denmark and Australia. A series of attacks is also recorded in Pakistan, Chad, Tunisia, Kuwait, Kenya, and Yemen. Significant and deadly terrorist attacks also occur in Paris, Brussels, Berlin and Manchester. The on-going conflicts between the Sunni and the Shia significantly contributed to the conflict. This paper discusses whether effective dispute resolution between the Sunni and the Shia is possible or not. Suggestions and recommendations are also included.

INTRODUCTION

It is difficult to find a conflict that is so strong that it continues for nearly 1,400 after the original dispute. But that is the case with the Sunni-Shiite dispute. Throughout history, the cycle of hatred between the Sunni—Shiite has taken many forms including persecution, civil war and genocide. The Sunni-Shiite dispute has also lead to various act of terrorism worldwide.

According to the Pew Research Center, among the numerous threats that Europe faces in 2016, "the menace of ISIS registers most strongly" with the ISIS being either tied or seen as the greatest threat in nine of the 10 European countries surveyed.[1] The other one being climate change.

According to the Global Peace Index 2015, the deaths caused by terrorism increased by 61 per cent in year 2013, which resulted in around 18,000 people being killed in terrorist attacks with 82 per cent occurred in just five countries: Iraq, Afghanistan, Pakistan, Nigeria and Syria.[2] The total number of deaths from terrorism in year 2014 skyrocketted to 32,685, 'constituting an 80 percent increase from 18,111 the previos year.'[3]

The Global Terrorism Database also reveals the high level of terrorism-related fatalities between year 2005-2014: Iraq with 42,063 casualities, Afghanistan with 17,137, Pakistan with 13,672, Nigeria with 12,178, Syria with 4,401, Somalia with 3,306, and the Central-African Republic with 897.[4]

However, the threat is not limited to those conflict-zones. It has affected many of the world's most peaceful countries, with terrorist attacks occurring in France, Denmark and Australia.[5] During year 2015, series of attacks is recorded in France, Pakistan, Chad, Tunisia, Kuwait, Kenya, and

1 Bruce Stokes, Richard Wike and Jacob Poushter, 'European see ISIS, climate change as most serious threats' (Pew Research Center, 13 June 2016) via http://www.pewglobal.org/2016/06/13/europeans-see-isis-climate-change-as-most-serious-threats/

2 Global Peace Index 2015, p.3

3 Institute for Economics & Peace, 'Global Terrorism Index 2015: Measuring and understanding the impact of terrorism' via http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf

4 Robert Muggah, 'Terrorism is on the rise – but there's a bigger threat we're not talking about (World Economic Forum 8 April 2016) via https://www.weforum.org/agenda/2016/04/terrorism-is-on-the-rise-but-there-s-a-bigger-threat-we-re-not-talking-about/

5 Global Peace Index 2015, p.3

Yemen.[6] Significant and deadly terrorist attacks occurs in Paris, Brussels, Berlin and Manchester, all claimed by the terrorist group ISIS. Understandably, the study of terrorism becomes important as policymakers struggle to find a way to put a stop to it.

This paper analyzes the possibility of using dispute settlement mechanism like arbitration to solve or reduce the Sunni-Shiite conflict. The paper also covers the history and development of the dispute, and the potential way to counter it.

ARBITRATION

Arbitration is simply defined in Oxford Concise English as 'the settlement of dipute by arbitrator'.[7] Arbitration offered a more convenient and effective method for parties intending to resolve their disputes outside national courts. What is arbitration really? While arbitration is popularly known as a form of alternative dispute resolution (ADR), the meaning differs from one literature to another[8].

Basically, it is legal technique for the resolution of disputes outside the courts, wherein the disputing parties refer it to one or more persons known as arbitrator(s) or arbitral tribunal.

According to Moser and Cheng, arbitration is *"a consensual dispute resolution process whereby parties agree to submit any disputes, controversies or claims between them for final resolution to one or more persons called arbitrators"*[9].

Arbitration law has a very long history which can be traced to ancient Egypt, Greece, Roman and Islamic law. Derek Roebuck stated that *"Roman authors, Apuleuis, Cato, Cicero, Juvenal, Livy, Ovid, Plautus, Plutarch, Quintilian, Seneca and Terence referred to arbitration, which is evidence that general readers and playgoers were familiar with the process. Cicero contrasts arbitration – "mild, moderate" and litigation – "exact, clear-cut, explicit". In De Officiis he writes of Q. Fabious Labeo's cunning as an arbitrator".*[10]

The difficulty of gathering detailed information about the history of arbitration is partly due to the difficulty to obtain reliable statistics and the fact that private dispute resolution including arbitration is private in nature.

The exact date for the first formal non-judicial arbitration is unknown but it is certain that arbitration predates formal court record. Arbitration has been used during Ancient Egypt, it was popular in ancient Greece and Rome and arbitration, also known as *tahkim* was commonly used during the time of the Islamic dynasties.

The concept of arbitration or *tahkim* under Islamic law is popular since the 7th century. It has been used in trade and also in other areas including politics. The concepts have similarity with modern arbitration but the exception is that the whole process should follow the guidelines provided under Islamic law.

The use of arbitration, also known as *tahkim* is popular among the Muslim community from the start of the Muslims empire in the 7 century. The main differences between *tahkim* and other type of arbitration is that under *tahkim*, there process must adhere to the guidelines provided in the *Quran* and *Sunnah*, the two major sources of Islamic law. Generally, *tahkim* is flexible as most of the principles laid down in the major sources of Islamic law are of general nature e.g. insistent on fairness and justice, the right of both parties to represent their case and protection of parties' rightful interest. However, there are some limitation on a few matters including the arbitrability of the certain matter and certain conditions for the arbitrator(s) and arbitral tribunals.

While arbitration was popular during the golden age of Islam, arbitration was also popular in

6 See Mohd Yazid bin Zul Kepli, 'The Common Mistakes in Combating Terrorism Financing' (2016) International Journal of Business, Economics and Law, Vol. 10, Issue 5 (Aug)

7 *The Concise Oxford Dictionary of Current English* (Oxford University Press 1998) 63

8 There are works that suggested that arbitration should not be included under ADR due to its characteristic and strong resemblance to litigation

9 Micheal J. Moser and Cheng, Teresa Y.W, *Hong Kong Arbitration: A User Guide* (2nd edn, CCH Hong Kong Limited 2008) 5

10 Derek Roebuck, 'Sources for the History of Arbitration: A bibliographical Introduction' (1998) LCIA, Arbitration International, Vol.14, No.3, 252

the Western world. Arbitration originated in Roman and Canon law and was revived back during the Middle Ages in European civil law systems.[11] Elaborate ordinance on dispute settlement through various gilds can be traced back even in the 16th century:

> "If any discord, strife or debate shall fortune to happen between one householder and another of the said company- or between them or any of their journeymen or apprentices or between any of the afore-said persons of the art or mystery of clothworkers which, without prejudice of the laws of the realm, may be appeased by good and wise men; that the said parties, before they move or attempt by course of law any suit between them or against the other in that behalf, shall first show their grief with the circumstance of the same wardens of said mystery … And if it shall seem to the masters and wardens that the matter is difficult and beyond their reach to end and determine the same for lack of better understanding of the laws of the realm or the custom of the clothiers, that then any of the said parties may take their remedy on against another without any further license to be obtained at the hands of the said wardens."[12]

There seems to be different views on the position of arbitration in the West. The first view is that arbitration is very common in the West since the 16th century, especially through the gilds that provided sort of institutional arbitrations. In England, from the 17th century, many trade disputes were commonly resolved by arbitration conducted by the merchant and craft guilds to address their concerns that courts were not sufficiently knowledgeable about commercial customs and were excessively slow and cumbersome.[13]

In those days there was not a great deal of immediate involvement of lawyers in maritime arbitration. Many cases were dealt with on a very low-key basis. Submissions to arbitrators would commonly be made by brokers on behalf of their principals, or other non-legal representatives. Lawyers might have been consulted, but any involvement they had was often in the background. The parties' lay representatives communicated directly with the arbitrators by letter. By and large, everything was relatively simple, quick and very cheap.[14]In the late 19th and early 20th century, arbitration in country like the United States also expanded along with the growth of trade associations.[15]

With the end of the Cold War at the end of the 20th century, obstacles to cooperation among countries were removed and the pressing demands of globalization become a driving force for the establishment of new courts, new commitment to arbitrate, the revival of inquiry and conciliation, and new uses of national courts for the resolution of international disputes (Mary Ellen, 2006).

Arbitration is also popular in country like China. Roebuck highlighted the misconception that there was no arbitration in China:

> "Rivalta (pp.40-42) got it wonderfully wrong: *"dove ogni liberta` e` sacrificata al despotism d'un monarca non vi fosse luogo pe'privati compromessi in arbitri, e' facile mostrarlo'*- "where every free-dom is sacrificed to the tyranny of a monarch, it is easy to show that there can be no place for private arbitration agreements'. He was misled, as better scholars have been, by his reading of Hegel."[16]

11 Katherine V.W. Stone, 'Arbitration – National' (2005) University of California, Los Angeles, School of Law, Public Law & Legal Theory Research Paper Series, Research Paper , No.05-18, 2

12 Ord. Clothworkers, London, 29 Eliz. (1587) as quoted in Earl S. Wolaver, 'The Historical Background of Commercial Arbitration' (1934) University of Pennsylvania Law Review and American Law Register, Vol.83, No.2, Dec.

13 Katherine V.W.Stone, 'Arbitration – National' (2005) University of California, Los Angeles, School of Law, Public Law & Legal Theory Research Paper Series, Research Papar No.05-18, 2

14 Bruce Harris, 'London Maritime Arbitration' (2011) Arbitration, 77(1), 116-124

15 Katherine V.W.Stone, 'Arbitration – National' (2005) University of California, Los Angeles, School of Law, Public Law & Legal Theory Research Paper Series, Research Papar No.05-18, 3

16 Derek Roebuck, 'Sources for the History of Arbitration: A Bibliographical Introduction' (1998) LCIA, Arbitration International, Vol.14, No.3, 257

The attitude of national courts on arbitration changed drastically in the past few centuries. Initially, national courts are more reluctant to assist arbitration as it is considered as an encroachment to the national courts power and jurisdiction. The modern national courts are more willing to recognize and assist arbitration. However, the national courts usually maintain a supervisory role to set aside awards in extreme cases, such as illegality or fraud but this rare.

Most modern arbitration laws adopt the position that court should be slow to intervene but the rules must be backed up by law if they are to be effective, and the relevant law in this aspect is the law of the seat of arbitration[17].

Modern maritime arbitration benefitted a lot from its long history. A series of detailed regulations have been established to act as both guidelines and directions to maritime arbitrators. Furthermore, nowadays, the existence of various institutional bodies related in maritime arbitration enable the arbitration sector to be more coordinated, systematic and efficient. The development in I.T technology and transportations also effected maritime arbitration. As time is usually of the essence, maritime arbitration is seen as a suitable mechanism to ensure a speedy settlement of maritime trade disputes.

However, not all developments of maritime arbitration have been positive. Maritime arbitration, and arbitration in general, used to be known as an inexpensive and more affordable means of dispute settlement. This characteristic is now lost, as arbitration is no longer associated with cheap or low cost. On the contrary, the cost of arbitration can be just as high, if not higher, than the cost of court litigation. Maritime arbitration remains attractive compared to court litigation due to its remaining advantages, particularly parties' autonomy, speedier process and relative ease of enforcement.

The history of Islamic tahkim (arbitration)

Many Muslims countries, particularly those in Middle East are highly skeptical towards modern conventional arbitration. This is due to the strong perception that the modern conventional arbitration as advocated by the West is bias, unfair, discriminatory, and grossly unjust and failed to adhere to the wishes of the parties. The first high profile legal case that leads to this perception is the case of Abu Dhabi oil arbitration.[18]

> **Petroleum Dev. (Trucial Coast) Ltd. V Sheikh of Abu Dhabi, Int'l & Comp. L.Q. 247 (1952)**
>
> This case is about the geographical scope of a 75-year oil concession granted by the sheikh of Abu Dhabi to Petroleum Development (Truman Coast) Ltd. The contract was made in Abu Dhabi and Islamic law, being the municipal law is to be applicable. However, the arbitrator, Lord Asquith concluded that Abu Dhabi is a very primitive region and there is nothing in the Koran that is of assistance in settling the dispute.

This is followed by two other cases that seem to indicate hostility against Islamic law.

> **Ruler of Qatar v International Marine Oil Co ILR 534,545 (1957)**
>
> In this case, the arbitrator refused to adopt Islamic law as applied in Qatar. The arbitrator admitted that Islamic law is the law in Qatar and Islamic law is also being applied strictly in Qatar but refused to adopt Islamic law in the case because in his view, *'the law does not contain any principles which would be sufficient to interpret this particular contract'.*
>
> **Saudi Arabia v Arab American Oil Co. (ARAMCO) 27 I.L.R. 117 (1956)**
>
> In this case, the arbitral tribunal panel ruled that Saudi laws must be *"interpreted or supplemented by the general principles of law,, by the custom and practice in the oil business and by notions of pure jurisprudence".* The panel then decided not to apply Saudi laws that are based on Islamic law

17 Alan Redfern and Martin Hunter, *International Commercial Arbitration* (3rd edition, Sweet & Maxwell 1999) 76-77

18 Petroleum Dev. (Trucial Coast) Ltd. V Sheikh of Abu Dhabi, Int'l & Comp. L.Q. 247 (1952)

> but rely merely on the 'general principle of law' that is largely based on Western law. The panel then ruled against the Saudi.

Before proceeding further, it should be noted that religious arbitration is not limited to Islam. Other religion like Judaism also has its own religious arbitration like *Beth Din* arbitration. According to Bernard Berkovits:

> "Jewish law provides that disputes between Jewish litigants should be referred to a Beth Din, or Jewish ecclesiastical court, rather than the civil courts (unless the Beth Din remits the case to the courts). The Beth Din is a Jewish ecclesiastical court, which has responsibility for purely religious matters (such as Jewish marriage and divorce, and the supervision of kosher food). It also sits as a court of arbitration, hearing a wide range of civil disputes (e.g. in matters of contract, employment, company law, partnership, wills, landlord and tenant, financial provision upon divorce, and so forth)… A Beth Din may be a permanent body, usually consisting of three arbitrators, or an ad hoc bench set up to deal with a specific dispute".[19]

There are a few differences between the nature of Islamic tahkim and other religious arbitration. Other religious arbitration normally involves only those from the same religion. For example, the Jewish communities have usually tried to preserve some jurisdiction for their own family and religious disputes.[20] On the other hand, Islamic tahkim or arbitration can also be used for disputes related to Islamic finance. A substantial number of Islamic finance consumers are non-Muslim. However, it is important to observe that conventional arbitration can be consistent with Islamic law provided that efforts are taken to remove the usually minor inconsistencies.

Arbitration is a common method of dispute resolutions in the Middle East, even before the emergence of Islam, as it is traditionally perceived as a fair method. Before the emergence of Islam, bloody wars and battles between different tribes for small matters are common. For example, one of the war between two tribes lasted for almost two hundred years because a man from another tribe cuts the ear of a camel that belong to an old woman from different tribe as the camel get lost outside its tribe.

Arbitration was one of the popular methods of dispute resolution before the emergence of Islam but there exists a few fundamental differences. Due to lack of systematic and proper court system, arbitration is not easily enforceable in the past. The enforceability of arbitration depends much on the parties involved. However, in a place where someone's honor depends on their ability to keep their promise, arbitration remains feasible.

As mentioned earlier, Islam does not eliminate a culture, tradition, regulation or law that exists before it or of those that belong to the Muslim community unless it is expressly contrary to the clear texts of the Quran or the *sunnah* of the Prophet Muhammad.

History shows that Prophet Muhammad himself used to conduct arbitration before and after his claim of prophet hood. For example, during his younger years, a famous dispute occurs concerning the holy black stone. According to legends, God gave the black stone to prophet Abraham when he built the Kaabah (the most important building in the holy mosque of Mecca) to complete it. People from all around Middle East used to go for pilgrimage in Mecca and they will run several times surrounding the Kaabah during their pilgrimage. The Kaabah was damaged during one of the heavy flood that hit Mecca and the people cooperated to rebuild the Kaabah together. However, a big dispute arise when it comes to the black stone as all tribes insisted that they are the most qualified to be the one who put the black stone on the newly rebuild Kaabah. This almost leads to fighting and animosity. In order to be avoiding unnecessary fighting, the people decided to appoint prophet Muhammad as the arbitrator. He put the black stone on his robe and decided that the head of all tribes should each hold a side of the robe and put the black stone together on the newly rebuild Kaabah. All parties accepted his decision unanimously.

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19 Bernard Berkovits, 'Beth Din arbitration and the Human Rights Act, Section 6' (2005) Arbitration, 71(3), 189-199

20 Derek Roebuck, 'Sources for the History of Arbitration: A Bibliographical Introduction' (1998) LCIA, Arbitration International, Vol.14, No.3, 252

Mecca was a flourishing trade centre even before the emergence of Islam. As an important trade centre in Middle East, it understandably possesses a basic system of legal administration in which arbitrators are appointed to solve commercial disputes. Sophisticated legal system was not yet in existence and arbitration is largely informal. Arbitration seems to derive its legal authority from its widespread acceptance of the community as it become part of the custom or urf.

After the emergence of Islam, arbitration continues although Muslims arbitrators will now ensure that the arbitral awards are made consistent with the principles highlighted in the Quran and sunnah.

One of the Quran verse said:

> "O you who believe! obey Allah and obey the Apostle and those in authority from among you; then if you quarrel about anything, refer it to Allah and the Apostle, if you believe in Allah and the last day; this is better and very good in the end.'

There is also another verse that ordered the believers to let the experts of certain matter to decide or handle the matters accordingly. Briefly, Islam is in support of arbitration. However, one fundamental difference is in Islam, there is no separation with the spiritual element. In other words, the Muslims are warned about the serious consequences of manipulating a trial, arbitration or other dispute resolution mechanism to achieve unjust victory. According to the prophet:

> "You bring me lawsuits to decide, and perhaps one of you is more skilled in presenting his plea than the other and so I judge in his favour according to what I hear. He to whom I give in judgment something that is hi brother's right, let him not take it, for I but give him a piece of the Fire."

Islamic law has a long and rich tradition of supporting and facilitating trade dispute resolution. The prophet himself, and many of his companions were successful businessmen and respected traders during their lifetime. Therefore, they have been exposed to trade disputes on daily basis and they are no sranger to arbitration.

The important role of arbitration in Islam is even reflected in the Constitution of Medinah, also known as Sahifah Medinah. The Constitution of Medinah was signed between the Muslims (mostly Muhajirin (the immigrants from Mecca) and Ansar (the Medinah locals), the non-Muslims and the Jews of Medinah in 622 A.D. One of the article of the Constitution stipulated that dispute between the tribes shall be resolved through tahkim or arbitration.

The use arbitration or tahkim is recognized in all sources of Islamic law from the *Quran*, the *sunnah* of the prophet, the ijma' (the consensus of scholars), the qiyas (analogy) and from the viewpoints of the four main school of thoughts (the mazahib).

The legal authority of arbitration as a valid dispute resolution mechanism in Islam is strong. Firstly, the golden legal principle in Islam is everything is permissible and permitted except those clearly prohibited by the texts of the Quran or the sunnah of the prophet. Therefore, unless there exists prohibited elements in arbitration, the general rule is that arbitration is valid and recognizable. Even when there exists prohibited element e.g. allocation of interest or usury in the arbitral award, the rest of the arbitral award should be valid in so far as it is consistent with the Islamic principles.

The second legal authority on the status of arbitration is the texts of the Quran itself. In various verses, the believers are requested to fulfill their contractual obligations and to render trusts/affairs to the experts and those capable of handling it.

> "O you who believe fulfill any contracts [that you make]…Fulfil God's agreement once you have pledged to do so, and do not break any oaths once they have been sworn to. You have set God up as a Surety for yourselves."

Another indicator on the legal authority of arbitration in Islam is the historical fact that the prophet himself was an arbitrator and the practice continues after Islam. The forth legal authority on the validity of arbitration is the acceptance of uruf or custom as part of Islamic law as long as it does not run contrary to Islamic principles. As arbitration is part of the customary practice to peacefully settle dispute, arbitration is acknowledged in Islam.

Under shariah, arbitral award is binding, similar to contract. Intentionally breaching an arbitral award is similar to intentionally breaking a contractual term and this is strictly forbidden in the religion.

It is however noted that the literature on Islamic arbitration, especially in the traditional literature is scarce and limited despite the clear validity of arbitration. A few reasons can be attributed to this. Firstly, in the past, the judiciary is not burdened with backlog of cases and other challenges currently suffered by modern judiciary. Cost was not a serious problem and legal revenue is basically accessible to the public at large. In other words, the judiciary was sufficient to handle the disputes at that time.

Secondly, the limited literature can be attributed to the very nature of arbitration itself. Contrary to court litigation, arbitration is generally confidential in nature. The arbitral award or the decision is basically limited to the relevant parties and understandably; it does not reach the public at large. Most of the writings of traditional scholars surround matters that involve public interest at large and not personal trading disputes between commercial parties.

For simplicity, the development of Islamic arbitration can be classified into four categories;

i. Islamic arbitration during the lifetime of the Prophets and Khulafa' al-Rashidin

ii. Islamic arbitration under the four main school of thoughts

iii. Islamic arbitration under Muslims Empire

iv. Modern Islamic arbitration

Islamic arbitration during the lifetime of the Prophets and Khulafa' al-Rashidin:

As mentioned earlier, arbitration is practiced during the lifetime of the prophet and the prophet himself used to become arbitrator to solve disputes. However, it is noted that there are a lot of interchange between the role as arbitrator and the role as judge in the earlier period of Islam to the extent that the distinction between the two is sometimes blur.[21]

Islamic arbitration under the four main schools of thoughts:

The development of Islamic jurisprudence is largely shaped by four main schools of thought; the Hanafis, the Malikis, the Shafies and the Hambalis. They are also known as the four Madhhab (school of law). There are reasons for the emergence of the Madhhab. While the basic teaching of the religion, concerning faith etc is clear; there are some matters that were not elaborated in details in the main sources of Islamic law. By following a particular school of law, a layman will not need to spend a lot of time and effort to analyze the exact position and view of the religion on various matters. Instead, they will largely follows the view of the experts that they preferred. For example, Islam commanded its followers to perform 5 times daily prayers but the exact methods on performing such prayers is not specified in the Quran. Therefore, by adopting or following a school of thought, a layman can just follow the style of the expert.

There is various school of thoughts/school of law. However, the four most influential one are the following:

21 There are a few possible reasons for this. For example, the word tahkim can literally be defined as arbitration. However, the root word for Arabic word 'tahkim' is hakama, literally interpreted as to judge or to arbitrate. As the two words and role are used interchangeably, the line between the two can become blurring.

i. The Hanafis;

ii. The Malikis;

iii. The Shafiies;

iv. The Hambalis.

The Hanafis:

The Hanafis madhhab is named after the Persian scholar Abu Hanifa an-Nu'man ibn Thābit. His two disciples, Abu Yusuf and Muhammad al-Shaybani preserved his legal views. Both of his disciples are also well-known scholars by their own rights. The Hanafis school has the most adherents in the Muslim world. The Hanafi school is the oldest among the four different schools of thought and it also have the largest followers.

The scholars in Hanafi school consider the contract of arbitration to share similarities to the contract of agencies and share some feature with conciliation. Basically, the arbitrator is considered as an agent of the parties (that appointed him). Therefore, the rules and conditions that govern agent are extended to arbitrator.

This school consider arbitral award to be binding under the Shariah. This is because arbitration contract is a valid contract and the validity of arbitration process is recognized by the main sources of Islamic law including Quran, Sunnah, Ijmak and Qiyas (as long as it is consistent with the principles laid down under Islamic jurisprudence).

All four schools of thought share the view that for someone to be appointed as an arbitrator, he or she must fulfill the conditions required for the appointment of a judge eg honest, knowledgeable in law etc.

The Hanafis, the Malikis, the Hanbalis and the majorities of the Shafies are of the view that a judge cannot and should not nullify an arbitral award simply because he disagree with the views decided by the arbitrator or arbitral tribunals. Accordingly, a judge should not review the merits of the disputes. However, all four school agree that a judge can intervene when the arbitral award expressly violate the Shariah principles.

The Malikis:

Malikis differ from other schools of thought in a few aspect. For example, under other schools of thought, the Sunnah or 'tradition' is limited to the Prophet but the Malikis also include the rulings and views of the four righly guided caliphs and relied heavily on the tradition of the practise of the salaf people of Medina.

The Maliki school also recognized the general validity of arbitration. However, this school is of the view that the authority of an arbitrator or arbitral tribunal cannot be revoked unilaterally once the arbitration proceeding started. The only way to revoke it is by the mutual agreement of the parties.

The Malikis, together with the Shafies and Hanbalis agreed that a non-Islamic legal system could be chosen as the choice of law when one of the parties is non-Muslim. However, such recourse is valid as long as it does not express or violate the basic interest protected by the Quran or Sunnah e.g. upholding justice, fair hearing etc.

The Shafiies:

The Shafiiiess school is based on the view of Abū Abdullāh Muhammad ibn Idrīs al-Shafiʿī. He is considered the founder of Islamic jurisprudence as he laid down the formal and clear methods

of deducting the legal principles from the various sources and turns it into a clear science. There are notable differences of view. According to Alkhamees:

> "The first view, which is held by the Hanafi and Shafi'I schools, states that the pronouncement of the arbitrators should not be regarded as anything more than conciliation. In the Shafi'I view, the status of the arbitrator is less significant than that of a judge, as the empowering of the former can be withdrawn by the parties, unlike judges".[22]

The Hanbalis:

The Hanbali school is based on the work of Imam Ahmad ibn Hanbal. Under the traditional hanbali school, an arbitral award is binding, similar to a court judgment. However, in order to be an arbitrator, the person must fulfill the same qualifications required to be a judge.

Islamic arbitration under Muslims Empire:

After the demise of the Islamic prophet Muhammad, the Muslim Caliphates extended from the Central Asia in the east to the Atlantic Ocean in the West. The Muslims empires of Umayyads, Abbasids, Fatimids, Ghaznavids, Seljuqs, Safavids, Mughals, and Ottomans were among the prominent and renowned powers in the world.

During this period, laws that are based on or consistent with Islamic principles are widely applied in various jurisdictions. Codification of law can be seen during some period. The last Muslim Empire, the Ottomans Empire also include some provisions concerning arbitration in its codification of Islamic law, as seen in "the Mejella". Most of the provisions are largely build upon the works of the Hanafis school.

The Mejelle, also known as Majallah al-Ahkam al-Adliyyah, the Book of rules of Justice was the civil code of the Ottoman Caliphate (1877-1926). The introductory part of the Mejelle consists of 100 articles, mostly legal maxims or legal formulae for immediate application in court while the total number of its article is 1,851. The purpose of the compilation of the Mejelle was to provide the practitioners of law of that time with ready-made principles of law but the judges are not strictly required to adhere to the provision laid in it, as they were free to apply, modify or depart from those provisions as the case may be.[23]

There are a few noteworthy differences in the Mejella if compared to modern arbitration. For example, a judge can nullify the decision of an arbitrator or arbitral tribunal. Furthermore, if there is inconsistency between a decision of a judge and the decision of an arbitrator, the decision of the judge will prevail.

The influence of the Mejelle is far-reaching. For example, the Mejelle was translated from Turkish into other language including Arabic, English and Malay. It was also introduced to the Malay peninsular in 1913, as Majallah Ahkam Johor and this demonstrate a breakthrough into a major Shafi'i jurisdiction.[24]

The development of Islamic arbitration was temporarily (but not effectively halted) by western colonialism that resulted in fall of the last Muslims empire. As western-based law gradually replace shariah law during the colonialism, the application of Islamic principles on various matters including trade and commerce slowly declined. By the end of the colonialism, the only Islamic principles allowed to be practice in Muslims countries are mostly limited to matters like marriage and divorce, and occasionally (but not always) inheritance law.

However, the end of the World War II is followed by changes in Western policy in which independence is granted or given to most Muslims countries. Muslims in various countries all around the world slowly re-introduce Islamic principles that emphasize on justice and kindness in all facets

22 Ahmad Alkhamees, 'International Arbitration and Shari'a Law: Context, Scope, and Intersections' (2011) Journal of International Arbitration 28(3), 257

23 C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi (trs), *The Mejelle: Being An English Translation of Majallah el-Ahkam-I-Adliya And A Complete Code of Islamic Civil Law* (The Other Press Sdn Bhd 2007) vi

24 C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi (translators), *The Mejelle: Being An English Translation of Majallah el-Ahkam-I-Adliya And A Complete Code of Islamic Civil Law* (The Other Press Sdn Bhd 2007) vi

of daily life, including trade and commerce, banking and also arbitration. In recent decades, the Mejelle has received fresh attention as reflected in the codification of the new Civil Code of the United Arab Emirates in 1985.[25]

While the development of Islamic finance has been remarkable, the same cannot be said towards Islamic arbitration. Some of the Muslim states, particularly those in the Middle-East are quite hostile towards arbitration in general. According to Prof. El-Kosheri:

> " Yes it is correct that Arab world was skeptical of arbitration, but the situation has improved since 1996. The skepticism was triggered by historical events that resulted in the Arab world having misgivings about international arbitration … The Abu Dhabi, Qatar and Aramco decisions caused people to turn against arbitration because it was conceived as supporting the interests of Western parties. The decisions had a negative psychological effect in that people felt like they were treated unfairly, that they were treated as underdogs."[26]

Attempts are currently being made by various Muslim countries to reintroduce the Islamic element into modern arbitration, as both can actually exists in harmony. Example includes the efforts of the Malaysian government in introducing Islamic arbitration for disputes related to its Islamic financial services.

Modern arbitration is generally consistent with Islamic principles. However, there are some minor exceptions, particularly on issue of interest attached to the arbitral award (as this is contrary to Islamic prohibition of usury). Many are positive about gradual acceptance of arbitration and possible harmonization of conventional arbitration and Islamic arbitration. According to Alkhamees:

> *"Recent decades have witnessed an increase in selecting international arbitration as an alternative method of resolving disputes. However, its acceptance and the interpretation of arbitration agreements have been notably influenced by Shari'a, as it is the primary source of law and public policy in many countrie sin the Islamic world. The growth in business relations between international companies and the Islamic world, mainly in the Middle East, in addition to the expansion of Islamic finance, stress the importance of understanding the Shari'a attitude towards international arbitration."*[27]

Professor El-Kosheri clarifies the reasons for his positive view on the future of arbitration despite previous hostility by various Arab nations:

> *"… I anticipate that arbitration will become the natural justice in business communities inside and outside the Arab world. Nowadays, complicated transactions take place and there is substantial inward and outward investment, which means that we need to find a good forum for resolving disputes. The contracts governing these complicated transactions and investments need to be properly negotiated to provide for effective remedies. The applicable law is not that important because the legal principles in many countries are alike, particularly when it comes to contractual relationships. Established rules and principles such a pacta sunda servanda are recognized worldwide. I foresee that arbitration will particularly take off in the Emirates, Qatar and Bahrain because these countries have so many inbound and outbound investments, they have modern legislation, institutional set-ups and promising young, highly educated lawyers that work closely with transnational law firms."*[28]

It is noted that in some jurisdiction, efforts are being taken to promote the settlement of disputes based on Islamic principles. For example, The Kuala Lumpur Regional Centre for Arbitration

25 C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi (translators), *The Mejelle: Being An English Translation of Majallah el-Ahkam-I-Adliya And A Complete Code of Islamic Civil Law* (The Other Press Sdn Bhd 2007), vi

26 Nadia Darwazeh and Professor Ahmed Sadek El-Kosheri, 'Arbitration in the Arab World: An Interview with Professor Ahmed Sadek El-Kosheri' (2008) Journal of International Arbitration 25(2), 203-210

27 Ahmad Alkhamees, 'International Arbitration and Shari'a Law: Context, Scope, and Intersections' (2011) Journal of International Arbitration 28(3), 225-264

28 Nadia Darwazeh and Professor Ahmed Sadek El-Kosheri ,'Arbitration in the Arab World: An Interview with Professor Ahmed Sadek El-Kosheri'(2008) Journal of International Arbitration 25(2), 209

(KLRCA) has introduced the Rules for Arbitration of Kuala Lumpur Regional Centre for Arbitration (Islamic banking and Financial Services) which allows any disputes arising from Islamic banking and finance to be referred to KLRCA for resolution. KLRCA has also invited Muslim arbitrators with background in Islamic banking to offer their services in the settlement of such disputes.

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) is making robust efforts to expand its role in promoting Islamic arbitration globally and will launch Islamic arbitration rules to cover other sectors such as construction and maritime[29].

Currently, the centre serves as a platform to deal with cases involving Islamic banking and finance, takaful, Islamic development financial business, Islamic capital market products or services, and other transaction business based on syariah principles. KLRCA director, Sundra Rajoo, said the centre would develop a generic set of Islamic arbitration rules to enable it to have a competitive advantage over other arbitration centres in the world. "*We believe there is great potential for KLRCA and Malaysia to become a global Islamic banking and finance dispute resolution hub that is both syariah-compliant and of international standard.*[30]

"We are in constant consultation with the relevant stakeholders, including Bank Negara Malaysia and the International Syariah Research Academy for Islamic Finance, to develop these new rules," he told Bernama in an interview. He said the new rules were expected to be launched next year and would be marketed globally, a move to further position Malaysia as among the top destinations for disputing parties to seek arbitration as well as a renowned business centre.

Sundra said the KLRCA was poised for future growth as it would be the first arbitration institution in the world to have a new set of rules. "We are also looking to hire a syariah law expert to help us develop the new rules, which will enable us to have the competitive advantage over other arbitration centres in the world," he said.[31]

The revised rules would be launched in 2012, he said. "We will play a different role and promote the rules of law worldwide with our own identity. When we have all in place, we target more people will come and arbitrate in Malaysia," he said.[32]

Beside Malaysia, other more established arbitration centers like Hong Kong also have Islamic arbitration as part of their portfolio. Example include the International Islamic Mediation & Arbitration Centre (IMAC), an independent international institution established by the Arab Chamber of Commerce & Industry on July 2008 in Hong Kong to conduct mediations and arbitrations and to provide assistance in the settlement of disputes.

While country like Malaysia adopted positive attitude towards arbitration, the same attitude is not always shared by other Muslim-majority countries. The hostility in various Middle-East countries towards arbitration can be traced to a few factors. According to Lew, the factors include:[33]

1. *Ignorance in the West about Islam, which is a major influence on the laws of most all the Arabs countries,*

2. *Ambiguity in the policies as expressed by the Governments in the region, and misunderstanding of Middle Eastern thinking*

3. *The absence of so many Middle Eastern States as party to the New York Convention*

29 'KLRCA to Actively Promote Islamic Arbitration Globally', *Bernama News* (Kuala Lumpur, 27 June 2011) < http://maritime.bernama.com/news.php?id=597088&lang=en> accessed 8 October 2011

30 'KLRCA to Actively Promote Islamic Arbitration Globally', *Bernama News* (Kuala Lumpur, 27 June 2011) < http://maritime.bernama.com/news.php?id=597088&lang=en> accessed 8 October 2011

31 'KLRCA to Actively Promote Islamic Arbitration Globally' *Bernama News* (Kuala Lumpur 27 June 2011) < http://maritime.bernama.com/news.php?id=597088&lang=en> accessed 8 October 2011

32 'KLRCA to Actively Promote Islamic Arbitration Globally' *Bernama News* (Kuala Lumpur 27 June 2011) < http://maritime.bernama.com/news.php?id=597088&lang=en> accessed 8 October 2011

33 Julian D.M. Lew, 'The recognition and enforcement of arbitration agreements and awards in the Middle East' (1985) Arbitration International, 2nd quarter, 178

4. *General distrust which still exists in the Middle East for Western institutions. On the other hand, arbitration agreements are frequently placed in contrasts with parties from the Middle East who will gladly accept arbitration instead of courts as the forum for dispute settlement.*

Nudrat Majeed has summarized how the series of discouraging cases influenced the hostile attitude towards arbitration by some:

> *" In Petroleum Development (Trucial Coasts) Ltd v. Shaikh of Abu Dhabi [Case No.37, ILR 1951; 1 ICLQ 247], the arbitrator, Lord Asquith rejected Islamic law as applied in Abu Dhabi as not being competent to regulate a modern commercial instrument … Similarly, in Ruler of Qatar v. International marine Oil Company Ltd [], the arbitrator, while holding that the law of Qatar to be the proper law of the concession agreement, declined to apply it. The law in Qatar followed the Islamic jurisprudential school of Hambali, which the arbitrator held to be inappropriate to govern a modern oil concessions ... The arbitrator then referred to the award of Lord Asquith and went on to say, "I have no reason to suppose that Islamic law is not administered there [i.e. in Qatar] strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract'. The assumption that there existed no general law of contract failed to take into account extensive Arabic legal scholarship that had long ago enunciated clear principles of contracts and contractual obligations in islamic law."*[34]

Country like Saudi Arabia seems to be taking a very cautionary approach with arbitration. However, arbitration is gradually gaining stronger ground in the Middle-East despite previous hostility. According to Reza Mohtashami and Sami Tannous:

> *"The increased bargaining position of Middle Eastern companies in negotiations with their Western counterparts, as well as the increased flow of intra-regional trade and investment, is likely to militate against the choice of the established European centres of arbitration as seats of arbitration stipulated in these contracts… The DIFC project is part of the Dubai government's wider vision to continue Dubai's rapid development into a regional financial and legal centre. The bulk of the legal construction work is now complete and the necessary structures are largely in place. The next step is to see how well this infrastructure operates in practice."*[35]

Furthermore, according to Khan:

> "Another recent development at the global level is the establishment of the International Islamic Centre for Reconciliation and Commercial Arbitration for Islamic Finance Industry, which was launched in April 2005 with 50 percent of the capital contributed by the Islamic Development Bank. The center, the headquarters of which will be situated in Dubai, will settle financial and commercial disputes between financial or commercial institutions that have chosen to comply with Shariah. One of its roles will be to develop some common understanding of standards in the application of Shariah. Reconciling disputes in the con- text of Shariah application requires a scientific understanding of the diversity in Shariah opinion and defining some globally acceptable standards for benefiting from Shariah diversity in the application of Shariah in the industry. This may be one of the major functions that this center may take on once it is fully in operation."[36]

From the previous discussion, it is clear that arbitration is not that popular in the Middle East and North African (MENA) region, even for commercial matter. It would be unlikely that the political powers in the MENA region would be willing to solve political and religious dispute like the Sunni-Shiite dispute using arbitration or other dispute mechanism resolution.

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34 Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) LCIA, Arbitration International, Vol.20, No.1, 102

35 Reza Mohtashami and Sami Tannous, 'Arbitration at the Dubai International Financial Centre: a Common law Jurisdiction in the Middle East' (2009) LCIA, Arbitration International, Vol.25, No.2, 185

36 M.Fahim Khan, 'Setting Standards for Shariah Application in the Islamic Financial Industry' (2007) Thunderbird International Business Review, Vol. 49(3), May–June, 301-302

SUNNI-SHIITE HISTORY

To have deeper understanding of the dispute, it is necessary to look back at the history of Sunni-Shiite. There are basically two views on the matter. The first view is the view of the Sunni that form the majority of the Muslim community, also known as the ummah. Around 85-90% of the Muslim population all around the world belongs to this category. The Sunnis are those believe in the Holy Quran and the teaching and practice of the prophet.

According to the first view, after the death of the Prophet Muhammad s.a.w, the companions of the Prophet agrees that the successor of the Prophet, and the new leader of the Muslims community should go to Saidina Abu Bakar. This selection was not surprising due to various reasons; Saidina Abu Bakar was a very competent leader, he was personally selected by the prophet as the leader or Imam of prayer when the prophet was sick, he migrated together with Prophet Muhammad s.a.w to Medina. In addition, Saidina Abu Bakar was mentioned in the Holy Quran in a very positive light:

> 'If you do not aid the Prophet - Allah has already aided him when those who disbelieved had driven him out [of Makkah] as one of two, when they were in the cave and he said to his companion, "Do not grieve; indeed Allah is with us." And Allah sent down his tranquillity upon him and supported him with angels you did not see and made the word of those who disbelieved the lowest, while the word of Allah - that is the highest. And Allah is Exalted in Might and Wise.' (Surah At-Tawbah 9:40)

The Holy Quran clearly identifies Saidina Abu Bakar as a companion of the Prophet Muhammad s.a.w. According to the *asbab al-nuzul* (reasons behind the revealation), Saidina Abu Bakar was migrating to Medina with the Prophet when a group of assasins from Mecca tried to trace and kill them. Both the Prophet and Saidina Abu Bakar hide in a cave. While the Prophet was sleeping in the cave beside Saidina Abu Bakar, a serpent bites Saidina Abu Bakar but he just remained silent so as not to disturb the Prophet. However, the Prophet woke up when the tears from Saidina Abu Bakar touched the face of the Prophet. Saidina Abu Bakar then clarified to the Prophet that he was not afraid of his own safety but he was afraid for the safety of the Prophet by saying: 'If I died, I am just a man. But if you died, you are the last Messenger of God.'

Saidina Abu Bakar was also the father-in-law of the prophet and a very respected figure in the community. His contribution to the ummah was very significant and he was a natural choice for the post of the caliph.

More importantly, his selection was not disputed by anyone. Although it is true that Saidina Ali was occupied with the funeral of the Prophet during the selection of Saidina Abu Bakar, Saidina Ali never objected to the selection. If the selection was wrongly made or if it were oppression against Saidina Ali, Saidina Ali would not just stand by and do nothing. Saidina Ali is known for his courage and bravery as proven by his willingness to sleep at the house of the Prophet during the night of migration (*hijrah*).[37]

After the demise of Saidina Abu Bakar, Saidina Umar was selected as the 2nd caliph. Saidina Umar was a very strong and competent leader, responsible for various contributions to the ummah. During his time, he prohibited his family members from holding important government posts to avoid the allegation of favor or bias. As a result, many appoinments went to the family members of others, including Saidina Osman.

After the demise of Saidina Umar, Saidina Osman was appointed as the third caliph. Saidina Osman was a very wealthy businessman before his appoinment as caliph and he came from a very respected family. Many of his family members were appointed to high positions during the time of Saidina Umar. When Saidina Osman was appointed as caliph, he was unwilling to interfere with the

37 The migration or *hijrah* from Mecca to Medina was ordered by Allah after the leaders of Mecca decided to assassinate the Prophet. However, due to the reputation of the prophet as a very trustworthy person, it has become a practice in Mecca to leave things with the prophet as safekeeper. It was necessary to leave someone in the house of the prophet to ensure that the trust is maintained and the properties returned to the rightful owner. However, it was very dangerous to sleep at the house of the prophet during the night of hijrah as the house was surrounded by assassins wanting to kill the Prophet. Saidina Ali volunteered to sleep at the bed of the Prophet and pretended to be him to deceive the assassins.

previous appoinments made by Saidina Umar so as to ensure the smooth running of the government. However, the enemies of Islam took this opportunity to spread rumours and false allegation that Saidina Osman was a corrupt and bias leader. This lead to his assassination by a dissatisfied group from Kufah.

After the assassination of Saidina Osman, the Muslim community became very angry and wants a speedy punishment against the killers. However, due to the extremely large number of the group, Saidina Ali preferred a careful investigation to prevent innocent people from being implicated as well. This resulted into conflct with some of the companions that preferred speedier prosecution.

During this time, Saidina Ali was appointed as the fourth caliph. Saidina Ali attempted to have a meeting with dissatisfied companions including Aishah and Muawiyah etc. Both sides wanted peace for the ummah and justice for Saidina Osman. However, the night before the meeting, the killers of Saidina Osman attacked the camp of Aishah to ensure that the meeting will fail. This is because the killers were aware that they will eventualy be prosecuted if the meeting was successful. By morning, both sides were already in battle.

The battles continue with the supporters of Saidina Muawiyah as well. During this time, Saidina Ali manages to gain military advantages. However, before Saidina Ali and his followers manage to gain victory, arbitration or *tahkim* was proposed. The arbitration failed and the ummah was further divided.

After the death of Saidina Ali, Saidina Muawiyah was appointed as the next caliph. However, the brutal treatment of the Umayyad empire against the family members of Saidina Ali make the Umayyad empire very unpopular and lead to the rise of the Shiite. The Shiite identifies themselves as the followers of Saidina Ali.

The Umayyad empire was finally overthrown by the Muslim community and replaced with the Abbasid empire. The Shiites play important roles in overthrowing the Umayyad. Unfortunately, the Sunni-Shiite dispute did not ends with the overthrowing of the Umayyad empire. The dispute continues.

Table. Selected history of Sunni and Shia

Year/ Century	Event
632	The demise of the Prophet According to Sunni, the Prophet did not clearly designate a successor and the Muslim community acted according to his sunnah in electing his father-in-law Abu Bakr as the first caliph. This differ with the Shi'a view that Ali is the first divinely sanctioned "Imam", or successor of the prophet. The Shiites consider the caliphate the exclusive right of male members of the family of Muhammad (ahl al-bayt) to head the imamate. The strongest and most influential of Shiite groups are the Twelver Shiites, named after their belief in the twelfth Imam, who allegedly went into hiding in 873; since 1979 this group rules in Iran.
657	The Ummayad governor, Saidina Mu'awiyya contested the reign of the fourth caliph Ali, son-in-law of the Prophet Muhammad, starting the first civil war among Muslims (fitna) that lasted until 661.
632-661	The first four caliphs are known among Sunnis as the Rashidun or "Rightly-Guided Ones". Sunni recognition includes Abu Bakr as the first, Umar as the second, Uthman as the third, and Ali as the fourth.
661	Saidina Ali was assassinated during his prayer. Upon his death, his elder son Hasan became leader of the Muslims of Kufa, and after a series of battles between the Kufa Muslims and the army of Muawiyah, Hasan agreed to cede the caliphate to Saidina Muawiyah and maintain peace among Muslims upon certain conditions that Saidina Muawiyah will not nominate any successor.
680	Saidina Muawiyah died and passed the caliphate to his son Yazid, and breaking the treaty with Hasan ibn Ali.

719	Shiah Rofidah murdered around 500,000 in Khorasan
894	Shia Zaidian murdered 50,000 Muslim in Yaman
	Umayyad period The Sunni rulers under the Umayyads sought to marginalize the Shia minority and later the Abbasids turned on their Shia allies and further imprisoned, persecuted, and killed Shias.
788-985	A Shia Zaydi dynasty existed in what is now Morocco
929	Shiah Qurmutiah attacked the Holy city, Mecca, murdered 400,000 pilgrimage, and damaged the Kaabah
990- 1096	A Shia Arab dynasty (Uqaylids) with several lines that ruled in various parts of Al-Jazira, northern Syria and Iraq.
934–1055	The Nuyids. At its peak consisted of large portions of modern Iraq and Iran.
1090	Shiah Hassasin murdered around 200,000 Muslim in Egypt
1099	Shiah Fatimids attacked Palestine and assist in the handover to the Christians
1258	The Shi'ite cheif minister (Wazeer), Ibn al-'Alqamee, also played a major role in that tragedy. Shiah Alawites, together with Monggols led by Hulagu, murdered around 800,000 in Iraq, and more than 2 millions in Syria, Lebanon, Jordan and Palestine. After the Mongol sack of Baghdad in 1258, prejudice against Shias became more frequent.
1347 1527	Bahmanis. A Shia Muslim state of the Deccan in southern India and one of the great medieval Indian kingdoms. Bahmanid Sultanate was the first independent Islamic Kingdom in South India.
909–1171	Fatimids. In 909 CE, a Shiite military leader Abu Abdallah, overthrew the Sunni ruler in Northern Africa; which began the Fatimid regime. The Fatimids controlled much of North Africa, the Levant, parts of Arabia and Mecca and Medina. The group takes its name from Fatima, Muhammad's daughter, from whom they claim descent.
1501-1736	Safavids. A major turning point in Shia history was the Safavid dynasty (1501–1736) in Persia. This caused a number of changes in the Muslim world including the ending of the relative mutual tolerance between Sunnis and Shias that existed from the time of the Mongol conquests onwards and the resurgence of antagonism between the two groups.
1514	The Ottoman sultan, Selim I, was alleged to order the massacre of 40,000 Anatolian Shia.
1686	Shiah Safawiah murdered around 1 million Sunnis in Iran
1737	Shiah Qadaniah changed the Kiblah to Iran
1801	The Al Saud-Wahhabi armies attacked and sacked Karbala, the Shia shrine in eastern Iraq that commemorates the death of Husayn.
1947	Shiah Isnaashariah decalre that Karbala is 7 times better than Mecca
1982	Shia Alawites murdered 40,000 Sunni Muslim in Homs, Syria
1986	Shia bombed part of the Holy Mosque
1987	Shia murdered 402 Saudis during Hajj

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Overview of Legal and Administrative Approaches to Manage Human-Wildlife Conflicts in Malaysia

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Abstract

Human-wildlife conflicts result when the actions of humans or wildlife have an adverse impact upon the other. This paper presents an overview of Malaysia's legal and administrative approaches to manage human-wildlife conflicts (HWC). Firstly, the paper reviews the status of wildlife in Malaysia and the current conflicts involving man and wild animals that happen both in urban and rural areas. Then it identifies government's policy relating to land-use planning as well as wildlife conservation, and examines how such policies have shaped HWC. While urbanization and agricultural expansion are considered main factors that contribute towards such conflict, environmental law and relevant administrative instrument on the other hand can play vital roles to support the management and mitigation of HWC. For this purpose, the article examines existing legal provisions and administrative strategy applicable in Malaysia to manage and mitigate conflicting interests of human and wildlife. The examination concludes that law and institutions have important roles to play in managing and mitigating HWC. Mitigation measures through the provisions of law and institutional strategy that take into consideration biological, economic and social factors can effectively narrow down the conflicts. At the same time such measures also help towards environmental conservation, and enhancement of human welfare, health and safety.

Keywords: *human-wildlife conflict, mitigation, environmental law, institutional strategy*

Introduction

As a developing country, Malaysia is under increasing pressure from rapid land development for various activities which has resulted, among other things, in a continuous competition of people and wildlife for the same natural resources such as land, water and forest. Such competition inevitably brings both humans and animals in close contact with one another with adverse impacts on both. From the perspective of environmental protection, the conflict between human and wild animals is

considered as an obstacle to wildlife conservation and is becoming one of the most serious threats to the survival of species including large animals such as elephant and tiger[1]. On the other hand, there have been instances where wildlife has attacked human or destroyed crops, livestock or property. Wildlife can also transmit disease to either human or domestic animal which is another cause of concern[2].

The growing conflict between human and wild animals needs to be addressed to manage its impact on both human and animal. For countries such as Malaysia that is facing such conflict, among mechanisms that can be applied are that of legal and administrative approaches which are considered important in supporting the management and mitigation of HWC[3]. This paper is meant to examine existing legal provisions and administrative strategy to manage and mitigate conflicting interests of human and wildlife. This is done by reviewing the status of wildlife in Malaysia and the nature of HWC that happens both in urban and rural areas. Then it identifies government's policy relating to land-use planning as well as wildlife conservation, and examines how such policies have shaped human wildlife conflict. The examination concludes that law and institutions have important roles to play in managing and mitigating such conflict. Mitigation measures through the provisions of law and institutional strategy that take into consideration biological, economic and social factors can effectively narrow down the conflicts. At the same time such measures also help towards environmental conservation, and enhancement of human welfare, health and safety.

Malaysia Forest Status

Malaysia is a tropical country that belongs to the Sundaland biogeographical region and covers an area of about 33million hectares, consisting of Peninsular Malaysia, and the Borneo states of Sabah and Sarawak. The two regions which are located entirely in the equatorial zone are separated by the South China Sea. Malaysia which is identified as one of 17 world's `megadiverse' country is rich in terms of both natural resources and biological diversity, and is also home to some 185000 species of fauna[4]. Malaysia is well endowed with tropical rainforests with total land under natural forest is estimated to be over 18 million hectares in 2014, covering over 54 % of the land area as illustrated in Table 1 below:

Table 1: Breakdown of Forested Area in Malaysia

Forested Area	Size
Permanent Reserved Forests (PRFs)	14.55 mil.ha
Protected area (National Park/ Wildlife Sanctuary)	1.86 mil.ha
State land forests	1.86 mil.ha
Total Forested Area	18.27 mil.ha

Source: Ministry of Natural Resources and Environment Malaysia 2016

1 Madden, F. (2008). The growing conflict between humans and wildlife: law and policy as contributing and mitigating factors. J. Int. Wildl. Law Policy 11,189–206.

2 Dickman, A.J. (2010). Complexities of conflict: the importance of considering social factors for effectively resolving human-wildlife conflict. Anim. Conserv.13,458–466.

3 Madden, F. (2004). Creating coexistence between humans and wildlife: global perspectives on local efforts to address human–wildlife conflict. Hum. Dimens. Wildl.9,247–257.

4 Ministry of Natural Resources and Environment (2006). Biodiversity in Malaysia. Kuala Lumpur: MNRE.

Under the Constitution, forestry comes under the jurisdiction of the respective State Authority. As such, each State is empowered to enact laws on forestry and to formulate forestry policy independently[5]. Despite a number of legal protections given to the forests, Malaysia's tropical rainforest continues to receive increasing pressure due to exploitation. Following rapid development since the 1970s, there has been a general loss of forest cover due to, among other things, extensive logging and the conversion of tropical lowland forests for agriculture. In the last few decades, a large portion of the rainforests has been diminished and replaced by rubber and palm oil plantation as well as settlement schemes. Clearing of forests together with environmental pollution are affecting Malaysia's rich natural resources, in particular the survival of wildlife species. According to Thang, in Peninsular Malaysia, the declining of forest volume is mainly due to the conversion of forest land to permanent non-forest use such as the expansion of large-scale agricultural plantation, and development of land schemes and residential areas[6]. Rapid conversion of forest to agriculture activities has caused Malaysia to lose 1.5 million hectares of forest to rubber and plantations by the 1980s[7]. The reliance on natural resources to sustain its development agenda can be seen from the country's Gross Domestic Product (GDP). In 2015, agriculture sector contributed 8.9 % to the GDP with palm oil as a major contributor at 46.9 %, apart from rubber (7.2%), and forestry & logging (6.9%)[8].

1. General Status of Wildlife in Malaysia

Malaysia is rich in wildlife with variety of animal species. There are many different environments for animals including mangroves, mountainsides, rivers, forests and open fields. The resulting diversity includes over 1000 species of butterflies and more than 600 species of birds. There are 344 species of mammals known to occur in Malaysia which is about 6.2 % of the total known mammals in the world[9]. The abundance of these mammals varies from common to rare, and the diversity of mammals differs according to different habitats. Currently, while there are at least 66 species of mammals that are endemic to Malaysia such as the pygmy flying squirrel and orangutan[10], some of these mammal species are already threatened. This concern was raised by the IUCN on the basis that Malaysia has a smaller land mass but high diversity of mammals. Thus possible threat of wildlife's extinction is imminent with about 21 species mammals are currently under the status of endangered or critically endangered[11]. Mammals that are already extinct in Malaysia include the Javan rhinoceros which is already non-exist since 1932 and the Sumatran rhinoceros which became extinct in 2015. Other extinct animals are the Banteng and Javanese green peafowl while the Malayan tiger has already met the IUCN Red List of Threatened Species' criteria for a 'Critically Endangered' listing[12]. According to the Department of Wildlife and National Park (DWNP), there were about 400 wild tigers left in Malaysia between 1995 to 2008[13] whereas experts suggest that the number of tiger has been reduced to 250-340 between 2010 to 2013[14].The population of elephant which is another endangered mammal

5 However the National Forestry Act 1984 was enacted as a Federal law for the purpose of promoting uniformity of law and policy between the States.

6 Thang, H.C. (2009). Malaysia Forestry Outlook Study. Bangkok: FAO, 44.

7 Nik Abdul Rahman (1988). "Water yield changes after forest conversion to agricultural land use in Malaysia", 1(1) Journal of Tropical Forest Scienve, 67-84.

8 See Department of Statistics Malaysia, https://www.dosm.gov.my/, Date accessed 19 July 2017.

9 See the IUCN Red List of Threatened Species, http://www.iucnredlist.org/initiatives/mammals. Date accessed 19 July 2017.

10 See Checklist of Endemic Species of Mammals in Malaysia and Borneo, at https://www.academia.edu/5929437/Checklist_of_Endemic_Species_of_Mammals_in_Malaysia_and_Borneo. Date accessed 20 July 2017.

11 Department of Wildlife and National park (2010). Red List of mammals for Peninsular Malaysia. Kuala Lumpur: DWNP, 1-11.

12 The IUCN Red List of Threatened Species, http://www.iucnredlist.org/initiatives/mammals. Date accessed 19 July 2017.

13 Department of Wildlife and National Park (2009). Kertas Maklumat Harimau Belang di Malaysia. Kuala Lumpur: DWNP. http://wildlife.gov.my/images/stories/penerbitan/kertas_maklumat/harimau.pdf

14 See the IUCN Red List of Threatened Species: Panthera tigris. http://www.iucnredlist.org/details/136893/0, Date accessed 19 July 2017.

is estimated as only 1223-1677 individuals in the Peninsular Malaysia[15]. Apart from mammals, there are 140 species of snakes and 165 species of frogs and toads that occur in Malaysia including species that are endemic. Nevertheless, a number of reptiles and other species of birds, amphibians, and fishes has been included in the IUCN list of declining and endangered species such as the hornbill and Malaysian giant turtle[16].

2. Definition of Human Wildlife Conflict

Human and wildlife interact in many ways. While such interaction can be positive, it can also lead to negative consequences or conflict on either human or wildlife. Generally, human-wildlife conflict (HWC) refers to any interaction between wildlife and humans which causes harm to either human or wild animal, or to property. For example, a conflict happens when an elephant has raided a farmer's crops. A conflict can also ensue when such farmer seeks to kill the elephant. DWNP describes HWC as an `interaction between wild animals and people and can result in negative impact on people or their resources and on wild animals as well as their habitats'[17]. While there is no specific definition to the term `human wildlife conflict', attempts have been made in defining what is HWC for management and conservation purposes. One generally accepted definition is by the IUCN[18] which provides that 'a conflict exists when wildlife requirements overlap, with those of human populations, creating costs both to residents and wild animals'. WWF defined HWC as 'any interaction between humans and wildlife that results in negative impacts on human, social, economic or cultural life, on the conservation of wildlife populations, or on the environment'[19]. A similar definition is put forward by Decker who defined the term as an `interactions between humans and wildlife where negative consequences, whether perceived or real, exist for one or both parties'[20], while according to Conover, HWC are 'situation occurring when an action by either humans or wildlife has an adverse effect on the other'[21]. From the various definitions of HWC, one aspect common to most definitions is the requirement for a 'conflict' and not merely an `encounter'. According to Madden & McQuinn, a situation is regarded as a conflict when there appears to be a need for a negative outcome or adverse effects to humans or wildlife or both[22]. Thus, it has been proposed that such conflict would include situations where `wildlife threatens, attacks, injures, or kills humans, as well as cases where wildlife threatens, attacks, injures, or destroys their livestock, crops or property'[23]. HWC also occurs when humans deliberately injure, abuse, or kill wildlife because of perceived or actual threats to their property, livelihoods, lifestyle, person, or family.

15 Department of Wildlife and National Park (2009). Elephant in Peninsula Malaysia. Kuala Lumpur:DWNP.

16 See the IUCN Red List of Threatened Species, http://www.iucnredlist.org/initiatives/mammals. Date accessed 19 July 2017.

17 Salman, S., Z.Y., Abdullah, M., Abdul Rahman & C. Keliang, (2016). Human wildlife conflict in Peninsular Malaysia current status and overview. Paper presented at the Biodiversity Forum 2016:Human-wildlife conflict mitigation and action In agricultural sector. Genting Highlands Pahang, 23 May 2016.

18 IUCN World Park Congress (2003). Preventing & mitigating human-wildlife conflicts. WPC recommendation 20.

19 WWF (2005). Human Wildlife Conflict Manual- Wildlife Management Series. World Wildlife Fund. Switzerland.

20 Decker, D. J., T. B. Lauber, and W. F. Siemer. (2002). Human-wildlife conflict management: A practitioner's guide. New York: Northeastern Wildlife Damage Management Research and Outreach Cooperative.

21 Conover, M. (2002). Resolving human-wildlife conflicts: The science of wildlife damage management. Florida: CRC Press.

22 Madden, F. & B. McQuinn (2014). Conservation's blind spot: The case for conflict transformationin wildlife conservation. Biological Conservation 178 97-106.

23 Madden, F. (2008). The growing conflict between humans and wildlife: law and policy as contributing and mitigating factors. J. Int. Wildl. Law Policy 11,189–206.

3. Causes and Impacts of Human Wildlife Conflict

Various factors have contributed towards the HWC. Direct causes of HWC include expansion of human populations into or near to areas inhabited by wildlife causing human's uses and modification of the area to be intensified. In Malaysia, main causes of HWC are habitat loss, degraded and fragmented habitat, poaching and urbanization[24]. In the case of wild animal such as elephant, when its habitat is encroached by plantation or human settlement, there is a possibility that this mammal would raid farming land for survival purposes[25]. For the Peninsular Malaysia in specific, fragmentation and loss of habitat due to land development activities is considered to be major root causes of HWC. While the amount of forest cover in this country is still significant, much of the forest is fragmented which means large contiguous, forested areas are broken into smaller pieces of forest. Forests become fragmented whey they are separated by roads, agriculture, utility corridors, subdivisions, or other human development which can result in the loss of ecological connectivity[26]. Among the impacts of fragmented forest on wild animals is the reduction of their movement, particularly of large mammals, and limitation on the amount of resources available to them.

Another cause of HWC is poaching. Globally as well as in Malaysia, poaching which is an illegal hunting activity on protected wildlife without authorisation or documentation can directly affect populations of hunted species and indirectly affect populations of dependent species. Illegal hunting has already affected populations of endangered carnivores such as tiger in Peninsular Malaysia[27] whereas in Sabah, poaching is the single major threat to the Sumatran rhinoceros due to demand for its horns despite it being illegal and with heavy penalties for offenders[28]. Other contributing factor towards HWC in Malaysia includes road kill[29], availability of discarded food from domestic wastes for the wildlife due to poor garbage system, and wildlife feeding activity[30]. A number of HWC has been caused by people feeding animals, the result of which is the animals became habituated and aggressive toward people[31]. In Malaysia, the current trend shows that HWC is not restricted to agricultural and rural areas, but it also happens in urban locations[32]. Wildlife in considered a nuisance in the urban area when it causes damage to human property including damage to house compound,

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24 Salman, S., Z.Y., Abdullah, M., Abdul Rahman & C. Keliang, (2016). Human wildlife conflict in Peninsular Malaysia current status and overview. Paper presented at the Biodiversity Forum 2016:Human-wildlife conflict mitigation and action In agricultural sector. Genting Highlands Pahang, 23 May 2016.

25 Wilson, S.,T.E. Hazarika & A. Zimmermann (2013). Understanding spatial and temporal patterns of human-elephant conflict in Assam, India. Oryx, Nov.2012, 1-10.

26 Asimopoulos, S. (2016). Human-Wildlife Conflict mitigation in Peninsular Malaysia: Lessons learnt, current views and future directions. https://stud.epsilon.slu.se/9293/1/asimopoulos_s_160804.pdf

27 WWF (2017). The Malayan Tiger.http://www.wwf.org.my/about_wwf/what_we_do/species_main/tiger/. Date Accessed 21 July 2017

28 WWF (2017). Rhino. http://www.wwf.org.my/about_wwf/what_we_do/species_main/rhino/. Date Accessed 21 July 2017

29 Lee, P. (2015). Roadkills running into thousands from 2006.

http://www.thestar.com.my/news/nation/2015/04/04/roadkills-running-into-thousands-from-2006/. Date Accessed 21 July 2017; and Kannan, H.K. (2016). Five highways and roads identified as 'roadkill hotspots'. https://www.nst.com.my/news/2016/07/158091/five-highways-and-roads-identified-roadkill-hotspots. Date Accessed 21 July 2017.

30 Salman, S., Z.Y., Abdullah, M., Abdul Rahman & C. Keliang, (2016). Human wildlife conflict in Peninsular Malaysia current status and overview. Paper presented at the Biodiversity Forum 2016:Human-wildlife conflict mitigation and action In agricultural sector. Genting Highlands Pahang, 23 May 2016.

31 Rodrigues, N.N., & R.A., Martinez (2014). Wildlife in our backyard: interactions between Wied's marmoset Callithrix kuhlii (primates:Cal-lithrichida) and residents of Ilheus, Bahia, Brazil. Wildlife Biology20:91–96; and Goulart V.D.L.R, C.P.,Teixeira, & R.J., Young (2010). Analysis of callouts made in relation to wild urban marmosets (Callithrix penicillata) and the implications for urban species management. European Journal of Wildlife Research56:641–649.

32 Md-Zain, B. M., Ruslin, F. and Idris, W. M. R. (2014). Human-Macaque Conflict at the Main Campus of Universiti Kebangsaan Malaysia. Pertanika J. Trop. Agric. Sci. 37 (1): 73 – 85; and Karuppannan, K,, Saaban, S., Mustapa, A.R., Zainal Abidin F.A., Azimat N.A. and Keliang, C. (2014). Population Status of Long-Tailed Macaque (Macaca fascicularis) in Peninsular Malaysia. J Primatol 3:118.

fruit tree, car and furniture[33], requiring drastic measures including culling[34].

There are two main forms of impact as an outcome of HWC, namely that on human and wildlife respectively. On the part of human, conflict with wild animals can cause adverse impact on their health, welfare and safety[35]. In addition, human can also suffer from crop loss, property damage, injury and fatality. Instances such as nuisance encounters with wildlife can cause the transmission of disease to human[36], while harmful or fatal encounter with predators have financial and other implications including the need for a medical treatment. Other financial implication includes the cost human has to bear when his property or agriculture is damaged[37], or when his livestock is exposed to inter-species disease whereas social impacts of HWC would include additional labour costs and work loss[38].

On the part of wild animals, HWC is rapidly becoming one of the most important threats to the survival of many wildlife species. A study by Ogada et.al.[39]has shown that large and highly endangered animals such as tigers, lions, wolves, elephants, and gorillas are directly associated with the conflict. There are various situations where wildlife including engendered species are injured or killed by human as an impact of HWC. These instances can be either accidental, such as road traffic and railway accidents, or capture in snares set for other species. These animals might also be killed intentionally through retaliatory shooting, or poisoning. In Peninsular Malaysia, from the period of 2006-2015, the DWNP has received over 86000 complaints about wildlife disturbances with species involved varies from mammals to reptiles[40] as provided in Table 2 below.

33 Nik Hanita N.M. (2011), Urban Residents' Attitudes Toward Wildlife In Their Neighbourhoods: The case study of Klang Valley, Malaysia. Journal of the Malaysian Institute of Planners, Vol IX 19-36.

34 The Star (2013). Decision to cull macaques not done in haste. http://www.thestar.com.my/opinion/letters/2013/03/20/decision-to-cull-macaques-not-done-in-haste/#53wICKbf52aGG1iR.99. Date accessed 22 July 2017; and Khairil Anwar, M,A, (2016). Penduduk resah `serangan' kera. http://www.sinarharian.com.my/edisi/perak/penduduk-resah-serangan-kera-1.588382. Date accessed 22 July 2017.

35 Thirgood, S., R. Woodroffe & A. Rabinowitz, (2005). The Impact of Human-Wildlife Conflict on Human Lives and Livelihoods. In R. Woodroffe, S. Thirgood, & A. Rabinowitz (eds). (2005). People and wildlife: conflict or coexistence?. Cambridge: Cambridge University Press.

36 Center for Wildlife Human Conflict Resolution (2017). Diseases. http://humanwildlife.cmi.vt.edu/Diseases/diseases.htm.

37 See Utusan Malaysia (2009). Mesyuarat khas atasi masalah gangguan. http://ww1.utusan.com.my/utusan/info.asp?y=2009&dt=1212&pub=Utusan_Malaysia&sec=Timur&pg=wt_02.htm. Date accessed 22 July 2017.

38 Madden, F. (2004). Creating coexistence between humans and wildlife: global perspectives on local efforts to address human–wildlife conflict.Hum. Dimens. Wildl. 9,247–257.

39 Ogada M.O., R., Woodroffe, N., Oguge, & L.G., Frank (2003). Limiting depredation by African carnivores: the role of livestock husbandry. Conserv Biol 17:1521–1530.

40 Department of Wildlife and National Park (2015). Annual Report. Kuala Lumpur: DWNP.

Table 2: Status of Human Wildlife Complaints (2006-2015)

Wildlife Species	No. of Complaints	Percentage
Long-tail Macaque	56760	66%
Elephant	7740	9%
Wild boar	6020	7%
Common Palm Civet	4300	5%
Pig-tail Macaque	2580	3%
Python	860	1%
Tiger	860	1%
Banded Leaf Monkey	860	1%
Cobra	860	1%
Dusky Leaf Monkey	86	0.1%
Other species	4300	5%
Total	86040	100%

Source: Ministry of Natural Resources and Environment

It was reported that long-tailed macaques are the wildlife species cited in the majority of complaints which is about 66 %, followed by elephant encroachment (9%) and wild boar disturbance (7 %). Other wildlife species that were reported to cause disturbance include pig-tailed macaque, python, tiger, banded leaf monkey, cobra, dusky leaf monkey. While report on elephant carries only 9 % of the total percentage, disturbances from this mammal has caused a substantial amount of loss to farmers due to crop damage. It is estimated that the total loss due to human-elephant conflict from 2007 to 2015 was about RM28 million, with over RM5.2 million losses estimated in 2015 alone[41].

Table 3: Record on Wildlife Attacks in Peninsular Malaysia (2004-2015)

Group of Species	**Injury**	**Fatality**	**Total**
Snakes	493	12	505
Wild boar	90	9	99
Primates	91	1	92
Elephant	20	9	29
Bees/hornets	15	14	29
Tiger	7	2	9
Sun bear	7	-	7
Leopard	4	-	4
Gaur	1	1	2
Crocodile	2	-	2
Monitor Lizard	2	-	2
Leopard cat	1	-	1
Total	733	48	781

Source: Ministry of Natural Resources and Environment

Wildlife attack on humans is another consequences of HWC in Malaysia. Referring to Table 3 above, from 2004 to 2015, more than 60 % of the wildlife attacks recorded are snake bites, followed by wild boar and macaque attacks, with main fatalities were from bees/hornets sting and snake bite. There

41 Department of Wildlife and National Park (2015). Annual Report. Kuala Lumpur: DWNP.

were two fatalities recorded from attacks from tiger.

4. Legal and Administrative Strategy on HWC

There are various strategies that can be applied to help lessen HWC. Law and relevant enforcement agencies have critical roles to play in effecting more positive outcomes for the conflict through a wide range approaches including short term mitigating strategies and long-term protective measures[42]. For example, mitigating strategies can be designed within the law to reduce the level of impact if the conflict already occurred, whereas systematic and long-term monitoring and protecting of wildlife and its habitat through a sustainable management can help provide a long standing solution to the conflict. In Malaysia, there already exist relevant legislations that deal with aspects of wildlife conservation. However, while there is no established legal framework on HWC, provisions that are directly, or indirectly, relevant to HWC can be found within legislations concerning wildlife or related subjects such as environment and forestry[43]. These legislations are being enforced by government institutions which also have a role to play in mitigating and managing possible or existing conflict. Below is the discussion on legal and administrative strategies of HWC, which also reflects the value of wildlife conservation including the manner in which the law in Malaysia response to HWC.

6.1 Protected Status of Wild Animals

In Malaysia, the DWNP is the main agency that plays major roles in managing and mitigating HWC through mandate derived from legislation passed by the parliament, government gazettements and policy decisions. The main law enforceable by the DWNP is the Wildlife Conservation Act 2010 (WCA) which is one of the most important legislations on wildlife protection, except for the States of Sabah and Sarawak. The term 'wildlife' is interpreted by the WCA to mean 'any species of wild animal or wild bird, whether totally protected or protected, vertebrate or invertebrate, live or dead, mature or immature and whether or not may be tamed or bred in captivity'[44]. One of the main mechanisms for protecting specific species under the WCA is to provide for a classification of animals which are to receive varying degrees of protection.

Table 4: Wildlife Protection Status under the Wildlife Conservation Act 2010

Class	First Schedule Protected Wildlife	Second Schedule Totally protected wildlife	Total
Mammals	220	273	493
Birds	383	1007	1390
Reptiles	314	97	411
Amphibians	37	10	47
Arachnida	17	1	18
Insects	82	4	86
Hirudinoidea	1	1	2
Gastropoda	1	-	1
TOTAL	1054	1393	2447

Source: Wildlife Conservation Act 2010

Under such classification, wildlife species are being divided into specific categories, namely `protected' and `totally protected' wildlife[45] as shown in Table 4 above. In relation to HWC, such listing is meant to provide

42 Madden, F. (2008). The growing conflict between humans and wildlife: law and policy as contributing and mitigating factors. J. Int. Wildl. Law Policy 11,189–206.

43 Maizatun, M. (2016). Environmental Law in Malaysia. The Netherland: Kluwer Law Internationals.

44 Section 3 of the WCA.

45 See First and Second Schedules of the WCA.

a long term protection of such animals which are continually under threat due to conflict with humans, exploited for commercial gain, or habitat loss due to human development. Once the status has been alleviated, the wildlife and its habitat would be safeguarded through various way including protection given to wildlife threatened by human activities of illegal hunting, trading, or disturbing[46]. Wild animal is also being protected against human's cruelty including the act of causing any unnecessary suffering, pain or discomfort to any wildlife[47].

6.2 Poaching

Poaching which is another cause of HWC can be referred to as the illegal hunting, killing or capturing of wild animals and considered as an environmental crime when wildlife is illegally hunted for products such as skin, ivory, horn, teeth, skin and bone. The hunting of wildlife species is not strictly prohibited in Malaysia but stringently regulated under controlled regulations which include restriction on hunting seasons, time of day, licensed weapon and so on[48]. Poaching does not follow the conditions imposed on the hunters such as that of licence or permit, or prohibition against the selling of animal or its parts for profit[49]. In Malaysia, poaching mainly involved native wildlife include wild boar, sambar deer, barking deer, mousedeer, porcupine, pangolin and tiger meant mainly for traditional medicine and consumption markets[50]. While the WCA does not use the word `poaching', the term `hunting' is applied to include `pursuing, trapping, capturing, taking or killing any wildlife by any prescribed means, whether or not the wildlife is then or subsequently taken, trapped, captured or killed'[51].

The WCA provides for the protection of wildlife against poaching by means of legal and administrative mechanisms. Similar to most other countries, authorisation is also required under the Malaysian law in the form of permit or licence for various types of wildlife use[52]. The DWNP as one of the main agencies involved in wildlife conservation plays a big role in managing the problem of poaching through a strict procedure pertaining to the application and approval of licence or permit as well as duties and obligations of the licenced hunter[53]. Protection of wildlife against poaching also entails long-term measures such as the requirements on management and conservation plans. Under the WCA, hunters are directly included within the wildlife management plan and the Act vested upon the DWNP power to prescribe the following: open season and close season in respect of protected wildlife; number of wildlife which may be hunted; methods or means by which any wildlife may be hunted; times during which, and places where, any wildlife may be hunted; quota of licenses and permits to be granted, each year or open season, and each state, in respect of each protected wildlife or any part or derivative of wildlife; and standard of maturity of wildlife which may be hunted.

46 Under the WCA, 'disturb' in relation to salt lick includes to remove or agitate any soil, mineral, water, tree, shrubs, undergrowth or other vegetation in or on the salt lick or in or on the land in the immediate vicinity of the salt lick. See section 85 of the WCA.

47 Section 86 of the WCA.

48 See Part IV of the WCA.

49 See the International Trade in Endangered Species Act 2008. Refer to Mariani, A. (2015). Enforcement Against Wildlife Crimes In West Malaysia: The Challenges. Journal of Sustainability Science and Management Volume 10 Number 1, June 2015: 19-2.

50 Brown, V. (2013). Poaching gone wild. The Star Online. http://www.thestar.com.my/opinion/online-exclusive/behind-the-cage/2013/12/13/poaching-gone-wild/. Date accessed 19 July 2017.

51 Section 3 of the WCA.

52 See sections 9,10 and 11 of the WCA.

53 See Part IV of the WCA.

Table 5: Offences Committed under the Wildlife Conservation Act 2010

	Keeping/ Using	Smuggling	Business	Illegal Hunting	Encroachment	Zoo/ Exhibition	Research
2014	1032	56	47	10	6	1	1
2015	1280	34	21	18	11	2	-

Source: Annual Report 2014, 2015 Department of Wildlife and National Park

In 2015, a total of 1366 cases have been brought to court for offences pertaining to hunting of wildlife and related offences under the WCA as shown in Table 5[54]. To ensure deterrence, the Act imposes a strict penalty in the form of payment of fine and jail sentence on activities involving hunting. For example, penalty imposed on the hunting of protected wildlife without licence is a fine not exceeding MYR 50,000 or jail for up to two years, or to both[55].Whereas any person who hunt or keep any totally protected wildlife without a special permit may be liable to a fine of up to RM 100,000, or jail for up to three years or to both[56]. For endangered species such as Javan rhinoceros, Sumatran rhinoceros, tiger, leopard, and clouded leopard, penalties imposed are a fine of not less than RM 100,000, and not more than RM 500,000 with imprisonment for a term not exceeding five years[57]. Strict penalties are also imposed on any person who hunt wildlife with poison or traps[58]; hunt wildlife 400 metres of salt lick[59]; or hunt wildlife from conveyance[60].

6.3 Managing Wildlife Habitats

Managing wildlife habitat through the creation of protected area (PA) is one of the most significant measures for the purpose of wildlife conservation and is directly relevant in providing a long-term measure in the management of HWC. PAs are established primarily for wildlife protection and biodiversity conservation and they are considered to be a cornerstone of global conservation strategies[61]. At present, a number of PAs has been gazetted all over Malaysia under various laws as a measure to protect wildlife and its survival due to problems such as habitat loss, human invasion, and developmental related activities.

In relation to HWC, the creation of PAs is recognised as a long-term measure which can help avoid possible intensity of wildlife's competition with people for the necessities of life. Many PAs such as national parks, state parks, wildlife reserves, wildlife sanctuaries and nature reserves were created in Malaysia and managed either centrally by the Federal government, or by individual State Authorities. The gazettement and management of PA can be found in a number of legislations such as the National Parks Act 1980 and the National Forestry Act 1984. Under the WCA, there is a specific requirement pertaining to the creation of wildlife reserves and sanctuaries[62]. Once an area has been gazetted as a reserve or sanctuary, various prohibitions are imposed including prohibition against disturbing, cutting, removing or taking of any soil, timber or vegetation; and hunting of any

54 Department of Wildlife and National Park (2015). Annual Report. Kuala Lumpur: DWNP.
55 Section 60 of the WCA.
56 Section 86 (1) of the WCA.
57 Section 86 (2) of the WCA.
58 Sections 79 & 80 of the WCA.
59 Section 81 of the WCA.
60 Section 82 of the WCA.
61 Stoner, C., T. Caro, S. Mduma, C. Mlingwa, G. Sabuni,G.& M. Borner (2007). Assessment Of Effectiveness Of Protectionstrategies In Tanzania Based On A Decade Of Survey Data For Large Herbivores. Conservation Biology,21,635–646. See also Gaston, K.J., S.F. Jackson, L. Cantu-Salazar & G. Cruz-Pinon (2008). The ecological performance of protected areas. Annual Review of Ecology, Evolution, And Systematics,39,93–113.
62 Sections 47 and 48 of the WCA.

animal or bird. The gazettement of forested area into wildlife reserve and sanctuary can also help manage HWC through a clear identification of PA's boundaries which only permit or licence holder allowed to enter[63], and through the prohibition on any disturbances to the wild animal and its habitat[64]. For example, Malaysia has established Sungai Deka Elephant Sanctuary in Terengganu and Kuala Gandah Elephant Sanctuary in Pahang to house rescued elephants resulted from HWC before it is being translocated. In the context of HWC mitigation, translocation is meant to remove wildlife from areas where their habitats are being encroached by development to a safer habitat[65]. Translocation is also done to prevent problem-causing animals from killing livestock or destroying crops. According to the DWNP, over the past 30 years, the elephant translocation programme has helped to resolve human-elephants conflicts and minimised the economic losses caused by such conflicts by relocating more than 700 wild elephants to a more suitable natural habitat[66].

6.4 Mitigating the Rights of Human against Wildlife

In dealing with HWC, it is necessary that the interests of both parties are taken into consideration to ensure management and mitigation objectives are achieved. While the law in Malaysia provides for the protection of certain wildlife against hunting, the law also takes into consideration factors such as people rights with respect to wildlife. Under the Constitution land and forests are State matters, while the protection of wild animals is under the concurrent jurisdiction of both Federal and State governments. There is no clear cut provision pertaining to the ownership of wild animal[67]. Under the National Forestry Act 1984, all forest produce belongs to State but the definition of `forest produce' under the Act does not include wild animals[68]. However, provisions of the WCA indicate that a killed wildlife would be the property of the State and such animal cannot be kept by the individual who killed it, but must be handed over to the DWNP[69]. While there is no direct legal provision pertaining to the ownership of wild animals, the law in certain circumstances allows for the right of a person or group of people to take priority over that of wildlife, particularly in instances that might trigger a conflict. This issue is elaborated further below.

6.5 Rights of the Indigenous People

In the rest of Malaysia, the State government owns most of the land and has the power to control all land matters, including forest land. Claims to land ownership have to be approved and registered by government mechanisms and formal land ownership relates to land only, and not to forest or mineral resources[70]. However, while the ownership of wild animals is not specifically addressed by the law, hunting and collecting rights are however reserved to a special group of people such as the indigenous community in accordance with their customary practices. The indigenous peoples of Peninsular Malaysia are known as the Orang Asli, which comprise around 0.6% of the population[71] and considered to be the earliest inhabitants. Their traditional economy is generally based on subsistence planting and foraging, assisted by trade with other communities.

From the perspective of customary practices, the hunting of wildlife is important for the Orang Asli's livelihood which is in accordance with their cultural heritage. However, while the Orang Asli's traditional land rights of hunting is customarily recognised, such customary practice which involved

63 Section 49 of the WCA.
64 Sections 49 & 85 of the WCA.
65 Department of Wildlife and National Park (2009). Elephant in Peninsula Malaysia. Kuala Lumpur:DWNP.
66 Department of Wildlife and National Park (2017). National Elephant Conservation Centre, Kuala Gandah, Pahang. http://www.nre.gov.my/en-my/EcoPark/Pages/National-Elephant-Conservation-Centre.aspx. Date accessed 19 July 2017.
67 See the 9th Schedule of the Federal Constitution.
68 Section 3 of the National Forestry Act 1984.
69 See for example sections 54 and 55 of the WCA.
70 See the Federal Constitution and the National Land Code 1965.
71 Department of Orang Asli Development (2014). Annual Report. Kuala Lumpur: JAKOA

the killing of protected species might be in conflict with the wildlife conservation law which prohibits such killing. The conflicting issue of the aborigine's hunting right and conservation of wildlife is a delicate matter, while mitigating such conflict can be complicated due to a number of factors including the existence of a complex framework pertaining to land and forest administration as well as wildlife conservation.

In order to solve this issue and avoid possible conflict between the aborigine and wild animal, the law in Malaysia takes a clear stand in upholding the rights of Orang Asli over that of wildlife as provided by the Aboriginal Peoples Act 1954. This Act which was enacted to protect well-being and advancement of the aboriginal peoples of Peninsular Malaysia provides that, in a situation where there is a conflicting need between aboriginal protection and wildlife conservation over a land area, the former will prevail. For this purpose, the Act gives the power to the State Authority to declare any area predominantly inhabited by the Orang Asli to be an `aboriginal area'[72]. Within an aboriginal area no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds. Similarly, the State Authority has the power to declare any area exclusively inhabited by aborigines to be an 'aboriginal reserve', and that no land shall be declared a sanctuary or reserve under any written law relating to the protection of wild animals and birds[73]. By virtue of these provisions, the Orang Asli would get a priority on matters pertaining to their land right over the right of a wildlife reserve or sanctuary. The way in which the aborigine's rights to land and resources are addressed in the Aboriginal Peoples Act 1954 is considered a long-term measure to prevent potential conflict that might arise if the wildlife reserve or sanctuary encroaches upon the Orang Asli native land. On the part of the Orang Asli, another right bestowed upon them as a mitigating measure to reduce HWC is that of hunting of wildlife. Hunting right which is being provided by the WCA allows the aborigines to hunt specified protected wildlife namely wild pig, deer, monkey, porcupine, water hen and dove[74]. However such hunting is meant strictly for his sustenance or the sustenance of his family members. Thus, the Orang Asli is not allowed to sell or exchange the hunted wildlife for food, monetary gains or any other thing as otherwise it would be an offence under the WCA[75].

6.6 Rights of Land Owners or Occupiers

It is already acknowledge that WHC is a serious obstacle to wildlife conservation and the livelihoods of people. For the local community, particularly farmers, such conflict has serious consequences in terms of safety and well-being, food security, and economy when wildlife encroaches upon human settlement. Farmers' agricultural lands close to wildlife habitat often face crop raiding which can be a serious problem for them whose livelihoods depend on agricultural produce apart from damage to equipment, food stuffs, structures and other possessions. For farmers, injury or death as a result of wildlife encounters can have serious implications on production capacity in terms of economic loss. On the other hand, when farmers have to endure economic loss, their resentment to the wildlife would increase which may result in retaliation or protective measures. Thus farmers or landowners may also resort to killing, illegal culling, or using snares and poisons in order to protect themselves or their farm or livestock against wildlife attack.

There are specific provisions under the WCA that address the issue of wildlife attacks on human or destroys crops. While WCA has taken measures to protect wild animals, the law takes into consideration issues faced by land owners or occupiers whose crop or property has been destroyed by the wildlife. In the event of HWC, a short term mitigating measure is provided by the WCA by allowing the land owner or occupier to kill or capture such wildlife for specified reasons as follows[76]:
- Using birdlime for the good faith destruction of grain-eating birds found damaging or destroying growing cereals during the period when the crop is ripe or ripening,

72 Section 6 of the Aboriginal Peoples Act 1954.
73 Section 7 of the Aboriginal Peoples Act 1954.
74 See the Sixth Schedule of the WCA.
75 Section 51 of the WCA.
76 Sections 53-55 of the WCA.

- Capturing or killing wildlife for protection of crops,

- Capturing or killing the wildlife which is causing serious damage to crops, vegetables, fruits, growing timber, domestic fowls or domestic animals after using reasonable efforts to frighten away the wildlife and failing to do so, or

- Killing a wildlife that constitutes an immediate danger to human life.

While an owner or occupier is allowed to capture or kill wildlife under the above situations, such killing or capturing should be considered a last solution in mitigating HWC after all possible methods have been utilised. Thus, under the WCA, problematic wildlife can only be killed after it refused to leave after several attempts have been taken to frighten such animal[77]. In all the above situations, the owner or occupier of land, without unnecessary delay, has to report to the relevant officer the details of the occurrence, including the species of the wildlife, the damage and weapon which has been used (if any) and whether the wildlife has been captured or killed[78]. As already stated, any wildlife captured or killed under this section shall be the property of the state and be handed to the DWNP officer.

6.7 Rights to Compensation

One of the main strategies that can be applied to reduce HWC is through the payment of compensation. Compensating human for the wildlife damage is considered a key component of HWC management such as by providing a reasonable financial support to families suffering human killing or to cover actual losses incurred from human injuries and livestock or crop depredations. Compensation as a mitigating strategy is designed to reduce the level of impact once the conflict occurred and lessen the problem for humans due to harm or injury suffered. From the perspective of HWC mitigation, this financial and health-related compensation scheme is designed, among other things, to increase damage tolerance levels among the affected persons, or to prevent them taking direct action themselves, such as by hunting down and killing of problem wildlife.

Currently, the law in Malaysia does not address the issue of compensation in HWC involving crop or property damage. Thus, there is no specific scheme of compensation available to those who suffer economic loss when farm or livestock is damaged due to wildlife attack[79]. However, a compensation scheme is being provided to a specific category of loss, namely human death or injury due to attack by predators. In Malaysia, the payment of compensation is allocated to any person who suffers harm or death after being attacked by certain wildlife species (Table 6). The main agency involved in providing such assistance is the Department of Social Welfare through the establishment of a fund known as the `Victims of Wild Animal Attack Aid Fund'[80].

Table 6: Statistic of Wildlife Attack Cases

Type of Species	2010	2011	2012	2013	2014	2015
Crocodile	2	7	9	7	10	23
Wild boar	8	3	9	11	12	25
Monkey	2	5	13	19	7	16
Snake	7	10	64	106	72	187
Bear	–	–	–	1	2	1
Elephant	–	2	2	1	3	3
Tiger	–	1	1	1	–	–
Hornet	–	7	9	7	6	1
Gaur	–	–	1	–	–	–

77 Section 55 of the WCA.

78 Section 54 of the WCA.

79 Ain Safre, B. (2016). Ancaman kera liar. http://www.utusan.com.my/berita/wilayah/perak/ancaman-kera-liar-1.392935. Date Accessed 22 July 2017. And Berita Harian (2016). Kehadiran gajah liar resahkan penduduk. http://www.bhplus.com.my/node/158875. Date Accessed 22 July 2017.

80 Department of Social Welfare (2015). Laporan Tahunan Kumpulan Wang Amanah Bantuan Mangsa Serangan Binatang Buas 2013 – 2015. Kuala Lumpur: Department of Social Welfare.

Water lizard	–	–	–	–	–	1

Source: Ministry of Women, Family and Community Development

The maximum amount of payment under this fund is RM20000 to be paid in the event of death. Before the payment can be made, the application needs to be verified by the DWNP or the Fisheries Department in the case of attack by dangerous aquatic or marine animals, as well as by a registered health officer[81]. Other injuries covered by the fund include allergies, poisoning, infections, coma, disability or loss of limbs and permanent ability. By far the highest number of incidents of HWC concern snake, followed by wild boar and crocodile. However, compensation will not be paid if the injury or death happened from the act of harassing or harming such animal or to cause it to be violent[82].

5. Conclusion

It is already acknowledged that WHC is a serious obstacle to wildlife conservation and the livelihood of people. However, managing such conflict requires extraordinary balance between conservation priorities and the need of the people who live with wildlife. The argument in this article is that law and institutions have important roles to play in managing and mitigating HWC. The overview of legal and administrative strategies demonstrates that, similar to many other countries, there already exist specific legislations in Malaysia that regulate wildlife. These laws including the WCA do not merely provide for the regulation on hunting, but extend to wildlife conservation and wildlife use for various purposes with the objective of sustainable management. Mitigation measures under the law in Malaysia takes into consideration biological, economic and social factors in order to narrow down the conflicts while at the same time help towards environmental conservation, and enhancement of human welfare, health and safety. There are various ways where law can balance the conflicting interest without compromising the needs of both human and wildlife. This article has shown that in several circumstances, public interest is given a priority in the process of managing and mitigating HWC. For example, the grant of hunting to the Orang Asli or rights to landowners can serve as a basis for successful wildlife management initiatives and minimise potential HWC, even if ownership of wildlife has not been transferred to landowners. Compensation scheme is also being used as a mitigating measure in case of death or injury due to wildlife attacks. The implementation of this scheme is an example of an inter-agency involvement and cooperation of several administrative bodies towards HWC mitigation. This article has shown that Malaysia is implementing a combination of long-term strategies alongside short-term mitigation tools in dealing with HWC to address both immediate problems and future issues. The legislations examined reflect the incorporation of interests of both human and wildlife apart from variety of other interests, including environmental sustainability, customary use, indigenous groups, and food security. Some of these interests are taken into account within WCA when addressing the issues of hunting and killing of wildlife. At the same time, other legislation on related subjects, such as forestry and environment contain provisions concerning wildlife and directly or indirectly applicable in dealing with HWC. Though the HWC solutions are very complex and require the account of economic, social and other policy considerations, it is concluded that the role of law and enforcement agency in respect of management and mitigation of conflict cannot be underestimated. Having an appropriate law can have an important impact on wildlife and habitat conservation and human health and livelihood.

81 See the application form of the Victims of Wild Animal Attack Aid Fund at https://www.kpwkm.gov.my/kpwkm/uploads/files/Jenis_Bantuan/Borang%20Permohonan%20Kumpulan%20Wang%20Amanah%20Bantuan%20Mangsa%20Serangan%20Binatang%20Buas.pdf. Date Accessed 22 July 2017.

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METHODS OF RESOLVING CRIMINAL DISPUTE WITHOUT A TRIAL: OPTIONS FOR AN ACCUSED

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Abstract

In the Malaysian criminal justice system, upon a charge is read to an accused, he may claim a trial, or plead guilty at an early stage of a criminal proceeding or applies for plea bargaining. A trial is not necessary if the accused plead guilty or applies for plea bargaining. It is undeniable that regardless of a criminal case is resolved through trial, or without trial, if the accused is found guilty of an offence and convicted, he will be punished accordingly. However, a sentence is lighter if the accused pleads guilty or applies for plea bargaining at an early stage of a criminal proceeding than convicted after the full trial. Meanwhile, under the auspice of restorative justice, a criminal case can also be resolved by way of victim-offender mediation, family group conferencing, and sentencing circle depend on the nature of a criminal case and the parties. The United Nation and the European Union recognise and encourage state members to adopt restorative justice as part of the criminal justice system. While other countries such as New Zealand, Sweden and the United Kingdom have legalised the restorative justice process and implemented it in the criminal justice system, Malaysia still silences on this. Definitely there are advantages in the restorative justice since it is accepted internationally and practiced in some countries. Therefore, this paper aims to examine resolution of a criminal case without a trial in Malaysia and identify its weaknesses if any. It also aims of this paper to analyse the restorative justice processes, and its implementation in other countries. It is recommended that Malaysia shall recognise other modes of criminal dispute resolution so that the accused can have more options to settle the criminal case without a trial which can meet his need and interest. The research utilises the doctrinal legal research based on analysis of primary and secondary sources such as statutes, case law, books, and journal articles.

***Keywords**: criminal dispute resolution, plea bargaining, restorative justice.*

1.0 INTRODUCTION

Methods of resolving a criminal dispute without a trial are limited in Malaysia. It is common practiced by the offender to speedily dispose of a criminal case through pleads guilty, or plea bargaining. Either plea bargaining, or plea bargaining, the consequence is similar that is the accused

has to plead guilty, he will be convicted of an offence, and will be punished. However, the nature of punishment differs based on option made by the accused. For example, if the accused plead guilty at an early stage, or applies for plea bargaining on sentencing, there will be a discounted sentence imposed on the offender. But, if the offender applies plea bargaining on a charge, the original charge will be amended to a lower charge. The punishment follows the current charge which is actually lower than the original charge. These two processes, though can be applied without a trial, the process normally involves the prosecutor, and the offender. In the meantime, the victim has no role in the process. The criminal case is resolved if the accused pleads guilty either at an early stage of criminal proceeding, or at plea bargaining process. Consequently, the court will decide a sentence, and justice is served when the offender completes the punishment.

While the offenders in Malaysia may choose to plead guilty at an early stage of proceeding, or apply for plea bargaining to avoid a trial, other countries have more than that. The United Nation has legally recognised the restorative justice in the criminal justice system and encourages state members to adopt it as part of a criminal resolution.[1] Several studies have been conducted by scholars from various backgrounds regarding restorative justice. A study shows that restorative justice programs are the most effective method of improving victim and offender satisfaction, and decreasing the reoffending compare to the traditional justice system.[2]

Thus, this paper will be divided into three main discussions. The first part examines the available process to resolve criminal cases without a trial in Malaysia. The second part analyses the concept of restorative justice and its implementation in selected countries. The third part examines on the possibility of incorporating the restorative justice process into the Criminal Procedure Code of Malaysia and suggestion for the improvement of current criminal justice system in Malaysia.

2.0 RESOLVING CRIMINAL DISPUTE WITHOUT TRIAL UNDER THE CRIMINAL PROCEDURE CODE OF MALAYSIA

It is a common process where a charge is read and explained to the accused, he has to opt either to plead guilty or to claim trial.[3] If the accused pleads not guilty or claims trial, the case will proceed to hearing. There are certain processes and procedures that need to go through before the court decides whether the accused is convicted and guilty of an offence or not. In a criminal proceeding, litigation is the best process if the accused believes that he is not liable for the offence, wishes to raise any defence, or disagrees with the facts tendered by the prosecutor. However, it may take a lot of time to complete a full trial proceeding until the court pass judgment. Alternatively, a criminal case can be resolved earlier if the accused wishes to plead guilty at an early stage of a criminal proceeding or applies for plea bargaining.

2.1 Plead guilty

If the accused wishes to plead guilty at an early stage of criminal proceeding, the case will not proceed to a trial. If the court satisfied that accused understands the charge made against him, the consequence of the plea, and the plea is made without any condition,[4] the court shall record the plea, and the accused is convicted of the offence. Subsequently, the court shall pass a sentence according to the law.

Section 173A and section 172G are applicable if the accused pleads guilty at an early stage of criminal proceeding which allows the court to give discount on sentencing. However, in certain

1 Basic Principes on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12.

2 Jeff Latimer, "The Effectiveness Of Restorative Justice Practices: A Meta-Analysis," *The Prison Journal* (June 2005): 127-144.

3 section 173 (2) of the Criminal Procedure Code

4 Section 173(b) of the Criminal Procedure Code

cases, the court may refuse to give any discount.[5] Section 173A gives power to the Court to release the accused and not record a conviction, considering the character, antecedents, age, health or mental condition of the accused though the charge is proven against him. Additionally, the court may make an order dismissing the charge or complaint after an admonition, or discharge the offender on his entering into a bond of good behaviour, pay compensation for injury or any loss suffered by the victim, restore stolen property or restitution to the owner. This provision indicates that the court has discretionary power to release the accused without record, by taking into account the background of the accused. Though accused is released, the court may make an order as stipulated in the provision.

If the court finds that section 173A is not pertinent to the accused, the court may make use of the power conferred under section 172G to provide a lighter sentence than the original sentence. This provision empowers the court to sentence the accused not more than half of the maximum punishment of imprisonment provided under the law for the offence that he had convicted, provided that a plea of guilty is made at an early stage of criminal proceeding.[6] Thus, if the accused pleads guilty upon a charge is read, the accused shall be liable to the lighter punishment than the original sentence.

In *PP v Jessica Lim Lu Ping & Anor*[7] *the judge highlighted* that it is a public interest that pending criminal cases be disposed of as expeditiously as possible and accused person who pleads guilty be imposed with a reduced sentence. A reduced sentence encourages honesty when an accused pleads guilty and it will lead more accused persons to plead guilty without a trial. It will reduce the workload of the prosecutor's officers and the backlog of cases. Sentence an accused with a severe punishment upon pleads guilty is against the public interest.

If the accused pleads guilty after trial had commenced, it cannot be a mitigating factor in the determination of sentence.[8] Hence, section 173A and section 172G are not applicable. As illustrated in *Nor Afizal bin Azizan v Public Prosecutor,*[9] where the appellant was charged for an offence under s 376 of the Penal Code in the sessions court for committing rape, which is punishable with imprisonment for a term of not less than eight years and not more than thirty years, and whipping of not less than ten strokes. Upon pleading guilty, the appellant was placed on a bond for good behavior for a period of five years under s 294 of the Criminal Code Procedure ('CPC'). The decision is affirmed by the Court of Appeal where the Sessions Court judge was correct in making the order by considering the plea of guilty made by the accused and other factors. Thus, the court in this case is properly exercised its power given under section 173A upon the accused pleaded guilty of the offence charged.

It is submitted that if an accused pleads guilty at an early stage of criminal proceeding, the punishment is lighter than prescribed in the law for a specific offence. It can simply be done in the early of criminal proceeding. If the court satisfied the plea of guilty made by the offender, the court will pass sentence accordingly. Since the court has a discretionary power to decide a sentence, the court may make any order as provided in the law. Furthermore, the presence of the victim in the process, and making decision is not necessary. Thus, the victim may or may not receive compensation from the offender. Although the offender has completed the punishment, justice for the victim is still not served.

2.2 Plea bargaining

Besides plead guilty, the Criminal Procedure Code of Malaysia legalises the accused to resolve a criminal case through plea bargaining. Plea Bargaining is a "form of negotiation by which the prosecution and defence counsel to enter into an agreement resolving one or more criminal charges against the defendant without trial" (Herman, 2012).[10] In other words, plea bargaining is a process of

5 See *Zaidon Shariff v Public Prosecutor* [1996] 4 CLJ 441; *Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155; *Bachik Bin Abdul Rahman v Public Prosecutor (supra*)

6 See *Ahmad Rashidi bin Zainol & Anor v Public Prosecutor* [2014] 9 MLJ 562

7 See *PP v Jessica Lim Lu Ping & Anor* [2014] 2 CLJ 763).

8 See *Mohd Shaiful bin Saad v Public Prosecutor* [2015] 3 MLJ 657

9 See *Nor Afizal bin Azizan v Public Prosecutor* [2012] 6 MLJ 171

10 Nicholas G. Herman, *Plea Bargaining*, (United States of America: Juris Publishing Inc., 2012),1.

criminal settlement without a trial, conducted between the prosecutor and the accused or the defence counsel, to negotiate for a lesser charge or a lesser sentence in return for plea of guilty made by the accused.

If the accused wishes reducing a charge, the original charge will be amended by the prosecutor to a lenient offence.[11] Subsequently, the accused has to plead guilty of the amended charge, convicted and the court will pass sentence according to the sentence provided in that particular offence. For example, in *Pendakwa Raya v Mashaifee bin Mohd Zaki*,[12] the accused in this case was caught with 217 grammes of cannabis. He was originally charged with drug trafficking under s. 6 of the Dangerous Drugs Act 1952 (Act 234) ("DDA") punishable with section 39B(1)(a) of the Act which carries the mandatory death penalty. During the first hearing date of 22.11.2016, the accused claimed trial after the original charge was read and explained to him. The prosecution then offered the accused an alternative charge of possession of 217 grammes of cannabis, punishable under section 39A(2) with imprisonment for life[13] or for a term which shall not be less than five years, and whipping of not less than ten strokes. The accused pleaded guilty to the amended charge. In this case, **Suraya Othman J** sentenced the accused to 7 years' imprisonment from the date of his arrest and to 10 strokes of the *rattan. It is noted that since the accused pleaded guilty to the amended charge, the judge is rightly decided the punishment as it is still within the range provided in the law.*

If the accused intends to apply for plea bargaining concerning punishment, the charge will not be amended. Upon the accused pleads guilty for the offence charged, the court will record the conviction and pass sentence as stated in section 172D(1)(c) of the Code, where the court may order the accused to pay compensation, deal with the accused under youth offender, or first offender, or sentence the accused to not more than half of the maximum punishment under the law for an offence he had committed. [14] However, if it is stated in the law a minimum term of imprisonment, the accused shall not be punished to a lesser term of imprisonment than that the minimum term.[15] In case the accused is sentenced to a fine, but fails to comply with the order, the accused shall be imposed a sentence of imprisonment for a term of not less than six months.[16]

As illustrated in *Ahmad Rashidi bin Zainol & Anor v Public Prosecutor* [17], **the** first and second accused were charged with an offence of gang-robbery under s 395 of the Penal Code ('Code'), where the maximum punishment is 20 years imprisonment. The case was brought to trial, and the court found both guilty for the offence. Each accused sentenced to five years imprisonment and three strokes of whipping. Both accused appealed against the conviction and sentence. **Zamani A Rahim J is of a view** the sentence imposed by the presiding judge was insufficient. Since both accused had claimed to be tried and the trial proceeded to the end of the whole case, the sentence should be more than the plea bargaining cases. The maximum punishment under s 395 of the Penal Code under which both the accused were charged was 20 years imprisonment. If both the accused **plead guilty** to the charge, the maximum punishment imposable on the accused should not be exceed than ten years by reason of s 172D(1)(c)(ii). Hence, the court setting aside sentence by the lower court and substituting with 12 years of imprisonment and ten strokes of whipping on each accused. It is noted that if the accused claims trial and the court finds guilty, the court shall not sentence the accused to half of the maximum punishment as prescribed in the laws. It is improper to sentence the accused with a lighter punishment if the case is brought to a full trial, then the accused is convicted, and guilty.

If the case is successfully resolved through plea bargaining, the accused has to plead guilty either on the original charge or amended charge. The court will record his conviction, and pass sentence accordingly. Whether the accused will be punished or not, it depends on the nature of the offence, kind of plea bargaining, as well as the background of the accused. If a satisfactory disposition

11 Section 172c (1), (2)(c) of the Criminal Procedure Code

12 See *Pendakwa Raya v Mashaifee bin Mohd Zaki* [2017] MLJU 581

13 The term"Imprisonment for life" means a term of imprisonment for 30 years. Section 2 of the Criminal Justice (Amendment) Act 2007.

14 Section 172D(1)(a),(b),(c) of the Criminal Procedure Code

15 Section 172D(2) of the Criminal Procedure Code

16 Section 172D(3) of the Criminal Procedure Code

17 See *Ahmad Rashidi bin Zainol & Anor v Public Prosecutor* [2014] 9 MLJ 562

has successfully reached by the accused and the prosecutor, the accused can be punished accordingly. Appeal is not allowed except on the extent of sentencing. However, if the accused intends to apply for plea bargaining, but no satisfactory disposition reached between the accused and the prosecutor, the case will proceed to a trial.

It is submitted that the plea bargaining agreement may result in any of the following; (1) the prosecutor agrees to amend the charge against the accused, (2) the accused pleads guilty to a reduced charge, (3) the accused pleads guilty to the original charge in return for a lesser sentencing. Plea bargaining gives the accused an opportunity to reduce the punishment or the charge by pleads guilty. Compared to litigation, plea bargaining could save time and legal costs. Nevertheless, the process merely involves a prosecutor and the offender. It is still the court to determine a sentence on the offender. In order to determine the sentence, it is guided by the law. The implication of the crime on the victim is not necessary.

The law does not provide the role of the victims in the plea bargaining process, and determining a decision. It is afraid that the victims will receive nothing though the crime affects the victims' property, unless the court orders the accused to pay compensation or to do community service. This process will benefit the accused because it will be subject to a lower sentence than the original punishment set forth in the Penal Code, but it does not benefit the victim.

Indeed, if the criminal justice system is still implementing the traditional approach, with aims to punish the offender, sometimes it does not benefit the victim. The victim is not the party in the process, and does not has right to make a judgment. Due to this obstacle, the restorative justice has emerged and implementing in several countries to complement the existing criminal justice system.

3.0 **Resolving Criminal Dispute through Restorative Justice Process**

Restorative justice was originally a dispute resolution practiced by aboriginal people who preferred peace and conciliation. Since 1990s, the acceptance of the restorative justice system has been growing and globally accepted as part of the criminal justice system. Restorative justice is a process where all victims and the offender in a particular offence get together to negotiate the offence and its implications in the future. Article 2 of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[18] provides that restorative process means any process where both the victim and the offender with community members affected by crime, participate in resolving the criminal case with the help of a facilitator. Crime is seen as a violation of people and relationships rather than a violation of law. As such, the offender is expected to be directly accountable for the act done to the victim by repairing the harm.[19] Restorative justice process comprises of victim-offender mediation, family group conferencing and circle sentencing.

3.1 Victim-offender mediation

Victim- offender mediation is a voluntary process involving disputed parties with the assistance of a neutral person to reach suggestions or solutions of a problem especially on how to amend the harm caused by the offender. [20] The stakeholders in victim-offender mediation are the offender, the victim and the community.[21] In the process, the offender has an opportunity to seek forgiveness, and to make restitution or restore the loss suffered by the victim. The mediator as a third party plays a vital role in assisting the offender and the victim to communicate and to reach an agreement. The goal of victim-offender mediation is to hold the offender directly accountable to the victim for the

18 Guidelines for restorative justice process established by the United Nation.

19 Mark Umbreit, and Howard Zehr, "Restorative Family Group Coference Differing Models and Guidelines for Practice," in *Restorative Justice: Critical Issues*, (London: Sage Publications, 2003), 69.

20 Heather Strang, *Repair or Revenge: Victims and Restorative Justice*, (USA: Oxford University Press, 2003), 49.

21 Howard E Barbaree, and William L Marshall, *The Juvenile Sex Offender, (*New York: Guilford Press, 2008), 343.

harm that he had committed upon the victim and to have an opportunity facing the offender, exchange information about the crime and seeking restitution as a solution.[22] Victim-offender mediation is widely recognised in several countries. However, Sweden has taken a proactive step to legally recognise the practice of victim-offender mediation as part of the criminal justice system.

Sweden introduces victim-offender mediation in1980s and incorporated into the Mediation Act in 2002 to complement the criminal justice system. Since 1 January 2008 all Swedish local authorities have been required to offer mediation if the offence was committed by someone under the age of 21. The mediation under this Act is defined as an offender and a plaintiff (victim) meet before a mediator to speak of the crime and the consequences thereof.[23] The purpose of victim-offender mediation is to allow the parties to get involved in the process, and to determine how the offender should make reparation.

The victim-offender mediation service is a part of the municipalities' social welfare activities.[24]Thus, it is not considered as a punishment for the offender. Eventhough the offender is required to comply with certain contract agreement which is reached at the mediation meeting, it is regarded as a contract between the offender and the victim.

The process begins when the police or local authority asks the offender, whether he or she is interested in taking part in mediation.[25] Victim- offender mediation is not a compulsory process, rather an option for the offender to resolve the criminal matter, in a private and confidential setting involving the offender, the victim and the mediator. The police officer has discretionary power to report or not report the offence done by youth offender.[26] The police officer has power to direct the child or youth offender to repair the harm. If the harm is repaired, the police will not report the case. Therefore, if the police officer found that it is appropriate to refer the child or youth offender to mediation, the offender will be asked whether he wants to participate in the mediation. Before the case is referred to mediation, the offender must plead guilty and willing to resolve the case through mediation. Then, the victim will be contacted. At the mediation meeting, it is expected that the offender and the victim exchange information concerning the crime such as, what makes the offender committed the crime, how the crime affects the victim, and how the offender can repair the harm to the victim. The parties have to come out with a contractual agreement. The common contractual agreement is financial compensation. However, in case the offender refuses or fails to comply with the agreement, the mediator must inform the prosecutor.[27]

The Mediation Act silent on the nature of the crime that is applicable for mediation. However, based on the report, the victim-offender mediation has been applied for non-serious offences such as theft, bullying, vandalism, and causing hurt. The process is not really workable for victimless crimes.[28] Whether the victim-offender mediation is the best option to resolve a crime, depends on the willingness of the victim and the offender, as well as the nature of the offence. Nevertheless, mediation will be considered successful if the parties are able to reach an agreement at the end of the process and it is binding upon the parties.

It is submitted that victim-offender mediation is the parties-driven solution, which needs full cooperation and commitment on the part of the parties in the process and to determine the contractual

22 Clifford K Dorine,, *Restorative Justice in the United States: An Introduction*, (United States of America: Pearson Prentice Hall, 2008), 225.

23 Section 2 of the Mediation Act 2002 (lag 2002:445 on medling med anledning av brott)

24 Anna Mestitz, and Ghetti. *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries,* (New York: Springer, 2005), 82.

25 Wahlin, Lottie, "English Summary: Victim-offender mediation in Sweden in the 21st century," National Council for Crime Prevention (2005), accessed 20th June 2016, https://www.bra.se/download/18.cba82f7130f475a2f1800026027/1371914734461/2005_victim-offender_mediation_in_sweden.pdf

26 Sophie Anderson, "Alternatives to Custody for Young Offenders: National Report on Juvenie Justice Trends" Sweden, (2011/2012): 5 , accessed July 1, 2017. http://www.oijj.org/sites/default/files/baaf_sweden1.pdf

27 Anna Mestitz and Ghetti. *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries,* (New York: Springer, 2005), 84.

28 Lottie Wahlin, "English Summary: Victim-offender mediation in Sweden in the 21st century". National Council for Crime Prevention (2005), accessed 20th June 2016, https://www.bra.se/download/18.cba82f7130f475a2f1800026027/1371914734461/2005_victim-offender_mediation_in_sweden.pdf

agreement. Sweden initiates the victim-offender mediation for child and youthful offender to deviate the offender from a sentence to a prison term. Thus, if the child or youth offender is suspected of an offence that can lead to imprisonment, the suspect will be asked by the police officer whether he or she intends to participate in the victim-offender mediation.[29] By agreeing to the victim-offender mediation, the offender will be referred to the social service, which would conduct the mediation. Most of cases, the offender will be asked to compensate the victim and to do community service as requested by the victim.

In Sweden, the victim-offender mediation is applicable for child and youth offender. Looking at the outcome of the contractual agreement which requires the offender to pay compensation to the victim and to do community service, the victim-offender mediation could be applicable to adult offender as well. However, application can be restricted to certain kinds of offence. For instance, in case of theft, or vandalism, the offender can be directed to the victim-offender mediation to resolve the case. The offender can simply pay the compensation or to do community service if agreed with the victim.

Nevertheless, it is found that it is difficult to set a meeting between the offender and the victim especially if the victim is still under trauma for what had happened on him or her. What more to reach an agreement which meets the needs and interests of the offender and the victim. A facilitator needs to play a vital role in order to ensure that the offender and the victim can communicate well, and the proposed contractual agreement is fair and just for the parties. Hence, a facilitator must have a legal background and possesses a good psychological skill.

1.2 **Family-group conferencing**

Family-group conferencing is defined as a process where all stakeholders, which include the offender, the victim, the family of the offender and the victim, get together to offer the offender the opportunity to express personal accountability for the commission of the crime to the victim and to collaborate with all participants to reach an outcome with the help of a facilitator.[30]

Family-group conferencing is found among the Maori indigenous culture in New Zealand. The New Zealand has enacted the Children, Young Persons, and Their Families Act 1989 to allow the process of family-group conferencing in the juvenile justice system. The involvement of a family in the process and decision making is a belief that a family is an optimum unit to satisfy the child's needs.[31]

In New Zealand, a family-group conference is available for a child or young person aged between 10 and 14years who has committed an offence.[32] The court may refer the child to a care and protection co-ordinator to determine whether it is necessary to convene a family group conference.[33] A family- group conference is flexible as the members may determine the time, place, and date of the conference as well as regulate the procedure in the conference.[34]

The conference is conducted in a private session as only persons who are listed under section 22 of the Act are allowed to attend the conference. They are the child, the child's family or guardian, a care and protection co-ordinator or a representative, a legal representative of the child, or any person if requested by the family members.[35]

The functions of a family -group conference are to consider the care or protection of that child or young person, to make such decisions or recommendations, and to formulate plans by taking into

29 Anna Mestitz, and Ghetti. *Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries, (*New York: Springer, 2005), 85.

30 Clifford K Dorine. *Restorative Justice in the United States: An Introduction*, (USA: Prentice Hall, 2007), 246-247.

31 Marie Connolly, and Margaret MacKenzie, *Effective Participatory Practice: Family Group Conferencing in Child Protection*, (New York: Transaction Publishers, 1998), 18.

32 Section 14(1)(e) of the Children, Young Person and Their Families Act 1989

33 Section 19 of the Children, Young Person and Their Families Act 1989

34 Section 21 of the Children, Young Person and Their Families Act 1989

35 Section 22 of the Children, Young Person and Their Families Act 1989

consideration the welfare and interests of the child, and to review the decisions and recommendations formulated by the conference and its implementation.[36] The decision or recommendation reaches in the conference must be recorded by a care and protection co-ordinator.[37] The chief executive shall consider any decision reached by the conference unless if it found that the decision or recommendation is impracticable or unreasonable.[38] If no agreement reaches in the conference, a care and protection co-ordinator must prepare a report and submit it to the court if the case is referred by the court.[39]

All communication, information and admission derive from the conference is confidential and inadmissible in any court proceeding.[40] Since all information derives from the meeting is considered private and protected under the law, the parties are free to express anything in the conference meeting. Whatever said by the offender inclusive of confession of committing the crime, cannot be accepted as an evidence in the criminal proceeding. This privilege protects the right of the offender and the victim to exchange information and they are free to discuss anything about the crime. Otherwise, if their words are not protected by the law, the parties will reluctant to share information because of afraid to be subjected to a legal action. Hence, it may be difficult to reach an agreement in the meeting.

It can be seen that the objective of a family-group conferencing is to involve family of the offender and the victim, besides the offender and the victim in the process with the assistance of a facilitator. Nature of the process itself requires the involvement of a family. Hence, this process is suitable for child and youth offender, not an adult offender. The participation of the offender's family helps the offender to feel ease in the process, and encourages the offender to talk and share about what makes he committed the crime. The presence of the family shows that the family is also responsible for the act that the offender had done. The victim needs a family support to rebuild his or her confidence. In the conference, in case the victim is unable to speak, or to voice out the implication of the crime on him or her, the family can assist the victim. Having involvement of the family in the conference shows the responsibility of the family in upbringing the child.

1.3 **Circle sentencing**

Circle sentencing is a traditional sanction practised by aboriginal people. In the circle, the offender, the victims, the families and communities will express their feelings about the crime and suggest how the needs of the victim and the community are to be addressed.[41] It is an alternative sentencing program which involves members of aboriginal communities and concerns the victims' expression, victims' protection and victims' support.[42]

New South Wales of Australia has regulated the Criminal Procedure Amendment (Circle Sentencing) Regulation 2009 to provide the circle sentencing programme under the Criminal Procedure Regulation 2005. The regulation is made under the Criminal Procedure Act 1986. A circle sentencing was emerged in Australia as aboriginal people contended that the criminal justice system fails to understand them. They want the aboriginal custom and value to be included in the process, and to participate in the justice process.[43] The implementation of circle sentencing in the justice system allows the custom and the belief of aboriginal people to be applied in resolving criminal matters.

An offender may be referred to a circle sentencing intervention programme by a participating court.[44] The factors that need to be considered in assessing the offender among others are nature of

36 Section 28 of the Children, Young Person and Their Families Act 1989
37 Section 29 of the Children, Young Person and Their Families Act 1989
38 Section 34 of the Children, Young Person and Their Families Act 1989
39 Section 31 of the Children, Young Person and Their Families Act 1989
40 Section 37 of the Children, Young Person and Their Families Act 1989
41 Gordon Bazemore, and Curt Taylor Griffths, "Conference, Circles, Boards and Mediations: The 'New Wave' of Community Justice Decisionmaking," in *Restorative Justice: Critical Issues*, (London: Sage Publications, 2003), 78.
42 Gordon Bazemore, and Curt Taylor Griffths, "Conference, Circles, Boards and Mediations: The 'New Wave' of Community Justice Decisionmaking," in *Restorative Justice: Critical Issues*, (London: Sage Publications, 2003), 86.
43 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, (Sydney: Hawkins Press, 2008), 129-130.
44 Clause 3 of the Schedule 4 of the Criminal Procedure Regulation 2005

the offence, whether the offender is part of an aboriginal community, the impact of the offence on the victim, the potential benefits to the offender, the victim and the community if the offender participates in the programme.[45] Upon assessing, the Aboriginal Justice Group must notify the court whether it satisfied that the offender is eligible to be referred to a circle sentencing intervention programme. The offender will participate in a circle sentencing intervention programme once he agrees to enter into an agreement to participate in the programme.[46]

The process of a circle sentencing involves the offender, the victim, the Magistrate, the offender's legal representative, the prosecutor, the Project Officer and at least three aboriginal persons.[47] The presence of a victim is not necessary, and if the victim participates in the programme, he may express his views about the offender and the implication of the offence on him.[48] The process is in a private setting as only members of a circle sentencing group are allowed to attend at a meeting. Generally, all information, admission and evidence generated from a circle sentencing meeting concerning the offender are not admissible in any criminal or civil proceeding. However, information in the meeting can be disclosed to the court that referred the offender to a circle sentencing intervention programme, and if an appeal is made.[49] The outcome of the meeting requires the group to determine an appropriate plan for the offender, or recommend an appropriate sentence for the offender.[50]

Once the group reaches a decision, the court has to pronounce the sentence in open court.[51] The offender has to comply with the intervention plan or any plan arising from the agreement in the programme as agreed by the circle sentencing group. The involvement of the community and persons with legal background is to ensure that the plan or sentence that will be imposed on the accused is in proportionate to the offence committed and harm suffered by the victim. In case the offender fails to comply with the intervention plan, the circle may be abandoned and he may be referred to the court.[52]

Circle sentencing can be successful if members of the circle sentencing group show good support in the process and the outcome. The recognition of a circle sentencing in the criminal justice system allows the aboriginal community to participate in the process and determine the sentence based on the value and customs of the aboriginal people. Besides, the implication of a circle sentencing programme is actually promoting healing and reconciliation, providing full support to the victim, as well as reducing reoffending in the aboriginal communities.

It is noted that the circle sentencing is a culture and a practice of aboriginal people. When it has been legalised in the New Zealand criminal justice system it shows that the process which is originated by aboriginal people is practicable to resolve criminal cases. However, it is only acceptable for adult offender as the participants are the offender, the victim, and the community. If the objective of circle sentencing is to allow aboriginal people or community to participate in the process and making decision, it should be extended to other adult offenders. The idea is the same, which is to allow the local community to participate in the process and determine the agreement based on their needs and interests. It is believed that locality has its own needs and interest. Thus, if the local community is giving a chance to get involved in the decision making process, this can also shorten the normal process to resolve criminal cases. Certain cases can simply be resolved through circle sentencing, and whatever agreement reached in the meeting, has a binding effect.

For example, in case of breaking home and theft at one place, instead of punishing the offender to fine, or imprisonment, it is best to ask the offender to pay the compensation and repair the harm. This process is the best solution if the offender is known to the community. This can help the offender to be integrated in the society without affecting his future. Involvement of the community in a circle sentencing process and making a decision, ease the court to expedite disposal of criminal cases. The court will only record the judgment and pass the judgment as agreed by the members of the circle

45 Clause 6 of the Schedule 4 of the Criminal Procedure Regulation 2005
46 Clause 8 of Schedule 4 of the Criminal Procedure Regulation 2005
47 Clause 11 of Schedule 4 of the Criminal Procedure Regulation 2005
48 Clause 15 of the Schedule 4 of the Criminal Procedure Regulation 2005
49 Clause 25 of the Schedule 4 of the Criminal Procedure Regulation 2005
50 Clause 16(4) of the Schedule 4 of the Criminal Procedure Regulation 2005
51 Clause 2(h) of Schedule 4 of the Criminal Procedure Regulation 2005
52 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, (Sydney: Hawkins Press, 2008), 131.

sentencing.

4.0 Whether the Restorative Justice Processes Should be Implemented in Malaysia?

There are limited options for the offender to resolve criminal cases in Malaysia. The Criminal Procedure Code of Malaysia recognise litigation, plea bargaining, plea of guilty as a means to dispose criminal cases. The restorative justice concerns on the direct participation of the offender and the victim in the process, so that the offender will be able to tell the factors that contribute him or her to commit the crime, and the victim will also be able to address the implication of a crime on him or her physically, spiritually and emotionally. It also aims of the restorative justice processes to include the offender and the victim to determine the contractual agreement, such as to pay compensation, or doing community service.

The Criminal Code of Malaysia has no direct provision which allows the offender to inform the victim of what makes him or her committed the crime. However, insertion of victim's impact statement in section 173(m) in the Criminal Procedure Code allows the victim and the family members to express the implication of crime against the victim or the victim's family in the court. This process is allowed in the trial proceeding, before the court passes a judgment. However, this process is allowed if the case has gone through the full trial process. Though this process does not allow decision making power on the victim, based on the nature of the crime and its consequence over the victim, the court will take into consideration before making judgment. These factors can influence the court to mitigate or aggravate the sanction over the offender.

The outcome of restorative justice processes normally is to pay compensation to the victim and to request the offender to do community service. The Criminal Procedure Code of Malaysia empowers the court to order the offender to pay compensation.[53] *In Mohamed Johan Mutalib v PP,*[54] *and Raja Izzuddin Shah v PP*,[55]the court ordered the offender to pay compensation to the victim. Section 293 of the Criminal Procedure Code of Malaysia allows the court to order the youth offender to do community service. The punishment is considered as an alternative punishment to imprisonment. Hence, it can be seen that the common outcome of the restorative justice processes that are compensation and community service are there in the Criminal Procedure Code of Malaysia.

It can be seen that there is still no provision which allows the offender and the victim resolving a criminal case between without a trial. If it is a need to allow the offender and the victim to meet each other, to discuss about the crime, and to decide on an agreement, it should be done without a trial. The Criminal Code could be amended to allow the restorative justice process to be incorporated into the Criminal Procedure Code to complement the existing criminal justice system. It is suggested restorative justice to be implemented to the youth offenders so that the offenders have more options to resolve the criminal case.

However, not all types of offences are practicable to be resolved through restorative justice processes. It must be minor offences in nature, where the punishment can be compensation or community service, and its practicability to the offender. For example, a circle sentencing and victim-offender mediation are applicable for all offenders regardless of age. But, for a family-group conference, is only practicable for child or youth offenders.

5.0 Conclusion

It is undoubted that litigation is the best way to resolve a criminal case, especially if the offender refuses to plead guilty, or claim trial. However, settlement of criminal cases without trial should be considered if the offender intends to plead guilty, hopes for a lenient sentence, and to expedite disposal of criminal case. In Malaysia, there are limited options for the offender to resolve criminal

53 Section 173(A), section 426(1) of the Criminal Procedure Code of Malaysia

54 See *Mohamed Johan Mutalib v PP* [1978] 1 MLJ 213

55 See *Raja Izzuddin Shah v PP* [1979] 1 MLJ 270

cases without a trial. The available processes are plea bargaining, and plead guilty at an early stage of trial. The implication of each process for the accused and the victim are different. If the accused opts to plead guilty, the sentence will be discounted. In plea bargaining, if the accused applies on sentencing, there will be discounted on a sentence, meanwhile if the accused pleas on charge, the charge will be amended to a lower offence. As such, the sentence that will be imposed on him or her is lower than the original charge. The process does not involve the victim and the community.

Besides plea of guilty, and plea bargaining, in other countries, there are other options for the offender to resolve a criminal case under the restorative justice, that is victim-offender mediation, family-group conference, and circle sentencing. The process requires participation of the offender, the victim, and some process need community to get involve. In the process, besides discussing on the agreement on how to repair the harm, the parties will also discuss about why the offender committed the offence, and the impact of the crime on the victim. It also gives the offender an opportunity to seek forgiveness from the victim and to directly responsible for the harm he had committed against the victim. Study also shows that all parties satisfied with the process and the outcome. The process also contributes in reducing the number of reoffending.

Though restorative justice is not accepted officially in Malaysia, in the Criminal Procedure Code, there are provisions which allow the offender to pay compensation, and do community service which are the common outcome of the restorative justice. Thus, impliedly it can be said that the element of restorative justice is there in the Code. The restorative justice process has been accepted in other countries, why not in Malaysia. It is urged that Malaysia should recognise the restorative justice process as a complementary to the current criminal justice system. The Criminal Procedure Code should be implemented to allow the process of restorative justice as a method of resolving criminal cases. Hence, the offender could have more options to resolve a criminal case. It is believed that the process and the outcome will not only benefit the offenders, but also the victim, and the community.

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Court as A Means of Dispute Resolution in Adoption cases in Malaysia: An Appraisal of the Syariah Court's decision on dispute relating to Custody and Maintenance of Adopted Children

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Abstract:

Children generation are depending on adult as their guardian due to their vulnerability. They are the subject of custody and maintenance. Under Islamic law, parents are the most common guardian and are responsible for children's custody and maintenance. Nevertheless, there are categories of children who are parentless or not living with their biological parents due to certain problems or situation like adoption. It follows that, as normal biological children, adopted children are also entitled to custody and maintenance in particular from their adoptive parents. The issues however arise whenever there is failure or neglect of care and maintenance of adopted children especially whenever the adopted children reached certain ages or in the event of divorce of the adoptive parents. This paper deals with court as a means to resolve dispute in matters relating to custody and maintenance of adopted children especially in Syariah Court in Malaysia. Examination will focus on Syariah Court's decision when dealing with those issues. A comparison with other jurisdiction where relevant and necessary will also be done especially to provide a good findings for the paper.

Introduction

Adoption is widely practised in many countries and it is not alien to Malaysia. In general, adoption has been long practised in Malaysia as a means to create an institution of a family consisting of parents and a child or children, either by childless couple or a couple with children.[1] Before adoption statutes were introduced, taking care of another person's child was either considered as customary or *de facto* adoption.[2] Adoption is also practised by Muslims in Malaysia though it does not create a new legal relationship between the child and the adoptive parents. This is to protect the child's biological parentage as afforded by Islamic law which will be discussed below.

Brief Concept of Adoption in Islam

Islamic law does not recognize the notion of legal adoption. Legal adoption was, however,

1 Shamsuddin Suhor, Anak Angkat dan Pengangkatan in *Undang-Undang Keluarga (Sivil)* edited by author and Noor Aziah Mohd Awal, Dewan Bahasa and Pustaka, 2007 [hereinafter Shamsuddin, Pengangkatan] at 47-48.
2 Mimi Kamariah, *Family Law in Malaysia*, Malayan Law Journal, 1999, at 217.

widely practised in pre-Islamic Arabia[3] known as *al-tabanni*, an act of adopting a child that is "to make one's son."[4] In *al-tabanni*, the adopted child would take the adoptive family's name and assume the biological child's rights and duties including inheritance and consanguinity. Basically, *al-tabanni* is perceived as the deliberate and intended act of making someone else's birth child as one's own.[5] After the advent of Islam, this form of adoption as recognized by the present day Western countries in which an adopted child has the same position as a biological child was no longer allowed.[6] The basis for such non-recognition is traced in the Qur'ān[7] and the case of Zayd bin Harithah, the adopted son of the Prophet Muhammad (s.a.w).[8] The Qur'ānic verse provides specific rules regarding the legal relationship of a child and his or her adopters in which neither the blood ties between the child and the birth parents are terminated nor is the identity of the birth parents are concealed.[9] It is also a reminder to the adoptive parents that they are not the child's birth parents.[10] In regard to the case of Zayd bin Haritha, he was freed as a slave and adopted by the Prophet (s.a.w). After that he was known as Zayd ibn (son of) Muhammad. However, after the revelation of the Quranic verse, as has been discussed above, Zayd was no longer known as Zayd ibn Muhammad, but was named again according to his father's name, Zayd bin Harithah.[11] The prohibition of the pre-Islamic Arabia practice of adoption is significant in order to eradicate the effects of legal adoption. In this regard, it protects the biological parents of an adopted son which is traced back to the birth father.

The prohibition of legal adoption is not a barrier to care for homeless children, such as orphans and foundlings. Alternatively, there is another form of "adoption" that is recognized by Islam, in which a man takes an orphan or a foundling into the family for the purpose of rearing, educating, and treating him or her as his own child. It follows that he has to protect, feed, clothe, teach, and love the child as his own without attributing the child to him and allowing him or her to inherit his property.[12] Significantly, this concept is quite similar to legal adoption to a certain extent and it is known as *kafālah*.[13] *Kafālah* literally refers to sponsorship, which derives from the root word that means "to

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3 See generally Amira al-Azhary Sonbol, "Adoption in Islamic Society: A Historical Survey" in *Children in the Muslim Middle East* edited by Elizabeth Warnock Fernea, University of Texas Press, 1995.

4 Yusuf Al-Qaradawi, *The Lawful and The Prohibited in Islam (al-halāl wa al-harām fī al-islām)*, Kitab Bhavan, New Delhi, India, 2007, at 223. See also, Amira al-Azhary, n. 91; Faisal Kutty, Islamic Law and Adoptions (June 20, 2014). Forthcoming in Robert L. Ballard et al., The Intercountry Adoption Debate: Dialogues Across Disciplines (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014); Valparaiso University Legal Studies Research Paper No. 14-5, <http://ssrn.com/abstract=2457066> viewed on 16 November 2015, at 15-16; Ingrid Mattson, "Adoption and Fostering" in *Encyclopedia of Women and Islamic Cultures: Family, Law and Politics* edited by Suad Joseph, Afsaneh Najmabdi, Leiden: Koninklijke Brill NV, 2005.

5 Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham, Rowman & Littlefield Publishers. EPUB file, 2002, at 8-9.

6 See generally Amira al-Azhary, n. 91.See also, David Pearl & Werner Menski, *Muslim Family Law*, 3rd edn., Sweet & Maxwell, 1998, at 408 (describing that Islam does not recognize the formal adoption that creates the legal fiction, allowing a child to stand on an equal footing to a natural relative of the adoptive father).

7 See, Qur'ān 33:4-5 (stating

> nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells (you) the Truth, and He shows the (right) Way. Call them by (the names of) their fathers: that is juster in the sight of Allah. But if you know not their father's (names, call them) your brothers in faith, or your Mawlās

8 For further discussion of the legal bases on the prohibition of adoption in Islam see, Yaḥyá Aḥmad Zakarīyā al Shāmī, al-Tabannī fī al-Islām : wa-Atharahu 'alá al-'Alāqāt al-Khāṣṣah al-Dawlīyah, Dār al-Jāma'ah al-Jadīdah, 2009; Ashraf 'Abd al-'Alim Al-Rifai', al-Tabannī ad Duwalī wa Mabda' Iḥtirām Maṣlahah al-Ṭiflu Dirāsah Muqārinah, Dār al-Fikr al-Jamā'i, 2011.

9 Ali Abu Noman Mohammad Atahar, & Zafrin Andaleeb. "Concept and Practice of Laws Relating to Adoption in Different Religion and Modern Societies: Special Reference to the Law of Islam" (2009) Vol. 3 *Journal of Islamic Law and Judiciary* 27, <http://works.bepress.com/cgi/viewcontent.cgi?article= 1014&context=abunoman_ataharali> viewed on 10 January 2015, at 30.

10 Ibid.

11 Ibid. See also, Yaḥyá Aḥmad Zakarīyā, n. 96, at 29-30; Ashraf 'Abd al-'Alim, n. 96, at 196.

12 Al-Qaradawi, n. 92, at 226. See also, Ahmad Imad, n. 106.

13 Ahmad Imad, n. 106. See also, Ali Abu Noman & Zafrin, n. 98, at 31.

feed".[14] The most precise translation of *kafālah* is "foster parenting" or "legal fostering".[15] It is also viewed as a legal guardianship of a minor referring to "wardship, tutelage, or the gift of care."[16]

In general, *kafālah* is a practice permitted by Islamic law to take care of a vulnerable child such as orphan, destitute or abandoned. The guardian (*kafil*) is responsible to provide him or her with guardianship, accommodation and care within a family setting by preserving the biological parentage without the affiliation and inheritance rights.[17] Unlike legal adoption, the notion of *kafālah* is a "primarily gift of care and not a substitute for lineal descent."[18] Thus, a foster child who has been taken into care through *kafālah* does not assume the rights and duties as to those of a birth child. There are several legal implications of *kafālah* based on the Quranic verse that prohibits legal adoption as recognized in Western countries and in pre-Islamic Arabia.[19] The foster child in *kafālah* is not allowed to take the foster family's name and must retain the name of his or her biological family name.[20] This is to avoid confusion with the heirs of the adoptive parents or any claim of legal rights that do not belong to the foster child such as inheritance.[21] The foster son is also restricted from being alone or mixing freely with the other female family members who are considered as *non-mahram* to him since they are not related by blood. It follows that the adopted mother and sisters, for example, are not the foster son's real mother and siblings.[22] In any case, the foster child is to be cared for and loved in the same manner as the birth child of the foster family but without denying his or her original lineage.[23] Accordingly, it seems that *kafālah* is an alternative to adoption that allows Muslims to do good deeds and take care of homeless children.

Adoption Law Governing Muslims in Malaysia

In West Malaysia, adoption is generally governed by two statutes which are the Adoption Act 1952 (hereinafter referred to as the AA)[24] and the Registration of Adoptions Act 1952[25] (hereinafter referred to as the RAA). The RAA is intended to accommodate the Muslims whose personal laws are repugnant to adoption and yet it is not rare for Muslims in this country to 'adopt' a child. In endorsing such customary practice, registration of the adoption is made under the RAA to safeguard the adoptive parent's right to custody.[26] Basically, an adoption of a child under the RAA is done by applying to the National Registration Department (NRD) for registration without involving court proceedings. The application to register an adoption must be made in the prescribed form[27] at the NRD of the district where the prospective adoptive parents reside.[28] The adoption will be registered by the Registrar after he has been satisfied with evidence either oral or documentary that such adoption took place.[29] The parent or parents, or any guardian of the child has to appear before the Registrar and give express consent to the adoption. The Registrar may also dispense with the consent of the natural parents if

14 Ibid.

15 Ibid. See also, Ingrid Mattson, n. 92, at 1(describing *kafālah* as fostering that means "the act of assuming partial or complete responsibility for a child whose parents are temporarily or permanently unable to care for him or her").

16 Bargach, n. 94, at 9.

17 Shabnam Ishaque, n. 116, at 414 (notes no.6). See also, Muslim Women's Shura Council, n. 115, at 6.

18 Bargach, n. 94, at 60.

19 See, Qur'ān 33:4-5.

20 See, Ali Abu Noman & Zafrin, n. 98, at 31.

21 Amira al-Azhary, n. 91, at 62.

22 Al-Qaradawi, n. 92, at 223-225. See also, Ashraf 'Abd al-'Alim, n. 96, at 189-191; Yaḥyá Aḥmad Zakarīyā, n. 96, at 35-39.

23 Ibid., at 407. See also, Ali Abu Noman & Zafrin, n. 98, at 32-33; Qur'ān, 8:75

24 Act 257.

25 Act 253. See also, Mimi Kamariah, n. 2.

26 *Harlsbury's Laws of Malaysia*, n. 21, at 58.. See also, *Sean O'Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137, at 159.

27 See, Registration of Adoptions Act 1952, s. 6(1), Sch. 1.

28 National Registration Department of Malaysia (NRD), *Application for Registration of (De Facto) Adoption*. <http://www.jpn.gov.my/en/perkhidmatan/permohonan-pendaftaran-pengangkatan/> viewed on 25 April 2015 [hereinafter NRD, *De Facto* Adoption].

29 Registration of Adoptions Act 1952, s. 6(1)(a).

he is satisfied that in all circumstances of the case, it is just and equitable and for the welfare of the child to do so.[30] The registration with the NRD, however, does not confer the adopted child with any form of legal status. It simply allows the registration of *de facto* adoption and indirectly recognizes the adoptive parents' right to custody and their continuing responsibilities to maintain and educated the adopted child.[31]

Notably, the RAA provides for registration of *de facto* adoption of a child under the age of eighteen years, has never been married, is in the custody of, and has been brought up, maintained and educated for a period not less than two years continuously by any person or spouses.[32] It seems that the prospective adoptive parents must fulfil the probationary period of two years in looking after the child before applying to register the adoption. According to the RAA, prospective adoptive parents must attain the age of 25 years old and at least 18 years older than the child to be adopted.[33] The applicants may adopt a child at the age of 21 if they are related to the child.[34] The RAA also requires for the prospective adoptive parents and the child to be ordinarily resident in West Malaysia.[35] Though it is not explicitly mentioned in the RAA, Muslim prospective adoptive parents are allowed to adopt a non-Muslim child.[36] The AA, on the other hand, clearly provides that adoptions of a Muslim child by non-Muslim prospective adoptive parents are not permitted.[37] It looks like the RAA is silent on the restriction of a single prospective adoptive parent in adopting a child of a different gender.

The effect of adoption under the RAA does not change the child's status, bloodline and inheritance rights in line with the Islamic principles.[38] It follows that the adoptive parents are not allowed to be ascribed to the child and if the parents of the child are known, the child will retain his or her natural father's name.[39] It follows that the RAA confers no inheritance rights to the adopted child. In *Re Loh Toh Met, Decd KongLai Fong & Ors v Loh Peng Heng,*[40] the court held that he registration of the *de facto* adoption under the Registration of Adoptions Ordinance 1952 confers no succession rights on the adopted child. Since the adopted child does not automatically inherit property from his adoptive parents, it can be distributed by way of gift, *waqf* or bequest.[41] Furthermore, a Muslim adopted child under the RAA must observe some limitations prescribed by Islamic principles such as covering '*awrah* while associating with the adoptive family member of different gender.[42] Observation of the '*awrah* suggests that the relationship between the child and the adoptive family members remains as a stranger unless the adopted child has gone through a suckling during infancy.[43] Accordingly, the child's biological parentage is preserved regardless of the registration. The registration of the adoption under the RAA is generally intended for securing the child's welfare, exempting from income tax, assisting

30 Registration of Adoptions Act 1952, s. 6(1)(b)

31 *Harlsbury's Laws of Malaysia*, n. 21, at 58.

32 Registration of Adoptions Act 1952, s. 6(1).

33 Registration of Adoptions Act 1952, s.10(2)(a)).

34 Registration of Adoptions Act 1952, s. 10 (2)(b).

35 Registration of Adoptions Act 1952, s.10(3).

36 See e.g, *Tan Kong Meng v Zainon bte Md Zain & Anor* [1995] 3 MLJ 408 (describing a case of *de facto* adoption of a Chinese, non-Muslim child by a Malay couple).

37 Adoption Act 1952, s. 31.

38 See generally Najibah Mohd Zain, Nora Abd Hak, Azizah Mohd, Normi Abd Malek, Norliah Ibrahim, Roslina Che Soh@Yusoff, Noraini Md Hashim & Badruddin Ibrahim, *Islamic Family Law in Malaysia*, Thomson Reuters, 2016, at 319-330; Azizah Mohd, "Pengangkatan dan Pemeliharan Anak" in *Undang-undang Keluarga (Islam)* edited by Najibah Mohd Zain *et.al*, Dewan Bahasa dan Pustaka, 2007 [hereinafter Azizah, Pengangkatan dan Pemeliharaan], at 300-303.

39 Azizah Mohd, "Protection of Rights of Adopted Children in Relation to Duties of Adoptive Parents under the Law in Malaysia" Vol. 14 No.4, *Adoption Quarterly* (2011) 229-245 <http://dx.doi.org/10.1080/10926755.2011.628261 > [hereinafter Azizah, Protection of Rights], at 238-239. See also, Azizah Mohd, Azizah Mohd, *Protection and Adoption of Abandoned Children in Malaysia: A Comparative Overview with Islamic Law*, International Law Book Services, 2008 [hereinafter Azizah, *Abandoned Children*], at 101 (noting that adoption would render no parental status for the abandoned child).

40 [1961] MLJ 234.

41 Azizah, Protection of Rights, n. 39, at 239-240; Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 302-303.

42 Azizah, Protection of Rights, n. 39, at 240.

43 See, Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 318-321 (describing suckling as a solution in adoption to remove restrictions between the child and the adoptive family members).

the process to include the adoptee in his or her adopter's passport or travel document, applying for the adoptee's identification card and for educational purposes.[44]

In practice, the Social Welfare Department (hereinafter referred to as the SWD) manages adoption in Malaysia. It comes under the Ministry of Women, Family and Community Development, Malaysia. The SWD is responsible to arrange adoption of children, especially those in children's or welfare homes. These children also include abandoned children, children from poor families, abused and neglected children as well as orphans.[45]

The Law Governing Custody and Maintenance of Muslim Adopted Child in Malaysia

As has been discussed above, the RAA makes it possible for Muslims in Malaysia to adopt a child legally subject to the rules under the Islamic law (*Shari'ah*).[46] But, this statute provides no express provisions regarding the rights of Muslim adopted child to custody and maintenance. In contrast to adoption through court proceedings under the AA, an adopted child stands in the same position as a birth child as though he or she was born to the adoptive parents in lawful wedlock.[47] Subsequently, the adopted child under the AA enjoys the same rights as the birth child, including custody and maintenance. Though it is evident that the RAA is silent on the legal effect of the registration, it is arguable that except for the issue of the child's identity and inheritance, he or she is entitled to enjoy the other rights of the birth child.[48] It seems that the intention of the RAA is merely to award the legal custody of the child to the adoptive parents so that they can look after the child as their own in accordance with the Islamic law.

In Malaysia, matters pertaining to custody and maintenance of a Muslim child are basically governed by Islamic family law through State Enactments in each state which is administered in the Syariah Courts.[49] For instance, the Islamic Family Law (Federal Territories) Act 1984 (hereinafter the IFLA) is applicable in Federal Territories which include Kuala Lumpur, Labuan and Putrajaya. Though there is no specific provision on adoption in the IFLA, the statute provides general provisions on the rights of Muslim children to custody and guardianship[50]as well as maintenance.[51]

As regards the custody of a Muslim adopted child, a person who is qualified to make such claim according to the Islamic law could do so by making application for custody of the child to the Syariah court. This application could be made by the person after the adoption is legally registered or not. In this respect, the birth parents who wish to claim for the return of the child who is given up for the adoption could challenge for the child's custody rights. It follows that custody over the child could be changed and transferred to the birth parents after a consideration by the court.[52]

In general, the IFLA provides that the mother should be entitled to the custody of her infant children during the marriage or after the divorce.[53] This can be seen in the case of *Zawiyah v Ruslan*[54] where the court decided that the custody of three years old boy was given to the mother since the child had yet to reach seven years old. The right of the mother to the child's custody is not to be disregarded though someone else is named in the will of the child's father as a guardian. In *Rosnah v Mohamed Nor*,[55] the court held that the mother was entitled to the custody of her child despite the uncle claimed

44 Engku Muhammad Tajuddin Engku Ali, "Adoption Laws in Malaysia: Comparative Perspective" (Master thesis, International Islamic University Malaysia), 1998, at 88. See also, Azizah, Abandoned Children, n. 39, at 101.

45 Azizah, Abandoned Children, n. 39, at 89-96.

46 See Raymond Mah & Liow Pei Xia, *Adoption in Malaysia*, <http://www.mahwengkwai.com/adoption-malaysia/> viewed on 23 July 2017.

47 See, Adoption Act 1952, s. 9.

48 Raymond Mah & Liow Pei Xia, n. 46.

49 See, Azizah, Protection of Rights, n. 39, at 236.

50 See, Islamic Family Law (Federal Territories) Act 1984 , ss. 81–105.

51 See Islamic Family Law (Federal Territories) Act 1984 , ss. 72–80.

52 Hak Penjagaan Anak Angkat, *Harian Metro*, 30 March 2017< https://www.pressreader.com/malaysia/harian-metro/20170330/281784218930639> viewed on 22 July 2017.

53 See Islamic Family Law (Federal Territories) Act 1984, section 81(1).

54 (1980) 1 JH (2) 102.

55 (1975) 1 JH (1) 42.

that the child's father had appointed him to be the guardian after he passed away. The IFLA further provides that the mother must fulfil certain conditions, including that she is a Muslim, of sound mind and good conduct, attains the age of majority as well as lives in a place suitable for her child.[56]

Significantly, the theory that a young child or an infant is better off with the mother is not definite. It is just a rebuttable presumption since the court holds the final decision regarding the child's custody.[57] Basically, the court will look into the facts of the case and give the paramount consideration to the welfare of the child by taking into account the wishes of the birth parents and the child, bearing in mind the child's maturity.[58] This seems to suggest that a mature adopted child who could express his or her own views could make a choice whether he or she wants to continue live with the adoptive parents or not if the custody right is challenged in the court by the birth parents. In cases where the adopted child is mistreated by the adoptive parents, the child's custody might be granted to someone else or association if the court thinks it is better to do so even if the birth parents have claimed for that custody against the adoptive parents.[59] Therefore, the child's welfare is also vital in determining who has the right over the custody of the adopted child.

The IFLA also provides a provision that could be applied concerning the maintenance of a Muslim adopted child. The IFLA provides that if a man has accepted a child who is not his as his family member, then he is responsible to provide for the child's maintenance while he or she remains a child. This responsibility continues for as long as the birth parents of the child failed to do so. The court may also make orders as it thinks fit to safeguard the child's welfare.[60] Significantly, this provision puts the responsibility to pay maintenance for the adopted child on the adoptive father.[61] The adoptive father's responsibility on the adopted child's maintenance is not based on basic requirements as prescribed by the Islamic law such as marriage, descendant and possession but due to his willingness to care for the child.[62] So, if the child is taken back by the birth parents or one of them, the responsibility ceases and the adopted father could claim any sum spent in maintaining the child from the child's parent.[63] Like the birth parents, adoptive parents are basically responsible over an adopted child that they take into their home, including maintenance. However, some adoptive fathers have refused to pay for their adopted child's maintenance after divorce. This misunderstanding happens because they do not understand their responsibilities towards the adopted child. This could affect the adopted child's welfare relating to his or her life needs and comfort that he used to feel before the divorce took place.[64]

The applicability of the RAA to Muslims was questioned in *Abdul Shaik bin Md Ibrahim & Anor v. Hussein bin Ibrahim & ors*[65] where the court had misconstrued its application. In this case, a child was given to the adoptive parents by the birth parents on condition that they would return the child after having their own child. The adoptive parents adopted the child legally by registering it under the RAA. After five years the adoptive parents got a child and refused to return the adopted child to the birth parents. Subsequently, the birth parents applied to the court to cancel the registration of the

56 Islamic Family Law (Federal Territories) Act 1984, s. 82.

57 Islamic Family Law (Federal Territories) Act 1984, s. 86(3). See also, Zanariah Noor, "Isu-Isu Berbangkit dari Hak Hadanah dan Hak Perwalian Anak", *Jurnal Syariah*, Jil. 20, Bil. 1, (2012), 123-144 <http://pustaka2.upsi.edu.my/eprints/856/1/ISU%20ISU%20BERBANGKIT%20DARI%20HAK %20HADA NAH%20DAN%20HAK%20PERWALIAN%20ANAK.pdf> viewed on 22 July 2017.

58 See Islamic Family Law (Federal Territories) Act 1984, ss. 86 (2), 84(2).

59 Hak Penjagaan Anak Angkat, n.52.

60 Islamic Family Law (Federal Territories) Act 1984, s. 78(1).

61 See, Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 303-304; Jabatan Kehakiman Syariah Negeri Selangor, *Soalan Lazim - Nafkah*, 18 April 2016 <http://www.jakess.gov.my/v4/index.php/2-uncategorised/422-soalan-lazim-nafkah> viewed on 22 July 2017.

62 PPPG 3683 UNDANG-UNDANG KELUARGA PERBANDINGAN II (SEM 2 10/11) Hak Anak-anak Setelah Belaku Pembubaran Perkahwinan Menurut Undang-undang Islam, n.d <http://www.academia.edu/5990228/PPPG_3683_UNDANG-UNDANG_KELUARGA_PERBANDINGAN_ II_SEM_2_10_11_Hak_Anak-anak_Setelah_Belaku_ Pembubaran_Perkahwinan_Menurut_Undang-undang_Islam> viewed on 22 July 2013, at 14 (citing Siti Zalikhah Md. Nor, *Anakku Anakmu, 2008,* Dewan Bahasa dan Pustaka,p 40).

63 Islamic Family Law (Federal Territories) Act 1984, s. 78(2),(3)

64 Hak dan tanggungjawab kepada anak angkat, *Kosmo*, n.d, <http://kosmo.com.my/kosmo/content.asp?y=2015&dt=0213&pub=Kosmo&sec=Varia&pg=va_01.htm> viewed on 18 July 2017.

65 [1999] 5 MLJ 618

adoption. The adoptive parents argued that Civil Court had no jurisdiction to hear the case since they were Muslims. The court held that section 31 of the AA was also applicable to the RAA's application in which it did not govern adoption by Muslims. The court further held that the registration of the adoption under the RAA was null and void. This kind of misconstruction might possibly because there are no provisions in the RAA that clearly spell out the rules of adoption and protections of the adopted child's rights such as custody and maintenance according to Islamic law. It needs to be noted, however, that the adoption under the RAA is in line with the Islamic law by ensuring that the child's biological parentage is retained while the adoptive parents gain the custody of the child legally, allowing them to care for him or her.

Since the rights of a Muslim adopted child to custody and maintenance are not directly provided in the legislation, the court appears to play significant role as a means of dispute resolution. The role of the court in resolving these disputes seems crucial to ensure that the rights of a Muslim adopted child are protected. Accordingly, it is imperative that the court takes into account the welfare of the adopted child in making its decision though the birth parents retains the biological parentage.[66] Below is the discussion of some reported cases regarding the rights of a Muslim adopted child to custody and maintenance in Malaysia.

Court as a Means of Dispute Resolution in cases relating to a Muslim Adopted Child Custody: Reported Cases

Early reported case regarding a Muslim adopted child's custody can be seen in *Jainah binti Semah v Mansor bin Iman Mat & Anor*[67] where evidence is admissible to prove certain custom applies although it be in conflict with the Mohammedan law. The issue in this case was the validity of the adoption and what was the position where the adoptive father had died and the blood relatives were competing with the adoptive mother to get the custody of the child. The court accepted the evidence by Chief Village that the practice of adoption was a recognized institution and it was practised among the Malays in Pahang, either the parties were related or not. Since adoption is a recognised part of the personal law of the Pahang Malays, the court satisfied that the customary adoption was valid. It was also held that when a married couple adopts a child, such adoption is not revoked by the adoptive father's death and the adoptive mother is ordinarily entitled to the child's custody. Accordingly, the adoptive mother was awarded with custody of the adopted child subject to the condition that she moved to Terengganu to live with her family.

At present, it seems that the law in Malaysia does not clearly provide for the rights of a Muslim adopted child to custody. In general, a Muslim adopted child is presumed to enjoy the custody rights after his or her adoption is registered with the NRD pursuant to the RAA. It appears that such registration secures the rights of the Muslim adopted child to custody.[68] The provisions under the IFLA relating to custody of a Muslim child can also be referred to for the purpose of protection of the adopted child's rights to custody.[69] Furthermore, the Syariah High Court is empowered to decide cases pertaining to custody of Muslim children.[70] In the absence of direct provisions on custody of a Muslim adopted child, Syariah Court has resolved such disputes based on the Islamic law by putting a mother as a priority. For instance, the court in *Rosnah v Ibrahim*[71] awarded the custody of three year old adopted child to the adoptive mother. The adoptive mother claimed for custody of the adopted child after her divorce. The above two cases seem to denote that the adopted child's rights to custody remain even after the divorce or death of an adoptive parent.[72]

There are also several reported cases where the birth parents challenge the adoptive parents

66 See Hak dan tanggungjawab, n. 64.

67 [1951] MLJ 62.

68 See Azizah, Protection of Rights, n. 39, at 237.

69 Ibid. (citing Abu Bakar Daud., *Keutamaan hak jagaan anak angkat: panduan dan penyelesaian mengikut perundangan Malaysia*, Workshop on Hak dan Kedudukan Anak Angkat Mengikut Syariah dan Perundangan Malaysia, 2002.).

70 See Administration of Islamic Law (Federal Territories) Act of 1993 (Act 505), s. 46(2b).

71 (1979) 1 JH (2) 94.

72 See, Azizah, Protection of Rights, n. 39, at 237.

on the right to custody of the adopted child. In *Tang Kong Meng v Zainon bte Md Zain & Anor,*[73] an illegitimate child born to a Chinese couple had been placed in care and possession of a Muslim couple as babysitters since she was three months old. At present, she was 9 year old. The child was then legally adopted by the Muslim couple under the RAA with the consent of the birth mother but without the knowledge of the birth father. Subsequently, the birth father applied for the adopted child's custody. In determining whether the adoption was valid or not in this case, the court examined the two requirements of custody and maintenance. From the facts of the case, the Muslim adoptive parents had physical custody of the child for more than two years before the application for adoption. As for the maintenance, it was actually paid by the birth mother. It follows that the Muslim adoptive parents failed to fulfil the requirement of maintenance. Accordingly, the court declared that the registration of adoption under the RAA was null and void. In determining the issue of the child's custody, the court took into account the welfare of the child as paramount importance. The court found that the birth mother and father were not in a position to look after the child. Subsequently, the court appointed the Muslim adoptive parents who wanted the child as their own and had been cared for her practically after she was born as her guardians. Though the custody of the child was given to the Muslim adoptive parents, the court did not allow them to decide on her religion.

On the other hand, the birth parents in the case of *Ahmad Arshad & Anor v. Jamal Mat Jamin & Anor*[74] were granted with the adopted child's custody by the court. A boy aged 4 years old was adopted by the adoptive parents pursuant to the RAA with the consent of the birth parents. But, the birth parents had applied to the court to claim back the child and repudiate the adoption. The court allowed the birth parents' application after considering that the birth mother has priority to the custody of her young child who has not reach the age of seven yet.

The Federal Court in *Sean O'Casey Patterson v Chan Hoong Poh & Ors*[75] dismissed the birth father's application to declare the adoption as null and void. The birth father also asked for custody of the child to be given to him. The adoptive parents in this case were a Muslim couple who had registered an adopted child under the RAA based on the birth mother's consent. At the time of adoption, the child's birth father was named as someone else in the birth certificate. Only after the adoption was finalised that the real birth father who was an American citizen found out that the child was his biological child. One of the issues was whether the consent of the birth father should be obtained under the RAA. The Federal Court held that the consent of the birth father was irrelevant since at the time of adoption he was not known as the child's birth father. The Federal Court accepted the statutory declaration which bore the birth mother's signatures attested by a registered Commissioner for Oaths and ruled that the Registrar had rightly exercised his discretion to dispense with the consent and presence of the birth father. The Federal Court further held that the rights of birth parents remain and are not extinguished despite the registration of their child's adoption under the RAA. In reaching to this decision, the Federal Court had compared the adoption made under the RAA and the AA. The court noted that the RAA has limited right over the child compared to the AA. The Federal Court also distinguished between the rights of the adoptive parents over a child under the RAA and the validity of the adoption itself. The Federal Court observed that though the RAA only confers the adoptive parents with custodian, care, maintenance and educational right over the child, it does not invalidate the adoption by the appearance of the child's birth parents who claim it so. The court stated that since the adoption in this case was properly registered according to the law, it remains valid until it is set aside. Though the application was dismissed, the legal rights of the birth father remain as conferred by law.

Similarly, the birth mother and her husband in *Kamarul Zaman Zolkefeli & Anor v. Kamaliah Md Ali & Ors*[76] applied to the court to repudiate the adoption which was registered under the RAA. As applicants, they also sought for custody of the child to be given to them. The applicants claimed that the adopted child was taken away from them illegally and without permission though the child at all material times under their care. The applicants further claimed that the adoption was made

73 (1995) 3 MLJ 408.
74 (2005) 20 JH (1) 42.
75 [2011] 4 MLJ 137.
76 [2013] 1 LNS 784

without their knowledge. The court stated that the decision of the Registrar to register the adoption based on his discretion after due process according to the law could not be annulled without credible justification. Since the applicants failed to prove their claims in declaring the adoption as null and void, the application was dismissed by the court. This case seems to suggest that a birth parent who wishes to claim back his or her child from the adoptive parents after the adoption is legally registered must prove that his or her case has merit and not baseless. Otherwise, it might be hard to challenge the Registrar's decision for registering the adoption under the RAA.

Based on the above cases, it appears that the adoption under the RAA merely confers custodial rights on the adoptive parents and the responsibilities to maintain and educate the Muslim adopted child. Since the adoptive parents have limited rights over the adopted child, birth parent or other person have the chance to challenge the right to custody of the adopted child. But, this is not likely to imply that the birth parent is automatically entitled to the right to custody of the adopted child. It follows that the court must consider the facts of the case by taking into account the welfare of the child before deciding any disputes regarding the Muslim adopted child's custody.

Court as a Means of Dispute Resolution in cases relating to a Muslim Adopted Child Maintenance: Reported Cases

In several reported cases, the court has discussed the position of the adopted child's maintenance when the adoptive parents divorce. In *Rokiah v Mohamed Idris,*[77] the court held that the 14 years old adopted child was not entitled to get the maintenance from the adoptive father. The decision was made based on the verse of Qur'an which states "Call them by (the names of) their fathers: that is juster in the sight of Allah."[78] This verse does not place the responsibility to pay maintenance on the adopted father. This decision denotes that the rights of a Muslim adopted child to maintenance from his or her adoptive father seems to cease when the adoptive parents get a divorce and the child no longer stays with the adoptive father.[79] Subsequently, this shows the weakness of the law in state enactments which fail to give protection to a Muslim adopted child.[80] The decision also appears to disregard the provision in the IFLA which provides for the responsibility of the adoptive father to pay for the adopted child's maintenance.[81]

Nevertheless, the court in the case of *Rosnah v. Ibrahim*[82] decided that the adopted child was entitled to maintenance from the adoptive father after the adoptive parents had divorced. The child was only one day old when he was taken by the adoptive parents. It follows that the adopted child was entitled to the rights of maintenance because the adoption was made based on the approval of both adoptive parents.[83] It follows that a Muslim adopted child should be registered legally under the RAA in order to entitle him or her to the maintenance rights.[84] After divorce, the adoptive mother may apply to the *Shariah* court for the adopted child's maintenance from the adoptive father. It appears that the documents when applying for the adoption might support her application in proving that the adoption is made on consensus by her and the adoptive father.

The court in *Aminah bt Ahmad v Zaharah bt Sharif & Ors*[85] has mentioned regarding the adopted child's rights to maintenance after the adoptive father passed away. The adoptive mother in this case claimed, among others, jointly acquired property after her husband death. The couple had

77 (1986) 6 JH 272

78 Qur'ān 33:4-5 (Quoted from 'Abdullah Yūsuf 'Alī (trans.), The Meaning of The Holy Qur'ān: Text, Translation and Commentary (In Modern English), Islamic Book Trust, 2006.

79 Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 304; Azizah, Protection of Rights, n. 39, at 238.

80 Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 304.

81 Azizah, Protection of Rights, n. 39, at 238.

82 (1979) 1 JH (2) 94.

83 See, Jabatan Kehakiman Syariah Negeri Pulau Pinang, Hak Wanita: Selepas Perceraian <http://www.jksnpp.gov.my/jksnpphq/index.php/en/18-penerbitan-mahkamah/86-hak-wanita-selepas-perceraian> viewed on 18 July 2017.

84 Sinar FM, Nafkah Anak Angkat, *You Tube*, 19 February 2014 <https://www.youtube.com/watch?v=kmzSLyydgFQ> viewed on 22 July 2017.

85 [2008] 3 SHLR 56.

two adopted children who had been in their care from when they were little until the present time. The two adopted children were still staying with and cared for by the adoptive mother. The court observed that the adoptive father had been responsible for the adopted children's maintenance during his life and such responsibility would be transferred to the adoptive mother after his death. The court also noted that the adoptive mother would be responsible to continue raising the two adopted children. Thus, the court decided that she was entitled to half from her husband properties which stated as jointly acquired property since she had such heavy responsibilities to carry out.

Significantly, the provision in the IFLA and also other State Enactments has placed the responsibility to pay for maintenance of a Muslim adopted child on the adoptive father, a person who has accepted the child as his family member. It is also necessary that the adoption of the child is legally registered under the RAA. Like custody rights, it seems that the rights of the Muslim adopted child to maintenance continue even after divorce or death of adoptive parent.

Conclusion

The adoption by Muslims in Malaysia is governed by the RAA. The registration for adoption under the RAA does not involve court proceedings but only an administrative process through the NRD. This is necessary in order to allow the adoptive parents gain the custody of the child formally and further protect certain rights of the child. It needs to be noted that the RAA does not provide for the rights of the Muslim adopted child to custody and maintenance. But, the adoptive parents are expected to be responsible to care, maintain and educate the adopted child like normal parents would after gaining the right to custody of the child. Notably, Islamic law and provisions in the IFLA or State Enactments could be applicable in determining the issues of custody and maintenance rights of the Muslim adopted children in Malaysia. In the absence of clear provision regarding the legal effect of adoption under the RAA, the court becomes a means of dispute resolution in cases relating to a Muslim adopted child's rights to custody and maintenance. Furthermore, it is crucial that the adoptive parents understand their responsibilities towards the adopted child and continuously protect his or her welfare even after they divorce. Since the adoptive parents choose to take the adopted child into their home, they must look after the adopted child as their own.

The Role of Shari'ah Councils in the Resolution of Matrimonial Disputes in the UK: Issues and Challenges

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Abstract

Shari`ah Councils came into existence in response to the need for Muslims to abide by Islamic law. They were instituted with deep-rooted aspirations, among others to govern family matters and resolve any disputes in accordance with the Shari`ah. The councils mainly adopt mediation and arbitration as modes of intervention and resolution of family and matrimonial dispute. As a quasi-judicial body, with no formal recognition Shariah Councils experience some drawbacks. The major anticipated problems are due to the absence of formal recognition from the state and the legal system on the establishment of Shari`ah Councils. This consequently entails many other legal, procedural and administrative issues which are the concern of the paper. This piece that formed part of a doctoral study identifies and analyses the possible issues, problems and challenges arising therefrom. They are particularly the operation of Shari`ah Councils, the personnel and the enforcement of decisions among the Councils. Apart from being weakened by the lack of recognition, these are aspects that require attention by the Shari`ah Councils in order to improve their credibility and competency as religious dispute-resolution institutions. While formal recognition is an official matter where only the state and the law of the land can decide, the Shari`ah Councils, at least, would still need some form of greater recognition and support from the Muslim community. The study convincingly demonstrates that there are indeed areas for improvement and issues to address as examined in this paper. The established Shari`ah Councils should work collectively to bring improvements, the achievement of which should be able to produce a best-practice guideline sufficient to lobby for a firmer or more stable future as one of the ADR providers in the UK.

Keywords: Shariah Councils, mediation, arbitration, quasi-judicial, recognition

1. Introduction

The efforts to establish religious institutions or Shari`ah Councils were initiated as early as the 1970s and 1980s.[2] They were instituted with deep-rooted aspirations, among others to govern family matters and resolve any disputes in accordance with the *Shari`ah* as well as to safeguard the religion from the secular environment.[3] In fact, driven by strong conviction towards the religion,

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2 Samia Bano, "Complexity, Difference and Muslim Personal Law': Rethinking the Relationship between Shari`ah Councils and South Asian Muslim Women in Britain" (PhD thesis, University of Warwick, 2004) 116; Shaheen S. Ali, *"Authority and Authenticity: Sharia councils, Muslim women rights and the English courts," Child and Family Law Quarterly* 113 (2013): 125-126. Ali especially relates the existence of many Muslim organisations such as Union of Muslim Organisations (1970), Muslim Parliament of Britain (1992), the Muslim Council of Britain (1997), the British Muslim Forum (2005), the Muslim Arbitration Tribunal (2007) and most significantly, the numerous Shari`ah Councils: Ali, "*Authority and Authenticity,"* 126; there was also a well-referred to report by Denis MacEoin, *Sharia Law or 'One Law for All'?* (Institute for the Study of Civil Society, Civitas, 2009) of as many as 85 Shari`ah Councils have been operating in the UK. Although, it is doubt the statistic provided in this report might have included the unknown and 'back-door' Shari`ah councils.

3 Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and*

many Muslims believe that English family law and legal principles cannot bring about a genuine resolution of matrimonial disputes for Muslims living in Britain.[4] Therefore Shari`ah Councils are pursued in order to advocate 'the moral authority of the Muslim community'[5] and for the Muslim experts to proactively assist the Muslim community.

The history of their establishment, as recorded in Nielsen, refers to the view of Shari`ah among two generation groups: the younger, educated and secularised generation and the older generation. While the former feels that it is the duty of everybody in the community, the latter is convinced that such duty should be carried out by the Islamic law scholars.[6] To fulfil this role there has to be some form of guiding or authoritative institution. It is to meet this requirement that a number of Muslim groups have come together in Britain to form a UK Islamic Shari`ah Council[7] whose function is to deal with individual cases, most frequently of marital breakdown.[8]

The terms 'Shari`ah courts'9 or 'Shari`ah Councils' seem to carry a similar connotation and 'can be used interchangeably'.10 However, Bano notes in her exploratory report that 'there is no single authoritative definition of Shari`ah Councils.'11 They are essentially bodies comprised of Muslim religious authorities or Shari`ah scholars who collectively hear disputes and decide cases according to the Islamic law in matters relating to religious and personal affairs of Muslims in the UK.12 Positioning their role as 'parallel quasi-judicial institutions',13 the Shari`ah Councils have fulfilled an essential task by providing the legal set-up to resolve Muslim family issues according to Islamic law and have become an important point of resort for the Muslim community. There are at least three main established Shari`ah Councils in Britain located in Birmingham and London14 – the Muslim Law (Shariah) Council UK in Wembley, West London,15 the Islamic Shari`ah Council in Leyton, South London, and the Birmingham Shariah Council. The three Shari`ah Councils function independently of each other.16 They are neither unified nor do they represent a single school of Islamic jurisprudence; instead, they are different bodies with some representing different schools of law.17

Pakistan (United Kingdom: Ashgate Publishing Limited: 2005), 57.

4 Samia Bano, "Shariah Councils and the Resolution of Matrimonial Disputes: Gender and Justice in the 'Shadow' of the Law" in *Violence Against Women in South Asian Communities: Issues for Policy and Practice*, eds. RK Thiara and AK Gill (London: Jessica Kingsley Publishers, 2010), 195.

5 Samia Bano, *Muslim Women and Shari`ah Councils: Transcending the Boundaries of Community and Law* (Hampshire: Palgrave Macmillan 2012) 120; Bano, "Muslim Personal Law", 132; see also the Islamic Sharia Council's website <http://www.islamic-Sharia.org/about-us/about-us-7.html> accessed 23 May 2011.

6 Jorgen S. Nielsen, "Emerging Claims of Muslim Populations in Matters of Family Law in Europe," Centre for the Study of Islam and Christian-Muslim Relations (CSIC), November, 1993, (10) 6.

7 Nielson, "Emerging Claims".

8 Nielson, "Emerging Claims".

9 Shah finds that they are frequently referred to as 'Muslim courts'. Prakash Shah, "Transforming to Accommodate? Reflections on the Shari'a Debate in Britain," in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et al. (United Kingdom: Ashgate Publishing Limited, 2009), 79-80.

10 Raffia Arshad, *Islamic Family Law*, (London: Sweet & Maxwell, 2010), 34.

11 Samia Bano, *An Exploratory Study of Shari`ah Councils in England with respect to Family Law* (England: University of Reading, 2012), 4-5, http://eprints.soas.ac.uk/id/eprint/22075.

12 The Islamic Shari`ah Council, <http://www.islamic-sharia.org/index.html> accessed 6 June 2013; The Muslim Law Shariah Council, accessed 6 June 2013, http://www.shariahcouncil.org/?page_id=23; The Birmingham Central Mosque, accessed 6 June 2013, http://www.centralmosque.org.uk/1/services/personal#shariah.

13 Sohail Warraich, "Migrant South Asian Muslims and family laws in England: an unending conflict" (MA diss., University of Warwick, 2001) cited in Samia Bano, "Islamic Family Arbitration, Justice and Human Rights in Britain," *Law, Social Justice and Global Development Journal* 1 (2007): 19; Jemma Wilson, 'the Shari`ah Debate in Britain: Shari`ah Councils and the Oppression of Muslim Women' (2010) 1 ASLR 46, 48.

14 Arshad, *Islamic Family Law*.

15 <http://shariahcouncil.org/About%20Us.htm> accessed 5 May 2011; <http://shariahcouncil.org/Home.htm> accessed 9 February 2011, <http://www.muslimcollege.ac.uk>

16 Just in the same way that there is more than one Beth Din for the Jewish community in the UK.

17 Noel J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964) and for information on the differences between the schools see David Pearl, *A Textbook on Muslim Law* (Kent: Croom Helm, 1979); Bano, *"Islamic Family Arbitration,"* 294-295.

2. Internal Issues and Challenges

This paper considers and analyses the possible issues, problems and challenges arising therefrom. The major anticipated problems are due to the absence of formal recognition from the state and the legal system on the establishment of Shari`ah Councils. There is also the absence of the power of enforceability over decisions issued by Shari`ah Councils. The paper also examines the internal issues and challenges surrounding Shari`ah Councils, particularly the operation of Shari`ah Councils, the personnel and the enforcement of decisions among the Councils.

2.1 Organisational Issue: Lack of Adequate Facilities and Proper Training

One of the main contributing factors of a competent judicial authority is a well-equipped institution in terms of facilities, workforce and training. As an institution dealing with private (and most of the time stressful) matters, there needs to be a proper court setting – a conducive environment, especially to conduct sessions like mediation, counselling and arbitration. Facilities also mean a sufficient workforce to manage workloads and all other managerial works. Bano revealed that 'a large number of samples show that women complained of the process being 'incoherent' and 'time-consuming.'[18] The absence of recognition and support from an official level arguably leaves Shari`ah Councils without state support and therefore with insufficient resources to adequately cover everything, let alone to have a proper office building.[19] Moreover, the status of Shari`ah Councils as institutions built on charity, being individual in character and voluntarily run mean that resources are extremely limited and individually managed.[20] If Shari`ah Councils want to become competent religious dispute-resolution institutions and win formal state recognition, they must be well equipped, not only in terms of facilities but also workforce.

There are also no clear rules on organisational and staff development or training requirements. Bano's study provided no information as to the type of training scholars received.[21] The nature of this training was not disclosed to the researcher.[22] The role of female counsellors or mediators is significant in dealing with the delicate characteristic of family issues. Therefore, females, as well as trained and qualified counsellors, mediators or arbitrators are equally important and crucially needed. However, none of these requirements is currently being fully observed at the Shari`ah Councils. It is argued that the ISC as well as other Shari`ah Councils are lacking not only female scholars but also adequate proper training for the existing staff members. It is a difficult fact to accept that the non-recognition has left Shari`ah Councils 'weakened' in many respects. Taking into account the available sources and the existing Shari`ah Councils, the researcher found that perhaps the ISC is to date the most established Council, with better facilities, workforce and management, even though there are still areas for improvement.

18 This mostly refers to their dissatisfaction and frustration when every time they approached the Shari`ah Council for an update of the case they hardly received any responses. Bano, "in the 'Shadow' of the Law'"203.

19 The research fieldwork demonstrates that some of these Shari`ah Councils do not even have a proper office. At one of the Shari`ah Councils visited during the fieldwork, the arbitration session was conducted in one of the rooms in a mosque which happened to be located close enough to hear the sound of trains passing by every now and then. It was quite unpleasant – more like having casual 'coffee-shop' arbitration with such disturbance. The researcher even at some points missed the discussion between the scholars and parties because of the sound of the trains. This is not revealed to damage the Council's reputation but rather to show sympathy from a real account.

20 One of the important facts to highlight is that the ISC runs its business based on charity and without unreasonable charges. The judges and the female counsellor at the same time engage with other social obligations. There are probably fewer permanent scholars since the scholars, for instance, at the ISC's headquarters, have their duty rotation.

21 Bano, *Transcending the Boundaries*, 107, 119.

22 Bano, *An Exploratory Study,* 6. Maulana Raza also admits that 'no training has been provided to the scholars. .. In fact there is no provision of any training for working at Shari`ah Council. This is the new experiment in this country. ... So even if I say that someone go to al-Azhar and get training for the Shari`ah Council in this country, they don't have any syllabus to offer to give training to someone who can work in this country as a member of the Shari`ah Council. Hopefully, we are hoping that now we have been working with Shari`ah Council for 20 years. Shari`ah Council should sit together and they should design a training course in the light of the experience we have now received by working at Shari`ah Council. So we are now in a position to bring something on paper and to offer some training also. So that should be done. We will cooperate': interview on 17 January 2012.

2.2 The Absence of a Uniform Standard Operating Procedure

The absence of a standard operating procedure is among the major drawbacks of Shari`ah Councils. The Shari`ah Councils are bodies independent of each other and which operate individually,[23] which means that their procedures are different.[24] Nevertheless, studies on the three main Shari`ah Councils show that there are no considerable discrepancies in the way cases are managed and processed from the stages of application to issuance of decision. They are arguably similar with only small differences in the detail. However, the important point to raise here is that Shari`ah Councils do not appear to have a properly documented standard manual of operation to be followed uniformly by all Shari`ah Councils.[25] The differences most probably derive from the history of the establishment of these Shari`ah Councils where they were instituted based on different community needs and backgrounds in places where there were demands. However, this was the situation many decades ago. Today, it should be among the aims of Shari`ah Councils to reform their grounds and work collaboratively, particularly when a number of the established Shari`ah Councils have been proven to produce a good volume of work and have been acknowledged by the community and state agencies. Today the Shari`ah Councils are receiving much public attention and are being scrutinised from every corner – clients, government, feminist groups and the media. Thomson, for example, suggests that if Shari`ah Councils are to function more effectively and professionally, there needs to be a systematic and standardised process just in the same way that the Employment Tribunal System has been designed to provide a recognisably similar service throughout the UK.[26] Responding to this need, recent developments evidence that effort is being undertaken by major *Shari`ah* Councils to unify the procedures. An initial meeting was carried out recently at London Central Mosque[27] which aimed at bringing the procedure closer[28] to the nature and requirements of English law. With the establishment of a board of *Shari`ah* Councils in mind, preparations are deemed necessary, particularly on dealing with important aspects such as a standard procedural guideline. Whether one likes it or not, the non-uniformity of procedure, in effect, discredits any efforts to gain legal recognition.

Another similar issue that requires further attention is the lack of properly documented clear rules to be followed uniformly among the Shari`ah Councils. Among the most important aspects that require clear documentation are the Islamic laws on marriage and divorce, ancillary relief and custody. Given the reality of current financial situations, especially in the West where people have complicated ways and systems of owning things, it is suggested that a clear rule should be available for the religious authorities and lawyers who are working closely with clients, particularly relating to Islamic family law. Some Muslim lawyers have been arguing over the lack of clear guideline regarding the Islamic law position on matters relating to finances and maintenance (ancillary relief).[29] A Muslim female barrister raises her dissatisfaction that:

> Nobody sat down and decided any of this yet they are saying we will accept all the cases ... Some of them (Shari`ah Councils) argue that the child gets child benefit from the state so why should the husband pay ... Our issue is complicated. It is not as straightforward as saying the house is in my name, not in your name. What if you got a husband and wife who have been married for 25 years and the husband

23 Amra Bone, a female Shari`ah scholar at the BSC in Birmingham. Interview, 5 December 2012.

24 Samia Bano, "In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Shari'a Debate' in Britain," *Ecclesiastical Law Journal* 10 (2008): 296-297.

25 For instance, a panel at the ISC in Leyton, London, will hold a collective agreement to make any decision relating to their operations, including procedure. Even though the ISC does not have to submit to any written procedure, the standard procedures adopted are presumably understood by all of its scholars and representatives.

26 Ahmad Thomson, "Accommodating the Islamic Dissolution of Marriage Law within English Law" (paper presented at the seminar of *Dissolution of Marriage*, London, September 10, 2006); interview 27 March 2012.

27 The idea was discussed at a meeting held by the director of the Islamic Cultural Centre among scholars from the Shari`ah Councils as well as 3 barristers. Three Shari`ah councils were represented at the meeting. They were The Islamic Shari`a Council Leyton (ISC), The Muslim Law (Shariah) Council UK, Ealing (MLSC) and a Shari`ah council from Dewsbury. Other three or five more expressed their agreement to the decision at the meeting. Interview with Dr Suhaib Hasan (Islamic Shariah Council in Leyton, London, 11 April 2011).

28 ibid.

29 There is also no figure set out for maintenance for children. In comparison, on child maintenance the civil law allocates for a child some 15% of the father's monthly net income. However, there is no precise guideline, for example, the saying in the Islamic law as to the percentage on this matter except from following just the basic of child maintenance and three months *`iddah*.

> always pays the mortgage and the house is completely in his name but the wife used to buy the food, and she cooked the food with her own money and she used to feed the husband and the children with her own money. Is she not entitled to the house, not a penny? The Shari`a court here generally would say the house is in the husband's name, that is in the husband's name, the wife gets three months *`iddah*, money for the children, nothing else. I doubt they would decide that the house should be sold and the money given to the wife.[30]

The absence of formal guidelines on the qualities and characteristics required of religious scholars among the Shari`ah Councils, even though they mirror the requirements under the Islamic law, might reduce the weight attached to them. Arshad suggests that Shari`ah Councils must be equipped with all the necessities either in terms of the workforce or the facilities so that 'it does not seem just as a building where divorces are issued.'[31] Shari`ah Councils should be looked at as 'a place of authority, a place of respect'.[32]

2.3 Absence of Independent Legal Advice at the Shari`ah Councils

The Shari`ah Councils are claimed to not provide or be supported with legal representation to advise and speak on behalf of the clients or illiterate parties.[33] They have in fact been condemned for not providing such facilities.[34] Taking the debate surrounding English family mediation, Brunch raises concerns of the possibility for negotiations to take place in private, 'without the presence of partisan lawyers and without access to appeal'.[35] From the standpoint of a formal courtroom, legal representation can be extremely important – for instance, in disputes involving money or property. Legal representation is absolutely crucial to protect clients from any misleading information, disclosure or fraud from the other party who may try to take advantage of the family's wealth. It is among the judges' concerns in the civil courts that parties may be cheated. They will therefore ensure that parties consult a lawyer regarding their interests. However, it should be remembered that Shari`ah Councils are not courts. Not only that they are not recognised as courts by the English legal system, Shari`ah Councils also operate as non-adversarial dispute-resolution institutions compared to a formal court where legal representation is required in most cases. Therefore, the current status of the Shari`ah Councils seems to be an impractical forum for lawyers. However, it is highly recommended for the parties to have legal advice before commencing their cases and throughout the proceedings at the Shari`ah Councils. It should apply just as similarly as the normal practice of professional mediation where clients seek legal advice either from their solicitors or independent legal advisors for clients who do not appoint solicitors. The role of legal advice is equally important, as cases involving Muslims are more complex, involving the intricacy of both English and Islamic laws. Having regard to the importance of legal advice, it is therefore suggested that the Shari`ah Councils place at least one professional competent and independent legal advisor at their office. The duties of a legal advisor are clearly to advise the parties of their legal rights, the procedures and requirements, and the legal consequences of their actions in terms of the English legal system, particularly clients who are in civil marriages. With such support, proper steps can be suggested by Shari`ah Councils to the clients should their cases end up in the courts. Considering the financial situation of most of the clients, not only will these facilities save costs compared to seeking legal advice outside Shari`ah Councils but clients can also be monitored if they undergo a similar procedure and receive advice from a similar advisor at a Shari`ah Council. Inevitably it will be a huge call for Muslim lawyers to respond to community needs and perform their social responsibility. 'What we need are a number of lawyers that would either be willing to work for free or just for basic expenses to help these women have a voice.'[36]

30 Interview with a Muslim Family Law Barrister, February 2012.

31 Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).

32 ibid.

33 This concern was raised by Arshad during the interview.

34 See for example, Carol S. Brunch, 'And how are the children? The effects of ideology and mediation on child custody and children's well being in the United States' (1988) (2)(1) International Journal of Law and Family 106, 120.

35 Brunch, "And how are the children?," 120 ; Bano, "in the 'Shadow' of the Law," 204.

36 Interview with Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).

On the other hand, the requirement of legal representation in itself would force or strongly encourage Shari`ah Councils to become more formal. This would give more weight and credibility to Shari`ah Councils as a place of authority.

2.4 Incompetence of Solicitors to Advise on Matters Relating to Islamic Family Law

The issue of legal advice and representation leads to another question of availability of lawyers well-versed in Islamic family law. However, as the above discussion focuses on the claims over the lack or inexistence of legal representation, this part in contrast explores the incompetence of legal advisors and representation. A study by Shah-Kazemi revealed that:

> In nearly all the interviews, the women believed that where mediation was appropriate, only Muslim mediators would have the sufficient understanding to grasp the issue at stake, because of the distinctive and dynamics of family life in the Muslim social context. Many interviewees went further and stated the importance of the Muslim mediator being knowledgeable in matters of the Shari`ah: it was not simply a question of religious identity but knowledge of Muslim family law.[37]

Khurram Bashir also commented that:

> The challenge remains unaccomplished until Muslim leadership, scholars and educationalist train a whole generation of mediation consultants who are well versed in Shari`ah and Islamic scholarship.[38]

Expertise in Muslim family law is now more in demand as the number of cases referred to lawyers increases. This could be due to awareness among Muslim couples of the English law's requirements or the complexity of cases where legal assistance becomes essential. Whatever the reason, lawyers in the future could be facing a 'flood of cases'. Advising and assisting clients on their rights, including those in accordance with Islamic law, is part of the lawyers' pledge of 'meeting the clients' needs'. However, not all non-Muslim solicitors and professional mediators are aware of those needs, and even if the awareness is there, the expertise is questionable. In this regard, Ahmad states:

> Since Islam is a relatively new feature in the English landscape, empathising with Muslim clients may seem a challenge to those who know little about Islam. If you are in a position not only to understand but also to advise your Muslim client as regards the Shari'a as well as English law, all the better for you and for your client. It is therefore essential for a family lawyer to ascertain what forms of marriage and divorce his or her client have gone or should go through.[39]

Arshad also indicates that the English legal system has actually already prepared for such cultural and religious interaction. Referring to the legal system's accommodation to foreign divorce, she states:

> At first glance, the complexities in the interpretation of the effective and ineffective *talaq*, the differences in the major school of thought on the grounds of *faskh* and the intricacies in the varied methods in which a Muslim couple can divorce may seem as completely separate and even irrelevant to English law. However, the very fact that English law recognises foreign divorce makes understanding the Shari`ah ever incumbent upon a family practitioner with a Muslim client base.[40]

It is a fact that not many lawyers or mediators, or those working in legislative and judiciary bodies, are well versed in every detailed aspect of Shariah law and this becomes a problem in the

37 Sonia N. Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Shari`ah* (The Nuffield Foundation, 2001), 75.

38 Khurram Bashir Amin, "Tahkim, Arbitration: Resolution of Matrimonial Disputes between Spouses through Arbitration" (paper presented at the seminar of *Muslim Personal Law*, Islamic Cultural Centre, London, August 22, 2004.

39 Ahmad Thomson, "Islamic Family Law for Lawyers," *Family Law Week* 1-2 (22/01/2007); Raffia Arshad, 'Practice Trends: Islamic Family Law', Practice Trends 151 (2007): 521, Raffia Arshad, "Children: an Islamic perspective," Practice Trends 151 (2007): 1187.

40 Arshad, *Muslim Family Law*, 132.

case of Muslim clients. In fact, as demonstrated above, some lawyers refer their clients to religious authorities such as Shari`ah Councils for assistance and advice. The Shari`ah Councils should be allowed not only to continue servicing the community as Islamic judicial institutions governing and resolving Muslim family issues but also to help the state resolve family crises and save the institution of the family. This role, arguably, cannot be offered by the state court or professional mediators who do not have adequate knowledge and therefore are not competent.

As demonstrated from the cases, as well as the observation on mediation sessions at the ISC and the BSC, counsel's comment or advice which is connected with a person's faith or religion may have a significant impact on the parties' decision on their future relationship. Such a comment or advice could prevent a divorce, encourage mutual solution, restore a relationship or, most importantly, bring parties back to understanding their responsibilities as spouses and parents, as commanded in the religion. Undeniably, religion proves to be among the significant factors in facilitating a peace process among Muslims, making them inclined to reflect on matters surrounding their life in accordance with God's commands. By this it is argued that Shari`ah Councils remain significantly important to be given a central role, particularly for the Muslim community. Shari`ah Council scholars are argued to be the most suitable and competent authorities to take the role of resolving disputes involving religious issues compared to professional mediators. Furthermore, the majority of clients, especially women, have expressed the benefit of having Muslim advisors or someone who is well versed in the religion.

2.5 Diversity of Opinions and Schools of Law (*Madhahib*)

The plurality in Islamic jurisprudence and the different application of or adherence to the school of law between Shari`ah Councils[41] leads to 'disparities in the way Shari`ah Councils operate and the decision they reach.'[42] This was claimed to encourage 'forum shopping'[43] where a client 'will contact a number of Shari`ah Councils to ascertain their school of law before making an application.'[44] This apparently becomes one of the reasons for the hostile reactions towards Shari`ah Councils by the state and certain groups alleging, without due understanding, that Islamic law is unsettled,[45] or as similarly commented by a former Archbishop of Canterbury, 'unfinished business'.[46] Such reaction worsens with the approach that 'because of these diversities, the [UK] should be wary of legally recognising aspects of Islamic family law.'[47] 'If the British government enshrines one interpretation of Islamic family law into its legal apparatus, it will confer authority over the interpretation while excluding other legitimate interpretation',[48] thereby 'undermining the pluralism inherent in Islamic jurisprudence.'[49] Ahmed further concluded that such thinking has unfortunately influenced the state approach toward recognising Islamic family law and in fact created the understanding that if recognition is given to one particular interpretation, the state will undermine plurality in Islamic jurisprudence. It is unclear from where such assumption derives. The researcher believes that this issue should not be approached in such a way. In fact, the researcher doubts that the promotion of Islamic legal pluralism is the reason for the state not conferring recognition to aspects of family law. That approach shows a shallow thinking and is a weak argument. It is suggested that the practical solution must come from among

41 Bano, "in the Shadow of the Law," 188.

42 Ali argues that even though the majority of Muslims in Britain adheres to one school of tradition ie the Hanafi, 'the apparent homogeneity is not reflected in their differing practice of Islam and varying understandings of Islamic law': Ali, *"Authority and Authenticity,"* 125; Charlotte Proudman, "A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry," *Family Law Week* 30/01/2012.

43 ibid.

44 ibid.

45 David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998).

46 The former Archbishop of Canterbury comments that 'Sharia law is not, as is often supposed, a monolithic system of static rules; it is rather a method of jurisprudence admitting of diverse traditions of interpretation.' Williams, 'Archbishop's Lecture, para 3; J Chaplin, "Legal Monism and Religious Pluralism: Rowan Williams on Religion, Loyalty and Law," *International Journal of Public Theology* 2 (2008): 421.

47 Samer Ahmed, "Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognising Islamic Law in the United Kingdom," *Yale Journal of International Law* 33 (2008): 494.

48 Ahmed, "Recent Development," 496.

49 Ahmed, "Recent Development," 491-492.

the Shari`ah Councils on the matter of diversity of opinion in Islamic jurisprudence.

The differences in following different schools of law are normal phenomena between Islamic scholars and it was already an established activity.[50] The differences in opinion in various schools are a healthy feature of Islamic law. Discussion on this issue stemmed from the apparent dilemma and problem highlighted in the previous chapter where the differences in schools of law denominated or adhered to by Shari`ah Councils or the particular scholar have led to a situation called 'forum shopping'. A major drawback created by the absence of legal enforcement can be seen in various other problems. The most unfortunate consequence is that parties may submit their cases to other Shari`ah Councils that can satisfy their interests through the 'forum shopping' activity. Once more, this is not to argue against the activity; however, a system of monitoring is important to consider in the current social situation of Muslims in this country and the intricacy, fragility and sensitive area of family, marriage and divorce. Some parties are taking advantage of the Shari`ah Councils' varying *madhhab* adherence and may disrespect or refuse to follow/abide by decision of a Shari`ah Council that does not meet their expectation and 'shop' for another that is more appealing or advantageous to their interests.

Not only does this incur more costs for the parties but also increases the case load of the Shari`ah Councils. Furthermore, the adherence to different schools of law among the Shari`ah Councils51 to a certain extent contributes to forum shopping. On the one hand, it creates flexibility in the judicial exercise among the Shari`ah Councils and the scholars, while on the other hand it seems a choice made at their own cost.52 This situation could be manipulated by unsatisfied clients to abandon decisions issued by one Shari`ah Council and try their case with another Shari`ah Council. It is suggested that there should be alliances between the Shari`ah Councils such as a Shari`ah Councils union or a board of Shari`ah Councils53 to combat unnecessary forum shopping. Decisions issued by one Shari`ah Council are enforceable at and by other Shari`ah Councils. This is especially the case if the parties apply to their preferred Shari`ah Council after making an informed decision following forum shopping. Furthermore, such effort should be able to significantly reduce 'bounced' cases going back and forth between the Shari`ah Councils. Not only that, it can also educate the public about the complex implications of forum shopping and give due respect to religious institutions whose authority and recognition comes from the communities themselves. Combating forum shopping can also be done through training Muslim counsel in various madhabs and making them capable of providing a more flexible solution to suit the parties.

3. Conclusion

The above discussions have demonstrated issues and challenges faced by the Shari`ah Councils in serving the Muslim community. For these particular issues, the early part of the discussion highlighted inadequate facilities, lack of competency (probably due to lack of training and skills), and procedural discrepancies among the Shari`ah Councils as being some of the reasons that potentially weaken the Shari`ah Councils' role as ADR bodies and their standing in the community. In fact, these issues directly or indirectly contribute to the state's constant refusal to grant recognition. The lack of recognition in the majority of the Shari`ah Councils' deliberations and mediated arrangements is translated into other problems and issues faced by the Shari`ah Councils and Muslims. The current reality conveys a very clear message of 'one law for all' and until plurality of religious practice (especially in family law) is accommodated, prospective Muslim couples in the UK are strongly advised to have both their marriage formalities registered.

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50 For example, see Ido Shahar, "Legal Pluralism and the Study of Shari`a Courts," *Islamic Law and Society* 15 (2008): 112.

51 Bano, "Muslim Personal Law," 115.

52 Nevertheless, in practice the Shari`ah councils actually adopt a more open and flexible approach when faced with issues of diversity of opinions and schools of law.

53 This idea was in fact shared with the researcher during an interview session with scholars from the three Shari`ah councils; the ISC, the BSC and the MLSC.

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RESOLVING MEDIA DISPUTES IN DEFAMATION CASES

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Abstract

Media plays a very important role in the society. The society receive news and information through them and this explains why media related people such as the journalists, reporters, publishers and Internet Service Providers (ISP) must ensure they deliver correct news and information either through online or offline media. Nevertheless, sometimes people get false news and even certain reports can cause damage to certain people reputation and dignity. Generally, media is expected to comply with media and communication ethics. They should also know their rights and duties provided in the media and communication laws as well as other relevant laws. In Malaysia, the media especially the journalists are supposed to comply with the Code of Ethics for journalists and the 'Rukunegara'which contains guidelines for them. However, in some cases the publishers and the reporters fail to comply with the media and communication ethics and the laws. As a result, people started to complain on false news and persons or companies affected will file the case against the publisher and the reporters. This is evidenced from various court decisions in Malaysia and some other countries. But medias also have their own defences based on the available laws such as Defamation Act 1957 (Malaysia) and other alternative method. Hence, this paper seeks to discuss the media rights and duties as well as defences available to them in resolving disputes particularly in defamation cases. Reference will include court cases and writings available online and offline.

Keywords: Media, reports, ethics, defamation, disputes

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INTRODUCTION

Media plays a very important role in delivering news and information. According to Oxford English Dictionary, the world started to speak about "media" only in 1920, and a generation later, in 1950, about a "revolution in communication". During this period, 1920-1950 (between the radio era and the television era), researchers have begun to rethink the importance of communication by creating new theories, analyzing and studying processes and phenomena generated by media's sharing.3 In this process, the researchers sometimes use the term 'media communication' and 'mass media communication' in explaining about the role of media in the society. Through media the society learn and obtain various information which include local and international news. In fact, social media such as Facebook and Twitter are becoming an essential part of many people's personal and professional lives.4 And with new development in information and communication technology, legal challenges to social media such as cross border defamation suit will require good and effective law. Since media uses various means to gather and deliver information it is their duty to observe media and communication ethics as well as the laws governing media. The media related people should have legal knowledge in order to avoid any legal implications and disputes although sometimes it is unavoidable. They should also be aware of the sensitivity or controversial issues in the society such as racism and always consider the interest of the public.

DEFINITION OF MEDIA

According to Oxford Dictionary online, media is 'the main means of mass communication (broadcasting, publishing, and the Internet) regarded collectively'.5 While Business dictionary defines media as 'communication channels through which news, entertainment, education, data, or promotional messages are disseminated. Media includes every broadcasting and narrowcasting medium such as newspapers, magazines, TV, radio, billboards, direct mail, telephone, fax, and internet. In short, media is the plural of medium and can take a plural or singular verb, depending on the sense intended'.6 The above definitions indicate that media covers every aspect of communication that uses various means to disseminate information. It covers conventional means of communication as well as online communication. In Malaysia, media includes television, radio, newspapers and web based media such as bloggers.7 Media and entertainment industries cover eight (8) sectors namely, TV, radio, music, film, publishing, theatre, Internet and the 'new' media and gaming.8

In addition to that, media is also very powerful in gaining people confidence and trusts towards the government. Hence, they are expected to know how to balance the citizen's righ to privacy and reputation as well as right of the press as stated by the learned judge VT Singham J in the case of Datuk Seri Anwar v Utusan Melayu.9 The learned judge states,

'the growth of the power of the press has increased around the region and the world as a whole as such, there is an urgent need to balance the citizens' right to privacy and individual's reputation and the right of the 'press' and other media's responsibility which includes 'trial by media' (at p 608).

At the same time media also receive support from the government through certain budget. They

3 Gheorghe Cojocariu, The phenomenon of media communication, *Contemporary Readings in Law & Social Justice*, (2014) Vol.6 (1):662-673 and *Oxford English Dictionary* (London: Oxford University Press,1989).

4 Alex Mills, (2017), The law applicable to cross-border defamation on social media: Whose law governs free speech in 'Facebookistan'?, *Journal of Media Law* , (2017)Volume 7, Issue 1.

5 Oxford Dictionary Online at https://en.oxforddictionaries.com/definition/media

6 Business dictionary at http://www.businessdictionary.com/definition/media.html

7 Media of Malaysia at https://en.wikipedia.org/wiki/Media_of_Malaysia

8 Zaid Hamzah & Yew Chen Kuok (2013), Media and Entertainment: A practical legal, business and strategy guide, Kuala Lumpur.

9 [2013] 3MLJ 534 , HC

receive funding, necessary tax breaks and grants especially in terms of local content creation.10

MEDIA AND COMMUNICATION ETHICS

Development in the information and communication technology (ICT) has created digital or online communication. At present, people can get news from digital news media such as online journalism, blogging, digital photojournalism, citizen journalism and social media. It also includes questions about how professional journalism should use this 'new media' to research and publish stories, as well as how to use text or images provided by citizens.11 Since the media play a very important role in shaping the social norms and values in the country, they should maintain their integrity by being independent and transparent and avoid creating political instability. The entertainment media should not show violence and sex as well as strong/bad language. These are the part of media ethics.

While communication ethics is the notion that an individual's or group's behavior are governed by their morals which in turn affects communication. It deals with moral good present in any form of human communication. This includes interpersonal communication, mass mediated communication and digital communication.12

In Malaysia, there are Code of Ethics (COE) and Canon of Journalism (COJ) that govern the media and journalists. The Internet service provider (ISP) that allows online publication also follows the guidelines in the Malaysian Communication Multimedia Content Forum (CMC) which provides the Content Code. 13 This Content Code aims to prevent unreliable sources that produce fake news and false content.14 The COE was created by a suggestion from the 1947 Hutchins Commission. They suggested that newspapers, broadcasters and journalists had started to become more responsible for journalism and thought they should be held accountable. In Malaysia, Institute of Journalist Malaysia (IJM) provides the COE. According to IJM, they believe that it is the duty and right of all journalists to uphold the followings:15

1. Freedom of the press
2. Freedom of speech
3. Freedom of thought
4. Freedom of belief, and
5. Freedom of opinion;
6. And to practice their profession with freedom from fear.

The Malaysian journalists have their own Canons of Journalism (COJ) since May 20, 1989.

10 Zaid Hamzah & Yew Chen Kuok (2013).

11 Stephen J.A Ward, Digital Media ethics at https://ethics.journalism.wisc.edu/resources/digitalmedia-ethics/

12 Communication ethics at https://en.wikipedia.org/wiki/Communication_ethics. See also Robert Beckett, Communication ethics: Principle and practice, *Journal of Communication Management*, (2004) Vol. 8 Issue: 1:.41-52,

13 CMCF at www.cmcf.my/download/cmcf-content-code-english.pd

14 Izwan Ismail, Towards responsible content creation, 6 March 2017 at https://www.nst.com.my/news/2017/03/218042/towards-responsible-content-creation

15 Institute of Journalist Malaysia at https://iojmalaysia.wordpress.com/2014/09/29/code-of-ethics/.

The COE is adopted in the United Kingdom and the USA. See National Union of Journalists UK at https://www.nuj.org.uk/about/nuj-code/ or https://www.nuj.org.uk/documents/nuj-code-of-conduct/nuj-code-of-conduct.pdf, Independent Press Standards Organsiataion https://www.ipso.co.uk/editors-code-of-practice and Society of Professional Journalists (SPJ) Code of Ethics at www.spj.org/ethicscode.asp

The COJ is based on 5 principles of Rukunegara which consists of five principles namely, believe in God, loyalty to King and Country, Upholding the Constitution, Rule of Law and Good Behaviour and Morality. The COE or COJ differs from one country to another due to different laws, culture, norms and political ideas. But in many countries the COE still contain common cognitions such as truth and accuracy.16 It is important to understand the application of COE in journalism because it addresses problems concerning the behavior of reporters, editors, news directors, photographers, and designers. The Malaysian COJ contains some principles which among others include the Malaysian Press's belief in the principles of Rukunegara and the national aspirations contained therein and it acknowledgement on its role in contributing to the process of nation-building as well as its duty to contribute fully to the promotion of racial harmony and national unity. In the US, in 1923, the American Society of Newspaper Editors adopted an ethical code known as the Canons of Journalism in response to the growing amount of sensationalism in newspapers.17

In addition to that, the National Union of Journalists (NUJ)(Peninsular Malaysia) also has its own Code of Professional Conduct which among others include to respect the truth and report the truth, not to falsify and supress information, to correct inaccuracy and to avoid plagiarism.18 Freedom of press is also related to freedom of expression, speech and information. The press should be free to express and report the truth and gather information from the right sources then report it to the public. Freedom of speech and expression includes:

- the right to express, or disseminate, information and ideas;
- the right to seek information and ideas;
- the right to receive information and ideas;
- the right to impart information and ideas; etc19

Freedom of speech and expression can be restricted based on the morality argument. Eg. Whether 'obscene speech' or 'obscene materials' on the Internet is allowed.20 In Malaysia, freedom of speech can be derived from the Federal Constitution (FC). Although there are Code of Ethics (COE) and Canon of Journalism (COJ) governing the media ethicss, they still need to know about the relevant laws governing media and communication laws as preparation for possible disputes and any potential legal consequences.

16 Mohd Helmi Abd Rahim & Peremobowei Akoje (2014), Development of journalism ethics: A comparative analysis of codes of ethics in Nigeria, United Kingdom, United States of America, India and Russia, *Malaysian Journal of Communication*, 30(2), 221-238, UKM

17 COJ at www.mediawise.org.uk/malaysia , 2011. The seven Canons of Journalism: Responsibility, Freedom of the press, Independence, Sincerity, truthfulness, accuracy, Impartiality, Fair play, and Decency. These seven canons still play a major role in journalism and media today. They let the world of the press have their wide range of journalistic freedom, but they help to set limits and regulations more along the lines of what is right and what is wrong. See Code of Ethics or Canon of Journalism (1923) at ethics.iit.edu/ecodes/node/4457

18 National Union of Journalists at www.nujm.org/.

19 Ahmad Masum, Freedom of Speech and the Internet -- A Case Study of Malaysia [2009] 3 *Malayan Law Journal* xxxiv. See W.Page Keeton, Defamation and freedom of press (US views)

20 Freedom of Information Act 2000 (FOI) at www.legislation.gov.uk. FOI is a statutory access law that allows any person to ask for information from government, subject to certain exemptions, and receive a response within 20 working days. The use of FOI by the media, NGOs and other groups has shown it to be a significant accountability tool in the right circumstances. See Benjamin Worthy, A Powerful Weapon in the Right Hands? How Members of Parliament have used Freedom of Information in the UK, Parliamentary Affairs (2014) 67, 783–803

RELEVANT LAWS GOVERNING MEDIA AND COMMUNICATION IN MALAYSIA

The role of media laws

Media laws involve regulation imposed by the government on the mass media. Hence, the press, radio, television, Internet, mobile phones, films, recorded music and many others should follow the laws and regulations, which aim to control and guide the media. Although there are restrictions, the media or press still have freedom to report news online. Since Malaysia does not impose censorship on Internet due to compliance with the Bill of Guarantees, people and the media can still view online news.

Basically, the press is subjected to media laws and their freedom is guaranteed under Article 10 of the Federal Constitution (FC). Article 10 Clause (1) of the Federal Constitution states that "Every citizen has the right to freedom of speech and expression", but that right is "subject to Clauses (2), (3) and (4)". The right is given only to citizens, and it is not absolute but subject to certain well-defined restrictions, including the security of the Federation, public order, morality, protecting the privileges of Parliament or State Assembly, contempt, defamation, incitement to any offence and sedition.21 In constitutional law it is generally understood that the right to freedom of speech and expression is not only confine to political sphere but also the artistic and aesthetic field. It is a combination of many rights in many forms for example communication by word of mouth, signs, symbols and gestures, and through works of art, music sculpture, photographs, films, videos, books, magazines and newspapers. The right to freedom of expression is recognized as a human right under Article 19 of the Universal Declaration of Human Rights (UDHRs) and recognized in the international human right laws in the International Covenant on Political Rights.22

There is no mention of freedom of the press or freedom of the electronic media in the constitution. It is to be emphasized that this right is available not only to natural persons who are citizens of the country but also to legal persons like companies, corporations and statutory bodies if they are incorporated or established under Malaysian law. But non-Malaysians are not protected. In all societies freedom of speech and expression is subject to limitations in order to secure the broader interests of the community. In Malaysia, the value system emphasizes duties as well as rights. We believed that rights and responsibilities must go hand in hand and that freedom is not an end in itself. As Raja Azlan Shah J in PP v. Ooi Kee Saik23 put it succinctly:

"There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights….are subject to such reasonable conditions as may be deemed to be… essential to the safety health, peace and general order and morals of the community. What the Constitution attempts to do in declaring the rights of the people is to strike a balance between liberty and social control."

As mentioned earlier the rights to enjoy freedom of speech and expression under Article 10 is subject to certain limitations in clause (2) where the Parliament may impose law on the right in order to give restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restriction designed to protect the privilege of Parliament or of any legislative assembly or to provide against contempt of court, defamation or incitement of any offence. A plethora of laws like the Printing, Presses and Publication Act 1984, the Police Act 1967,the Official Secrets Act 1972 and the Sedition Act 1948 regulates free speech and expression. The Police Act 1967 criminalizes the gathering of three or more people in a public place without license. Other relevant Acts include the Communication and Multimedia Act 1998 (CMA), Copyright Act 1987, Bernama Act 1967, Penal

21 Salleh Buang, Our media law limitations, 17 September 2015 at https://www.nst.com.my/news/2015/09/our-media-law-limitations

22 Article 19 provides that "Everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art ,or through any other media of his choice."

23 [1971] 2 MLJ 108.

Code and SOSMA 2012.

Furthermore, based on the index compiled by Reporters Without Borders (RFS), the World Press Freedom Index 2017 shows that Malaysia ranked at number 144 out of 180 countries in the world. Compared to other countries such as Norway (ranked at no.1, Australia ranked at no. 19, UK ranked at no. 40 and the US ranked at no. 43), Malaysian journalists have more restrictions and less freedom to share information and news with the public.24 Although there are many laws governing media, this paper will limit the discussion on few laws only namely the Federal Constitution (as above), the Printing Presses and Publication Act 1984 (PPPA), the Communication and Multimedia Act 1998 (CMA) and the Bernama Act 1967 (BA).

I) Printing Presses and Publication Act 1984 (PPPA) (Act 301) (Updated In 2012)

The Printing Presses and Publication Act 1984 which replaced the Printing Presses Act 1958 and the Control of Imported Publications Act 1958 (Revised 1972) is the most important restriction on the print media. The Act regulates the usage of printing presses, the printing, production, reproduction and distribution of publications, and importation of print materials from abroad. The Act imposes a number of prior restraints on the above activities and prescribes strong penalties including imprisonment. It is a criminal offence to posts or uses a printing press without a license granted by the Home Affairs Minister.25 Under the Act the Minister is given absolute discretion in granting and revocation of licenses and can also restrict or ban any publication that are likely to endanger national security interest or create social unrest.26 It also provides provision to the Minister to control undesirable publication.27 According to subsection 7(1) of the Act, the Minister may prohibit any publication that contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest. Thus, any person who without lawful excuse is found in possession of any prohibited publication shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit (s.8). Hence, the press including publishers must avoid publishing prohibited news.

In short, in order to avoid any legal implications the press i.e. printers and publishers must comply with the requirements laid down in the PPPA. Among them the printing must be lawful and not against public policy (s.4: Printing press used for unlawful purpose); the printer/publisher must have permit (s.5: Offence to print, import, publish, etc., newspaper without permit); the publication must not prejudicial to public order/interest, morality & security (s.7: Undesirable publications); the news must be true not false (s.8A: Offence to publish false news) and the publication shall not be contrary to Islamic principle. The last requirement is provided under the shariah statute i.e. the Syariah Criminal Offences (FT) 1997 (Act 559) (section 13). One relevant issue is whether right of the press is restricted by section 8A of the Act?. Section 8A reads as follows:

(1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term no exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

(2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news.

(3) No prosecution for an offence under this section shall be initiated without the consent in writing of the Public Prosecutor.

24 2017 World Press Freedom Index at https://rsf.org/en/ranking

25 Printing Presses and Publication Act 1984, Section 3.

26 Printing Presses and Publication Act 1984, Section 6.

27 Printing Presses and Publication Act 1984, Section 7.

In Public Prosecutor v Pung Chen Choon,28 the Supreme Court held, "The Malaysian press is not as free as the press in India, England or the United States of America, and cases from these jurisdictions are of little relevance". This case has referred to section 8A of the PPPA 1984 and Articles 4(2)(b), 10(1)(a) and (2)(a) of the Federal Constitution. But that was decided in 1993. At present there is new development on this issue.

Communication and Multimedia Act 1998 (CMA)

This Act came into existence due to convergence of communication and multimedia industry in Malaysia. It repealed the Telecommunications Act and Broadcasting Act. The CMA 1998 has been used to block websites reporting on corruption, penalize radio stations for airing discussions of matters of public interest, and arrest and prosecute users of social media. Section 3 of the Act provides its four categories of regulation 1998 namely, Economic Regulation, Technical Regulation, Consumer protection and Social regulation. Furthermore, this Act does not allow censorship of the Internet.

As regards to media, the relevant section that can be applied is section 233 of the Act which provides on the improper use of network facility or network service etc. The improper use or misuse of network includes publishing online news that could affect national security. Based on the section, the government through MCMC can impose restriction or even block the media or press if it thinks the news published had caused confusion to the public.[29]According to MCMC, TMI had published matters that have caused confusion or known also as 'unverified reports' and this had violated section 233 of CMA 1998.[30] Following the act by the MCMC, the Malaysian Bar Council on 1st March 2016 had issued a press release stating, "causing public confusion is not, and cannot be, an offence under Section 233 of the CMA. MCMC's reliance on Section 233 for its action against TMI is therefore without any basis, and oppressive. It is quite puzzling that anyone could consider causing public confusion to be an offence at all. It is also rather demeaning and offensive to assume that Malaysians will be "confused" merely as a result of contradictory statements in the press, or because the source of press statements was not disclosed. Moreover, MCMC cannot invoke Section 263(2) of the CMA for the purpose of barring public access to websites on unjustifiable grounds".[31]

Again in January 2017, the Malaysian Bar had critised the CMA 1998 stating that it was being abused like the Sedition Act.[32] Its Vice President George Varughese, urged the government to stop using and to repeal legislations that negate the exercise of the freedoms of speech, expression, opinion and thought. He added, "the misuse of sections 233(1)(a) and section 263(2) of the CMA gives rise to the perception that the CMA is yet another dressed-up political weapon. This act would render Article 10 (1) (a) of the Federal Constitution meaningless.[33] Article 10(1)(a) of FC states, subject to clauses (2),(3) and(4), every citizen has the right to freedom of speech.

I) ***Bernama Act 1967***

BERNAMA is the Malaysia National News Agency and a disseminator of news often quoted and relied on by other news agencies in Malaysia. This Act governs the news agency or also known as 'Pertubuhan Berita Nasional Malaysia' (PBNM). In the case of *Khalid Bin Yusoff v Pertubuhan Berita Nasional Malaysia (Ber-*

28 [1994] 1 MLJ 566. New development on this issue can be seen in Federal Court decisions in both *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 and *PP v Azmi bin Sharom* [2015] 6 MLJ 751

29 Press release: Misuse of the Communications and Multimedia Act 1998 to Stifle Freedom of Speech and Expression Must End, I March 2016 at www.malaysianbar.org.my/

30 Gov't blocks The Malaysian Insider-Malaysiakini, 15 February 2016 at www.malaysiakini.com/news/331711

31 Press release: Misuse of the Communications and Multimedia Act 1998 to Stifle Freedom of Speech and Expression Must End, ibid.

32 Communications and Multimedia Act being abused like Sedition Act, says the Malaysian Bar, 9 January 2017 at www.themalaymailonline.com/.../communications-and-multimedia-act-being-abused-l..

33 ibid

nama) & Ors,[34] the plaintiff's claim against the 1st, 2nd (The New Straits Times Press (Malaysia) Berhad) and the 4th Defendant (Insight News Sdn Bhd) for libel. His claim against the 3rd Defendant has been withdrawn. The Pf who was the Director of Examinations for the Certificate In Legal Practice ("CLP") claimed that the 1st Defendant had on 20.4.2009 published in its online news portal accessible at www.Bernama.com a news report or article entitled "Court Upholds Jail Term On Former CLP Director" ("BERNAMA Article" or "Article"). The 2nd and 4th defendants also published similar news later. It reads,

> "*Khalid, 57, also former Law faculty dean of Universiti Teknologi Mara had been convicted of altering the results of CLP examination* ***for financial benefit*** *at the Legal Profession Qualifying Board office in Menara Tun Razak, Jalan Raja Laut, between August and September 2001*." (emphasis added).

Based on the statement, the Plaintiff alleged that he has been defamed and he claimed, inter alia, general damages, aggravated damages and exemplary damages. Further, the Plaintiff also prays for an injunction against the Defendants restraining them from publication of the words complained of or any words which are defamatory of and concerning the Plaintiff. The court decided that the 1st, 2nd and 4th Defendants are not liable to the Plaintiff for defamation by reason of their respective defences raised. Accordingly, the Plaintiff's claim was dismissed. The Plaintiff was ordered to pay costs of RM12,000.00 to each of the three defendants. This case shows that it is not easy to sue the media if one cannot establish elements of defamation.[35]

COMMUNICATION LAWS AND ETHICS

The communication law regulates communications in both printed and digital format. There are also regulations governing broadcasting, telephone and telecommunications service, cable television, satellite communications, wireless telecommunications, and the Internet.[36] In the US, communication laws also cover a variety of issues namely, media law, First Amendment, cable and broadcasting law, computer and Internet law, and telecommunications.[37]

In Malaysia, the Malaysian Commission and Communication (MCCM) Malaysia or 'Suruhanjaya Komunikasi dan Multimedia Malaysia (SKMM) provides the following laws on communication namely, the MCMA 1998, CMA 1998, Postal Services Act 2012 (And Regulations), Digital Signature Act 1997 And Strategic Trade Act 2010.[38]The CMA 1998 has been discussed under the media law as well since both media and communication laws are interrelated. In addition to these laws, other relevant law such as Defamation Act 1957 is also important.

Although media claim they have observed the law and ethics, they still face legal suit by an individual who thinks that he has been defamed and such act had caused him to suffer monetary loss and reputation. The concept of defamation and other related issues shall be discussed below.

The Concept of Defamation

Under common law, defamation refers to "the publication of untrue statement of fact which

34 Civil suit No. 23 NCvC-62-07/201. See also *Pertubuhan Berita Nasional Malaysia v Stephen Kalong* Ningkan [1980] 2 MLJ 19, FC Kuching, [2014] 8 CLJ 337 and *Ku Abdul Rahman bin Ku Ismail v Muna bt Mohd Jaafar & Ors* [2016] MLJU 556

35 See *Pertubuhan Berita Nasional Malaysia v Stephen Kalong* Ningkan [2010] 2 MLJ 19

36 Communication laws at https://en.wikipedia.org/wiki/Communications_law

37 Communications law and regulation at corporate.findlaw.com. See also US Communications Act of 1934 (47 U.S.C. 151 et seq.) and UK Communication Act 2003.

38 Malaysian Commission and Communication (MCMC) at http:///www. skmm.gov.my or https://www.mcmc.gov.my/

reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."[39] The common law recognised two forms of defamation that is libel and slander. In England, libel is a tort as well as a crime whereas slander is only a tort and not a crime. In Malaysia, libel and slander are both torts and crimes.[40] The defamatory statements may be made either through printed form (offline) or online by using Internet. [41]

In Malaysia, Defamation Act 1957 (DA) governs defamation cases. The Act was moulded based on English Defamation Act 1952, but the DA 1957 remains unchanged until this date. In England, the Defamation Act 1952 had been revised and updated from time to time and on April 25, 2013, England's new defamation law known as Defamation Act of 2013 came into effect.[42] However, the DA 1957 does not define the meaning of the term 'defamation'. But then, it could still be argued that the Act protects both private and public figures in Malaysia from being victims of irresponsible journalism or the media from damaging their reputation through defamatory statements. In other words, the law of defamation seeks to protect a person's dignity and honour.[43] According to section 3 of the Act,'For the purpose of the law of libel and slander the broadcasting of words by means of radio communication shall be treated as publication in a permanent form.' This means eventhough words are broadcasting through radio they are considered as permanent form and could be amounted to defamatory words in certain cases. In order to establish the existence of defamatory statements or to succeed in defamation suits, the Plaintiff must establish three elements i.e. (1) he must ensure the impugned article contain elements of defamation namely, (2) the words must be defamatory words and the words referred to the Plaintiff or person defamed and (3) the words were published. While types of slander are mentioned in few sections in the Act: sect.4 (Slander of women), sect. 5 (Slander affecting official, professional, or business reputation) and sect. 6 (Slander of title, *etc*).

Online defamation

Online defamation refers to defamatory words published online. This includes Facebook postings and Twitter.[44] This means it is governed by rules applicable to online publication. On this point, section 114A of Malaysian Evidence Act 1950 which came into force on 31st July 2012 provides that all persons who act as owners, hosts, administrators, editors or sub-editors, or who facilitate to publish or re-publish any publication to be presumed as publishers under the law unless otherwise stated.[45] This amendment appears to make all bloggers or operators of Internet communications are considered as publishers and consequently liable for any online materials posted on their websites, including the third party content, thus the element of knowledge shall no longer be considered.[46]

In online defamation cases, the plaintiff cannot sue the ISP and blamed them for publishing the news online since law protects the ISP. But if it involves blogger, one can still sue the blogger who owns the website such as in the case of *Dato' Sukri bin Hj Mohamed v Wan Muhammad Azri bin Wan*

39 Williams –Jeremy Clarke. & Skinner, L. (2003). *A practical guide to libel and slander*. London: Butterworth Lexis Nexis.

40 Norchaya Talib. (2010). *Law of torts in Malaysia*. (3rd ed.). Petaling Jaya: Sweet & Maxwell Asia. See also Ahmad Masum & Md Rejab Md Desa, Media and the libel law: The Malaysian experience, *Procedia -Social and Behavioral Sciences*, 155 (2014) 34 – 41 at www.sciencedirect.com . Note that the law on this subject has been comprehensively dealt with by Hamid Sultan Abu Backer JC (now Court of Appeal Judge) in *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008]5 MLJ 577,HC. This case was mentioned by Vernon Ong J in *Shaharuddin bin Mohammad v Malayan Banking Bhd*. [2011] 7 MLJ 589, HC.

41 See further K.Kuldeep Singh (2007), *The tort of defamation: Concepts and cases on libel and slander in Malaysia and Singapore,* Kelana Jaya, Selangor Darul Ehsan ; Dayton, Ohio : LexisNexis

42 Defamation Act 2013 at www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf

43 See Ahmad Masum, (2014) and Farid Sufian Shuaib,(1999). General publication, public interest and common law qualified privilege: Where is the law heading? *Malayan Law Journal*, 2, clxiii-clxxvi.

44 D. Kanyakumari, Chess championship director to file defamation suit over Facebook post, 10 May 2017 at http://www.thestar.com.my/news/nation/2017/05/10/chess-championship-director-to-file-defamation-suit-over-facebook-

45 Section 114A Evidence Act 1950

46 Khairun nisa & Nazli Awang, A Comparative Legal Analysis of Online Defamation in Malaysia, Singapore and the United Kingdom (2015), *International Journal of Cyber-Security and Digital Forensics* (IJCSDF) 4(1): 314-326

Deris.[47] In this case, the Repondent owned and administered his blog or website known as 'www. papagomo.blogspot.com' ('the said blog'). The appellant contended that the respondent had uploaded and published three articles onto the blog defamatory of the appellant. Hence, the Appellant appeal to the Court of Appeal which decided that the blogger or Respondent did not commit any defamatory act towards the Plaintiff (The Appellant) when making statements in his blog.

DEFAMATION CASES RELATED TO MEDIA

There are many defamation suits against the media whom includes the reporters, journalists, the publishers of the newspaper or online media and the editors. In most cases, all of them are named together as co defendants and the plaintiff usually involve someone with good reputation such as politicians or professionals. In this paper, only few selected cases between 2015 and 2017 are discussed.

Case 1 (2015): *Utusan Melayu (M) Bhd v Lim Guan Eng*[48] *Court of Appeal, Putrajaya,* Badariah Sahamid (JCA)

The respondent/plaintiff claimed that as a consequence of the publication of the impugned words in the article, he had been seriously defamed and the words had brought the respondent/ plaintiff into public contempt and ridicule and caused the plaintiff to suffer injury to his reputation. Thus, the plaintiff claimed for general damages, aggravated and exemplary damages for the libelous article published by the defendant. The High Court allowed the plaintiff 's claim. The issues for determination before the High Court were whether the impugned words were defamatory and if they were, whether the defendant could rely on the defence of fair comment or in the alternative or in addition thereto, the defence of qualified privilege? Hence, the defendant appealed on finding of liability and quantum of damages awarded by the High Court. The Court of Appeal allowed the appeal in part only and granted RM150,000 damages to the Respondent.

Case 2 (2017): *Utusan Melayu (Malaysia) Berhad v Othman bin Haji Omar*[49] *Court of Appeal (Putrajaya*)

In this case, the respondent/Plaintiff sued the Appellant/Defendant for libel or defmatory remarks made in *Utusan Malaysia* newspaper on 29 January 2013 stating'*Dikatakan banyak timbul kontroversi ketika menerajui PKNS — Kontrak Othman tak disambung*?' ('the said article'). The High court decided there are defamatory remarks in that article. The Appellant was ordered to pay damages to the Respondent.The Appellant appealed to the Court of Appeal but it was dismissed. The CA found that the learned trial judge was correct when deciding the case at the High Court. In this case, the trial judge followed *Reynolds v Times Newspapers Ltd and others*[50] the appeal dimissed. It was decided that the impugned sttaments in the article were defamatory of the respondent as it would tend to lower the respondent in the estimation of right-thinking members of society generally and be likely to affect him adversely in that it would tend to cause others to shun or avoid him and expose him to hatred, contempt or ridicule. The learned trial judge was satisfied that the defamatory words referred to the respondent and that the words were published. The learned trial judge found that the appellant had failed to discharge its burden of proving its pleaded defence of qualified privilege. As such they are not entitled to rely on the said defence. (p.806).

47 [2016] 3 MLJ 529.
48 [2015] 6 MLJ 113
49 [2017] 2MLJ 800. See also *Keluarga Communication* case.
50 [1999] 4 All ER 609, HL

Case 3 (2017): *Datok Seri Dr Mohamad Salleh b Ismail & Anor v Mohd Rafizi bin Ramli & Anor*[51]

The first plaintiff ('P1') was the chairman and director of the second plaintiff ('P2') which had several agreements with the Malaysian government to implement a national feedlot centre project. To facilitate the project's implementation, the government had given P2 a loan. The first defendant ('D1'), who was a director in an opposition political party, called a press conference to allege that part of the loan P2 had received was deposited with a commercial bank ('PBB') and was used as security to obtain personal loans to buy properties in the names of P1 and his family members. D1 claimed his allegations were based on information contained in copies of certain bank documents he had received from an anonymous party. Representatives of the second defendant ('D2') Mkini.dotcom. Sdn Bhd which operated an Internet news website and television site attended the press conference, recorded the proceedings and later published an article about D1's allegations on its website and uploaded a video clip of the press conference. Pf1 sued the Dfs for defamation and contended that D1's allegations were untrue. P1 claimed the defendants' libel had tarnished his reputation whilst P2 claimed the libel had caused it to suffer financial losses. The High Court allowed the Plaintiffs claims against the 1st defendant and dismissed the claims against the 2nd defendant (the media).

Case 4 (unreported 2017): *Datuk Seri Anwar bin Ibrahim v Ranjit Singh Dhillon & Ors. (High Court decision- settlement)*[52]

It was reported in the Star newspaper on 9 January 2017 that Datuk Seri Anwar Ibrahim had filed a defamation suit against Ranjit Singh Dhillon, Looi Sui-Chern, Adrian Lai and the New Straits Times Press (M) Berhad. He claimed for RM70mil damages for the publication of an article in the English daily. He claimed that the first defendant had uttered malicious and defamatory statements in a press statement on Aug 6, 2013 to ruin his good name and reputation following an article "Prove you have nothing to hide" published on the same day. Anwar alleged that the article accused him of paying Karpal Singh RM50mil in legal fees in order to bribe judges and prosecuting officers.

However, the suit has been settled since Anwar has agreeed to accept a public apology from the defendants. The terms of settlement were negotiated after five hours in chambers at the Penang High Court. The first defendant Datuk Ranjit Singh Dhillon agreed to apologise in court and retract his statement. While journalists Adrian Lai, Looi Sue-Chern and The New Straits Times Press (M) Berhad were ordered to pay RM60,000 in costs. The paper will issue a printed apology. Ranjit Singh read out his apology in open court before Justice Datuk Rosilah Yop.[53]

Case 5 (reported on 13 July 2017): *Datuk Seri Najib Tun Razak & Anor v Mkini Dotcom Sdn Bhd & Ors*[54] (still in progress)

In this case, the plaintiffs sued the defendants for defamation and the case was filed on May 30, 2014. The co-plaintiff is Umno's executive secretary Datuk Seri Ab Rauf Yusoh and the two other defendants are editor –in-chief Steven Gan and chief editor Fathi Aris Omar. The plaintiff claimed that the defendants had allowed the publication of two alleged defamatory articles in the "Yoursay" column of web portal www.malaysiakini.com on May 14, 2014. They said the defendants had also published another article titled *Najib threatens to sue Mkini over readers' comments on May 16.* They said the defendants had compiled the comments on the article and published another article on May 17, which showed their intention to continously defame them. The defendants pleaded a defence of fair comment over a matter of public interest. Since it has been three years since it was filed the High Court Judge (Appellate & Special Powers) justice Kamaludin Md Said suggested to the parties

51 [2017] 7 MLJ 150

52 Anwar arrives at Penang Court for defamation case at www.thestar.com.my 9 January 2017

53 Arnold Loh, N. Trisha and Gayle Lim, Defendants in Anwar's defamation suit apologise, 9 January 2017 at http://www.thestar.com.my/news/nation/2017/01/09/defendants-in-anwar-defamation-suit-apologise/#2dYdFtC3jtztHWr6.99

54 Judge advises Najib and defendants to settle out of court, The Star 13 July 2017 at 14.

to settle out of court. It is not known whether the defendants agreed to settle out of court or not. However, on September 19, 2017 there will be case management pending a decision by the Federal Court on the issue of whether a civil servant could file a suit in his personal capacity. The issue arose as Najib is suing in his personal capacity.

The above two cases (case 4 & 5) are the examples of cases where dispute may be solved through a public apology and out of court settlement. But the defendants can still plead their defences. However, in reality there is never ending legal suits to be encountered by the media as long as they report the matters which some people think had defamed them. An example can be taken from US whereby a former Alaska Governor Sarah Palin had announced in July 2017 that she will subpoena two dozen reporters in defamation suit. This shocking news will involve many reporters, editors and other workers from New York Times.[55] The Times has claimed that Plain has no case because she cannot prove malice, the legal standard for claiming defamation. But Palin's lawyers claim the Times knew the statements in the editorial were false, but "fabricated the link anyway" in order to drive web traffic.

DEEFENCES AVAILABLE TO MEDIA

Media as the defendant can rely on several defences depending on the claims made by the plaintiff. There are statutory defences and equitable defences. The statutory defences are provided by few Acts namely the Defamation Act 1957, the Communication and Multimedia Act 1998 (CMA) and the Federal Constitution (FC). But the followings discuss only defences in the DA 1957 which provides several defences namely defence of justification, fair comment, absolute privilege, qualified privilege, defence of reportage and unintentional defamation.

1- Defence of justification (s.8 DA 1957)

This defence means the statements made were actually true. For example, if Ali was really a convicted criminal, a statement that Ali was convicted of a criminal offence, is not defamatory. Section 8 of DA 1957 provides "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." This defence was used by the defendants in the case of *Khalid b Yusoff v Pertubuhan Berita Nasional Malaysia (Bernama) & Ors*[56] and the Court decided that such defence by two defendants are acceptable.

2- Defence of fair comment (s.9 DA 1957)

Fair comment allows everyone in society to comment on matters of public interest but the privilege extended to expressions of opinion only not misstatement of facts.[57] The statement made was an honest expression of an opinion about a matter of public interest. Section 9 of DA provides "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. The first defendant (D1) in *Datok Seri Dr Mohamad Salleh b Ismail & Anor v Mohd Rafizi bin Ramli & Anor*[58] relied on the defence of fair comment but it was not available to D1.

55 Kaja Whitehouse, Palin to subpoena two dozen reporters in defamation suit, 26 July 2017 at http://nypost.com/2017/07/26/palin-to-subpoena-two-dozen-reporters-in-defamation-suit/

56 Civil Suit No.23 NCvC-62-07/201

57 W.Page Keeton, Defamation and freedom of press, *Texas Law Review*, 54 Tex. L. Rev. 1221 1975-1976

58 [2017] 7 MLJ 150

3- Defence of absolute privilege (s.11of DA 1957)

Absolute Privilege refers to a situation where a person cannot be sued for statements made even if they are defamatory. An example would be "a fair and accurate and contemporaneous report of proceedings" in court, as well as the "judgment, sentence or finding of such court". The reporter should report the fact that the statements were made at the press conference rather than for the purpose of persuading the reader/viewer of the truth of their contents.[59]

4- Defence of qualified privilege (s.12 DA 1957)

This defence covers situations where the maker of the statement has a legal or moral duty to make the statement, or where the statement is made to further a legitimate common interest. For example, it may be qualified privilege for a former employer to communicate information about the character of a former employee, to that individual's future employer (if he is asked for a reference). That being said, the defence of qualified privilege can be defeated if the claimant can show that the maker of the statement was motivated by malice. i.e the Pf must proof that the Df has intention to damage his reputation.[60]

Section 12 of DA 1957 provides the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice. Malice refers to one's intention to do injury to another party. But in the case of *Utusan Melayu (M) Bhd v Othman bin Hj Omar*,[61] the trial judge rejected defence of qualified privilege raised by the defendant (Appellant) because it failed to prove such defence. The CA agreed with the trial judge and followed the principles in *Reynolds*[62]'s. The Appellant also never raised defence of justification. And in *Lim Guan Eng lwn Utusan Melayu (M) Bhd,*[63] the high court judge has rejected the defence of qualified privilege raised by the defendant (Utusan Melayu or publisher) since there was an unfair and inaccurate reporting of the judicial proceedings. While in *Ku Abdul Rahman bin Ku Ismail v Muna bt Mohd Jaafar & Ors,*[64]the Second to Fourth Defendants contended that they were not liable based on the defence of absolute privilege as well as qualified privilege on the basis of the Defamation Act 1957 and the common law. In this case, the Dfs managed to raise defence of qualified privilege and the 4th Df had satisfied the court by giving accurate and fair report of the actual court proceedings. In other words, no malice found on the part of the Dfs. Therefore, the DFs were not liable and the Pf's claim was unsustainable and dismissed.

Further, the learned High Court judge in *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors,*[65] decided that the defendants could rely on qualified privilege or the defence known as the *Reynolds* privilege, which is a defence of responsible journalism most likely to be raised by a newspaper and journalists, such as the defendants herein. The *Reynolds* privilege could be raised as a defence in two situations, namely where the subject matter of the impugned statement is a matter of public interest, in which case the journalist should exercise responsible journalism; and in reportage, a rare form of the *Reynolds* privilege, where the public interest lies in the making of the allegation itself and not the contents of the allegation.

59 Ibid.

60 See Harold A. Jones, Interest and duty in relation to qualified privilege (1924), Vol. 22, No.5 *Michigan Law Review* 437- 453

61 [2017] 2 MLJ 800. See also *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press* [2010] 2 MLJ 492.

62 *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, HL

63 [2013] 8 MLJ 575. HC

64 [2016] MLJU 556

65 [2016] 12 MLJ 476

5- Defence of reportage (for journalists)[66]

In describing this defence, it is best to refer to case *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press*[67] (pp520-521), where in that case the learned judge said the followings:

> "The law allows reporting privileges through fair and accurate reports of parliamentary and court proceedings. The defendants here are relying on a more general privilege known as reportage. According to Gatley on *Libel and Slander (11th Ed)* this doctrine first surfaced in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EMLR 13. Reportage in that case was depicted as 'a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper'.

It was concluded that, the defence of reportage would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations. In the instant case, the defendants submitted that this was a classic case of reportage as SD1 was merely reporting from the New Republic article. It was a report from another report and did not carry her own views or comments on the subject-matter in question. And that was why it did not carry the name of the author. The court rejected the defence and stated the impugned article is not one that is reported in a fair, disinterested and neutral way. In the circumstances, the defence of reportage is not available to the defendant. The plaintiff's claim was allowed.

In *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor,* [68] several defences were raised by the defendants namely, defence of justification; defence of fair comment by saying the publication of both the articles were made in the interest of public and with regard to the public's right for information and had no intention to defame the plaintif and both the articles were based on the BBC interview and the Press Conference by Datuk Dr. Hassan Ali (DW1) and the comments were made in relation to the plaintiffs view on law pertaining to homosexuality;defence of qualified privilege and reportage by stating among others the articles complaint were published based on the BBC interview in which the exact wording of the interview was from the plaintiff himself. However, the defendants failed to succeed.

In short, the reporter should report the fact that the statements were made at the press conference rather than for the purpose of persuading the reader/viewer of the truth of their contents. For example, the video clip was a faithful recording of the actual events that took place. The reporting was done in a fair, disinterested and neutral way.

OTHER TYPES OF DEFENCES

Apart from the above defences, there are other types of defences available to the media i.e no intention to defame (unintentional defamation) or public apology. For unintentional defamation, the Df who published the alleged defamatory words may say it has no intention to defame the plaintiff. The defence is provided by section 7 of the Defamation Act 1957.

While public apology is made through media such as the newspaper and this defence will not exempt the defendant from paying damages to the plaintiff. According to section 10 of Defamation Act 1957, the defendant may apply for apology to mitigate damages to be paid to the plaintiff. This

66 Zaid Hamzah, (2013)

67 [2010] 2 MLJ 492. See also *Datok Seri Dr Mohamad Salleh b Ismail & Anor v Mohd Rafizi bin Ramli & Anor* [2017] 7 MLJ 150. Defence of reportage was not available to the defendant in the first case but available to D2 in the later case.

68 [2013] 3 MLJ 534

happened in the case of *Dato' Seri Anwar Ibrahim against the NST and others*.[69] How to make public apology? Before the commencement of the action or at the earliest opportunity afterwards, the person who published such words may insert or offer to insert in such newspaper a full apology for the said libel. The effect of making apology is that the defendant shall be held liable to his act because his apology is considered as admission of fault or liability under the evidence law. This position is adopted in Malaysia in many defamation cases since the defendants will still be held liable for making defamatory remarks and the court will order the media to pay damages to the plaintiff.[70] In one decided case, the Court of Appeal judges held that the apology should be regarded as adequate noting that there are expressions of regret by the defendant that such charges or suggestions were ever published.

In 2012, the New Straits Times also issued a substantial retraction and apology to the Australian politician for a May 2 article headlined "Observer Under Scrutiny: Impartiality Questioned: Anti-Islam Australian lawmaker comes under fire" about Australian Senator Nicholas Xenophon.[71]However, in Australia, the ALRC recommends that any apology or correction of published material by a defendant should not be treated in evidence as an admission of fault**.** [72] It refers to the definition of apology in New South Wales Civil Liability Act.

CONCLUSION

It is submitted that based on the above discussions, media is actually at the crossroad. Sometimes they are in dilema whether to publish the truth about certain issues or hide them from the public for security reason or other reasons. What is certain is that they are expected to adhere to media laws, communication laws and media ethics in order to avoid legal implications. However, since Federal Constitution guarantees media's right the media can still share the information or news through online or offline medium. In fact, the news disseminated through social media may change the society from passive and ignorance to knowledgeable and alerted society. Although it seems that media may not have absolute freedom of speech and expression with the restrictions imposed on them by the FC and other relevant laws, the restrictions must be seen from the positive side and its positive impact to the society and the country. Media can still rely on many defences available in the relevant laws including seeking seeking public apology through retraction of statement made earlier. Nevertheless, resolving media disputes is still quite challenging since in many cases the courts have rejected several defences raised by the media. In fact, even after the media issued public apology, they still have to pay certain amount of damages to the claimant.

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69 [2010] 2 MLJ 492

70 See case *Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700 CA

71 *Sydney Smith*, May 4, 2012 , Malaysian Newspaper Apologizes, Retracts Story Reporting Wrong Quote, Politician May Sue for Libel at www.imediaethics.org/malaysian-newspaper-apologizes-retracts-story-reporting-wrong

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ARBITRATION IN DOMESTIC AND INTERNATIONAL TAKEOVERS & MERGERS OF COMPANIES

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Abstract:

Takeovers and mergers are complex business transaction especially when they take place cross-border. Due to its complex nature, it is inevitable that some takeovers and mergers deals result in disputes. Takeovers and mergers can be successful by implementing a problem solving system that deals with a dispute at an early stage. This corporate exercise also involves a lengthy procedure. Disputes may thus arise at different stages of the corporate exercise; the very initial stage of takeovers and mergers involving the due diligence process itself frequently gives rise to disputes. Many disputes also arises at post-closing stage involving representations and warranties. It is also possible for disagreement and disputes to arise in relation to ancillary agreements related to intellectual property issues and management agreements. Arbitration has emerged as a preferred method to resolve takeovers and mergers related disputes. This paper discusses the importance of arbitration at various stages of takeovers and mergers. The paper detailed out the disputes at various stages of takeovers and mergers. It then examined the role arbitration can play at the various stages involving specific problems and complications related to takeovers and mergers. The paper highlights the advantages of arbitration and examines its effect on takeovers and mergers of companies.

KEYWORDS: Dispute resolution, Takeovers and mergers, Arbitration, Domestic, International.

INTRODUCTION

Takeovers and mergers transactions also known as M&A, have increased worldwide both in number and volume. Recent data supports the growth of Asia's slice of pie in the global mergers and acquisitions market. [1] The total volume of global M&A in the first quarter of 2016 was US$597.4 billion. Of this, US$132.1 billion (22.1%) came from Asia-Pacific (ex-Japan) and US$14.8 billion (2.5 %) from Japan.[2] The total share of Asia-Pacific, including Japan, aggregates to 24.6 % of the global M&A pie. Clearly, the Asia Pacific region represents the third largest in volumes and comes close to Europe.[3] The Asia Pacific region has witnessed an exponential growth in the incidence of M&A since the turn of the century. For example, data across time horizons indicate that M&A activity in the Asia-Pacific region, both in terms of number of deals and volumes, has grown faster than the

1 Umakant Varottil and Wai Yee Wan, *Comparative Takeover Regulation*, Cambridge University Press, at 6.

2 Mergermarket, 'Global and Regional M&A: Q1 2016', HYPERLIN"http://www.mergermarket.com/pdf/MergermarketTrendreport. Q12016. FinancialAdvisorLeagueTables.pdf cited in Umakant and Wai Yee Wan, above note 1 at 6.

3 Ibid.

worldwide rates such that the region's share in the global M&A has increased significantly.[4] The statistics show that Asia does play an important role in the M&A market. This underscores the need for a deeper analysis of the matters relating to takeovers and mergers in general and mechanisms to dispute settlement in particular.

In Malaysia, tremendous changes to mergers and acquisitions activities has been seen over the years. Key developments that affect the volume and value of mergers and acquisitions in the later years, to some extent, stem from government initiatives that encourage economic growth in certain sectors. Among other initiatives, the Malaysian government targets economic growth through the Economic Transformation Programme (ETP) and the Association of Southeast Asian Nations (ASEAN).[5] Most Malaysian companies either consolidate within the country or they merge and acquire companies abroad. The increased competiveness in this highly connected global economy has made mergers and acquisitions almost a necessity for companies seeking survival in major economic sectors. Malaysian companies having been active seeking growth and revenue by sizing up to withstand the competition coming into the country and to tap opportunities outside the country.[6]

Takeovers and mergers are complex business transaction especially when they take place cross-border. Due to its complex nature, it is inevitable that some takeovers and mergers deals result in disputes. Takeovers and mergers can be successful by implementing a problem solving system that deals with a dispute at an early stage. In cross-border transactions, it is very important to strengthen, among others, investor-state dispute settlement mechanism in the pursuit of succesful takeovers and mergers deals.

Takeovers and mergers transaction requires stringent confidentiality as well as a smooth process for efficient deal. A cross-border deals are usually concluded under a suite of transaction documents involving multi parties. Cross-border deals also requires a neutral forum for disputes between parties from different jurisdictions. Looking at the nature of the delicate aspects of takeovers and mergers deal, it is not surprising that arbitration has been the most preferred means to resolve disputes in this corporate transaction.

Confidentiality, for instance is vital importance to takeovers and mergers dispute. Bidders would not want to disclose any confidential information or price sentive information regarding the business and operation of the target company. The bidder certainly, having spent a significant amount of time and money, will have to avoid a free-rider. Thus preservation of confidentiality is of significant importance. Arbitration that provides confidentiality in respect of arbitral proceedings and awards provides a suitable dispute settlement in takeovers and mergers deals.

Takeovers and mergers disputes also require speedy settlement. Speed can be critical in a pre-closing dispute, otherwise the closing of the deal can be placed at risk. Arbitration provides settlement on an expedited basis; an arbitrator may have to decide the dispute based on documents only with a limited number of briefs. This way, the bidder and the target may be able to save the deal from falling apart.

The nature of takeovers and mergers

Takeovers and mergers are long and complex processes. Disputes may thus arise at different stages of the corporate exercise; the very initial stage of takeovers and mergers involving the due diligence process itself frequently gives rise to disputes. Many disputes also arises at post-closing stage involving representations and warranties. It is also possible for disagreement and disputes to arise in relation to ancillary agreements related to intellectual property issues and management agreements.

It is thus important to discuss what are takeovers and mergers; what are the common disputes and the stage they arise.

Generally, there are three common methods used for acquisition of corporate control. Acquisition

4 Ibid.

5 Hong Yun Chang and Wai Sum Teo, GLI-Mergers & Acquisitions Second Edition, Malaysia, at page 91.

6 Mushera A Khan, 'Regulation of Takeover and Mergers in Malaysia' published as a chapter in *Comparative Takeover Regulation,* Cambridge University Press, 450.

can be done through market purchase, private treaty or takeover offer. These methods differ from each other and are applied generally based on the type of target companies. 'Takeover' and 'merger' as a notion are frequently used together. The term 'merger' and 'acquisition' are frequently used interchangeably. However, it must be borne in mind that the terms 'takeover' and 'merger' do not have identical definition across the world. The first critical factor thus relates to inconsistency in the use of the terms and the different scope of the terms.

The expression "takeover" is commonly used to refer to any acquisition of a company or a business. A "takeover offer" is generally a technique for effecting a takeover through an offer to acquire shares of a company. It is technically defined as an offer made by a bidder to the target company shareholders to purchase the entire shares not owned by the bidder in the target company.[7] The end result of such exercise will vest control in the target company in the hands of the bidder. It is also possible for a bidder to make a takeover not to acquire all, but a specific class or classes of voting shares or voting rights, in a company.[8] 'Takeover', in certain jurisdictions is given a wider meaning. Weinberg and Blank, the leading figures in takeovers law define 'takeover' as:

> *"A transaction or series of transactions whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company".*[9]
> *The use of the term 'takeover' may therefore refer to acquisition of control in a company through acquisition of shares and assets. Thus, the terminology itself may bring about some differences between the parties.*
> *A 'merger' on the other hand occur when the merging companies have their mutual consent. It is effected either by exchanging shares or alternatively by the formation of a new company to which shares or the assets and liabilities of the two original companies. A 'merger' can be defined as any business transaction whereby "several independent companies become vested in, or under the control of, one company (which may or may not be one of the original companies), and the original participating parties may or may not cease to exist.*[10] *In this sense, a merger may be effected through an acquisition, or a combination among companies of equal positions. Such activities are usually divided into subgroups based on the relationship between the surviving company and the original merging parties. 'Merger' has, also been used to mean that at least one of the merging companies losses its legal personality and ceases to exist as a separate legal entity.* [11]
> *'Amalgamation' and 'consolidation' of companies are, sometimes tied up with the definition of a 'merger'. Gaughan illustrated in his book:*
> *"a merger differs from a consolidation, it is a business combination whereby two or more companies join to form an entirely new company. In a consolidation, the original companies cease to exist and their stockholders become stockholders of the new company'*.[12]

Sometimes the term 'merger' is used in a broad and narrow sense. In a broad sense, a merger can be defined as any business transaction by which several independent companies come under

7 Mushera Ambaras Khan, "A Guide to Malaysian Takeovers and Mergers Law", Sweet & Maxwell, 2013. At 8.

8 See Capital Market and Services Act 2007 and the Rules on Takeovers. Mergers and Compulsory Acquisitions 2016.

9 Weinberg and Blank, *Take-overs and Mergers*, Sweet & Maxwell, 2003 para.1-1004

10 Ibid, para 1-1002.

11 See EEC Third Council Directive on Mergers, 78/855.

12 Patrick A. Gaughan, Mergers, Acquisitions, and Corporate Restructurings, 4th Ed., 2007,John Wiley & Sons Inc., p. 12.

one and the same direct or indirect control. In a narrower sense, a merger is a transaction by which one or more participating companies cease to exist as separate legal entities. A merger in this narrower sense results in only one surviving company.

In the US, 'reverse triangular merger' and 'forward triangular merger' are widely used; these terms are alien to the other countries. In most European countries, distinctions between mergers and acquisitions are made based on the relative size of the merging companies as well as the forms in which the transactions are completed: mergers are normally taking place between companies with equal size, which are to be combined into a single business, while acquisitions (or takeovers) are defined as the purchases of shares by larger company of the smaller ones. In comparison, the size factor is almost disregarded in the US.

The terminology dilemma also arises in the ASEAN region. In Indonesia for example, a company typically obtains control of another company through a share acquisition. Mergers are less common unless they are undertaken for operational or tax reasons.[13] Vietnam which recently become favoured destination for takeovers and mergers for foreign investors particularly for Japan and Singapore, lacked the laws governing takeovers and mergers thus giving rise to more complexities when structuring a deal with investors from outside Vietnam.[14]

Cross-border takeovers and mergers

Takeovers and mergers transactions can be divided into two categories; namely, domestic and cross-border. In the earlier category, the bidder and the target companies are of same nationality. In the latter category, the bidder and the target are from different countries. Cross-border mergers can be a vertical, horizontal or conglomerate in nature. Being an FDI entry mode, cross-border takeover and merger possess almost all general characteristics of foreign investments. However, it is essential to note that there are several features that are exclusive to cross-border takeovers and mergers.[15] A thorough understanding of these features is necessary by the parties involved in the deal because these transactions have produced a number of special legal and practical problems. In many Asian countries where financial crisis has resulted in a serious economic recession, inward takeovers and mergers have been increasing owing to the falling asset prices and the changes in business practices, which create an environment more favorable to foreign merger and acquisition.[16] Cross-border deals are taking place due to their inherent advantages over other forms of investment; the needs and desires of firms to maintain and strengthen their competitiveness on a global basis can be better served through cross-border takeovers and mergers.[17] Many actions involved in a cross-border deals, such as the decisions to buy or sell, the price negotiations, and the analysis of business valuation, are based on the audited financial statement provided by the accounting firms. The laws applicable also can be complex giving rise to many interpretations. As seen from ascertaining the working definition in the introduction, 'merger', 'acquisition' and takeover have differences from each other. The terminology used in the deal itself has the potential to give rise to a dispute between the parties involved.

The phases of takeovers and mergers

Regulators and practitioners have progressively developed a process which provides a balance between the conflicting interests of the bidder and the target. In most international acquisitions, there are five clear stages:

Initial identification of the target and negotiation of the broad terms of the deal, possibly leading to

13 Jonathan Streifer, http://www.ssek.com/download/document/BritCham__M&A_June_2013_JMS_81.pdf.

14 Mergers and Acquisitions in Vietnam-Pitfalls and Resolution, https://www.financierworldwide.com/mergers-and-acquisitions-in-vietnam-pitfalls-and-resolutions/#.WYATOLYRWpo

15 http://scholarbank.nus.edu.sg/bitstream/handle/10635/14815/HuZhe.pdf?sequence=1

16 Ibid, at page 26.

17 Ibid, at page 29.

an exchange of heads of agreement or a letter of intent;

- A "due diligence" examination of the target; either before or after the exchange of a formal agreement;
- Negotiation and drafting of formal agreements;
- Obtaining third party and government consents or licences; and
- Finalization of the transaction[18].

The first two stages are crucial to the buyer because a decision to complete the transaction should only be made once a proper assessment has been made of the target and its business.[19] All actions taken by the parties will certainly have effects on arbitration in the resolution of disputes. During preliminary contacts, the selling process is a sensitive process

with respect to the target and must therefore remain secret. A confidentiality agreement may be executed between the parties during the initial part of process.[20] Disputes sometimes arise with respect to the breaches of pre-signing confidentiality or exclusivity provisions giving rise to important questions of proof of the breach and of the resulting damages.

The outcome of the due-diligence is critical to the parties further negotiations and has far reaching consequences for the deal. The due–diligence process frequently gives rise to disputes. The scope of pre-contractual duties of disclosure of the target is one of the most common area of dispute. Dispute may arise in relation to the completeness of the information provided by the target in the data room and the obligation of the target to disclose sensitive information. In addition, if clauses in the agreement have been drafted vaguely, a dispute can arise over the interpretation of broadly expressed term. Parties generally include a price adjustment clause if a due diligence is to take place after signing. Frequently, disputes on price adjustment clauses are due to a lack of clear descriptions of accounting methods, discrepancies in methods and concepts applied in asset and share deals, insufficient time allowed for compliance with certain obligations, or vagueness in the delimitation of accounting methods from legal methods. The contract frequently provides for an expert who, in the event of a price adjustment dispute, will determine the adjustment by reviewing the situation on the basis of a procedure and criteria generally defined in detail in the contract. [21]

Where buyer decides to proceed with the transaction in view of what he has learned as a result of the due diligence, the parties will proceed to execute the 'agreement'. This is the contractual instrument pursuant to which the parties, in a binding manner, implement or agree to implement the transaction and list all terms and conditions thereof. It necessarily includes the subject matter of the deal. It also comprises of provisions, governing the representations and warranties made by the seller as well as detailed clauses on the buyer's

Indemnification should the "representations and warranties" prove inaccurate.

In the vast majority of cases the transaction is not actually implemented upon signing. There are many reasons for this, usually because the parties have provided for various kinds of "condition(s) precedent".[22] If a condition precedent is not satisfied, not fulfilled in the agreed

time, or if the parties have agreed that the buyer could step out after signing and before completion (discretionary walk away right, the granting of which is relatively rare), the signed agreement will not be "closed". [23]

It is also worth noting that many jurisdictions require strict adherence to time-table during the

18 Agaoglu, Chahit "Arbitration in Merger and acquisition transactions: Problem of consent in parallel proceedings and in the transfer of arbitration agreement' PHD thesis, Queen Mary University of London 2012 at 49.

19 Ibid.

20 Ibid at page 50.

21 Ibid at 96.

22 Ibid at 71.

23 H. Peter and Jean Christophe Liebeskind, above note 22, p. 265. Takeovers and mergers agreements are subject to certain conditions, known as the 'condition to closing'. See Agaoglu Chahit, above note 18 at 85.

process of takeovers and mergers. Malaysia, for example, requires the parties involved in takeovers and mergers to adhere to time-frame until the completion of the deal.

Figure 1 provides the details of the day-to-day process of a takeover or merger. Figure 1 sets out the procedure to be followed in any takeover or merger taken in Malaysian jurisdiction. The bidder and the target companies will have to adhere to the procedure; however, sometimes the time line can be extended with prior approval from the securities commission.

Beginning with the announcement of an offer, the day to day progress of the deal relies on the time-line as provided by the securities commission. Dispute between the parties may arise at any of the different stage in the takeover deal.

Arbitration in takeovers and mergers deals

Arbitration is a consensual and private mechanism for dispute resolution which leads to an enforceable arbitral award. The contractual foundation of arbitration constitute the fundamental difference between arbitration and litigation. As many statistic disclose, with the rising amount of takeovers and mergers deals, disputes arising out of such deals have also increased.

Confidentiality is an important aspect of mergers transactions. There are several key provisions of confidentiality agreement. These key provisions are described by Peter in the following[24]:

Identity of the parties: These are usually the buyer and the seller. Occasionally, the target is also a party, so that it may directly claim performance or compensation in the event of breach. Third parties may be required to sign the confidentiality agreement, such as advisors, or managers of the parties, including sometimes those of the target.

Scope: The parties undertake to keep the confidential information secret and to use it strictly in compliance with the purpose of the agreement, i.e. the acquisition of the target.

Confidential information: The definition of what is deemed to be confidential is a key provision. The mere existence of negotiations between the parties is often expressly designated as confidential.

Abortion: The fate of the information, and the related documents, is usually provided for should the acquisition not ultimately take place.

Applicable law and dispute settlement: Applicable law and jurisdiction are, in most cases, specified.

Although the confidentiality provisions can be part of the letter of intent, they often take the form of a separate and preliminary documents.

Although most takeovers and mergers agreements contain arbitration clauses and the number of the arbitration proceedings in this area has increased since the late 1990s, arbitration proceedings for pre-closing conflicts are few occurred by the reasons of

confidentiality, rarely published. Pre-closing disputes include all disputes arising before the takeovers and mergers deal has been completed. Pre-signing disputes arise between buyers and seller, however, after they have entered into negotiations, but also among buyers who have formed a consortium to realise an acquisition, or among partners in a contract which provides for the acquisition of shares or assets in a company under specific circumstances.[25]

Most purchase or sale agreements, particularly in cross-border transactions contain valuation or purchase price adjustment clauses providing for a two stage dispute resolution mechanism. Since expert determination and arbitration are often combined in a two step (or parallel) dispute resolution mechanism, disputes have been caused by the lack of definition of the scope of assignment at each level.

Submitting takeovers and mergers disputes to arbitration is probably often the most appropriate way to deal with these many difficult, specialised, sensitive, urgent, multinational and highly controversial problems. This is undoubtedly why most takeovers and mergers agreements contain

24 Ibid.

25 Agaoglu Chahit, above note 18 at 80.

FIGURE 1

an arbitration clause and why such a high proportion of arbitration awards concern such disputes.[26] However, a number of procedural problems have frequently arise in the context of takeovers and mergers arbitrations. Among others, they include, validity of an arbitration clause, scope of arbitration clause, applicable law, expedited procedure, interim relief and damages. In an attempt to minimise disputes with arbitration, it is vital to have careful drafting of an effective arbitration agreement and to consider the choice of a known arbitration institution.

Conclusion

The above discussion have shown the rise of takeovers and mergers globally. Given the complex nature of takeovers and mergers, it may give rise to numerous disputes which are difficult to resolve or provides no clear answer. It has been shown that a multitude of different phraseology and terminology has been employed in takeovers and mergers transactions in these different jurisdictions. Different answers may be given to the same queries, depending on at which stage the issue arises in the process. Studies have shown that arbitration has become a more favoured mechanism for dispute settlement between the involving parties, given its flexibility nature and the freedom of the parties to select arbitrators. The freedom to select arbitrators from a variety of languages, familiarity with the industries and commercial experiences allow a better prospect for dispute settlement. Arbitration also allow the parties to adjust the process, which are essential for takeovers and mergers deal according to their needs. There are, however, some rooms for improvement for arbitration in takeovers and mergers deal. In certain situations, arbitration is private but not expressly confidential. Therefore, when confidentiality is sought, the parties have to agree that the arbitration proceedings must remain confidential in the terms of reference. In light of possibility of opting for confidential proceedings, international arbitration is more favoured for settling disputes in cross-border takeovers and mergers.

26 Ibid at pg 78.

The Financial Ombudsman Scheme as an Alternative Dispute Resolution Mechanism for Financial Disputes: The Malaysian Experience

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Abstract

Evils in litigation have led disputing parties to prefer settlement of conflicts via alternative dispute resolution. The evils include lengthy processes, time consuming, expensive cost, stringent and technical procedures, as well as offensive in nature which ruins cordial relationships between litigants. However, the increased use of alternative dispute resolution especially arbitration and active involvement of legal practitioners in its procedures had caused arbitration to be infected with the same disease like litigations making it not much appealing as it used to be. Hence, people has moved towards using other forms of alternative disputes resolution mechanisms. To encourage the use of alternative dispute resolutions, authorities in various jurisdictions have taken numerous measures to invest it with attractive benefits. In Malaysia, Bank Negara Malaysia as an authority for the financial sector initiated the financial ombudsman scheme to be the preferred, statutory sanctioned alternative dispute resolution mechanism for financial disputes with various incentives. Among the incentives are it is free of charge, speedy and does not require representation by legal practitioner. In this paper, we discuss the history of the financial ombudsman scheme, its purposes, processes and benefits to financial consumers as well as criticisms and suggestions for improvement of the scheme.

Keywords: *alternative dispute resolution, financial ombudsman scheme, financial disputes, ombudsman for financial services*

1.0 Introduction

Alternative or amicable dispute resolution (ADR) is a wide-ranging term used to generally refer to conflict settlement mechanisms other than the court. It is a genus with multiple species such as negotiation, arbitration, mediation, conciliation, adjudication and ombudsman[3]. Unlike in judicial proceedings where disputes are solved via a binding decision of an independent third party exercising judicial powers vested in it by the state, ADR heavily relies on disputing parties' cooperation, consent and mutual agreement.

In Asia, ADR is as ancient as the culture of its society. The fundamentals of ADR has been informally practiced by the multi-races, multi-cultural and multi-religious society for centuries. The foundation of ADR can be traced back to the teachings of different religions embraced in Asia and various cultures practiced by its community. In Islam, the word *sulh* or amicable settlement appeared multiple times in the text of the Holy Quran and was personally practised by the Holy Prophet Muhammad during his life. In the Malay community, *penghulu* and *imam* play significant roles in settling disputes that arise between members of their *qariah*. In Hinduism, ADR is reflected in the text of its scriptures. The *panchayat* or village council has been long practiced within the Indian community. Buddhism and Confucius teachings accentuates on harmony as well as peaceful resolution of dispute.

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3 Guru Dhillon and Lee Sook Ling, "Alternative Dispute Resolution Methods and Processes in Malaysia — A Review", *Malayan Law Journal*, vol. 2, (2015): viii.

In fact, Confucius despises litigation which is apparent from the words the great Confucius, "*in death avoid hell, in life avoid law courts*"[4].

The use of ADR is not new in Malaysia. The Arbitration Act has been in existence as early as 1952 (now repealed and replaced by the Arbitration Act 2005) while the Mediation Act has been around since 2012. In addition, numerous institutions and procedures were established to conduct ADR such as[5] –

(a) Kuala Lumpur Regional Centre for Arbitration (KLRCA) established in 1978[6];

(b) conciliation under the Law Reform Act (Marriage and Divorce) 1976 and the Islamic Family Law Act (Federal Territories) 1984;

(c) *hakam* under the Islamic Family Law Act (Federal Territories) 1984;

(d) Malaysian Mediation Centre established in 1999 by the Malaysian Bar Council[7];

(e) Tribunal for Consumer Claims under the Consumer Protection Act 1999[8]; and

(f) *hisbah* (ombudsman) under Terengganu's Hisbah Enactment 2000;

(g) *majlis sulh* in Syariah Court established under the respective syariah court act or enactment e.g. under the Shariah Court Civil Procedure (Federal Territories) Act 1998 and the Syariah Court Civil Procedure (State of Selangor) Enactment 2003[9];

(h) Tribunal for Home Buyers Claims established in 2002; and

(i) court-annexed mediation pursuant to Practice Direction No 5 of 2010 dated 16 August 2010[10].

In this article, we will zoom into the rather newly reformed, Financial Ombudsman Scheme (FOS) which is an alternative dispute resolution mechanism for financial disputes initiated by Bank Negara Malaysia (BNM) to facilitate settlement of disputes between financial service providers (FSP) under its purview and financial consumers. Via qualitative studies of legislations and various documents related to the FOS, we will discuss its history, purposes, processes and benefits to financial consumers as well as criticisms and suggestions for its improvement.

2. Financial Ombudsman Scheme in Malaysia

The FOS is an ADR statutory scheme to resolve financial services disputes between FSP regulated by Bank Negara Malaysia (BNM) who are members of the FOS and their customers. The primary benefits of the FOS compared to other financial services dispute resolution mechanisms are that it is offered free of charge, fast and does not require representation by legal practitioner.

The history of the FOS could be traced back to the Insurance Mediation Bureau (IMB), a

4 Mohamed Ishak Abdul Hamid and Nik Azahani Nik Mohammad, "Cross-Culture Jurisprudential Influence on Mediation in Malaysia", *Malayan Law Journal*, vol. 4, (2016): xli.

5 Guru Dhillon and Lee Sook Ling, "Alternative Dispute Resolution Methods and Processes in Malaysia — A Review", *Malayan Law Journal*, vol. 2, (2015): viii.

6 Kuala Lumpur Regional Centre for Arbitration, "KLRCA Overview", Who are We, <https://klrca.org/Who-We-Are-KLRCA-Overview> (accessed 15 July, 2017).

7 Malaysian Mediation Centre, "About Us", Malaysian Mediation Centre, <http://www.malaysianmediationcentre.org/about-us/> (accessed 15 July, 2017) and The Malaysian Bar, "Malaysian Mediation Centre (MMC)", The Malaysia Bar <http://www.malaysianbar.org.my/malaysian_mediation_centre_mmc.html> (accessed 15 July, 2017).

8 Ministry of Domestic Trade, Co-operatives and Consumerism, "Tribunal for Consumer Claims", Official Portal, <http://www.kpdnkk.gov.my/kpdnkk/tribunal-for-consumer-claims/?lang=en> (accessed 15 July, 2017).

9 Su'aida bt Safei, "Majlis Sulh (Islamic Mediation) in The Selangor Syariah Court and Malaysian Mediation Centre of the Bar Council: A Comparative Study", *Malayan Law Journal*, vol. 5, (2009): lxxxiii.

10 Arifin Zakaria, "Responsibility of Judges under Practice Direction No. 5 of 2010", Pejabat Ketua Pendaftar, Mahkamah Persekutuan Malaysia, <http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/23062011/speech%20mediation%20jb.docx> (accessed 16 July, 2017).

company limited by guarantee established by the insurance industry on 23 August 1991 to serve as an alternative channel for the public to refer dispute with their insurance companies for settlement free of charge. The IMB was the first financial industry self-regulatory body in Malaysia funded entirely by the industry players. Modelled based on ombudsman schemes in the United Kingdom, it started its operation in October 1992 with limited jurisdiction to resolve complaints involving claims in relation to personal insurance policies of up to RM50,000 within 3 months period. In 1996, the IMB's jurisdiction was enhanced to also resolve claims related to life insurance policies and its monetary jurisdiction was extended to RM100,000. Since its inception until 2004, IMB successfully resolved 5,668 cases[11] as per the following details:

Year	Oct 1992 - 1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Cases brought forward	-	5	14	54	52	40	31	40	77	145	165	172
New cases	37	58	110	152	279	383	463	515	726	932	1070	1105
Cases resolved	32	49	70	154	291	392	454	478	658	912	1063	1115
Pending cases	5	14	54	52	40	31	40	77	145	165	172	162

Following the success of IMB, the banking industry followed the same path by establishing a separate company limited by guarantee under the name of Banking Mediation Bureau (BMB) on 28 June 1996. BMB was also modelled based on ombudsman schemes in the United Kingdom and started its operation on 1 April 1997 with the objective to provide a simple and speedy mechanism for dispute resolution free of charge for consumers of banking industry. BMB was tasked to resolve disputes involving monetary loss arising from banking services, namely (a) excessive fees, interest, and penalty charges; (b) misleading advertisements; (c) unauthorised Automated Teller Machine withdrawals; (d) unauthorised use of credit cards and (e) unfair practice of instituting legal actions against guarantors. The mediator was required to settle a dispute within 3 months and was empowered to make awards of up to RM25,000. From 1996 to 2004, IMB resolved 2,568 cases[12] as per the following details:

Year	1997	1998	1999	2000	2001	2002	2003	2004
Cases brought forward	-	28	34	164	166	87	163	153
New cases	87	134	325	447	346	503	468	444
Cases resolved	59	128	195	445	425	427	478	411
Pending cases	28	34	164	166	87	163	153	186

In 2004, as part of BNM's initiatives to improve financial services dispute resolution mechanism under the Financial Consumer Protection Framework in its Financial Sector Masterplan[13], both the IMB and the BMB were merged into a one-stop ADR centre for the financial industry. As a result, the Financial Mediation Bureau (FMB), a company limited by guarantee was formed on 30 August 2004. With an objective to provide an ADR channel which is convenient, efficient and independent, the FMB started its operations on 20 January 2005. Similar like its 2 predecessors, the FMB continued to provide free of charge services to resolve financial disputes between 3 to 6 months in the following subject matters[14]:

11 Financial Mediation Bureau, *Annual report 2015*, (Kuala Lumpur: Author, 2016), 10 -11.
12 Financial Mediation Bureau, 11 – 13.
13 Bank Negara Malaysia, *Financial Sector Masterplan 2001-2010*, (Kuala Lumpur: Author, 2001).
14 Financial Mediation Bureau, 13 - 15.

Subject Matter of Dispute	Jurisdictional Limit (RM)
Conventional or Islamic banking services or products.	100,000
Fraud involving use of designated payment instrument or a payment channel, credit card, charge card or Automated Teller Machine (ATM) card, or a cheque.	25,000
Life insurance or family takaful claims.	100,000
Motor and fire insurance or takaful claims.	200,000
Third-party property damage insurance or takaful claims.	5,000
Other general insurance or takaful claims.	100,000

Between 2005 until 2015, FMB resolved 22,763 cases as per the following details:

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Cases brought forward	348	575	865	1166	1917	2743	3150	2540	1741	1030	615
New cases	1934	2107	2287	2337	2624	2150	2224	1919	1881	1691	1707
Cases resolved	1707	1817	1986	1586	1798	1743	2834	2718	2592	2106	1876
Pending cases	575	865	1166	1917	2743	3150	2540	1741	1030	615	446

At the same time, the FMB dynamically engaged with stakeholders in the financial industry especially associations representing industry players such as Persatuan Insurans Am Malaysia (PIAM), Life Insurance Association of Malaysia (LIAM) and Malaysian Takaful Association (MTA). Such engagements had enabled the FMB to share its observation on the nature and trend of disputes with the industry, as well as, allowed FMB to recommend best practices and proposals for the industry's consideration with a view to further improve the manner disputes are handled by them.

In 2015, the regulatory framework of FOS was established via the Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015. The Regulations came into force on 14 September 2015. The Regulations were issued by the Minister of Finance on the recommendation of BNM pursuant to section 260 of the Financial Services Act 2013 (FSA) and section 271 of the Islamic Financial Services Act 2013 (IFSA) to provide for the approval to operate FOS, obligations of an operator of FOS and BNM's oversight over an operator of FOS to ensure effective, timely and fair resolution of disputes with FSPs in connection with financial services or products offered by them. This new regulatory framework which was one of the recommendations on consumer empowerment in BNM's Financial Sector Blueprint 2011–2020[15] had led to the transformation of the FMB into the Ombudsman for Financial Services (Operator).

There were 2 main reasons for the transformation. First, to afford statutory backing to the FMB which operated for a decade on voluntary basis, contractual arrangement and merely backed by moral suasion. Secondly, to enable BNM to institute certain degree of oversight in the dispute resolution scheme in particular, the governance framework, terms of reference, resources, independence, impartiality, fairness and confidentiality, and ensure all objectives of FOS are realised. The same scheme was subsequently made available effective from 31 January 2017 for development financial institutions via the issuance of the Development Financial Institutions (Financial Ombudsman Scheme) Regulations 2016 pursuant to section 123 of the Development Financial Institutions Act 2002 (DFIA).

On 20 June 2016, the FMB changed its name to Ombudsman for Financial Services (Operator). It received an approval from BNM to be the operator of the FOS pursuant to the FSA, IFSA and DFIA. Effective from 1 October 2016, the Operator plays the role as an ADR body to assist financial consumers to resolve their disputes with FSPs who are members of the Operator. As at 15 July 2017, there are 28 licensed commercial banks, 18 licensed Islamic banks, 43 licensed insurance and takaful operators, 6 prescribed development financial institutions, 33 non-banks approved designated payment instrument issuers, 30 approved insurance and takaful brokers and 25 approved financial

15 Bank Negara Malaysia. *Financial Sector Blueprint 2011–2020*, (Kuala Lumpur: Author, 2011), 158.

advisers and Islamic financial advisers who are members of the Operator[16].

The jurisdictions, powers and duties of the Operator are governed by the FOS Regulations[17] as well as the Operator's Articles of Association and Terms of Reference (TOR). Dispute resolution process via the Operator covers a wide range of approaches, including negotiation, conciliation, mediation and adjudication[18] which shall be based on 6 basic principles namely independence, fairness and impartiality, accessibility, accountability, transparency and effectiveness[19]. Disputes which are eligible for reference to the Operator encompass the following:

Subject Matter of Dispute	**Jurisdictional Limit (RM)**
Financial services or products or Islamic financial services or products, developed, offered or marketed by a by a Member, or by a Member for or on behalf of another person, other than matter listed in rows (2) to (4) below.	250,000
Motor third party property damage insurance or takaful claims (not applicable to a Member which is a prescribed development financial institution).	10,000
Unauthorised transaction through the use of a designated payment instruments or an Islamic designated payment instruments or payment channel such as internet banking, mobile banking, telephone banking or automated teller machine (ATM).	25,000
Unauthorised use of a cheque as defined in section 73 of the Bills of Exchange Act 1949 (not applicable to a Member which is a prescribed development financial institution).	25,000

Nonetheless, the Operator may still consider a dispute which involves a monetary claim exceeding the above jurisdictional limit if the Operator, complainant and member involved in the dispute agree on 2 matters. First, to refer such dispute to the Operator and second, the monetary award may exceed the abovementioned limit. However, the Operator will not handle disputes relating to the following matters[20]:

(a) general pricing, product features, credit or underwriting decisions, or applications to restructure or reschedule a loan or financing which are commercial decisions within the discretion of a member;

(b) actuarial standards, tables and principles which a member applies to its long term insurance/takaful business (including the method of calculation of surrender values, paid up policy values and paid up policy values and the bonus rate applicable to the policy in question) for insurance or takaful claims, except guaranteed payment which are explicitly mentioned in the terms and conditions of the policy;

(c) contract of employment between a member and its officers and employees or agency matters concerning a member;

(d) dispute that has been filed in a court or arbitration or referred to arbitration or has been decided by a court or arbitrator;

(e) dispute referred to the Operator after expiry of six months from the date a member has provided its final decision in respect of a dispute;

(f) dispute that is time barred under the Limitation Act 1953, Limitation Ordinance (Sabah) (Cap. 72) or Limitation Ordinance (Sarawak) (Cap. 49);

(g) dispute that had been previously decided by the Operator (including a complaint/dispute decided

16 Ombudsman for Financial Services, "Our Members (with effect from 1 October 2016)", Ombudsman for Financial Services, <http://www.ofs.org.my/en/our_members> (accessed 15 July, 2017).

17 The Financial Services (Financial Ombudsman Scheme) Regulations 2015, the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the Development Financial Institutions (Financial Ombudsman Scheme) Regulations 2016.

18 See paragraphs 1(7) and 19 of the Terms of Reference for the Ombudsman for Financial Services.

19 See paragraph 3 of the Terms of Reference for the Ombudsman for Financial Services.

20 Ombudsman for Financial Services, "Scope (with effect from 1 October 2016)", Ombudsman for Financial Services, < http://www.ofs.org.my/en/scope> (accessed 15 July, 2017).

under the FMB) unless material new evidence is available;

(h) dispute on investment performance of a financial product except in relation to non-disclosure of facts or misrepresentation;

(i) dispute on capital market services and products offered or marketed by a member;

(j) dispute that involves more than one complainant but referred to the Operator without the consent of the other complainant, and the Operator considers it inappropriate to deal with the dispute without other complainant's consent;

(k) dispute arising from a third party bodily injury or death; and

(l) dispute relating to payment of policy moneys under life insurance policy and personal accident insurance policy or payment of takaful benefits under a family takaful certificate and a personal accident takaful certificate made in accordance with Schedule 10 of the FSA and the IFSA respectively.

The Operator operates on a "without prejudice" basis[21]. This means information and document provided for dispute settlement purposes via the Operator shall not be used in any court proceedings. Before referring any dispute to Operator, a complainant must first refer the dispute to the relevant member with which the dispute occurs for amicable settlement. If the complainant rejects the final decision of the member on the dispute or the member did not provide any response within 60 calendar days, the complainant can forward the case to the Operator for decision. Dispute must be referred to the Operator either within 6 months from the date of the final decision issued by a member on the dispute or after 60 calendar days from the date the dispute was first referred to the member but no response has been received. Nevertheless, the operator may still consider a dispute filed after the expiry of six months from the date of a final decision issued by a member on the dispute if the member does not object to the Operator accepting such a dispute or there is exceptional circumstances which warrant the Operator to accept such dispute despite that it was referred to it after the deadline.

Since the Operator is an ADR body and not a court, its procedures are inquisitorial in nature and it is not bound by evidential rules that bind the court[22]. Procedures for dispute resolution via the Operator are divided into 2 stages namely Case Management Stage and Adjudication Stage. The stages are governed by the Terms and Procedures for Case Management and the Terms and Procedures for Adjudication respectively[23].

The Case Management Stage is conducted by a case manager whose role is to encourage and facilitate dialogue, provide guidance, assist disputing parties in clarifying their interests and understanding differences, and to work towards a mutually acceptable settlement. After giving the disputing parties a reasonable opportunity to make submissions and provide document and information about the dispute, the case manager may facilitate the resolution of dispute through negotiation, mediation or conciliation process. The Case Management Stage will be completed within three months from the date of receipt of full and complete document and information from the disputing parties. A complainant may withdraw from the Case Management by giving a written notice at any time prior to the case manager issuing his Recommendation. This option however, is not available to a member.

If the disputing parties fail to reach an amicable settlement, the case manager will make a recommendation which in his view would resolve the dispute within 30 days from the date the disputing parties failed to reach an amicable settlement. If the disputing parties accept the recommendation within 30 days or by the date stipulated in the recommendation (whichever is later), the dispute is considered resolved through adoption of the recommendation. If either disputing parties does not accept the recommendation, they are not bound by it. Instead, they are free to pursue settlement through any other means including litigation at court, arbitration of referring the dispute to the second stage i.e. Adjudication Stage by an ombudsman within the latest date between 30 days from the date of the recommendation or by the date stipulated in the recommendation.

21 See paragraph 27 of the Terms of Reference for the Ombudsman for Financial Services.

22 See paragraph 28 of the Terms of Reference for the Ombudsman for Financial Services.

23 see http://www.ofs.org.my/en/alternative_dispute_resolution_documents

If the dispute is referred to the second stage, an ombudsman will be assigned by the Operator to adjudicate the dispute by way of submission of documents or by way of hearing. The appointed ombudsman will provide reasonable opportunity to the disputing parties make submissions and provide information. The ombudsman shall accept written evidence submitted by the disputing parties and may also accept any other form of evidence it deems appropriate, including taped or video evidence. The ombudsman shall adjudicate the dispute independent of the findings or the recommendation made by the case manager at the Case Management Stage. Final decision shall be issued within 14 days from the receipt of full and complete documentation from the disputing parties. During the Adjudication Stage, a complainant may withdraw his case by giving a written notice at any time prior to issuance of final decision by the ombudsman. This option however is not available to a member.

The above procedures may be summarised into the following chart[24]:

24 Ombudsman for Financial Services, "Dispute Resolution Process (with effect from 1 October 2016)", Ombudsman for Financial Services, <http://www.ofs.org.my/en/dispute_resolution_process> (accessed 15 July, 2017).

When a final decision is made by an ombudsman, such decision will only be binding on a member if the complainant agrees to it[25]. If the complainant refuses to accept the final decision, the complainant is not bound by it and is free to pursue his rights through other means he deems fit, including via court or arbitration. A member shall comply with any award made by the ombudsman within 14 days from the date the complainant accepts the award. Failure by a member to comply with any award within the stipulated timeline will result in imposition of late payment charges against the member. The award granted by an ombudsman may include:

(a) a monetary award of such amount as the ombudsman considers fair compensation for any direct loss subject to the monetary limit set out in the TOR;

(b) a monetary award of such amount exceeding the monetary limit set out in the TOR provided that the Operator, the complainant and the member involved in the dispute agree;

(c) a direction to require a member to take certain steps in relation to a dispute as the ombudsman considers appropriate;

(d) a direction to require the member to repay the actual cost incurred by the complainant in relation to a dispute, subject to a maximum of RM1,000.00 per dispute; or

(e) such other relief as provided in the TOR.

For smooth transition from the FMB to the FOS –

(i) if a dispute was registered under the FMB and remains outstanding on 1 October 2016, it will be transferred to the FOS on 1 October 2016 but will be considered based on the TOR of the FMB; and

(ii) if a dispute was registered and resolved under the FMB before 1 October 2016 and subsequently reopened by the Operator due to availability of new material evidence on or after 1 October 2016, such dispute will be considered based on the TOR of the FMB; and

(iii) if a dispute was registered to the FOS on or after 1 October 2016, the TOR will apply.

From 2015 to 2016, the Operator resolved 3440 cases[26] as per the following details:

	Under Predecessor Scheme		Under FOS
Year	**2015**	**1 Jan 30 Sept 2016**	**1 October until 31 December 2016**
Cases brought forward	615	446	-
New cases	1707	1206	382
Cases resolved	1876	1527	37
Pending cases	446	125	345

3. Financial Ombudsman Scheme from Syariah Perspective

Islam is beyond *'aqidah* (spiritual belief) and *'ibadah* (act of worship) which centered on relationship between man and god. Islamic teachings cover multiple aspects of human life including relationship between fellow human beings both individually and collectively. Being a comprehensive code of conduct and realizing that occurrence of conflict from human interactions is inevitable, Islam imparts various methods of dispute management with the main aims of preserving and restoring peace as well as ensuring dignity of disputing parties remain intact and their rights preserved.

Peaceful settlement of disputes is a segment of Syariah. In fact, the word "Islam" itself is one of the derivatives of the word "*salam*" which means peace. Other than *qada'* (judiciary) and *tahkim* (arbitration), *sulh* (amicable settlement) is one of the means of resolving disputes recommended by Islam. This is evidenced from repetitive appearance of the word "*sulh*" and its derivatives in the Holy Quran. Among them is in Surah Al-Hujraat verse 9-10[27] where Allah says:

25 See paragraph 34(23) – 34(24) of the Terms of Reference for the Ombudsman for Financial Services.

26 Ombudsman for Financial Services, *Annual Report 2016*, (Kuala Lumpur: Author, 2016), 37.

27 Abdullah Yusuf Ali, *The meaning of the Holy Quran* (USA: Amana Publications, 2006), 11th edition.

> 9. If two parties among the Believers fall into a quarrel, **make ye peace between them**: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just).
>
> 10. The Believers are but a single Brotherhood: **So make peace and reconciliation between your two (contending) brothers**; and fear Allah, that ye may receive Mercy.

Article 1531 of the Ottoman Code, *Al-Majallah Al-Ahkam Al-Adaliyyah* defines "*sulh*" as "*a contract removing a dispute by consent. And it becomes a concluded contract by offer and acceptance*". Al-Jurjani in his writings, Taarifat defines the term as, "*An accord to end a dispute*"[28]. Unlike *qada'* and *tahkim*, *sulh* does not involved an authoritative third party whose decision is binding on the disputing parties. Instead, an independent third party in *sulh* would normally proposes a compromise acceptable to all disputing parties for them to concur. Once all disputing parties agreed to the compromise, they will enter into a binding contract to record the settlement terms. *Sulh* in modern world is referred via various terms such as conciliation, negotiation, compromise and mediation.

Other than the above mentioned Quranic verses, the legality of *sulh* as a settlement of dispute mechanism in Islam is also supported by numerous *hadith* (tradition) of the Holy Prophet Muhammad. The practice of *sulh* was personally demonstrated by the Holy Prophet before he was appointed as a prophet when he resolved a dispute between Quraish of Makkah in placing the Hajarulaswad to its rightful place at the cornerstone of Kaabah following its reconstruction after it was damaged by flood. Another sample on the application of *sulh* by Prophet Muhammad after he had become a prophet could be seen in the making of the Hudaibiyah Treaty. It was narrated by Al-Bara Bin Azid that when the Holy Prophet made a peace treaty with the people of Hudaibiyah, Ali Bin Abu Talib wrote on the treaty document, "*Muhammad, Rasulullah* (Allah's Apostle)". The pagans disagreed and asked to neglect the word "Rasulullah" from the document. The Holy Prophet then asked Ali to delete the word, but Ali refused to do so. Eventually, the Holy Prophet himself erased the word "Rasulullah" and subsequently made peace with the people of Hudaibiyah.[29]

Authority from the conduct of sahabah may be seen from the words of the second Righteous Caliph, Umar Ibn Al-Khattab who was reported to say, "*Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful*". In fact, he favoured *sulh* compared to *qada'* based on his sayings, "*Return the disputants till the conciliation is achieved. Verily, litigation causes rancour between disputants*". This is because in *qada'* (and also *tahkim*), the disputing parties are bound by the decision of a *qadi* (jugde) or a *hakam* (arbitrator) which leads to a win-lose situation. Hence, the losing party will often feel dissatisfied with the decision which left the litigants in a heated relationship. This does not happen in *sulh* where a dispute is settled based on mutual will of the disputing parties and results in a win-win scenario. The nature of settlement via mutual consent also put an immediate end to a dispute without any chance of appeal. This is also different from *qada'* which provides the losing party, an opportunity to appeal at a higher court which results in prolonging the period of dispute.

Additionally, *sulh* is conducted discreetly compared to *qada'* which usually takes place in an open court. Via *sulh*, disputes are kept confidential from public knowledge and the disputing parties are saved from *'aib* (shame). It is for these same reasons in our view that *sulh* is the recommended dispute resolution mechanism for marital disputes as found in Surah An-Nisa' verse 128[30]:

> If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they

28 Said Bouheraoua, "Foundation of Mediation in Islamic Law and Its Contemporary Application" in *Mediation in Malaysia: The Law and Practice*, (Petaling Jaya, Selangor: LexisNexis Malaysia Sdn Bhd, 2010), 385-396. ISBN 978-967-5371-84-4.

29 Aishath Muneeza, "Is Conventional Alternative Dispute Resolution to Islamic Law?", *Malayan Law Journal*, vol. *4*, (2010): xcvii.

30 Abdullah Yusuf Ali, *The meaning of the Holy Quran* (USA: Amana Publications, 2006), 11th edition.

> arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if ye do good and practise self-restraint, Allah is well-acquainted with all that ye do.

Sulh is conducted in much more relaxed and flexible procedures compared to *qada'*. In *qada'*, a judge is appointed and determined by the state and exercise the authority vested in him by the state. In *sulh*, a mediator or conciliator is appointed based on mutual agreement of the disputing parties. The terms of reference of the mediator or conciliator are also determined based on the parties' agreement. In addition, *sulh* is not subject to the strict rule of evidence as adopted by the court procedures. Although the process of appointment of *hakam* in *tahkim* and mediator or conciliator in *sulh* is generally similar, the mediator or conciliator in *sulh* does not make any decision on behalf of the disputing parties. Instead, he only encourages the parties to negotiate and facilitates them to agree on a meeting point. Unlike *qada'* which focuses on legal right, *sulh* operates on the basis of compromise with an ultimate aim of solving dispute without jeopardizing the parties' relationship.

A *sulh* agreement concluded at the end of *sulh* process is binding on the disputing parties based on the Quranic verse in Surah An-Maidah verse 1 where Allah says, "*O ye who believe! fulfil (all) obligations*"[31]. This is further supported by the hadith of the Holy Prophet Muhammad narrated by Abu Hurairah and compiled by Abu Dawood, "*Muslims are on (i.e. stick to) their conditions*". Article 1556 of Al-Majallah also echoed to the same effect[32]:

> When a compromise is complete, one of the parties alone cannot go back from it. And the plaintiff by the compromise, becomes the owner of the price of the compromise, and there no longer remains a right of action. And the defendant cannot demand back from him the price of the compromise.

Based on the above discussion, it is clear that the wide–ranging scope of *sulh* in Islam includes settlement of dispute via the Operator under the FOS be it through negotiation, conciliation or mediation during the Case Management Stage or through ombudsman during the Adjudication Stage.

4. Criticism to the Financial Ombudsman Scheme and the Ombudsman for Financial Services

While we appreciate the initiative by BNM to offer alternative dispute resolution which are flexible, free of charge and timely to financial consumers, here we discuss criticisms to the FOS and the Operator and suggestions for purposes of improvement.

First, the name "ombudsman" adopted by the Operator does not accurately reflect the actual processes of dispute resolution handled by the Operator and hence, may be misleading to consumers. This is because as explicitly provided in paragraphs 1(7) and 19 of its TOR, dispute resolution process via the Operator covers a wide variety of approaches, including negotiation, conciliation, mediation and adjudication. As discussed above, the Operator's procedures may be divided into two stages i.e. the Case Management Stage and Adjudication Stage. Disputes which are resolved through negotiation, mediation or conciliation, or resolved via adoption of case manager's recommendation during the first stage do not have to encounter the ombudsman stage. In fact, based on the data from 1 October until 31 December 2016, only 1 out of 37 cases resolved via the Operator under the new scheme was resolved in the second stage and this represent only 3% of the total case resolved by the Operator[33]. In this respect, we suggest the Operator to adopt a name which more accurately represent actual processes of dispute resolution handled by the Operator to avoid confusion by the public.

Second, the procedures of the Operator especially during the Adjudication Stage may be seen as

31 Abdullah Yusuf Ali, *The meaning of the Holy Quran* (USA: Amana Publications, 2006), 11th edition.

32 *Al-Majallah Al-Ahkam Al-Adaliyyah*

33 Ombudsman for Financial Services, 36 and 47.

one-sided to the advantage of the complainant. This is because the operating expenses of the Operator are jointly borne by the members via payment of annual levy, members are required to pay case fees[34] and complainants use the Operator's services free of charge. However, complainants are given two advantages which are not given to members:

(a) a complainant may withdraw from a case management stage before the case manager issue his recommendation and withdraw from an ombudsman stage at any time before final decision but a member does not have similar option.

(b) whether or not a final decision made by an ombudsman is binding to the disputing parties depend solely at the choice of the complainant. Members are force to accept the choice made by complainants.

Thirdly, the choice accorded to complainants on whether to accept a final decision of an ombudsman during the second stage or otherwise would potentially discourage early settlement at the Case Management Stage. This is because the complainant has nothing to lose in the sense that every stage of dispute settlement process i.e. case management, recommendation and ombudsman via the Operator is within their control. This will encourage complainants to "try their luck" with a view of obtaining the most advantageous solution for themselves at the next stage given that they do not have to surrender to a binding decision even at the final Adjudication Stage. Indirectly, this will also lead to waste of time and resources if finally, complainants withdraw from the process for his own convenience or reject any settlement attempt in all stages.

In respect of the second and third criticisms, there may be a need to create a mechanism to balance the position of both parties so that the whole processes are not tilt too much to the complainants' advantage. For example, amendment to the TOR to require the complainants to pay certain fees if the complainant withdraw from the Case Management or Adjudication Stage without concrete basis or refuse to accept the final decision of the ombudsman. This would discourage complainant from abusing the process by shopping for the most advantageous solution through the three phases (i.e. case management, recommendation and ombudsman) procedures of the Operator.

5. Conclusion

By nature, conflicts in whatever form among human beings are unavoidable. The more intricate rules and situation, more challenging to resolve the conflict. Conflicts arising out of commercial and banking transactions are relatively complex and thus require some expertise to resolve it justly and speedily. Orderly, timely and pacific settlement of financial disputes is important to preserve public confidence in the financial system and prevent disruption to their financial activities. Settlement of financial disputes via the Operator under the FOS is a modern, Syariah-compliant, statutory sanctioned ADR which confers various benefits to financial consumers compared to other ADR offered by other institution. Its objective to provide a simple and speedy mechanism for dispute resolution free of charge for FSC seems to have been accomplished to a large extent. Statistical data shows consistent reference of financial disputes to the Operator for settlements over the years. The success is evident from the number of pending cases which been steadily on the decrease and the increasing number of cases which have been resolved year by year. This indicates continuous confidence of the public in the role and effectiveness of the Operator in settling disputes. Though there are some areas which are open for improvement, the overall process of the Operator facilitates the orderly settlement of financial disputes between financial consumers and FSP efficiently and effectively.

The FOS is an example of a modern ADR institution, which has been designed to accommodate the needs of a particular industry, imbued with Islamic principles and value. Through the transformation of the FMB into the FOS, it is hoped that the oversight role performed by BNM over the scheme and the Operator would further enhance public preference to the scheme over other ADR offered by other institution. It is also hoped that the transformation would encourage the Operator to continue to improve its services and quality, and expertise of its case manager and ombudsman for the benefit

34 See paragraphs 44 - 49 of the Terms of Reference for the Ombudsman for Financial Services.

of not only financial consumers but also FSP so that the Operator would continue to be one of the modern trends in effective dispute resolution.

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'*EFFECTIVITÉS*':

AN IMPERATIVE LEGAL PRINCIPLE IN RESOLVING THE SENKAKU/DIAOYU ISLANDS DISPUTE

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ABSTRACT

Since 1971, China, Taiwan and Japan have disputed over claiming sovereignty to the Senkaku/Diaoyu Islands in the East China Sea. These islands have been the subject matters of dispute due to the existence of oil deposits underneath and also being strategic location for exploitation of energy resources in the region. China claims historic title over the Diaoyu Islands as these have been *inherent part of it since ancient times. It further contends that islands were seized by Japan during the 1895 Sino-Japan War. On the other hand, Japan concedes that it had occupied the Senkaku Islands since 1895 while these islands were terra nullius and totally uninhibited prior to that time. Besides, China had never challenged Japanese exercise of sovereignty over these islands until 1971 in which the United Nations reported to have substantial oil and gas reserves in the area. As far as contemporary international adjudication is concerned, a state has immense prospect of having title over the territory if it can prove the exercise of state sovereignty and 'effective control' (effectivités) over the disputed territory. This is because international courts and tribunals, in practice, predominantly draw attention solely on the element of effective control in deciding the territorial and boundary disputes in spite of having various modes and concepts of acquisition of territory under international law. Accordingly, this paper intends to analyse critically the judicial interpretation and application of the principle of 'effectivités' by the international courts and tribunals in resolving inter-state territorial and boundary disputes. In addition, it applies the said principle to the Senkaku/Diaoyu Islands dispute and finally offers some feasible solutions to address the dispute among the parties in peaceful manners under the purview of international law.*

Keywords: *East China Sea Dispute, Senkaku/Diaoyu Islands, State Territory, Effectivités, Effective Control*

I. INTRODUCTION

Since 1971, China, Taiwan and Japan have disputed over claiming sovereignty to the Senkaku/Diaoyu Islands in the East China Sea. These islands have been the subject matters of dispute due to the existence of oil deposits underneath and also being strategic location for exploitation of energy resources in the region. The group of islands consists of five uninhabited islands and three barren rocks with approximate total surface area of 6.3 km² situated in the East China Sea.[1] These islands are roughly located 170 km from the Japanese Ishigaki Island, 370 km from the mainland China and 180 km from the coast of Taiwan.[2] Each island has its own name both in Japanese and Chinese as follows: Kuba-shima, Kobi Sho or Huangwei Yu (Lat: 25° 58'/Long: 123° 41'); Taisho-jima, Akao-sho or Chiwei Yu (Lat: 25° 55'/Long: 124° 33'); Uotshuri-shima or Diaoyu Dao (Lat: 25° 45'/Long: 123° 29'); Kita Kojima or Beixiao Dao (Lat: 25° 45'/Long: 123° 33') and Minami Kojima, Minami-ko-shima or Nanxiao Dao (Lat: 25° 44'/Long: 123° 34'). Three rocks are also named in both languages as Okino Kitaiwa or Dabeixiao Dao; Okino Minamiiwa or Dananxiao Dao and Tobise or Feilai Dao respectively.[3]

Nevertheless, in Chinese, the whole group of islands is generally called as Diaoyu Islands which originates from the biggest island among them. Taiwan prefers to name these islands as "Diaoyutai" against "Diaoyu-dao" as called by the mainland China. Both terminologies share more or less the same meaning, i.e., "Diaoyu-dao" means "fishing island" whereas "Diaoyutai" means "fishing platform". In 1843, British explored the islands and named the group as the "Pinnacle Islands". In 1900, the Japanese explorer Tsune Kuroiwa renamed the islands as "Sento Shoto" in Japanese language by following the British translation of the "Pinnacle Islands". The word "Senkaku" and "Sento" share the same meaning in Japanese language. These mean the "sharp point" or "peak" as in the case of the English word "Pinnacle" means the "top of a mountain" or "peak".[4]

Dispute concerning the sovereignty over the Senkaku/Diaoyu Islands between China, Taiwan and Japan arose mainly due to the existence of oil deposits underneath. **China as well as Taiwan claim historic title over the Diaoyu Islands as these have been** integral part of China since ancient times. Furthermore, it is contended that islands were seized by Japan in the 1895 Sino-Japanese War. On the other hand, Japan concedes that it had occupied the Senkaku Islands since 1895 while these islands were *terra nullius* and totally uninhibited prior to that time. Besides, China and Taiwan had never challenged Japanese sovereignty over these islands until 1971 which was after the United Nations (UN) reported to have substantial oil and gas reserves in the area.

As far as contemporary international adjudication is concerned, a state has immense prospect of having title over the territory if it can prove the exercise of state sovereignty and 'effective control' (*effectivités*) over the disputed territory. Although there are several modes and legal principles of acquisition of territory under international law, in practice, the international territorial dispute arbitration, the Permanent Court of International Justice (PCIJ) and the International Court of Justice

1 Steven Wei Su, "The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update," *Ocean Development & International Law* 36 (2005): 46.

2 Alfred Soons and Nico Schrijver, "What does international law say about the China-Japan dispute over the diaoyu/senkaku islands?" (Briefing paper, The Hague: Institute for Global Justice, December 3, 2012): 3.

3 Daniel Dzurek, "The Senkaku/Diaoyu Islands Dispute," (October 18, 1996), Accessed April 03, 2013. http://www-ibru.dur.ac.uk/resources/docs/senkaku.html.

4 See Martin Lohmeyer, "The Diaoyu / Senkaku Islands Dispute: Questions of Sovereignty and Suggestions for Resolving the Dispute" (Master Thesis., the Faculty of Law, University of Canterbury, 2008): 15-16; Steven Wei Su, "The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan," *Chinese Journal International Law* 3 (2004): 385.

(ICJ) mainly focused on the element of 'effective control' in deciding territorial and boundary disputes.[5] It can be seen from decisions of the international courts and tribunals in the following cases, namely, *Island of Palmas*;[6] *Clipperton Island Arbitration*;[7] *Legal Status of Eastern Greenland*;[8] *Minquiers and Ecrehos*;[9] *Frontier Dispute Case*;[10] *Land, Island and Maritime Frontier Dispute*;[11] *Land and Maritime Boundary Case*;[12] *Pulau Ligitan and Palau Sipadan*;[13] and, *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.[14] Accordingly, this paper intends to analyse critically the judicial interpretation and application of the principle of '*effectivités*' by the international courts and tribunals in resolving inter-state territorial and boundary disputes. Furthermore, it applies the said principle to the Senkaku/Diaoyu Islands dispute and finally offers some feasible solutions to address the dispute among the parties in peaceful manners in accordance with international law.

II. HISTORICAL BACKGROUND OF THE SENKAKU/DIAOYU ISLANDS

The islands were first recorded in China since 1221 AD[15] although Chinese claims to the Diaoyu Islands dated back to 1372 AD. During the reign of Ming Dynasty (1368-1644), the Ryukyu kingdom, of which territory includes from Amami to the Yaeyama islands, was tributary to the Chinese Emperor. Such tributary relations with China continued throughout the Ming and Qing Dynasty (1644-1912).[16] The Chinese Emperors sent approximately twenty-four investiture missions to the Ryukyu kingdom during 1372-1879.[17] In 1874, the last mission was dispatched to the vassal state which was two years after the Japanese annexation of the kingdom.

In 1372, the first imperial envoy named Yang Zai was despatched followed by a total of ten before the mission of Chen Kan in 1532. However, all these records were lost due to a fire in the Fujian archives and thus Chen Khan records to the Ryukyu kingdom became the oldest ever existed to prove Chinese claims to the Diaoyu Islands.[18] In the records, Chen Kan used the name "Diaoyu Yu" by stating that Kume Hill was under the reign of the Ryukyu Kingdom. The boundary of the Ryukyu Kingdom end at the Kume Hill and therefore the Diaoyu Islands located within the vicinity of China.[19] In 1403, the Shunfeng Xiangsong Guide Book detailed that the Diaoyu Islands could be used for refuelling wood and drinking water.

In 1561, Guo Rulin led an investiture mission to the vassal state. It was recorded that the boundary beyond Kume Hill was under the rule of Ryukyu Kingdom and the Diaoyu Islands - including Chiwei Island - were considered to be part of China.[20] In the 16th Century, Diaoyu Tu and Chi Yu were used as

5 See Malcolm Shaw, *Title to Territory: the Library of Essay in International Law* (London: Routledge, 2005), xix.

6 *Island of Palmas Case* (Netherlands v. USA) (1928) 2 R.I.A.A. 829.

7 *Clipperton Island Arbitrarion* (France v. Mexico) (1931) 2 RIAA 1105; (1932) 26 AJIL 390; (1932) 6 ILR.

8 *Legal Status of Eastern Greenland Case* (Norway v. Denamrk) PCIJ Rep Ser. A/B (1933), No. 53.

9 *Minquiers and Ecrehos Case* (1953) ICJ Rep. 47.

10 *Frontier Dispute Case* (Burkina Faso v. Mali) (1986) ICJ Rep 554.

11 *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua Intervening) (1992) ICJ Rep 351.

12 *Land and Maritime Boundary Case* (Cameroon v. Nigeria: Equatorial Guinea Intervening) (2002) ICJ Rep 303.

13 *Sovereignty over Pulau Ligitan and Palau Sipadan Case* (Indonesia v. Malaysia) 2002 ICJ Rep 625.

14 *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore) General List No. 130, Accessed April 03, 2013. http://www.icj-cij.org/docket/files/130/14492.pdf.

15 Unryu Suganumu, *Sovereign Rights and Territorial Space in Sino-Japanese Relations: Irredentism and the Diaoyu/Senkaku Islands* (University of Hawaii Press, 2000), 42.

16 See Lohmeyer, "The Diaoyu / Senkaku Islands," 47.

17 Han-yi Shaw, "The Diaoyutai/Senkaku Islands Dispute: Its History and An Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan" (Occasional Papers/Reprinted Series in Contemporary Asian Studies, Number 3, 1999): 43.

18 Kiyoshi Inoue, "Japanese Militarism & Diaoyutai (Senkaku) Island – A Japanese Historian's view," Accessed July 28, 2017. http://www.skycitygallery.com/japan/diaohist.html.

19 See Lohmeyer, "The Diaoyu / Senkaku Islands," 48.

20 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 46.

part of China's coastal defence system.[21] In 1561, Zheng Ruozheng mentioned in his defence manual that the Diaoyu Islands were appurtenant to the Fujian garrison.[22] In 1576, Xiao Chong recorded on his mission to the Ryukyu Kingdom that it took days to enter into Chinese territory after passing the Kume Hill.[23] Thus, it is obvious that Xiao Chong regarded the area after passing the Kume Hill was under Chinese rule.

In 1606, Xia Ziyang explicitly expressed in his record to the vassal state that the Diaoyu Islands drew the boundary line between China and the Ryukyu Kingdom.[24] In 1663, Zhang Xueli led the first investiture mission to the Ryukyu Kingdom during the Qing Dynasty. Zhang Xueli's records did not entail any information about the Diaoyu Islands as he himself lost the way to the vassal state.[25] In 1683, Wang Chi who executed the Ryukyu's request for an investiture mission recorded that in the evening after their arrival to the Chiwei Island, they celebrated ritual to the sea god by scarifying rice, live pigs and sheep in which they believe the boundary between China and another country. Thus, this record appears to recognise the area near Chiwei Island which is one of the disputed Islands to be the boundary limit between China and the Ryukyu Kingdom.

In 1709, Xu Baoguang also recorded upon return from his mission that Kume Hill was regarded as the southwest boundary between China and the Ryukyu Kingdom.[26] In 1719, Xu Baoguang published a map of the Ryukyu Kingdom depicting all its thirty-six islands without any of the Diaoyu islands. In 1755, Zhou Huang recorded the Diaoyu Islands as practical navigational aids on his mission to the Ryukyu Kingdom.[27]

In the 18th Century, most of the Japanese scholars believed that the Senkaku Islands belonged to China.[28] In 1708, Cheng Shuntse stated in his booklet titled General Guide Book for Navigation that the Kume Hill is the western boundary of the Ryukyu Kingdom.[29] Similarly, Hayashi Shifei, a Japanese geographer, expressed that the Ryukyu Kingdom was composed of thirty-six islands without including the Diaoyu Islands. In 1785, Lin Tzu Ping, a Japanese cartographer, drew a map of the Ryukyu Kingdom in which the Diaoyu Islands were considered as part of Chinese territory.

In the Japanese context, the Ryukyu Kingdom became its tributary starting from year 1609 following the Japanese subjugation to the vassal state during the waning of the power of Ming Dynasty. Since then, the Ryukyu Kingdom was a tributary state to both countries, i.e., China and Japan.[30] In 1872, the Japanese government completely occupied the Ryukyu Kingdom under the jurisdiction of the Foreign Ministry and forced it to cut off tributary relationships with the Chinese Emperor. In 1876, the jurisdiction of the former Ryukyu independent kingdom was delegated to the Japanese Home Secretary.[31] In 1881, after the mediation held by Ulysses S. Grant, the former President of the United States (US), China agreed to the Japanese proposal in which from the Okinawa Islands to the all northern territories to be Japanese and all the territories belonging to Miyako-Yaeyama islands to be Chinese. The Diaoyu Islands were not even the subject matter of that negotiation and they were considered as Chinese territory *per se*.[32]

In 1884, Koga Tatsushiro, a native of Fukuoka Prefecture, discovered the Senkaku Islands for Japan and tried to lease the islands from the government of Okinawa prefecture, the Ministry of Home Affairs, the Ministry of Agriculture and Commerce. The application was refused on the ground that it was not clear whether the islands belonged to the Japanese Empire. Hence, at that time, the title

21 Ibid., 56.

22 Tao Cheng, "The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition," *VJIL* 14 (1974): 256.

23 Suganumu, *Sovereign Rights*, 54.

24 See Lohmeyer, "The Diaoyu / Senkaku Islands," 50.

25 Suganumu, *Sovereign Rights*, 71.

26 Ibid., 76.

27 See Lohmeyer, "The Diaoyu / Senkaku Islands," 56.

28 See Ibid.

29 Cheng, "The Sino-Japanese," 256.

30 See Lohmeyer, "The Diaoyu / Senkaku Islands," 53-57.

31 Man-houng Lin, "The Ryukyu and Taiwan in the East Asian Seas: A Longue Durée Perspective," Accessed April 07, 2013. http://www.japanfocus.org/products/topdf/2258.

32 Inoue, "Japanese Militarism."

of the islands was uncertain for Japan.[33] The Governor of the Okinawa Prefecture requested to annex the Senkaku Islands as part of his administration to the central government in 1885, 1890 and 1893 respectively.[34] On the other hand, in 1893, the Chinese Empress Dowager Cixi granted the Diaoyu Islands to Sheng Xuanhuai who was the Chief Minister of the Court of Imperial sacrifices and also a businessman in the pharmaceutical sector of that time.[35]

On 1st August 1894, the Sino-Japanese War broke out and China lost its territory in Taiwan as well as on the Liaodong peninsula as the Chinese military was defeated by the Japanese.[36] In the same year, the central government reacted to the third submission and conferred the islands to the Okinawa Prefecture. On 14th January 1895, the Japanese government eventually instructed the prefecture to erect landmarks on the islands.[37] Nonetheless, the Cabinet decision did not mention anything about the Chiwei Island.[38] On 17th April 1895, China and Japan signed a peace treaty titled "Treaty of Shimonoseki" in which Taiwan was transferred to Japan together with all islands belonging to it.[39] Nevertheless, no precise word mentioned in the said peace treaty pertaining to the Senkaku/Diaoyu Islands.[40]

In 1896, Koga Tatsushiro ranted the islands (Uotshuri-shima, Kuba-shima, Kita Kojima and Minami Kojima) for thirty years from the Japanese government. He invested in the development of these islands and built houses, wharves, reservoirs, drainage, sanitary facilities, etc. In 1909, the islands already had a population of 248 people forming 99 families altogether.[41] After his death in 1918, his son Zenji Koga bought Uotshuri-shima with the price of 1.825 Yen, Kuba-shima with 247 Yen, Minami Kojima with 47 Yen and Kita Kojima with 31.5 Yen.[42]

In 1919, a Chinese vessel carrying thirty-one fishermen and their families suffered breakdown and the incident compelled them to take refuge on the main Diaoyu Island. Later, they were rescued by the Japanese from Ishigaki Village.[43] On 20th May 1920, Feng Mian, the Consul of the Republic of China (Taiwan) in Nagasaki issued a letter of appreciation to the Japanese officials for the rescue efforts.[44] These islands were under private ownership until 1941 marking the last Japanese activity on the islands.

In 1943, the "Cairo Declaration" was issued and it mentioned that Japan shall return all territories occupied since the beginning of the World War I to the Republic of China (Taiwan).[45] Nonetheless, the declaration does not specifically spell out anything about the Diaoyu Islands. In 1945, the three victorious nations in the World War II convened the Potsdam Conference which declared that:

> "The terms of the Cairo Declaration shall be carried out and Japanese Sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine".[46]

33 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 30.

34 Toshio Okuhara, "The Territorial Sovereignty over the Senkaku Islands and Problems on the Surrounding Continental Shelf," *Japan Annual of International Law* 11 (1967): 98.

35 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 60-62.

36 Ian Nish, "An Overview of Relations between China and Japan, 1895-1945," in *China and Japan: history, trends, and prospects*, ed. Christopher Howe. (Oxford: Oxford University Press, 1995), 23.

37 Ministry of Foreign affairs of Japan, "The Basic View on the Sovereignty over the Senkaku Islands," (May 08, 2013), Accessed July 29, 2017. http://www.mofa.go.jp/region/asia-paci/senkaku/basic_view.html; Okuhara, "The Territorial Sovereignty," 98.

38 See Lohmeyer, "The Diaoyu / Senkaku Islands," 65-67.

39 Choon-Ho Park, "Oil under Troubled Waters: The Northeast Asia Sea-Bed Controversy," *Harvard International Law Journal* 14 (1973): 250.

40 See Lohmeyer, "The Diaoyu / Senkaku Islands," 67.

41 Dai Tan, "The Diaoyu/Senkaku Dispute: Bridging the Cold Divide," *Santa Clara J. Int'l L.* 5 (2006): 146, accessed July 29, 2017, http://digitalcommons.law.scu.edu/scujil/vol5/iss1/8/.

42 Suganumu, *Sovereign Rights*, 119; Lohmeyer, "The Diaoyu / Senkaku Islands," 70.

43 Okuhara, "The Territorial Sovereignty," 100.

44 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 32-33.

45 National Diet Library, "Cairo Declaration," (2003), Accessed April 03, 2013. www.ndl.go.jp/constitution /e/etc/c03.html.

46 Caleb Wan, "Security Flashpoint: International Law and the Islands Dispute in the Far East," *The New Zealand*

After the Japanese unconditional surrender in the WWII on 2nd September 1945, the Japanese signed the instrument of surrender at Tokyo Bay and accepted the provisions set forth in the declaration issued at Potsdam. In this way, both the Cairo Declaration and the Potsdam Declaration became part of the conditions for the Japanese surrender. On 29th January 1946, the UN confined Japanese territory in Decree 667 to the five major islands including the Ryukyu Islands north of 30° degree of north latitude which excluded the Senkaku/Diaoyu Islands from being part of the Japanese territory.[47]

During the US occupation from 1945-1951, the Supreme Commander of the Allied Powers (SCAP) was the sole governing authority over Japan.[48] In April 1947, the US State Department published the book "Atlas and Gazetteer" in which the Senkaku Islands were described as part of Yaeyama County in Okinawa prefecture. In the same year, on the other hand, the SCAP published a map which included the Senkaku Islands as an integral part of Taiwan.[49] The US included the Senkaku Islands as part of the administration of the Yaeyama Islands under Article 1(d) Ordinance No. 22.[50] The final peace agreement with Japan could not settle until 1951 due to the separate governments claiming for China, i.e., the People's Republic of China (mainland China) and the Republic of China (Taiwan).[51] In 1952, the San Francisco Peace Treaty, signed between Japan and 48 allied signatories, in which Japan agreed that: "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system with the United States as the sole administering authority... Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."[52] Accordingly, the islands were placed under the US administrative control and trusteeship. Although the San Francisco Peace Treaty does not expressly include the Senkaku/Diaoyu Islands, in 1953, the proclamation of the SCAP describes the islands as being controlled by the US[53] and the US air-force used two of the islands for training.[54] The US Navy and Japanese Maritime Self-Defence Forces jointly patrolled the waters around the islands. Furthermore, the US Navy made an annual rental payment of $11,000 to Zenji Koga, the Japanese private owner of the Uotshuri-shima Island, as compensation for using the island until 1978.[55]

III. EMERGENCE OF THE SENKAKU/DIAOYU ISLANDS DISPUTE

Before the discovery of oil reserve underneath, these uninhabited islands have less economic value except some fishing and feather collecting activities[56] with some military significance as a strategic location in terms of national security.[57] In 1969, geologists from the Republic of Korea and the Philippines formed a Committee for Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) under the sponsorship of the UN Economic Commission for Asia and the Far East (ECAFE). The outcome of the survey conducted by the aforesaid committee revealed that the continental shelf

Postgraduate Law E-Journal 2 (2005): 42, accessed July 30, 2017, https://cdn.auckland.ac.nz/assets/nzpglejournal/Subscribe/Documents/2005-2/1%20Caleb%27s%20Final.pdf.

47 See Lohmeyer, "The Diaoyu / Senkaku Islands," 73.

48 Robert E. Ward, "The Legacy of Occupation," in *The United States and Japan*, ed. Herbert Passin. (US: Columbia Books, Inc., 1975), 31.

49 Jean-Marc Blanchard, "The US Role in the Sino-Japanese Dispute over the Diaoyu (Senkaku) Islands, 1945-1971," *The China Quarterly* 161 (2000): 103.

50 Okuhara, "The Territorial Sovereignty," 100.

51 National Diet Library, "Cairo Declaration."

52 The San Francisco Treaty 1951, Article 3; See Lohmeyer, "The Diaoyu / Senkaku Islands," 76.

53 Seokwoo Lee, "Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands," *Boundary and Territory Briefing* 3 (2002): 11.

54 Okuhara, "The Territorial Sovereignty," 101.

55 Blanchard, "The US Role," 95-123.

56 Yoshiro Matsui, "International Law Of Territorial Acquisition And The Dispute Over The Senkaku (Diaoyu) Islands," *The Japanese Annual of International Law* 40 (1997): 3.

57 Helena Legarda Herranz, "Diaoyu or Senkaku? Strained Relations in the East China Sea," *European Institute for Asian Studies – EIAS* 1 (September 2012).

between Taiwan and Japan may be one of the most prolific oil reservoirs in the world.[58] A 200,000 sq km next to the Senkaku/Diaoyu Islands was predicted to be the vital part of the oil reservoirs.[59] This discovery triggered the dispute concerning the sovereignty over the islands among three claimants, i.e., China, Taiwan and Japan.[60]

3.1 Chinese Claims

Chinese claims to the Islands are mainly based on the historic title.[61] It asserts undisputed sovereignty over the Diaoyu Islands as its historical records of the ownership of the islands dated back to 1372 AD.[62] Geographically, the islands situate on the Chinese continental shelf and accordingly Chinese fishermen exploited waters surrounding the islands since time immemorial.[63] It has been exercising sovereignty over the islands until those were annexed by the Japanese together with the island of Taiwan (Formosa) under the Treaty of Shimonoseki. After the WWII, Japan returned all occupied territories and islands to China except the Diaoyu Islands which the US arbitrarily and wrongfully annexed under the Nansei Islands in accordance with San Francisco Treaty in which China was not a party. In 1972, the US transferred its administrative powers over the islands to Japan. China has consistently been protesting against such transfer together with the Taiwanese authorities.[64]

3.2 Taiwanese Claims

Taiwanese claims are essentially similar to that of China. It claims that the Diaoyu Islands belonged to the island group of Taiwan historically.[65] The islands were annexed by the Japanese together with the island of Taiwan (Formosa) under the Treaty of Shimonoseki.[66] After the WWII, according to the Peace Treaty of 1952 between Japan and Taiwan, all treaties and agreements concluded before December 1941 were regarded as null and void. The Treaty of Shimonoseki concluded in 1895 was void and therefore the Diaoyu Islands were necessary to be transferred to Taiwan same as other occupied territories.[67]

3.3 Japanese Claims

Japan claims sovereignty over the Senkaku Islands which had become part of Okinawa prefecture since their formal prescription on 14th January 1895. It asserts that the islands were totally uninhabited and thus were *terra nullius* at that time of its occupation on the basis of repeated surveys of these islands between 1885 and 1895. Accordingly, occupation of *terra nullius* was lawful at that point of time.[68] Furthermore, it has been exercising sovereignty over the Islands since 1895 which was not interrupted and protected neither by China nor Taiwan until 1971 which was after some reports

58 See Lohmeyer, "The Diaoyu / Senkaku Islands," 84; Shaw, "The Diaoyutai/Senkaku Islands Dispute," 13-15.
59 Victor H. Li, "China and Offshore Oil: The Diaoyu Tai Dispute," *Stanford Journal of International Studies* 10 (1975): 143.
60 See Lohmeyer, "The Diaoyu / Senkaku Islands," 84; Carlos Ramos-Mrosovsky, "International Law's Unhelpful Role In The Senkaku Islands," *U. Pa. J. Int'l L.* 29 (2008): 917-918.
61 Tan, "The Diaoyu/Senkaku Dispute," 142.
62 See Su, "The Territorial Dispute," 48.
63 Mark E. Manyin, "Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations," *Congressional Research Service* (22 January 2013): 2.
64 Soons and Schrijver, "What does international law say," 4.
65 See Su, "The Territorial Dispute," 48.
66 Manyin, "Senkaku," 3.
67 Tan, "The Diaoyu/Senkaku Dispute," 145.
68 Jon Lunn, "The territorial dispute over the Senkaku/Diaoyu Islands," *International Affairs and Defence Section* (20 November 2012): 4.

revealed oil reservoir in the region.[69] Thus, after the WWII, the Senkaku Islands were regarded as part of the Nansei Shoto Islands by the US which transferred the administrative rights to Japan in 1972.[70] Since then, it continues to exercise of its sovereignty over the Senkaku Islands.[71]

IV. THE JUDICIAL INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF '*EFFECTIVITÉS*'

Before discussing further into the interpretation and application of the principle of '*effectivités*' in the cases decided by the international territorial dispute arbitration, the PCIJ and the ICJ, it is worthwhile to discuss a little bit on the modes of acquisition of territory under international law.

4.1 Modes of Acquisition of Territory under International Law

In the past, there was, of course, no unanimous agreement in the international community pertaining to the modes of acquisition of territory. In most part of the world, state territory was merely regarded as the private property of monarch. Therefore, it is not surprising to see that Grotius and his follower even went on to the application of the concept of acquisition of private property to the acquisition of territory by states.[72] Afterward, the concept had alerted gradually and the acquisition of territory has been considered as the acquisition of the supreme sovereign authority over the territory by a state.[73]

Traditionally, there were five[74] modes of acquisition of territory under international law, i.e., occupation; prescription; subjugation, conquest or annexation; cession; and, accretion. These were the concepts of the acquisition of territory developed during the time when European powers attempted to expand their territories across the world. In view of that, acquisition of territory by way of subjugation, conquest or annexation was considered lawful then.[75]

In the middle of 20th Century, the principle of self-determination was introduced by the UN and, as a result, colonial powers needed to grant independence statehoods to most of the states that were under their subjugation. Accordingly, acquisition of territory by way of subjugation, conquest or annexation was outlawed ever since.[76]

Hence, at present, there are only three essential legal concepts in which a State can acquire territory, i.e., occupation, prescription and cession. Besides, accretion is also still a legal mode of acquisition of territory derived due to the geographical changes but not on the basis of any legal notion. Furthermore, there are a few more legal principles upon which the territorial acquisition by a State can be derived, namely, acquiescence, recognition, estoppel, continuity, contiguity, *uti possidesti* and self-determination.[77]

Albeit there are several modes and legal principles of acquisition of territory under international law, in practice, the international territorial dispute arbitration, the PCIJ and the ICJ mainly focused on the element of 'effective control' in adjudicating territorial and boundary disputes.[78] It can be seen

69 Tan, "The Diaoyu/Senkaku Dispute," 145.

70 Soons and Schrijver, "What does international law say," 4.

71 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 22-28; Yasushi Kudo, "Japan, China Need to Manage and Contain Dispute over Senkaku (Diaoyu) Islands" (paper presented at the Council of Councils Asia Regional Conference, October 31, 2012): 1.

72 Shaw, *Title to Territory*, xiii.

73 Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* (Oxford: Oxford University Press, 1996), 678-679.

74 See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Archon Books, 1927), 107.

75 Shaw, *Title to Territory*, xiv-xvi.

76 See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), 152.

77 Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (Sweet & Maxwell Asia, 2011), 101-123.

78 See Shaw, *Title to Territory*, xix.

from decisions of the international courts and tribunals in the following leading cases.

4.2 International Territorial Dispute Arbitration

In the early 20th Century, it was necessary for a State to exercise effective sovereign authority over the territory claiming jurisdiction even under the concept of occupation in which state normally could claim jurisdiction over a territory by mere discovery and intention to act as sovereign.

In 1928, this notion was propounded by Max Huber, the sole arbitrator, in the case of *Island of Palmas*[79] by saying that:

> "[D]iscovery alone, without any subsequent act, cannot, at the present time suffice to prove sovereignty over the Island of Palmas… It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods… The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty…".[80]

In this case, the arbitrator emphasised that discovery alone can only confer inchoate title over the territory and, thus, there must be subsequent exercise of effective sovereignty authority over the territory.

In addition, such exercise of effective sovereignty authority over the occupied territory must also be continuous as well as peaceful and must not be challenged by any other state until the critical date. The arbitrator opined that:

> "The Netherlands found their claim to sovereignty on the title of peaceful and continuous display of state authority over the Island…".[81]

Therefore, the Netherlands was given territorial sovereignty over the Island of Palmas as it was exercising effective sovereign authority over the territory peacefully and continuously.

Nonetheless, it is not crucial for a State to exercise effective sovereign authority as intention alone is sufficient to occupy if the territory is totally uninhibited. In 1931-1932, it was observed in the arbitral award of the *Clipperton Island Arbitration*,[82] that:

> "[I]f a territory, by virtue of the fact that it was completely uninhibited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed".[83]

It can be seen that the requirement for exercising effective sovereign authority over the territory is much depended on the types of such territory, i.e., whether it is inhibited or uninhibited.[84]

4.3 The Permanent Court of International Justice (PCIJ)

In 1933, in the case of *Legal Status of Eastern Greenland*,[85] the PCIJ pointed out that:

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79 *Island of Palmas Case* (Netherlands v. USA) (1928) 2 R.I.A.A. 829.
80 Ibid.
81 Ibid.
82 *Clipperton Island Arbitrarion* (France v. Mexico) (1931) 2 RIAA 1105; (1932) 26 AJIL 390; (1932) 6 ILR.
83 Ibid.
84 See Sein, *Public International Law*," 104-107.
85 *Legal Status of Eastern Greenland Case* (Norway v. Denamrk) PCIJ Rep Ser. A/B (1933), No. 53.

> "[A] claim to sovereignty …, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise and display of such authority".[86]

Thus, there are two separate requirements to be fulfilled for a State that claims jurisdiction over territory, i.e., the definite intention to act as sovereign over the occupied territory and the actual exercise of the state sovereignty over that territory.

The Court found, in this case, that Denmark was sufficiently exercising effective sovereign authority over Eastern Greenland and stated that:

> "The result of all the documents connected with the grant of the [trading, hunting and mining] concession is to show that…the King of Denmark was in position to grant a valid monopoly on the East coast … The concession granted for the erection of telegraph lines and the legislation fixing the limits of territorial waters in 1905 are also manifestation of the exercise of sovereign authority. In view of the above facts and the absence of all claims to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority… to a degree sufficient to confer a valid title to the sovereignty".[87]

It can be observed that the PCIJ applied the principle of '*effectivités*' as an essential criterion in deciding the legal status of Eastern Greenland.[88]

4.4 The International Court of Just

In the case of *Minquiers and Ecrehos*,[89] the ICJ observed that:

> "…[T]he British authorities during the greater part of the nineteenth century and in the twentieth century have exercised state functions in respect of the group… In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom".[90]

The Court regarded that the United Kingdom displayed its actual exercise of state sovereignty over the Ecrehos group and therefore it acquired the territorial sovereignty over those islands.

In *Frontier Dispute Case*,[91] the boundary dispute between Burkina Faso and Mali, the parties' claims for the jurisdiction of the disputed territory were based on the treaty and effective control. In this case, the ICJ acknowledged that the exercise of 'effective control' by the colonial State can support an existing title to the successor State.[92] In the same vein, in *Land, Island and Maritime Frontier Dispute*,[93] the boundary delimitation dispute between El Salvador and Honduras, the parties made claims based on treaties and effective control, *inter alia*. In this case, the ICJ focused solely on the exercise of 'effective control' by the former colonial state as evidence of having sovereignty over the disputed territory and awarded the islands to whichever party had exercised postcolonial effective

86 Ibid; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), 134.
87 *Legal Status of Eastern Greenland Case* (Norway v. Denamrk) PCIJ Rep Ser. A/B (1933), No. 53.
88 See Sein, *Public International Law*," 115-116.
89 *Minquiers and Ecrehos Case* (1953) ICJ Rep. 47.
90 Ibid.
91 *Frontier Dispute Case* (Burkina Faso v. Mali) (1986) ICJ Rep 554.
92 Ibid.
93 *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua Intervening) (1992) ICJ Rep 351.

control.[94] Again, in *Land and Maritime Boundary Case*,[95] the boundary dispute between Cameroon and Nigeria for the Bakassi Peninsula and the Lake Chad region, the parties' claims to the territory were based on treaties, history and effective control, *inter alia*. The ICJ, after rejecting Nigerian's arguments on historical title, held that it reaffirmed the view in *Frontier Dispute Case* and awarded the territory to Cameroon.[96]

Furthermore, in the case of *Pulau Ligitan and Palau Sipadan*,[97] the Court observed that:

> "Given the circumstances of the case, and in particular in view of the evidence furnished by the Parties, the Court concludes that Malaysia has title to Ligitan and Sipadan on the basis of the *effectivites* referred to above".[98]

In correspondent to the case of *Minquiers and Ecrehos*, the Court gave title to Malaysia on the basic of having effective control over Pulau Ligitan and Sipadan. In the same fashion, the ICJ treated Singapore as a State exercising 'effective control' over the Pulau Batu Puteh and awarded the territorial sovereignty from Malaysia to Singapore in the case of *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.[99]

It is observed from the aforementioned decided cases before the international territorial dispute arbitration, the PCIJ and the ICJ that the principle of '*effectivités*' is an imperative legal principle in resolving inter-state territorial and boundary disputes. The state that can prove the actual exercise effective sovereign authority over the territory claiming jurisdiction has massive potential of having title to that territory.

V. THE APPLICATION OF THE PRINCIPLE OF '*EFFECTIVITÉS*'IN THE SENKAKU/DIAOYU ISLANDS DISPUTE

The Chinese and Taiwanese claims for sovereignty over the Senkaku/Diaoyu Islands are similar[100] as both based their claims mainly on historical facts.[101] It is undeniable that the islands were *terra nullius* and totally uninhabited before Chinese discovery. A number of records made by Chinese investiture missions to the Ryukyu kingdom during 1372-1879 showed these islands as part of Chinese territory.[102] Moreover, the Ryukyu Kingdom had never objected or challenged the fact that the Diaoyu Islands belonged to China.[103] Until 1893, China had clearly expressed its intention to occupy these islands (*animus occupandi*) and the actual exercise of the state sovereignty over the territory (*corpus occupandi*) by issuing the Imperial Decree of the Chinese Empress Dowager Cixi which granted the Diaoyu Islands to Sheng Xuanhuai.[104] This is what led some researchers to opine that the Diaoyu islands were integral part of Chinese territory until 1893.[105]

On the other hand, the Japanese conducted survey throughout 1885-1895 to confirm the status of the Senkaku Islands. The Japanese government incorporated the islands by the cabinet decision on 14th

94 Ibid.

95 *Land and Maritime Boundary Case* (Cameroon v. Nigeria: Equatorial Guinea Intervening) (2002) ICJ Rep 303.

96 Ibid; Brian Taylor Sumner, "*Territorial Disputes at the International Court of Justice*," *Duke Law Journal* 53 (2004): 1779.

97 *Sovereignty over Pulau Ligitan and Palau Sipadan Case* (Indonesia v. Malaysia) 2002 ICJ Rep 625.

98 Ibid.

99 *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore) General List No. 130, Accessed April 03, 2013. http://www.icj-cij.org/docket/files/130/14492.pdf; see Sein, *Public International Law*," 117-120.

100 Larry A. Niksch, "Senkaku (Diaoyu) Islands Dispute: The U.S. Legal Relationship and Obligations," *Congressional Research Service* (September 30, 1996): 3.

101 See Lohmeyer, "The Diaoyu / Senkaku Islands," 46.

102 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 43.

103 Inoue, "Japanese Militarism."

104 Tan, "The Diaoyu/Senkaku Dispute," 143.

105 See Barbara Demick, "The specks of land at the center of Japan-China islands dispute," *LA Times*, September 24, 2012, 1.

January 1895, which was prior to the "Treaty of Shimonoseki".[106] Furthermore, none of these islands was the subject matter of the said treaty[107] and it was perhaps by mistake that the Chinese assumed that Japan had annexed the said islands under the general wordings of such treaty.[108] Consequently, China acquiesced to the exercise of Japanese sovereignty over the islands and failed to conduct any form of protest against it.

Starting from 1896 until 1941, these islands were under Japanese private ownership. In 1909, the islands already had a small population of 248 people.[109] In 1919, Japanese authorities rescued some Chinese fishermen who suffered breakdown and compelled to take refuge on the main Island.[110] In response to this incident, the Consul of the Republic of China in Nagasaki issued a letter of appreciation on 20th May 1920. This situation clearly shows the Chinese recognition of the Japanese sovereignty over the islands.[111]

During the US administration period, the Senkaku Islands were regarded as part of Yaeyama Islands under Article 1(d) Ordinance No. 22.[112] Accordingly, the islands were placed under the US administrative control and trusteeship. In 1953, the proclamation of the SCAP describes the islands as being controlled by the US[113] and the US air-force used two of the islands for training purposes.[114] The US Navy and Japanese Maritime Self-Defence Forces jointly patrolled the waters around the islands. Furthermore, the US Navy made an annual rental payment of $11,000 to Zenji Koga, the Japanese private owner of the Uotshuri-shima Island, as compensation for using the island until 1978.[115]

If the general interpretation of the Treaty of Shimonoseki were to include disputed islands within its subject matter, then Japanese effective control over the islands, during 1895-1945, would have been immaterial and Japan had to transfer the islands back to China. However, China continued to acquiesce to the exercise of US administration over the islands between the periods of 1945 to 1972[116] and failed to conduct any forms of protest against it. China was also completely silent when the islands were put under the US trusteeship instead transferring them back to China during the post-WWII arrangement of Japan's territory.[117] Besides, the "ROC Yearbook" issued in 1962, 1963 and 1968, did not count the islands as falling under the sovereignty of Taiwan.[118] Again in 1965, the book titled "The outline of Local-Self Government in Taiwan Province" impliedly stated that the Tiaoyu-Tai Islands were not under the Chinese jurisdiction.[119] Furthermore, in 1961, the two Taiwanese logbooks stated the Islands as part of the Senkaku Gunto.[120] It, therefore, seems that both China and Taiwan did not raise the question of restoring the Islands to their sovereignty up to this point.[121] Almost 30 years of effective control over the islands exercised by the US without any challenge from China and Taiwan, somehow, validated Japanese claims to the Senkaku Islands.[122] Although the islands under the US administration from 1945-1972 could not also be regarded as Japanese control over the islands,[123] the

106 Wan, "Security Flashpoint," 21-22.

107 See Jing Zhao, "The Japanese Communist Party and the June 4th Incident of 1989," *US-Japan-China Comparative Policy Research Institute*, accessed July 29, 2017, http://chinajapan.org/articles/12.1/12.1jingzhao25-32.pdf; Peter N. Upton, "International Law and the Sino-Japanese Controversy over the Territorial Sovereignty of the Senkaku Islands," *Boston University Law Review* 52 (Fall 1972): 776.

108 See Su, "The Territorial Dispute," 54-55; Shaw, "The Diaoyutai/Senkaku Islands Dispute," 25.

109 Tan, "The Diaoyu/Senkaku Dispute," 146.

110 Okuhara, "The Territorial Sovereignty," 100.

111 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 32-33.

112 Okuhara, "The Territorial Sovereignty," 100.

113 Lee, "Territorial Disputes," 11.

114 Okuhara, "The Territorial Sovereignty," 101.

115 Blanchard, "The US Role," 95-123; Cheng, "The Sino-Japanese," 247.

116 Yves Tiberghien, "The Diaoyu/Senkaku Dispute: Analyzing the Chinese Perspective," *Asia Pacific Foundation* 30 (4 October 2012): 5.

117 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 121.

118 See Lohmeyer, "The Diaoyu / Senkaku Islands," 81-82.

119 Suganumu, *Sovereign Rights*, 125; Okuhara, "The Territorial Sovereignty," 103.

120 See Lohmeyer, "The Diaoyu / Senkaku Islands," 82.

121 See Su, "The Territorial Dispute," 54.

122 Blanchard, "The US Role," 95-123.

123 Wan, "Security Flashpoint," 38.

US did recognise Japanese residual sovereignty over the islands.[124] Due to such recognition, the US would not transfer its sovereign powers to any other state other than Japan.[125]

On 12th August 1968, forty-five Taiwanese workers, who had been dismantling a wrecked ship on Minami-kojima Island, were deported by the Japanese officials on the pretext that they did not carry either passports or immigration permits from the Ryukyu government. The workers later applied for the Japanese permission and continued their job in the following year. In May 1969, Japanese erected a national marker on the main island of Diaoyu to prove its claim to the island. On 17th July 1970, Japan delivered a diplomatic note to the Chinese government with the intention to claim the sovereignty over the islands.[126] In September 1970, Taiwanese private individuals hoisted a flag on the island and Japanese authorities removed it on the following day.[127] Later, the Japanese foreign ministry announced that Japan has the inherent sovereignty over the Senkaku Islands and thus there is no necessity to negotiate the status of these Islands with any State. Following to this announcement, series of anti-Japanese protest movements were launched by the Chinese nationals.[128] In 1970, another group of Taiwanese ship-dismantling workers were found in Kuba-shima and ~~they~~ were ordered to leave the place by the Japanese officials.[129] Again, none of these official activities exercised by Japan were challenged either by China or Taiwan.

It can be seen that from 1895 to 1971, there was no objection to Japanese effective control over the islands and thus Japan has maintained 'peaceful and continuous exercise of sovereignty' over the islands.[130] Starting from September 1970, the Taiwanese government asserted that Japan has no right to explore on the Chinese continental shelf and the reversion of the islands from the US to Japan would be a unilateral decision that would never affect her claims.[131] In 1971, China challenged Japanese sovereignty over the islands after discovering that the disputed area is rich in mineral and oil resources.[132] Taiwan first officially claimed sovereignty over the islands in February 1971 followed by the Chinese official claim for the ownership of the islands on 31st December of the same year.[133] Accordingly, in this case, the critical date is therefore set to be in 1971. If the concept of acquiescence under international law were to be applied to this case, it becomes too late for both China and Taiwan to start protest in 1971. The timely protest should have started as early as in 1895 or, at least, during the post-WWII arrangement of Japan's territory.[134]

On 15th May 1972, Japan regained sovereignty over the Okinawa Islands under the Okinawa Reversion Treaty in which the US relinquished the Ryukyu Islands and the Daito Islands to Japan by virtue of Article 3 of the San Francisco Peace Treaty.[135] In response to this, China contended that Diaoyu and the other islands have been its territory since ancient times and thus it is absurd that the US transfer part of Chinese territory to Japan.[136] On the other hand, the US declared that it returned administrative rights over those islands to Japan as it received them from Japan. Nevertheless, it does not diminish the rights of other claimants and thus any conflicting claims to the islands are a matter to be resolved among the parties concerned. The U.S. Foreign Relations Committee declared that Japan only has administrative rights and not that of sovereignty over the islands under the Okinawa

124 Blanchard, "The US Role," 95-123.

125 See International and Civil Affairs Directorate, Office of the Deputy Chief of Staff for Military Operations, Department of the Army, "Okinawa Reversion: A Study of the Administrative Aspects," (secret) (April 1, 1969): 1-2, RG 260 (USCAR), Records of the HCRI, HICOM Administrative Files 1969-1972, Reversion Agreements to Pre Comm 1971-72, Box 2, National Archives-College Park. As cited in Blanchard, "The US Role," 95-123.

126 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 11.

127 See Lohmeyer, "The Diaoyu / Senkaku Islands," 85.

128 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 11.

129 Ibid., 34.

130 Cheng, "The Sino-Japanese," 242; Lohmeyer, "The Diaoyu / Senkaku Islands," 86.

131 Cheng, "The Sino-Japanese," 243.

132 Wan, "Security Flashpoint," 32; Blanchard, "The US Role," 95-123.

133 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 37.

134 Mrosovsky, "International Law's," 930.

135 Manyin, "Senkaku," 4.

136 Beijing Review, "Tiaoyu and other Islands have been Chinese Territory since Ancient Times," January 7, 1972, 13-14.

Reversion Treaty.[137] This treaty, therefore, did not determine the status of the islands between China and Japan. However, it is important to note here is that the US recognised Japanese residual sovereignty over the islands during the administration of the Okinawa Islands from 1945-1972.[138] At that juncture, although the US left the dispute in limbo between China and Japan, on the other hand, it awkwardly found itself obliged to defend the islands under the 1960 US-Japan Security Treaty in which the US agrees to protect the areas under the Japanese administration.[139]

In accordance with the Sino-Japanese Communiqué 1972, China and Japan established diplomatic relations[140] and consequently Japan announced that all treaties with Taiwan were invalid. Since then, both nations did not formally recognise Taiwan as a state which can claim sovereignty over the islands.[141]

In 1972, then Japanese Prime Minister Kakuei Tanaka and Chinese Prime Minister Zhou Enlai agreed to shelve the dispute for the future.[142] Before the conclusion of the Peace and Friendship Treaty in 1978 between China and Japan, Chinese anti-treaty Diet members recommended the Japanese government to determine the status of these islands in the upcoming treaty. In April 1978, a hundred armed Chinese fishing boats were dispatched to the islands. However, the Chinese Vice-Premier Keng Piao shortly declared that the incident was neither intentional nor deliberate.[143] The incident gave some favours to the Japanese claim and since then Japan acquired at least the de-facto ownership of the islands.[144]

Yet again, the Senkaku/Diaoyu Islands dispute was left out from the content of the Peace and Friendship Treaty which was concluded on 23th August 1978 between China and Japan. Moreover, on 22nd October 1978, then Chinese Vice Premier Deng Xiaoping paid an official good-will visit to Japan in which he confirmed the omission of dispute concerning the sovereignty over the islands.[145] Later on Japanese Prime Minister Yasuhiro Nakasone agreed to postpone the dispute for the future. It can be observed that China failed to challenge the territorial sovereignty over the islands timely[146] and left the islands under the control of Japan uncontested even after launching of its formal protests since 1971.

Meanwhile, since 1972, the Japanese private youth organisation called "Japanese Qingnianshi" established the beacon on the islands. In 1979, they constructed a helicopter landing-pad on the Islands[147] and proclaimed the islands on behalf of Japan.[148] In 1990, the Japanese Maritime Safety State agency officially regarded the lighthouse on Senkaku Islands. When some Taiwanese students hoisted a Taiwanese flag, the Japanese officials immediately removed it from the islands.[149]

Since 1990s, China has raised the degree of activities to prove the sovereignty over the islands with some physical presence in the disputed area against Japanese control over the islands.[150] In 1992, China enacted the Law on the Territorial Sea and Contiguous Zone which expresses the "Diaoyu Islands" as an appurtenance to Taiwan that is considered as Chinese territory.[151] In 1996, it took

137 Niksch, "Senkaku," 4-6.

138 Blanchard, "The US Role," 95-123.

139 Manyin, "Senkaku," 1; Jason Collins, "China and Japan's claims to sovereignty over the Diaoyu/Senkaku islands," *New Zealand Online Journal of Interdisciplinary Studies* 1 (2012): 3.

140 Vincent Wei-cheng Wang, "Can Taiwan Join the United Nations?," in *The International Status of Taiwan in the New World Order*, ed. Jean-Marie Henckaerts. (Martinus Nijhoff Publishers, 1996), 93.

141 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 13.

142 Robert H Wade, "China-Japan Island Dispute: The Other Side of the Story," *Economic & Political Weekly* 47 (9 March 2013): 28.

143 See Lohmeyer, "The Diaoyu / Senkaku Islands," 89-90.

144 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 16-17.

145 M. Taylor Fravel, "Explaining Stability in the Senkaku (Diaoyu) Islands Dispute," in *Getting the Triangle Straight: Managing China-Japan-US Relations*, ed. Gerald L. Curtis et al. (Tokyo: Japan Center for International Exchange, 2010), 157.

146 Collins, "China and Japan's," 2.

147 Lee, "Territorial Disputes," 8.

148 See Lohmeyer, "The Diaoyu / Senkaku Islands," 90-91.

149 Suganumu, *Sovereign Rights*, 139.

150 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 17-21.

151 Su, "The Territorial Dispute," 47; Mrosovsky, "International Law's," 928.

initiative with Japan to conduct a joint exploration of the oil field by accepting the condition that Japan recognises China's sovereignty whereas Japan declined the proposal.[152] In July, the Japanese Youth Organisation returned to repair the lighthouse on one of the islands flying the Japanese flag and erected two memorials.[153] Accordingly, series of demonstrations took place in Hong Kong and Taiwan.[154] Since then, several civil and political groups from all three claiming States have been regularly visiting the islands to demonstrate the sovereignty of their domestic government.[155] Japanese officials used to expel the activists from the islands. On the other hand, the Chinese government, instead of claiming Japanese violation of its sovereignty, remained silent over the issue of expelling activists from the islands by the Japanese officials.[156]

In February 2001, China and Japan concluded a mutual agreement in which each party is required to give prior notification to the other before entering the waters of an area around the disputed islands.[157] In 2004 seven Chinese activists landed on the islands and they were later deported back to China by the Japanese officials.[158] In 2005, Japan published marine maps that include the Japanese lighthouse on the islands and later it was recognised as an official beacon.[159] Since 2006, private ships from China and Taiwan entered into waters surrounding the islands serially claiming these islands as part of its exclusive economic zone. In 2006, members of the Action Committee for Defending the Senkaku Islands attempted to land over the islands and later the Japanese Coast Guard prevented them before landing.[160] In 2007, disputing countries installed a 24/7 telephone hotline in the disputed areas.[161]

Again in 2008, some Taiwanese activists were escorted by Chinese Coast Guard vessels approached near to the main island with the intention to assert the sovereignty over the islands.[162] In the same year, a Japanese patrol vessel collided with a Taiwanese fishing boat and detained the captain for three days.[163] Later, Japanese officials apologised for the incident and paid compensation to the owner of the boat.[164] In July 2010, nine Japanese fishing boats carried out fishing activities near the islands with the intention to assert Japanese sovereignty over the islands.[165] None of these activities were challenged by neither Chinese nor Taiwanese officials. In September, two Japanese Coast Guard patrol boats ordered a Chinese fishing trawler to leave the area near the islands. Upon failure to comply with the order, two coast boats collided with the fishing trawler and arrested the captain.[166]

In 2011, a fishing boat carrying some activists was blocked by Japanese Coast Guard vessels and a helicopter while it was navigating within 23 nautical miles of the islands. In response to this event, the Taiwanese Coast Guard Agency despatched five patrol vessels which later returned to Taiwanese

152 See Lohmeyer, "The Diaoyu / Senkaku Islands," 91.
153 Niksch, "Senkaku," 2.
154 Alan Dupont, "The Environment and Security in Pacific Asia", *Adelphi Papers* 34 (2008): 319.
155 Shaw, "The Diaoyutai/Senkaku Islands Dispute," 18-19.
156 See Lohmeyer, "The Diaoyu / Senkaku Islands," 91-92.
157 See Ibid., 92-93.
158 Paul O'Shea, "Sovereignty and the Senkaku/Diaoyu Territorial Dispute," *EIJS* (Stockholm School of Economics, Working Paper 240, September 2012): 21.
159 Ibid., 20.
160 Associated Press, "Activist ship from Hong Kong briefly enters Japan's waters in protest over islands," *International Herald Tribune*, October 26, 2006, accessed April 07, 2013, http://global.nytimes.com/?iht.
161 See Manyin, "Senkaku," 1.
162 Shih Hsiu-Chuan and Flora Wang, "Officials drop plan to visit Diaoyutais," *Taipei Times*, June 18, 2008, accessed July 29, 2017, http://www.taipeitimes.com/News/taiwan/archives/2008/06/18/2003415043.
163 Ralph Jennings, "Taiwan protests as Japan holds fishing boat captain," *Reuters*, June 12, 2008, accessed July 29, 2017, http://uk.reuters.com/article/2008/06/12/taiwan-japan-idUKPEK35756320080612.
164 Kosuke Takahashi, "China signals V for victory," *Asia Times*, October 05, 2010, accessed July 29, 2017, http://www.atimes.com/atimes/Japan/LJ05Dh01.html.
165 Yoko Nishikawa, "China presses Japan over sea row as Tokyo voices concern," *Reuters*, July 04, 2011, accessed July 29, 2017, http://uk.reuters.com/article/2011/07/04/china-japan-idUKL3E7I40YO20110704.
166 See Sheila A. Smith, "Japan and the East China Sea Dispute," *The Foreign Policy Research Institute* (Summer 2012): 374, accessed July 29, 2017, doi: 10.1016/j.orbis.2012.05.006.

territory.[167] In July 2012, a Taiwanese coastguard vessel escorting activists in the area collided with Japan coastguard vessel. On 15th August 2012, some activists from China managed to swim ashore. [168] On 17th August 2012, fourteen activists were deported for illegal entry into the Japanese territory by the Japanese officials.[169] In the same month, four private Japanese vessels carrying Japanese activists travelled to the islands.[170] All these activities were challenged by neither Chinese nor Taiwanese officials, and it was the Japanese officials who denied the groups the right to land.[171] On 11th September 2012, Japanese government purchased Minami-kojima, Kita-kojima, and Uotshuri-shima islands from Japanese private owner in order to diffuse territorial tensions in the region.[172] In the same month, the most serious conflicts occurred between the disputants when seventy five Taiwanese fishing vessels were escorted by ten Taiwanese Coast Guard vessels to the area. Japanese Coast Guard ships and the Taiwanese Coast Guard ships fought with water cannons by announcing their respective claims to the islands.[173] In the same year, series of maritime and aerial incursions to the disputed areas occurred and the Japanese government made formal diplomatic protests to China.[174]

In January 2013, a boat carrying Taiwanese activists was intercepted and prevented from landing on the islands by Japanese patrols with the use of water cannons.[175] In February 2013, a Chinese marine surveillance vessel sailed in the contiguous zone next to Japanese territorial waters surrounding the islands.[176] In response to this, the Japan Coast Guard deployed Maritime Self-Defense Force (MSDF) destroyers to bolster patrols around the disputed Senkaku Islands.[177] The situation become more aggressive compared to previous years because China and Japan started monitoring the area by sending fighter airplanes which may trigger a war with the region at any time.[178] On 30th March 13, Taiwan intents to discard its claims to the Senkaku Islands while negotiating a fisheries agreement with Japan. President Ma Ying-jeou is eager to secure fishing rights in waters north of the Yaeyama Islands, where Japan intends to give concessions to Taiwan, than in the Senkakus.[179]

However, on 31st March 2013, a Taiwanese vessel equipped with machine guns and water cannons was commissioned to patrol around the disputed islands. At the same time, President Ma Ying-jeou urged parties to jointly develop the rich natural resources in the area. China simply ignored the offer as it considers Taiwan as part of its own territory.[180] Chinese public criticised the government for not being forceful enough against Japan as protests alone were not sufficient enough to prevent the

167 CNA, "Taiwan fishing boat repelled by Japanese ships near Diaoyutai," *Want China Times (Taiwan)*, 30 June 30, 2011, accessed April 07, 2017, http://www.wantchinatimes.com/news-subclass-cnt.aspx?cid=1101&MainCatID=&id=20110630000117.

168 Sheila A. Smith, "Why Japan, South Korea, and China Are So Riled Up Over a Few Tiny Islands," *The Atlantic*, August 16, 2012, accessed July 29, 2017, http://www.theatlantic.com/international/archive/2012/08/why-japan-south-korea-and-china-are-so-riled-up-over-a-few-tiny-islands/261224/.

169 Katherine Tseng Hui-Yi, "The Diaoyu Islands Contretemps and Nationalism in China," EAI Background Brief No. 757, (October 04, 2012): i.

170 Al Jazeera, "Japanese activists arrive at disputed islands," August 19, 2012, accessed July 29, 2017, http://www.aljazeera.com/news/asia-pacific/2012/08/201281813355613577 9.html.

171 BBC, "Japan activists land on disputed islands amid China row," *BBC News*, August 19, 2012, accessed July 29, 2017, http://www.bbc.co.uk/news/world-asia-china-19303931.

172 See Lunn, "The territorial dispute," 5.

173 Enru Lin, "Local, Japan vessels clash off Diaoyutais," *The China Post*, September 26, 2012, accessed July 29, 2017, http://chinapost.com.tw/taiwan/national/national-news/2012/09/26/355552/Local-Japan.htm.

174 Manyin, "Senkaku," 1.

175 Zhang Yunbi, "Senior officials urge calm over islands dispute," *China Daily*, January 25, 2013, accessed July 29, 2017, http://africa.chinadaily.com.cn/china/2013-01/25/content_16172578.htm.

176 Nanae Kurashige, "China sending helicopter-carrying ships in Senkakus dispute," *Asahi Shimbun*, March 04, 2013, accessed April 03, 2013, http://ajw.asahi.com/article/asia/china/AJ201303040005.

177 Asahi Shimbun, "Coast guard to deploy retired MSDF ships to counter Chinese incursions," March 05, 2013, accessed April 03, 2013, http://ajw.asahi.com/article/asia/china/AJ201303050086.

178 Reuters, "China navy seeks to 'wear out' Japanese ships in disputed waters," *Asahi Shimbun*, March 07, 2013, accessed July 29, 2017, http://ajw.asahi.com/article/asia/china/AJ201303070111.

179 Takio Murakami, "Taiwan to skip Senkakus claims in fisheries talks with Japan," *Asahi Shimbun*, March 30, 2013, accessed July 29, 2017, http://ajw.asahi.com/article/asia/china/AJ201303300056.

180 Associated Press, "Taiwan vows to step up patrols in East China Sea," *Taiwan News*, March 30, 2013, accessed July 29, 2017, http://www.taiwannews.com.tw/en/news/2185158.

Japanese exercise of effective sovereign authority over the islands.[181]

It is clear from the above that, historically, China did consider the islands as an integral part of its territory but later acquiesced to Japanese effective control over the islands during 1895-1945 and the US administration over the islands during 1945-1971.[182] Even after 1971, protests made by China were not powerful enough to prevent Japan from exercising effective sovereign authority over the islands. Only after 1900s, both China and Taiwan have increased their activities to prove the sovereignty over the islands in the disputed area. On the other hand, Japan has stronger chance of getting the title due to its exercise of effective sovereign authority over the islands if it is adjudicated before an international court or a tribunal in accordance with contemporary international law.

VI. CONCLUSION

In recent years, the tension among China, Taiwan and Japan over activities in and around the Senkaku/Diaoyu Islands has become more subtle and sensitive.[183] It is likely to continue until and unless the dispute concerning the sovereignty over the islands resolved in one way or another. Of course, any armed confrontation among the disputants is not desirable as it would entail grave repercussions to the international peace and security, *inter alia*.[184] Under the auspices of the UN, members are required to resolve disputes among them in peaceful manners as prescribe in Article 2 (3) and Article 33 of the UN Charter.

It should also be noted that Taiwan cannot be treated as a separate State under contemporary international law and thus it could not make a separate claim from that of China as it has no *locas standi* before the ICJ as a member of the UN and the Statute of the ICJ.[185] Therefore, China and Japan - being the members of the UN - may seek for all available peaceful means in order to solve this dispute. The suggested solutions would be, first, the negotiation between the disputants for the joint exploitation of natural resources in the areas of the disputed islands;[186] or, second, the judicial settlement before the ICJ[187] or an *ad hoc* international territorial arbitration.

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181 O'Shea, "Sovereignty," 12.

182 Tan, "The Diaoyu/Senkaku Dispute," 155.

183 See Smith, "Japan and the East," 380.

184 See Kudo, "Japan," 3; Manyin, "Senkaku," 1.

185 See Sigrid Winkler, "Taiwan's UN Dilemma: To Be or Not To Be," *Taiwan-U.S. Quarterly Analysis* (The Brookings Institution, June 20, 2012), accessed July 26, 2017, https://www.brookings.edu/opinions/taiwans-un-dilemma-to-be-or-not-to-be/; Shaw, "The Diaoyutai/Senkaku Islands Dispute," 128; Soons and Schrijver, "What does international law say," 4-5.

186 See also Shaw, "The Diaoyutai/Senkaku Islands Dispute," 129-133.

187 See Wade, "China-Japan," 1-4.

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STATUTORY ADJUDICATION: A GLOBAL TREND FOR RESOLUTION OF PAYMENT PROBLEMS IN CONSTRUCTION INDUSTRY

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ABSTRACT

This paper examines the reality of payment problems bedeviling the stakeholders in the construction industry and the enormity of the threat that it poses in the delivery of projects in general and the economic development in particular in Nigeria. It x-rays the causes and effects of and possible solutions to this problem as well as the attempts that have been made to tackle the menace through the instrumentality of law at the international level and at the domestic level. The paper identifies, among others, the report of the project audit commission set up in year 2013 to investigate on the federal government abandoned projects which revealed that over 12,000 projects awarded by the federal government of Nigeria had been abandoned across the country while those of the states were even worse especially with the present economic recession while the deleterious effects of this phenomenon such as loss of lives, unemployment among others are also catalogued.

Interview was conducted to collect in order to identify the causes of this payment problem. Hence, Fifteen (15) construction experts were interviewed consisting of legal practitioners, stakeholders and judges who have been into construction practice for more than ten (10) years were selected using purposive technique to get rich data. The findings revealed the inadequacy of the legal framework for construction dispute resolution in Nigeria. This has led to the abandonment of many of the projects across the country as well as claiming the lives and properties of some stakeholders.

Hence, the paper suggests a number of ways through which these challenges can be tackled with the adoption of statutory adjudication act which has assisted many of the construction industry in other commonwealth countries to regain its lost glory. In conclusion, the paper makes certain recommendations for Nigeria such as the need to revisit the legal framework for construction dispute resolution and enact a law and modification of the existing laws guiding the resolution of construction disputes in Nigeria to accommodate statutory adjudication as a lasting solution to payment problems in construction industry.

INTRODUCTION

It is apparent that efforts are geared towards finding solution to payment problems, such as delayed and non-payment, facing the construction industry in Nigeria. There is now a consensus that payment mode in the Nigerian construction industry needs an overhauling for effect delivery of projects. The problem of paying the contractors, subcontractors among others has brought a lot of setback to both the stakeholders and many projects. The report of the Project Audit Commission set up in 2013 to investigate the Federal Government abandoned projects revealed that over 12,000 projects awarded by the Federal Government of Nigeria had been abandoned across the country while those of the states were even worse especially with the present economic recession.[2] In order

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2 Ayodeji, Olubunmi Ogunde et al, "Factors Military against Prompt Delivery of Construction Projects in Lagos

to identify the causes of this payment problems, interview was conducted to collect data from the stakeholders concerned. Hence, Fifteen (15) construction experts were interviewed consisting of legal practitioners, stakeholders and judges who have been into construction practice for more than ten (10) years were selected using purposive technique to get rich data. The findings revealed the inadequacy of the legal framework for construction dispute resolution in Nigeria. This has led to the abandonment of many of the projects across the country as well as claiming the lives and properties of some stakeholders. At moment, major construction disputes are settled through litigation in Nigeria. The inadvertent delay occasioned in court on construction dispute cases has resulted in loss of time, cost and quality of projects. This has also resulted in loss of jobs, unemployment, bankruptcy, and loss of lives and property of some of the stakeholders concerned. However, in an attempt to find a lasting solution to the question of what could have caused these problems the paper examines the use of statutory adjudication as practised in other commonwealth countries such as Malaysia, Singapore among others for resolution of payment problems facing their construction industry.

Statutory Adjudication

Statutory adjudication is a form of dispute resolution procedure used for resolution of construction disputes.[3] A legal instrument used when a party's rights is being infringed upon by the other party to construction agreement. Adjudication became a legal right in through which a party can claim what is due to him after work done or service rendered in relation to construction contracts. This was first initiated in the UK when legislation known as the Construction Act came into force in 1996. Statutory adjudication is confined to payment disputes which are disputes over payment for work done or services rendered under the express terms of the construction contract.[4] The right was introduced to address the unfair payment treatment in construction contracts which has contributed to the high level of insolvency in the construction sector. Some of the unfair treatments include payment terms for subcontractors dependent on the main contractor receiving payment, provisions which prevented payment of amounts 'in dispute' but then postponed the resolution of disputes to arbitration, and simple non-payment on the basis of spurious disputes.[5] The Construction Act provides a statutory framework for payment provisions in construction contracts and a statutory basis for adjudication to resolve disputes.[6] In Malaysia, statutory adjudication is applicable to all written construction, supplies and consultancy contracts for works wholly or partly situated in Malaysia except for residential building contract intended for occupation by a natural person and those contracts exempted by the Works Minister.[7] The adjudication process is fast, effective and the decision is binding but not final. In other words, the dispute can be re-opened afresh by arbitration or litigation in court where a party is not satisfied with the decision of the adjudicator. The non-finality of the adjudication decision is premised on the conceptual presupposition that it is unjust to have a conclusive decision when it has been rapidly determined. That notwithstanding, the decision is binding and enforceable as a judgment of the High Court.[8] There is only a limited avenue of challenge against the adjudication decision if it has been improperly procured.[9] The desirability of statutory adjudication is the availability of

Megacity, Nigeria: Contractors' Perspectives," *Mediterranean Journal of Social Science, MCSER Publishing, Rome-Italy,* Vol.8, no. 3 (May, 2017): 231-240.

3 Howard, Klein and Great Britain. "Alternative dispute resolution procedures used to resolve construction disputes in the UK." (A Paper Present at the XXIII *FIG Congress TS*. 2006):1-16.

4 M.E.C. Munaaim, "Security of Payment Regimes in the United Kingdom, New South Wales (Australia), New Zealand and Singapore: A Comparative Analysis," In W113-Special Track 18th CIB World Building Congress May 2010 Salford, United Kingdom): 428.

5 Maritz, Marthinus Johannes. "What are the legal remedies available to contractors and consultants to enforce payment?: technical paper," *Journal of the South African Institution of Civil Engineering= Joernaal van die Suid-Afrikaanse Instituut van Siviele Ingenieurswese*, vol. 54, no. 2 (2012): 27-35.

6 Lim Chong Fong," The Legal Implication of the Construction Industry Payment and Adjudication Act (CIPAA, 2012)," Newsletter Kuala Lumpur Centre for Arbitration, July-December, 2012, 9-14.

7 Ibid.

8 Lim Chong Fong, "Resolution of Construction Industry Disputes: Arbitration, Statutory Adjudication or Litigation in the Construction Court? *News and Legal Update*, (2014): 1-7.

9 This has been enunciated and enshrined in S.15 of the Malaysian Construction Industry Payment and

remedies as it is provided in CIPAA to makes the collection of debts possible as well as avoidance of further financial exposure.[10]

The use of statutory adjudication

Statutory adjudication is a new mechanism specially designed for resolution of payments affecting the construction industry from completion of projects as at when due. This mechanism has proved to be fast and effective in the resolution of payment problems both in Malaysia and UK in general.[11] However, this is yet to be introduced in the legal framework used for resolution of payment problems bedeviling the Nigerian construction industry. The stakeholders in the Nigerian construction industry who were interviewed during the fieldwork expressed their concern regarding poor performance of their colleagues in the industry due to delayed and non-payment of the work done by clients of the projects. One of the interviewees had this to say:

> 'It was also found that contractors and other stakeholders had been financially affected by this attitude of the clients. Many of these stakeholders have been compelled to wound up their construction business; some have died while others have been plagued with dying sickness. This is because the existing processes is not adequately designed and catered for resolution of payment problem. This has resulted into having majority of the complex construction projects being abandoned.'

The most striking aspect of this is that when construction cases are taken to court, the client will not pay serious attention. Most times the cases are struck out for lack of diligence. At the end of the day both contractors and the projects suffer. Nigeria construction industry stands to gain from Malaysia and UK experience on the use of statutory adjudication mechanism through the establishment of the payment Act as argued in this study**.**

Effect of delay in court

The inadvertent delay occasioned in court on construction dispute cases has resulted in loss of time, cost and quality of projects. This has also resulted into loss of jobs, unemployment, bankruptcy, and loss of lives and property of some of the stakeholders concerned.[12] However, in an attempt to find a lasting solution to the question of what could have caused these problems the paper examines the use of statutory adjudication in other construction industry as practised in other commonwealth countries. Statutory adjudication process had been introduced to reduce the cost that goes into settlement of construction dispute across the globe to facilitate prompt delivery of projects. This process has been adopted by other commonwealth countries such as South-Africa, Ghana, Singapore and currently Malaysia as a lasting solution to the delayed and non-payment problems confronting the construction industry. It is a common knowledge that arbitration provides technical issues to be handled by those who possess the requisite technical knowledge of the subject matter of dispute.[13] However, arbitration only comes to play after

A delayed payment by a party involves in the process of payment claim may have an influence on the supply chain of payment in whole. Problems in payment at the higher end of the hierarchy can give a serious blow on cash flow problem down to the ebb the chain of contracts. The

Adjudication Act, 2012.

10 Mohamed Nor Azhari, Azman, Natasha Dzulkalnine, and Zuhairi Abd, "Payment Scenario in the Malaysian Construction Industry Prior to CIPAA," *Law and Dispute Resolution* (2013): 56.

11 Chia, Fah Choy, "Economic Fluctuations and Productivity in the Malaysian Construction Sector." (Ph.D. dissertation, Queensland University of Technology, 2011).

12 Barakat Adebisi Raji, The Legal framework for Construction Dispute Resolution in Nigeria: A Reform Oriented Analysis," (Ph.D. dissertation, International Islamic University Malaysia, 2017): 138-146.

13 Mallam Hussani Adamu Dikko, "Experts explore arbitration as alternative dispute resolution in construction industry", *Vanguard Newspaper* (June 30 2015).

research done by Abdul-Rahman, Hamzah, et al et al revealed that client's employees are wrongfully holding the payment and most of the time they do this to obtain some kind of "gift" from contractors once they pay out the payment.[14] According to Zakaria, Zarabizan, Syuhaida Ismail, and Aminah Md Yusof clients' deliberate delay for their own financial advantages, delay in releasing of the retention monies to contractor and wilful withholding of the payment for personal reasons are the cause of the paymaster's withholding of payment.[15]

Based on Malaysian contractors' perceptions, delay for few day less than 5 working days is acceptable and accepted late payment from the clients as they are always at the mercy of the clients. This could be due to the inherent culture of late payment in the Malaysian construction industry that the contractors perceived late payment for a few days as something insignificant. Delay in certification by parties involve in the project also tends to result in late payment issues. The parties involve may delay in approving the application for payment claim due to certain reasons which may arise because of one party or other party's inaction.

Benefits of the statutory adjudication to Nigerian Construction Industry

Statutory adjudication process encourages free flow of cash for smooth running in the execution of projects. Problem of cash-flow has been a barrier in the prompt execution of projects. However, Nigerian construction stands to gain in the adoption of statutory adjudication because of free flow of cash for the execution of projects. Once this barrier is removed, contractors, subcontractors and even suppliers of material will gain their profits within a very short time and the client gets the good services he pays for as well. Statutory adjudication enhances the socio-economy growth because good environment promotes economic growth in any given country. There are lots of benefits given to contractors in the event of late or non-payment on the part of his client. Formerly, contractor who has expended on materials and labours had to wait until payment by his client is made and had no right to suspend the work but reverse is the case now. A contractor can suspend work when his client refuses to pay but he must do this vide a written notice served on the client.[16] This has established a cheaper and speedier system of dispute resolution in the form of adjudication.

The Act also provides for the recovery of payment upon the conclusion of the adjudication process in addition to a host of other remedies such as a right to reduce the rate of work progress or to suspend work or even to secure direct payment from the principal.[17] It further makes provisions for default payment terms in the absence of provisions to that effect in the construction contract. There is no doubt that statutory adjudication has come into play to assist all the stakeholders concern in the construction industry. Hence, it is highly recommended so that the Nigerian construction industry so that the industry will be in tandem with its contemporaries. It will also makes the industry compete effectively among its counterparts.

Procedure for Statutory Adjudication

The statutory adjudication Act serves as the practice direction for statutory adjudication. The Act allows the parties to follow the payment modes of the construction contract.[18] Where a party

14 Abdul-Rahman, Hamzah, et al, "Project Schedule Influenced by Financial Issues: Evidence in Construction Industry," *Scientific Research and Essay*s, vol.6, no.1 (2011): 205-212.

15 Zakaria, Zarabizan, Syuhaida Ismail, and Aminah Md Yusof. "Cause and Impact of Dispute and Delay the Closing of Final Account in Malaysia Construction Industry*," Journal of Southeast Asian Research*, vol.1, 2012: 1.

16 See Clause 30.7 of PAM form 2006; Wong, Chen Hin, "Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry?" (B.SC Dissertation, UTAR, 2011), 73-84.

17 Azman et al, "Payment Scenario in the Malaysian Construction Industry Prior to CIPAA," *Law and Dispute Resolution (*2013), 105-114; Zakaria et al, "Cause and Impact of Dispute and Delay the Closing of Final Account in Malaysia Construction Industry," *Journal of Southeast Asian Research,* (2012), 1- 12; Hasmori, M. Fikri, Izuddin Ismail, and Ilias Said, *"Issues of Late and Non-Payment among Contractors in Malaysia*", (Paper presented at the 3rd International Conference on Business and Economic Research, Bandung, Indonesia, 2012), 82-93; Azman et al, "Payment Issue in Malaysian Construction Industry: Contractors' Perspective," *Jurnal Teknologi,* vol. 70, no. 1 (2014)

18 Supardi et al, "Security of Payment Regime in Construction Industry: Are Malaysian Sub-Contractors *R*eady*?" The Built Human Environment Review,* vol. 4, no. 1 (2011): 122-137; Sinden, Gary F et al, "The New Construction Act Views and Perceptions*:* of Construction Industry Stakeholders," *Structural Survey,* vol 30, no. 4 (2012): 333-343.

has failed or refused to pay the other party for the work which he has done, the unpaid party has the right to serve the payment claim on the non-paying party.[19] The responding party could then admit or dispute the claim in whole or in part within ten (10) days of the payment claim. The non-paying party has ten working days within which to reply to the said claim. His failure to respond within the time frame, is an indication that the entire payment claim is not disputed. In other words, either parties can make a referral of the dispute to adjudication. The claimant (referring party) shall no later than seven days after serving a Notice of Adjudication, register the matter at the KLRCA.[20] This must be served on the Director of the Kuala-Lumpur Regional Centre for Arbitration. A non-refundable registration fee must be attached with the notice to the Centre in accordance with the payment.[21]

Steps had been taken by the KLRCA to device some forms to ease the process of adjudication for a party who wishes to adjudicate his payment claim which the other party has failed to pay. These forms have been labelled and sequentially numbered just like company registration forms. The adjudicator must decide on the dispute and deliver the adjudication decision within Forty –Five working days after the service of the adjudication response and reply to the response.

1) The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.

2) Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within—

a) Forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later;

b) Forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; or

c) Such further time as agreed to by the parties.

3) An adjudication decision which is not made within the period specified in subsection (2) is void.

4) The adjudication decision shall be made in writing and shall contain reasons for such decision unless the requirement for reasons is dispensed with by the parties.

5) The adjudication decision shall also determine the adjudicated amount and the time and manner the adjudicated amount is payable.

6) The adjudicator shall serve a copy of the adjudication decision, including any corrected adjudication decision made under subsection (7), on the parties and the Director of the KLRCA.

19 See Section 41 of the Malaysian Construction Industry Payment and Adjudication Act 2014; Ang, Tony Su Sin, "Payment Issues-the Present Dilemmas of Malaysian Construction Industry, (Ph.D. dissertation, Universiti Teknologi Malaysia, 2006), 7; Abdullah et al, "Causes of Delay in MARA Management Procurement Construction Projects," Journal *of Surveying, Construction & Property,* vol. 1, no.1 (2010): 123-138.

20 See Pursuant to schedule III, Rule 2 of the KLRCA Adjudication Rules & Procedure 2014; Wong, Chen Hin, *"Adjudication: Evolution of New Form of Dispute Resolution in Construction Industry?"* (A Master Dissertation, UTAR, 2011), 95-98; Chong, H. Y., &Rosli, M. Z, "The Behaviour of Dispute Resolution Methods in Malaysian Construction Industry" In Industrial Engineering and Engineering Management, (A Paper Presented at the International Conference on IEEE, 2009): 643-647.

21 Pursuant to schedule III, Rule 2 of the KLRCA Adjudication Rules & Procedure 2014.

Comparison between Arbitration and Statutory Adjudication for resolution of Construction Disputes

Arbitration is only applicable for resolution of construction disputes where parties have consented to it through a written agreement while statutory adjudication comes into play when there is evidence of construction contract agreement through oral or in written form. Arbitration encourages postponement of disputes till the end of completion or at termination period when such dispute would have become complex while statutory gives prompt resolution to dispute and prevent further occurrence of such dispute. Arbitration is more expensive given the size and nature of the dispute while statutory adjudication is cost effective because it addresses dispute as its early stage. Arbitration takes much in the resolution of dispute unlike statutory adjudication which takes less than forty- five days for hearing and determination of dispute cases. Although adjudicated cases can still be re-opened through arbitration or in the court of law but there are seldom occasion where this is done. Hence, the paper recommends the adoption of statutory adjudication by the law makers for effective resolution of construction disputes in Nigeria.

Conclusion

The stakeholders are very much aware and recognize the need to reform the law regulating the disputes occurring in the industry, in order to tackle the severe problems bedevilling it. However, there is a need for committed leadership and management to drive forward a law for improvement. There must be a drive from the stakeholders to communicate the cultural requirement and operational changes needed in the industry since disputes have become part and parcel of the industry.[22] Having realized that money allocation is a major factor identified causing problems between the client and contractor, it will be difficult to provide 'quality' when clients select designers and contractors primarily on the basis of cost and value for money, hence the need for the client to study and comply with the procurement act in this regards. However, this can be handled through the provisions of statutory adjudication process.

To achieve performance improvement, the industry must adopt a dispute resolution mechanism targeting at quality improvements in the efficiency performance of the industry which guarantees the safety and high labour productivity. The DRB can be of great help in this regard. The board guarantees quality performance and prompt delivery of projects because experts are involved in the day to day running and management of the resources on site. With the establishment of a construction court all disputes affecting the growth of the industry can be summarily done with and there will be sanity for quality performance and prompt delivery of projects guiding construction industry to facilitate regular and timely payment, as a mechanism for speedy dispute resolution through adjudication. Therefore, the stakeholders must establish team work and find a way of engaging the government to be more committed. There is a need for good rapport between the client and other stakeholders to enable the payment Act see the light of the day for free flow of cash to be realised and for prompt delivery of projects to meet the quest of the clients as planned. This will also enable the stakeholder change their slogan "Pay only when paid" which is the obstacle that is affecting the industry. This has led to mass movement of many reputable construction practitioners out of the industry. Hence the urgent need for statutory payment mechanism to be added into the existing legal framework for construction dispute resolution in Nigeria.

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Muhtasib, Ombudsman and Malaysian Financial Ombudsman Scheme: A Comparative Study

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Abstract

The growth of alternative dispute resolution (ADR) is an inevitable phenomenon due to inherent drawback of the conventional litigation. One of the most acceptable forms of ADR is ombudsman which is known as Muhtasibfrom Islamic perspective. In Malaysia, the first ombudsman institution has been established in financial industry operated by the Ombudsman for Financial Services (OFS). It is one of the moves initiated by Bank Negara Malaysia (BNM) with a view of providing simple, inexpensive and effective redress mechanism to financial consumers. Applying doctrinal research methodology, this paper examines the background of Muhtasib and ombudsman as well as their functions and characteristics. Similar observation is made vis-à-vis the OFS. These three aspects are subsequently compared to investigate the similarities and differences between the Muhtasib, ombudsman and the OFS. The study concludes that both the Muhtasib and ombudsman have undergone evolution from their original structure. Despite derived from different origin and with a different terminology used, it is resolved that in the contemporary milieu of alternative dispute resolution, the function of Muhtasib and ombudsman is ultimately to settle the dispute amicably, impartially, effectively and independently. The key principles of ombudsman are also in line with Shariah principles and have been incorporated in the establishment of the OFS. Recommendation is made concerning the imposition of specific requirements on the ombudsmen of the OFS. This study provides a significant insight on the traditional and modern aspect of Muhtasib and ombudsman as well as the newly set up Malaysian OFS.

Keywords: alternative dispute resolution, muhtasib, ombudsman, financial ombudsman scheme.

INTRODUCTION

It is an undisputable fact that Islam is all-embracing governing not only spiritual matters but also extend to wide array of worldly matters one of which is regarding alternative dispute resolution (ADR). Variety modes of ADR have been acknowledged in Islam including *sulh* (negotiation, mediation,conciliation, compromise of action); t*ahkim* (arbitration); *med-arb* (a combination of *sulh* and *tahkim*); informal justice by the *wali al-mazalim* or chancellor; and fatwaof muftis (expert determination)(Rashid, 2004).*Muhtasib*which is frequentlyviewed as identical to ombudsman is also recognised as one of the ADR instruments in Islam(Abdul Hak, Oseni, & Ahmad, 2013;Oseni, 2009;Islam, 2012). *Muhtasib*, ombudsman institution from western perspective and the Malaysian Ombudsman for Financial Services (OFS) will be the central theme of this paper.In financial services arena, ombudsman scheme has become a central part of the consumer protection processes and

increasingly seen as the only effective means of redress (Cartwright, 2004). There is consensus amongst observers that this development has been a broad success, improving access to justice and providing redress for consumers that would not otherwise have been available (Steve, 2008).The focus of the study is on their background, functions and the characteristics followed with a comparative analysis and conclusion.

HISBAH INSTITUTION AND MUHTASIB

Background

Islahi (2006) describes *Hisbah* institution as "*a religious institution under the authority of the state thatappoint people to carry out the responsibility of enjoining what is right, whenever people start to neglect it and forbidding what is wrong, whenever people start to engage in it.*"On the other hand, the *Muhtasib* technically refers to a person who proliferates the principles of enjoining what is good and forbidding what is evil. Prophet Muhammad SAW has been recognised as the first *Muhtasib* in Islamic history due to his role in executing Shariah injunctions of enjoining good and forbidding evil in the society. Parallel with the expansion of Islamic territory, the*Muhtasib* became the holder of the office of *Hisbah* having direct contact with the people whether in the market or other places to reprimand them to do good, prohibit them from doing evil and punish those involve in sinful acts(Salman & Aziz, 2012).

Hisbah institution continued to be relevant even after the departure of the Prophet SAW. Though initially the caliphs assumed the role of *Muhtasib*, immense expansion of Islamic state necessitate delegation of such duty to provincial governors. For example, during the reign of Umar al-Khattab, he appointed Abd Allah ibnu Utba al-Mas'ud as a *Muhtasib*(Ibn Taymiyya, 1983). This institution has undergone a momentous enhancement during the Abbasids era particularly during the period of Caliph Abu Ja'afar Mansur in 157 AH whereby he has introduced a separate and independent department of *Hisbah* with full time *Muhtasib* assisted by qualified staff known as *Arif* and *Amins*(Ibn Taymiyya, 1983). The existence of this institution remained until the reign of Fatamids, Ayyubids and Ottoman(Ibn Taymiyya, 1983).

Muhtasib in Quran and Sunnah

Even though the term *Muhtasib* is nowhere appears in Quran, the duty of enjoining the good and forbidding the evil vibrantly manifest the function of ombudsman. The following Quranic verseevidence the said assertion: -

Let there arise out of you a group of people inviting to all that is good (Islam), enjoining what is right and forbidding what is wrong. And it is they who are the successful.

(al-Imran 3: 104)

The duty of enjoining good and forbidding evil is also prescribed in the Sunnah. For instance Prophet Muhammed told his people that: "If some people commit sins and if there are other persons among them who can prohibit them and still they do not do it, soon punishment from Allah will fall on all of them(Al-Ghazali, 1967).Historically, it is true to declare that the Prophet SAW himself played the role of *Muhtasib*since he personally oversees people's compliance with Islamic moral and legal injunction. For example, it was reported that once the Prophet SAWsaw a man selling foodstuffs (wheat) and it pleased him. He then placed his hand unto the interior of the wheat and found moisture in it. He asked the merchant: Why are there wet things in it? He said: Rain melted them. The Prophet then said: Why did not you put the wet part above so people can see it. He who defrauds us is not of us(al-Albani, 1977).From this action, the Prophet SAW displayed the basic component of *Hisbah* namely to encourage good thing and forbid which is bad.Apart from that, a number of eminent companions have been appointed as *Muhtasib* such as Umar bin al-Khattab for Madinah and Saad

bin al-As bin Ummayyah for Makkah(Ibn Taymiyya, 1983). The delegation of duty is necessary due to expansion of Islamic empire.Therefore, it is apparent that *Muhtasib* institution finds its root in both Quran and Sunnah. It is also safe to contend that its existence is as old as Islam itself and is still pertinent in today's world.

Functions of *Muhtasib*

Within Islamic context, the functions of *Muhtasib* extend to both religious affairs and worldly concerns(Oseni, 2009). In respect of the former, some of the duties include satisfactory maintenance of mosque, appointment of Imams, arrangement of prayers whether daily prayer, Friday prayer and Eid prayer. Besides, *Muhtasib* is also responsible to ensure observance of religious principles in daily life such as performance of prayer and adherence of modesty in public places(Rashid, 2000). This is carried out by way of preaching, advising, reprimanding or referring to appropriate authority. Salman & Aziz (2012)classify this role as overseeing the proper organisation and facilities for the observance of *Ibadah*.

The latter on the other hand extends to municipal affairs and implementation of justice in a society. Municipal affairs require the *muhtasib* institution to engage in the inspection of and maintenance of public utilities such as maintenance of roads, streets, bridges, schools, hospitals to ensure these facilities are in good condition and finest state of hygiene. The function is implemented via regular inspections of the whole town whereby necessary, action will be taken accordingly such as removal of garbage and sewage as well ascarrying out adequate repairs. In addition to that, inspection also covers building and road under construction to confirm it meets the minimum standard while inspection of water boards and electricity board intends to ensure these utilities are precisely supplied(Ibn Taymiyya, 1983).

Implementation of justice is noticeable in the sphere of commercial activities with a view to safeguard the interest of the consumers, the traders as well as general public(Murtuza, 2004). Specifically, *Muhtasib* is responsible to take account on issues pertaining to honesty in trade and commerce(Rashid, 2004).In this regard, Al-Mawardi, n.d.)lists down three types of complaint referable to *Muhtasib* namely complaints related to weight and measure, complaint against adulteration in the substance sold or complaint against the price paid for an item sold and complaint against non-payment of debt although the buyer has the ability to repay it.

Other than regulating commercial activities, Muhtasib also monitors the performance of professionals in the course of their profession such as doctors, teachers, goldsmith(Murtuza, 2004). Likewise, he is responsible to investigate and remedy excess of the judiciary, the police and other law enforcement agencies. This institution also intercedes in private disputes and offers harmonious settlements between individuals, individual and organisations and between employers and employees. Finally, a wide-ranging coverage of the Muhtasib's task can be seen when he is not only concerned with human beings but extended to damages caused by animals, cases related to environmental pollution and also administration of judiciary(Ibn Taymiyya, 1983).

As time evolves and due to tremendous political, economic, and social change; the role of Muhtasib also changes. Muhtasib becomes an officerappointed by the state to manage the affairs of the Hisbah institution entrusted with the maintenance of public morals and standards in the state which cover social, economic, political and religious matters(Musa, 1969).

Presently, *Muhtasib* is no longer confined to state-based officials but spread to institutionalised private bodies as well remarkably as a dispute settlement officer with more specialised job scopes. For example, Banking Mohtasib Pakistan is dedicated to resolve disputes amicably through informal and friendly process of recompilation between banks and consumers. This is perhaps influenced by the western concept of ombudsman which has gained worldwide acceptance as a dispute settlement instrument both in public and private sector.

Charateristic of *Muhtasib*

Ibn Taymiyya (1983)has laid down several characteristics which must be fulfilled by a *Muhtasib*. Firstly, he must a male muslim with highest sense of maturity,possessing high level of integrity, insight, reverence and social status in the society. Secondly, he must be knowledgeable in the area of Islamic law and conversant in Islamic jurisprudence. Apart from well-versed in Shariah, it is prerequisite for him to be pious. Piety will deter him from abusing the power granted to him and simultaneously ensuring a just and fair decision. Additionally, to guarantee an in-depth understanding on the complaints brought before him, it is essential for him to possess knowledge of social customs, mores, trades and dominant profession in his society. Besides, he is also expected to be kind and patient as these attitudes help to instil confidence of the related parties in him. The last quality of *Muhtasib* is boldness and confidence. These qualities will ensure the *Muhtasib* to perform his duty without fear and favour.The aforesaid characteristics are necessary to warrant effective and efficient performance of the *Muhtasib* thereby realising the objective of its establishment(Salman & Aziz, 2012).

OMBUDSMAN INSTITUTION

Background

The word 'ombudsman' is derived from the Old Norseword *'umbodhsmadhr'*, which means deputy, agent or plenipotentiary(Melville, 2010). Initially the word was used by medieval Germanic tribes to refer to a third party whose responsibility was to collect fines from remorseful culprit families and give them to the aggrieved families of victims(Kirchheiner, 1983). Progressively, the term later extended to stand for a representative agent or proxy generally(Gregory & Giddings, 2000). The establishment of the first statutory ombudsman with a broader civic role, the *Riksdagens Justitieombudsman* (the Parliamentary Commissioner for Justice) in 1809 in Sweden to investigate citizens' complaints against public officials is traditionally accepted as being the birth of the modem ombudsman concept(Melville, 2010). The idea was later on adopted by other countries such as Finland, Norway and New Zealand. By the 1970s, ombudsmen had appeared in many parts of the world.

Currently, ombudsman institution has been modified to suit various sectors and organizations as well as local circumstances. In general, ombudsmen can be classified into two; firstly those concerned with the administration of government and the delivery of public services, which are funded by the taxpayer; and secondly those operating in the goods and services economy, which are funded by industry participants(Reif, 2004). Another way of classifying ombudsman is classical, executive, organizational, advocate and industry specific ombudsman. Some ombudsmen can investigate on their own initiative while others can only respond to complaints. Thus, extension of ombudsman scheme from public sector to the private sector evidences its increasingly significant feature of the justice in many countries.

Functions of Ombudsman

Receiving, investigating and redressing citizen's complaints related to mal-administration of government agencies or their functionaries continue to be the central function of public sector ombudsman. According to Hill (2015), six fundamental objectives of ombudsman institution are: -

a. To right individual wrongs.

b. To make bureaucracy more humane.

c. To lessen popular alienation from government.

d. To prevent abuses by acting as a bureaucratic watchdog.

e. To vindicate civil servants when unjustly accused, and

f. To introduce administrative reform.

The rise in both the number and types of ombudsman offices across the globe has also led to significant additions and modifications to its functions. In the United Kingdom, ombudsmen are complaint-handlers, providing an impartial, accessible, informal, speedy and cheap means of resolving complaints(Gregory & Giddings, 2000).In New Zealand and other Commonwealth countries, the role of ombudsman began to undergo an important change in focus whereby the principle duty of ombudsman was considered to investigate complaints and where suitable to provide recommendation on some form of remedial action. Hence, the core function of ombudsman is to redress grievances. There is also a view that ombudsman does not only provide redress for individual complaints, but he is also responsible to improve standards and quality control(Drewry, 1997).Based on the investigation, generalised weaknesses in practices, rules and attitudes will be discovered and the finding will be useful to those who have not complained, because the resulting improvement in the system is a generalised benefit(Seneviratne, 2000).

Characteristics of Ombudsman

The accomplishment of ombudsman offices in performing their functions is subject to several essential characteristics widely discussed in the ombudsman literature. Some of these characteristics are related with legislative provision; operating practices adopted by the office; skills and personality of the ombudsman concerned and aspects of the administrative culture as well as governmental environment within which the office operates(Owen, 1999).

Gregory & Giddings (2000)summarise the key elements of successful ombudsman to include visibility, accessibility, credibility, impartiality and independence. Additionally, ombudsmen must be vested with adequate power of investigation and his competence should be appropriately prescribed in the legislations. Another important feature is effectiveness especially in delivering the results and determining the most appropriate remedial and corrective actions. Finally, effective ombudsmanship is characterized by accountability on the part of ombudsman.

MALAYSIAN FINANCIAL OMBUDSMAN SCHEME

Background

Financial Ombudsman Scheme (FOS) is the first ombudsman institution ever created in Malaysian alternative dispute resolution landscape. Its establishment is pursuant to the Financial Services Act 2013 (FSA) and Islamic Financial Services Act 2013 (IFSA); legislations aim at regulating and supervising financial and Islamic financial institutions respectively to ensure financial stability. Bank Negara Malaysia (BNM) has appointed Ombudsman for Financial Services (OFS) which was formerly known as Financial Mediation Bureau (FMB) to operate this scheme. The objective of the OFS is primarily to provide an effective and fair handling of complaints and for the resolution of disputes between eligible complainants and members. Disputes may be referred to the OFS after an attempt to resolve at bank's level via its Complaint Unit fails to reach satisfactory settlement. The OFS is a company created under the Companies Act 1965 and commences its operation on 1st October 2016.

In performing its function, it should abide by the Financial Services (Financial Ombudsman Scheme) Regulations 2015 (FSR), Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 (IFSR) and its terms of reference (TOR). TOR plays a significant role in the overall

operation of the OFS as it details out matters related to the terms of the membership, the procedures and time period for submission of documents or information required for dispute settlement, the procedures and time period for compliance with the award and the procedures to ensure compliance to the membership terms in the event of breach by the member.

Functions of Ombudsman for Financial Services

As stated earlier, the role of the OFS is to settle dispute between eligible complainant and its members. Eligible complainant refers to financial consumer who uses or has used any financial services or products provided by a member either for personal, domestic or household purposes or in connection with a small business. Members on the other hand consist of licensed bank, licensed Islamic bank, licensed insurer (excluding professional reinsurer and licensed insurer carrying on financial guarantee insurance business), licensed takaful operator (excluding professional retakaful operator), prescribed development financial institution, approved issuer of a designated Islamic payment instrument, approved insurance broker, approved takaful broker, approved financial adviser and approved Islamic financial adviser (Paragraph 4 of the TOR; First Schedule of the FSR and the IFSR).The scope of the parties is therefore confined to those falling within these categories only. It is also worth to note that the OFS entertains both conventional and Islamic financial disputes falling within its jurisdiction.

> As far as dispute settlement is concerned, ombudsman is not the sole party to decide the dispute. The process involves two stages namely case management and adjudication whereby during the former the dispute will be decided by a case manager while at the latter stage, ombudsman is responsible to adjudicate the case. In this respect, the role of ombudsman is basically to resolve the dispute applying various appropriate techniques such as negotiation, conciliation, mediation or adjudication.

Characteristics of Ombudsman of the OFS

Up until now, neither the TOR nor the Regulations specify the requirements of individual ombudsman. However, both provides that the OFS shall comply with the fundamental characteristics of ombudsman namely independence, fairness, impartiality, accessibility, accountability, transparency and effectiveness (Regulaation 5 of the FSR and IFSR).

Subparagraph 3(1) of the TOR provides that the OFS shall be subject to the oversight of the Board which shall be responsible for ensuring the integrity of the operations and its ability to provide effective and independent services to eligible complainants. The OFS' decision making process shall be objective and independent of the members and the eligible complainants.

The fairness and impartiality principles is underscored in subparagraph 3(2) which spells out the requirement to ensure the information provided by the parties to be carefully and objectively considered in reaching a well-reasoned decision taking into account the law, regulations, standards and/or guidance issued by Bank Negara Malaysia as well as industry best practices. Furthermore, the OFS must also ensure that there is no conflict of interest between the case manager or ombudsman with any of the disputing parties and that they must provide fair, adequate and intelligible reasons for any decisions given.

The principle of accessibility is also acknowledged whereby the OFS is required to promote simple and inexpensive access to its services by creating awareness of its services, maintaining easy to understand, clear and transparent procedures for eligible complainants to refer a dispute to the FOS (Subparagraph 3(3) of the TOR).Obligation to publish an annual report on its activities and operations as well as submission of a report to BNM on its activities during the financial year, including its audited annual accounts reflects accountability principle (Subparagraph 3(4) of the TOR).

Transparency is another weighty value of ombudsman scheme. In this respect, information on

the services and scope of the OFS shall be published including the types of disputes and awards granted by an ombudsman, the approach adopted in handling disputes and the manner in which the decisions were made (Subparagraph 3(5) of the TOR). In case of dispute which is materially significance, manner and reasons for arriving at a particular decision should also be published. Nevertheless, the identities of the disputing parties shall remain anonymous, in compliance with confidentiality and privacy obligations.

Effort to establish an alternative dispute settlement would be fruitless if it fails to be effective. Thus, the TOR assert the need to have necessary resources, coverage and powers to resolve disputes in a timely and effective manner. This includes ensuring a satisfactory number of aptly qualified and competent case managers and ombudsmen to reflect the volume and complexity of disputes handled (Subparagraph 3(6) of the TOR). Additionally, dispute resolution process should not be complicated with superfluous formality or technicality while decision must be clearly communicated to the disputing parties.

ANALYSIS

From one aspect, it is agreeable that *Muhtasib* and ombudsman share the similar function of resolving grievances although with some variations in respect of the former duties in the past. Particularly, in respect of *Muhtasib*, he does not only concern with worldly matters but covers religious aspects as well. Attachment to religious sanctity make it unique and distinguishable from the western concept of ombudsman. The sacred duty of enjoining good and forbidding evil expand the job scope of *Muhtasib*.

It also incontestable that their rolehas undergone vast transformation due to changing in time and place as well as political, economic and social conditions.Their modern counterparts have been revised to suit local conditions. The ombudsman and *muhtasib* themselves, their operating methods and objectives also vary from country to country.Malaysian OFS is a fine example of modern *hisbah* or ombudsman institution with a specific duty of settling a dispute amicably to a specific group of disputing parties.

Pertaining to institutional structure, originally both *Muhtasib* and ombudsman is a one-man business being an individual referred to for the purpose of settling a dispute. Current scenarios differ in the sense that they become an institution either from public or private sector with diverse organisational structure. In this respect, OFS is a private company established under the Companies Act 1965 and its formation is subject to the provision of the said Act.

In performing their duties, Muhtasib is bound by the Shariah injunctions prescribed in the Quran and Sunnah as well as other secondary sources of law. In the present context, Muhtasib is also subject to the governing law or regulations enacted by respective state. Ombudsman also must act in accordance with the relevant laws or regulations governing the dispute applicable at that particular time in that particular country. Same goes to OFS whereby ombudsman must make a reference to any applicable law, regulations, standards and/or guidance issued by BNM as well as industry best practices. It is submitted that as far as Islamic financial institutions are concerned, the shariah provisions are also applicablesince the relevant laws or regulations must be in accordance with Shariah principles.

The characteristics of Muhtasib laid down by Ibn Taymiyyaare personal in nature in that they are devoted to the individual traits of being male muslim with highest degree of maturity, well-versed in not only in Islamic law but also social customs, mores, trades and dominant profession in his society, pious, kind, patience, bold and confident. These personalities are crucial especially if one is dealing with Islamic cases albeit very subjective.Some of these qualities maybe reconsidered such as the requirement of being male in view of the present phenomena whereby female are also qualified to be appointed as a judge.

The principles of ombudsman applied in majority ombudsman scheme worldwide have been incorporated in the OFS namely independence, fairness, impartiality, accessibility, accountability, transparency and effectiveness. These principles are in fact analogous with Shariah and therefore

adaptable as well in Hisbah institutions. Since the OFS is an institution, the obligation to comply with the principles also extend to the said company. It is suggested that there should be a specific requirement on the case manager and ombudsman of the OFS to enhance the credibility and reliability in performing their functions.

CONCLUSION

Although of different origin, the foregoing discussions highlight the similarity between *Muhtasib* and ombudsmanas analternative dispute resolution instrument.The transformation of these institutions proves that they are flexible yet the fundamental objective of being independent, effective, impartial, accessible and transparent remain unaltered. Its role in providing redress to financial consumers has been widely acknowledged. Malaysia has followed suit with the setting-up of the OFS to handle financial disputes depicting the modern ombudsman model. Whether it will achieve its goal to provide to be an independent, impartial, effective and prompt resolution of financial disputes is still questionable since it is still new. However, with the availability of comprehensive framework and support from the regulator as well as industries, it is hoped that the OFS will also share the same success story.

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حقيقة أفضلية التحكيم عن القضاء في تسوية المنازعات

Preference of Arbitration over Judiciary in settlement of disputes

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مقدمة :يرى جانبٌ من الفقه أن التحكيم يتميز عن القضاء في تسويته للمنازعات ،ويُبرر ذلك بعدد من المزايا التي تُحاول أن تجعل من التحكيم بديلاً حقيقياً منافساً للقضاء ،وهي وجهةٌ حَظي بها التحكيم بحثاً وتشريعاً ،فقد دأب الفقه بإسهاب على إدراج جوانب يُسميها بمزايا التحكيم كلما تعرض له في أيٍ من جوانبه ،وهو ما جارته القوانين المحلية والدولية بأن أفردت نظم قانونية مستقلة للتحكيم ،مع هجرٍ تام للإلتفات إلى القضاء وتصويب ما يعثريه من مثالب ،في الوقت الذي يقوم فيه الأخير كركن أساسي في الدولة لاغنى عنه لتمثيل سيادتها القضائية ،كما أن التحكيم ذاته على الرغم مما قُدم له من دعم بحثي وتشريعي إلا أنه يظل في جوانب واسعة من عملية التحكيم خاضعاً للقضاء ،وهو ما أملى البحث في حقيقة المزايا التي تُقدم للتحكيم كأساس لتفوقه عن القضاء ،ومدى قدرته على القيام كبديل عن القضاء ،وفي المقابل بيان حقيقة العيوب التي يتأخر فيها النظام القضائي على نظام التحكيم ،وما مدى إمكانية معالجتها لتعزيز نظام القضاء في هذا الجانب كونه صاحب الولاية العامة في الدولةوذلك بمنهج نقدي تحليلي مُقارن يستند إلى نظم قانونية مختلفة ويتخد من القانون الليبي كأساس لمرجعية النصوص القانونية ،مُتناولا هذه الجوانب وفقاً للخطة التالية :

المبحث الأول :حقيقة مزايا التحكيم ومدى قيامه كبديل عن القضاء لفض المنازعات.

المطلب الأول :تقييممزايانظامالتحكيمفيضوءالنظامالقضائي .

المطلب الثاني : حقيقةوجودالتحكيمكبديلمستقلعنالقضاء.

المبحث الثاني : تقييم النظام القضائي وتقويمه.

المطلب الأول : الجوانبالمتعلقةببطءالعدالة .

المطلب الثاني : الجوانبالمتعلقةبالكفاءةوالسرية .

المبحث الأول :حقيقة مزايا التحكيم ووجوده كبديل مستقل عن القضاء :

دأب الفقه على إعتبار نظام التحكيم نظام متميز ومستقل لتسوية المنازعات يتفوق عن القضاء نظراً لما له من عيوب تضر بمصلحة أطراف النزاع ،وهو ما يُملي تناول هذه المزايا في ضوء النظام القضائي في مطلب أول،ثم الكشف عن حقيقة إستقلال التحكيم عن القضاء في مطلبٍ ثانْ .

المطلب الأول :تقييم مزايا نظام التحكيم في ضوء النظامالقضائي :

تُحاول الدراسة ضِمن هذا الإطار أن تتولى تقييم الجوانب التي يُقدمها الفقه كمزايا [1] لنظام التحكيم وذلك ببيان موقف النظام القضائي منها :

1-سرعة الفصل في المنازعات :يُقال أن العدالة البطيئة ظلم ،وبالتالي فإن سرعة الفصل في الدعوى تعتبر أحد أهم عناصر العدالة ،وضمن هذا الإطار تُقدم السرعة كأحد أهم مزايا التحكيم التي يتفوق من خلالها على القضاء ،نظراً لما يستغرقه الأخير من وقت في الإجراءات القضائية من مواعيد وإعلانات وطعون وغيرها ،وهي جوانب قد تضُر بمصالح أطراف الخصومة ،وتكمن خصوصية السرعة في نظام التحكيم في عدم التقيد بالشكليات القضائية ،وتفرغ المحكمين لنظر المنازعة ،والتقاضي على درجة واحدة دون إستئناف ،بالإضافة إلى تحديد مدة إنهاء النزاع ،وفي المقابل فإن بطء العدالة في النظام القضائي لم يعُد يُخفى على أحد ،إلا أننا نُحاول أن نتوقف على حقيقة ذلك عملياً. ففي جانب التفرغ نشير إلى أن ذلك يُتاح جزئياً في القضاء أيضاً من خلال المحاكم الغير مكتظة بالمنازعات ،أما من حيث التقيد بالشكليات فإن نظام التحكيم أيضاً يقتضي التقيد بشكليات التحكيم التي قد تفرض تمديد

[1] - والي ،فتحي ،قانون التحكيم في النظرية والتطبيق ،منشاة المعارف : الإسكندرية ،الطبعة الأولى 2007 ،ص 14 .

آجال التحكيم وتُبطئ من عملية التحكيم [١] ،أما في مايخص التقاضي على درجة واحدة فإن ذلك قد يُحسب على نظام التحكيم لا عليه ،وذلك لخطورة آثار الحكم على أطراف النزاع في بعض الأحيان ،وهو ما يؤمنه القضاء من ضمانة جوهرية [٢] من خلال إمكانية تلافي آثار ضرر الحكم في محكمة ثاني درجة ،أو نقضه من محكمة النقض ،فضلاً عن ذلك ،فإنه على الرغم مما يُفرضه القانون [٣] من آليات تتمثل في سرعة مواعيد الحضور ،ونظم القضاء المستعجل والنفاد المعجل نظراً لطبيعة موضوع النزاع والأذى الذي يلحقه بسبب التأخير [٤] ،ونظام الأوامر القضائية وتوثيق الصلح بين الأطراف وغيرها من النظم التي تُقدم بدائل أفضل من حيث سرعة الإنجار ،إلا أنه مع ذلك يظل نظام التحكيم يتفوق عن النظام القضائي في هذا الجانب وهو ما سوف نتناوله بشئ من الإيجاز ضمن المبحث الثاني .

2**–السرية** : تُعد السرية أحد أهم المزايا التي تُقدم للتحكيم ،وذلك للحفاظ على موضوع النزاع وجوانبه من العلانية ،بالإضافة إلى الحفاظ على سرية قيام النزاع ذاته ،لاسيما وأن الأمر يتعلق بِسُمعة أطراف النزاع من النواحي التجارية أو الإجتماعية أو السياسية أو غيرها ،وفي هذا الجانب يتفوق نظام التحكيم الذي يقوم علىمبداء السرية على القضاء الذي يقوم على مبداء العلانية ،سواءً من حيث الجلسات والمرافعات[٥] ،أو من حيث الأحكام[٦] ،إلا أنه خروجاً عن مبداء العلانية في المرافعات والجلسات في النظام القضائي يتيح القانون للمحكمة مُكنة إجراء الجلسة سرية،وذلك

للمحافظةعلىالنظامالعامأومراعاةللآدابأولحرمةالأسرة[٧] ،وهي حالة يُمكن من خلالها البحث عن معالجة

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[١]- نفس المرجع ص ،16 .

[٢]- أعبودة ،الكوني علي ،قانون علم القضاء ،جامعة ناصر / الطبعة الأولى ،طرابلس : 1991 ،ص 79 .

[٣]- المادة (83) من قانون المرافعات الليبي .

[٤]- أنظر نفس المرجع ،ص 378 ومابعدها .

[٥]- المادة (130) من قانون المرافعات ،والمادة (20) من قانون نظام القضاء ،الليبي .

[٦]- المادة (276) من قانون المرافعات الليبي .

[٧]- المادة (130) المشار إليها .

الفارق بين نظامي التحكيم والقضاء ،أما بالنسبة لعلانية الأحكام فهي تندرج من طبيعة النظام القضائي وهو ما يحتاج إلى تمحيص أرجاءت الدراسة التعرض له إلى المبحث الثاني .

3– الحياد : دأب الفقه على أن نظام التحكيم أكثر حيادية من نظام القضاء وذلك من حيث النزاهة والميل نحو تطبيق قانون معين من عدمه ،إلا أن ذلك يُجافي الحقيقة ،ذلك لأنه من حيث النزاهة فإن المحكم لايخضع في عمله إلا إلى ضميره الشخصي وبعض النظم التي تقررها مؤسسات التحكيم إن وجدت ،أما القاضي في نظام القضاء فإنه يخضع في ذلك لضميره الشخصي ولهيئات الرقابة والتفتيش القضائي وتعقيب محكمة ثاني درجة ومحكمة النقض ،وهو ما يُملي عليه بدل كل ما في وسعه لإعمال مبداء الحياد والحفاظ على النزاهة ،أما بالنسبة لمسألة الميل نحو تطبيق القانون الوطني على حساب القوانين الأخرى فإنه جانب يفرضه مظهر السيادة القضائية في الدولة الذي ينعكس في تشريعاتها بمنح الأولوية لقانون القاضي ،فضلاً عما يستأثر به القاضي إعمالاً لقاعدة النظام العام ،وفي الوقت الذي لايزال فيه نظام التحكيمبصدد توحيد وتفصيل قواعد للسلوك والأخلاقيات المهنية للمحكمين [1] لمحاولة تحري نزاهة وحياد المحكم[2] .

4– قلة التكاليف: تُقدم قلة التكاليف كميزة للتحكيم مقارنةً بالقضاء وذلك من حيث إنخفاض قيمة الرسوم وقصر مدة التقاضي التي تستدعي دفع الرسوم في كل مرحلة بالنسبة للقضاء ،بالإضافة إلى جوازية إقتسام الرسوم بين أطراف الخصومة في التحكيم ،إلا أن ذلك غير دقيق نظراً لأن المبداء السائد هو مجانية القضاء بإعتبار المؤسسة القضائية إحدى المؤسسات التي تقدم خدمة عامة للمجتمع ،على الرغم من تحمل الخصوم للرسوم القضائية إلا أنها تبقى رسوم زهيدة في مقابل الرسوم التي تُدفع لعملية

[1] – تقرير لجنة الأمم المتحدة للقانون التجاري ،الدورة التاسعة والأربعون (27 يونيو : 15 يوليو –2016) الجمعية العامة – الوثائق الرسمية – الدورة الحادية والسبعون – الملحق رقم 17 – صفحة 52 .

[2] – أنظر ،طلعت دويدار ،ضمانات التقاضي في خصومة التحكيم ،دار الجامعة الجديدة :الازاريطة 2009 ،ص 124 .

التحكيم ،فضلاً عن مجانية بعض أنواع الدعاوى ،كالدعاوى العمالية وغيرها ،يُضاف إلى ذلك مجانية المحاماة[1] تحقيقاً لمفهوم الحق في التقاضي ،وهو مبداء يقوم على تحمل الدولة لنفقات المحامي،وهو أمر غير مُتاح على الإطلاق في نظام التحكيم ،كما أن نظام القضاء يُتح أوجه عديدة للتدخل في الدعوى من قبل دوي المصلحة برسوم زهيدة ،بينما نظام التحكيم لايُتيح ذلك ويقتضي تأسيس تحكيم مُستقل برسوم جديدة مالم يرتضي أطراف النزاع ذلك[2].

5-المحافظةعلىالعلاقةبينالخصوم : يُقدم التحكيم عادةً وكأنه وسيلة توفيقية بين الخصوم تُحافظ على العلاقات بين أطراف الخصومة كونه تم إختياره بإرادتهم جماعيةً ،إلا أن ذلك يُجانب الحقيقة ،ذلك لأن اللجوء إلى التحكيم يتم بسبب وجود خلل في العلاقة بين الأطراف ،ويتم في بعض الأحيان بناءً على مشارطة تحكيم تمت عند إبرام العقد وقبل حدوث المنازعة بما يجعل إرادية اللجوء إلى التحكيم عند حدوث النزاع غير متحققة بمعناها النفسي الذي يُروج له ،وفي المقابل فإن القضاء أيضاً يقع من ضمن مهامه التوفيق بين الأطراف ما أمكن وللمحامين القيام بدور بارز في ذلك وفقاً لما تقتضيه أخلاقياتهم المهنية ،ومن زاويةٍ أخرى يُمكن النظر إلى القضاء كمؤسسة مختصة بتسوية النزاع وفقاً للحقيقة بشكل إحترافي ،وفي ذلك أثر فعال في الحفاظ على علاقات الأطراف فيما بعد .

6-التحكيموسيلةلتشجيعالتجارة والإستثمار : يُروجللتحكيم عادةً على أنهأداة رئيسية لتشجيع الإستثمار وإزدهار التجارة ،وذلك بسبب شكوك المستثمر الأجنبي في القضاء الوطني من حيث عدم الكفاءة لنظر المنازعات الإستثمارية ،وعدم الحياد لإنصاف طرف أجنبي في مواجهة طرف محلي قد يكون الدولة ذاتها ،وهو أمر ليس له سنداً من القانون ،ذلك لأنه وعلى الرغم من التفاوت المعرفي

[1]- القانون الليبي رقم (4) لسنة 1981 .بشأن المحاماة الشعبية .

[2]- والي ،فتحي ،مرجع سابق ،ص 16 .

للقضاة وقدراتهم ،إلا أنهم في جميع الأحوال تبقى مهمتهم تحقيق العدالة بصرف النظر عن جنسية أطراف النزاع ،ولا أساس لذلك إلا في جوانب ضيقة جداً بِمُكنة القاضي التصدي لها من خلال الخبرة الفنية .

7– **مرونة التحكيمفي إختيار المحكمين** : تُقدم مرونة إختيار المحكمين كميزة أساسية للتحكيم ،وذلك من حيث مُكنة إختيار أطراف النزاع لشخص معين أو هيئة معينة متخصص في موضوع النزاع بشكل يُساهم في تسويته وإنصاف الأطراف ،وهو جانب يقوم على التوافق المحض لإرادات الأطراف التي بإمكانها تجنب الخلاف من بابٍ أولى ،إلا أنه من حيث الواقع إذا أحتدم الخلاف ،مالم تكن الأطراف حددت سلفاً المحكم أو مؤسسة التحكيم المختصة بشكلٍ دقيق ،فإنه من الصعب توصلهم إلى إختيار المحكم لدرجة اللجوء إلى القضاء لتعيين محكم ،أما بالنسبة لموقف النظام القضائي من هذه المرونة نشير إلى أن الإرادة تلعب دوراً مُباشراً أيضاً في إختيار محكمة معينة بإرادتهم خروجاً عن قواعد الإختصاص المكاني للمحاكم[1] ،فضلاً عما تحتويه المحاكم من دوائر تخصصية ،وإن يعوزها بعض التأهيل النسبي الذي قد يعوز المحكمين أيضاً ،كما سيرد بحثه لاحقاً .

8–**المرونة في إختيار القانون الواجب التطبيق** : يُتيحالتحكيم لأطراف النزاعحريةإختيار القانون الواجب التطبيق ،وهو أمر غير مُتاح أمام القضاء ،وهو جانب له صِحته إلى حدٍ ما ،ذلك لأن أطراف النزاع في بعض المنازعات ترى أن بعض القوانين والنظم هي الأكثر ملائمةً لحكم منازعتهم خاصةً فيما يتعلق بالأعراف التجارية وبعض النظم القانونية الخاصة،كما أن التحكيم يغني الخصوم عن تتبع مسائل تنازع القوانين وتنازع الإختصاص القضائي ،أما بالنسبة للنظام القضائي فإنه بِمكنة أطراف النزاع تقديم إثبات عن الأعراف الحاكمة لموضوع النزاع للمحكمة وطلب الحكم بمقتضاها ،وهو أمر مقبول بإعتبار

[1] – يذهب القضاء الليبي إلى أن قواعد الإختصاص المحلي أو المكاني ليست من النظام العام ،وبالتالي يجوز الإتفاق على مخالفتها ،حكم المحكمة العليا في الطعن المدني رقم 54/لسنة 26 قضائية ،جلسة 1982/2/8 .

أن هذه الأعراف من ضمن مصادر القانون التجاري طالما لم تتعارض مع النظام العام في الدولة ،وجدير بالبيان أنه على الرغم من إختيار المحكمين للقانون الواجب التطبيق إلا أن محكمة التحكيمبِمُكنتها الخروج عن ذلك القانون إلى قانون آخر [1]،لأسباب تتعلق بعدم الكفاية أو التعارض مع النظام العام في دولة تنفيد الحكم ،أما فيما يتعلق بجوانب تنازع القوانين وتنازع الإختصاص القضائي ،فإن قواعد الإسناد والإحالة في القانون الدولي الخاص غنية بالنظم الكاشفة عن القانون الواجب التطبيق ،فضلاً عما تُقدمه من مرونة تضع إرادة الأطراف في مُقدمة الأطر التنظيمية للإختيار.

9- **المرونة في إختيار مكان ولغة التحكيم** : تُقدم المرونة في إختيار مكان ولغة التحكيم كميزة هامة لنظام التحكيم ،إلا أن ذلك رغم أهميته إلا أنه لا يُعتبر ميزة يتفوق بها التحكيم عن القضاء ذلك لأن القضاء غالباً ما يكون أقرب مكانياً إلى مواطن أطراف النزاع وفقاً لقواعد الإختصاص المكاني ،فضلاً عن ذلك فإنه بِمُكنة الأطراف إختيار محكمة معينة بحكم الإتفاق الصريح أو الضمني بحضور الجلسات والتخلي عن قواعد الإختصاص القضائي ،أما فيما يخص لغة التحكيم فإن القضاء يُقدم مرونة أكبر بالخصوص ،وذلك من حيث توفير مترجم محلف يتولى ترجمة طلبات الخصوم .

وفي تتمة دراسة المزايا التي تُقدم كأساس لتفوق التحكيم عن القضاء يتبين أن المقارنة لم تكشف عن فروق جوهرية يُمكن معها القول بتغلب نظام التحكيم عن النظام القضائي ،على الرغم من وجود تفاوت بسيط مبناه بعض العيوب التي يُعانيها النظام القضائي والتي تحاول الدراسة تقييمها وتقويمها في المبحث الثاني منها .

المطلب الثاني :حقيقة وجود التحكيم كبديل مستقل عن القضاء :

[1]- أنظر النظام القانوني للإتفاقيات البترولية في دول مجلس التعاون ،أحمد عبد الحميد عشوش ،وعمر باخشب ،مؤسسة شباب الجامعة :الإسكندرية ،1990 ،ص 375 ،والتحكيم والنظام العام ،إياد مُحَمَّد بردان ،منشورات الحلبي الحقوقية :بيروت ،الطبعة الأولى 2004 .

يُقدم الفقه تبريرات متعددة لإعتبار التحكيم وسيلة مستقلة عن القضاء ،إلا أنه من حيث الواقع فإن نظام التحكيم لايزال في جوانب متعددة منه رهين بما تُقرره السلطة القضائية ،وفيما يلي تحاول الدراسة أن تقدم بعضاً من تلك الأوجه وتقسمها إلى أوجه تتعلق بسير الدعوى ،وأخرى تتصل بتنفيد حكم التحكيم .

أولاً :أوجه توقف التحكيم عن القضاء أثناء سير دعوى التحكيم :

تبرز التشريعات ذات العلاقة جوانب عديدة تقضي بدور مباشر للقضاء في العملية التحكيمة نسرد بعضاً منها فيما يلي :

1–دور القضاء في الجوانب الشكلية : يحدث أن تقع المنازعة ولم يتفق الطرفان على تعيين المحكم ،أو يتفقان على تعيينه إلا أنه يأبى لسببٍ أو لآخر عن نظر النزاع ،وفي هذه الحالة يمنح القانون [1] للقاضي صلاحية تعيين محكم أو محكمين بناءً على طلب أيٍ من الخصوم،وذلك بموجب قرار غيرقابلللطعن" ،كما يُمكن إعتبار حكم المحكمة بعدم الإختصاص إستناداً لوجود شرط الإحالة للتحكيم إحالة ضمنية للتحكيم بموجب تخليها كصاحبة الإختصاص الأصيل في نظر المنازعات ،فضلاً عن دور القضاء في عزل المحكمين وردهم [2] وذلك بناءًعلىطلبأحدالخصومبعدسماعالطرفالآخروالمحكمأوبناءًعلىإتفاقالخصوم،ويصدرالقاضيقراراًبرفضالطلبأوقبولهغير قابلللطعن ،وهي ذات الأحوال التي يُرد ويُعْزل فيها القاضي .

[1] – المادة (746)منقانونالمرافعاتالليبي .

[2] – المادة (749) من ذات القانون .

2-دور القضاء في الجوانب الموضوعية : ينص القانون [1] على مسائل محددة يعتبرها من المسائلالخارجةعنولايةالمحكمين،ومنهاالطعنبالتزويرفيورقةأواتخذتإجراءاتجنائيةعنتزويرهاأوعنحادثجنائيآخر،وكذل كإذاعرضتمسألةيرىالمحكمونأنلهاتأثيراًفيموضوعالتحكيم –

أوقفالمحكمونعملهموأصدرواأمراًللخصومبتقديمطلباتهمإلىالقاضيالمختص،وفيهذهالحالةيتوقفسريانالميعادالمحددلل حكمإلىأنيعلنأحدالخصومالمحكمينبصدورحكمإنتهائيفيتلكالمسألةالعارضة ،فضلاً عن ضرورة الرجوع للمحكمة في الحكمعلىمنيتخلفمنالشهودعنالحضور أو آداء الشهادة [2]،و الأمربالإناباتالقضائية ،كما أنه نظراً لعدم إختصاص المحكمين بالإذن بالحجزولابأيةإجراءاتتحفظية ،فإنه إذاأذنالقاضي للمحكمبالحجزفيقضيةمنظورةأمامه،فإنه يجب الرجوع للقاضي لتقرير صحةالحجز .

ثانياً أوجه توقف التحكيم عن القضاء أثناء تنفيد حكم التحكيم :

تختلف النظم القانونية الخاصة بتنفيد أحكام التحكيم من دولةٍ لأخرى ،ذلك لأنه وعلى الرغم من محاولة إتفاقية نيويورك [3] توحيد نظم الإعتراف ،إلا أن الإتفاقية ذاتها لم تُحدد الإجراءات الواجب إتباعها للإعتراف بأحكام التحكيم الأجنبية تاركةً ذلك لأحكام القوانين الوطنية في كل دولة [4] ،وعليه فإن إجراءات التنفيد في ليبيا ومصر وغيرها من الدول التي تتخد من قانون المرافعات الفرنسي أساساً لها تفرض قيود متعددة لتنفيد حكم التحكيم نتناول منها ما يلي :

1-**إيداعأحكامالمحكمين :** تقضي المادة(762) من قانون المرافعات على أن

"جميعأحكامالمحكمينولوكانتصادرةبإجراءمنإجراءاتالتحقيقيجبإيداعأصلهامعأصلمشارطةالتحكيمبمعرفةأحد

[1]- المادة (757) وما بعدها من ذات القانون .

[2]- رضوان ،أبوزيد ،الأسس العامة للتحكيم التجاري الدولي ،دار الكتاب الحديث (دون بيان مكان نشر) طبعة1996 ،ص 17 .

[3]- إتفاقية نيويورك لتنفيد الأحكام الأجنبية لسنة1958 .

[4]- يدر ،آمال ،الرقابة القضائية على التحكيم التجاري الدولي :منشورات الحلبي الحقوقية :بيروت – لبنان ،الطبعة الأولى 2012 ،ص180 .

همقلمكتابالمحكمةالمختصةأصلاًبنظرالدعوى ...وتختص هذه المحكمة بتصحيح الأخطاء المادية إن وجدت وفقاً لنص المادة (764) من القانون المذكور .

2- **تنفيذأحكامالمحكمين :** ينص القانون [1] على أنه

لايصيرحكمالمحكمينواجبالتنفيذإلابأمريصدرهقاضيالأمورالوقتيةبالمحكمةالتيأودعأصلاالحكمقلمكتابهابناءعلىط لبأحدذويالشأن،وذلكبعدالاطلاععلىالحكمومشارطةالتحكيموالتثبتمنعدموجودمايمنعمنتنفيذه،ويوضعأمرالتن فيذبذيلأصلالحكم ،ويخبرقلمالكتابالخصومبالإيداعوبتصديقالمحكمةبالطرقالمقررةلإعلانالأحكام ،وتكمن الغاية من ذلك في مراقبة عمل المحكم قبل تنفيذ حكمه من حيث مراعاتها للجوانب الإجرائية للموضوع[2] ،صحيح أن ذلك لايُتيح للقاضي التطرق إلى الجوانب الموضوعية ،إلا أنه يظل قيد قائم على حكم التحكيم ،وقد شهدت سوابق التحكيم الليبية تجارب عديدة أنتهت إلى عجز نظام التحكيم عن تنفيذ أحكامه ،مما حتم عليه الرجوع إلى طريق المفاوضة المباشرة مع الدولة[3] .

3- **التحقق من شروط تنفيذ حكم التحكيم الأجنبي** :تُجيزالمادة (408) من قانون المرافعات الليبي تنفيذ "أحكامالمحكمينالصادرةفيبلدأجنبيشريطةً أن تكونهائيةوقابلةللتنفيذفيالبلدالذيصدرتفيهفضلاً عن خضوعها لشروطٍ أخرى سنتناول بعضاً منها تِباعاً ،وبعض هذه الشروط لاتعدوا كونها شروطاً شكلية يترخص قاضي التنفيذ بالتحقق منها ،كشرط المعاملة بالمثل ،وعدم تعارض حكم التحكيم مع حكم أو أمر آخر صدر عن المحاكم الليبية ،أما بعض الشروط الأخرى فإنها تمنح القاضي مجالاً موضوعياً واسعاً

[1] - المادة (763) من قانون المرافعات الليبي .

[2] - حكم محكمة النقض المصرية في النقض المدني جلسة 1978/2/15 ،مجموعة أحكام محكمة النقض س 29 ص 472 .

[3] - تنفيذ حكم التحكيم الصادر في دعوى التحكيم المقدمة من شركة(B.P) البريطانيةضد الدولة الليبية بعدتأميمهاأنتهى إلى تسويةوديةوفقاً للقانونرقم (102) لسنة 1974م ،كما أنتهى تنفيذ حكم التحكيم الصادر في دعوى التحكيم المقدم من شركةليامكوضدالحكومةالليبيةعنطريقتسويةوديةوفقاً لقراراللجنةالشعبيةالعامة (مجلس الوزراء) رقم (298) لسنة 1981م ،كما أنتهى أيضاً حكم التحكيم في دعوى التحكيم المقدمة من شركة تكساكوضد ليبيا عنطريقتسويةوديةسنة 1977 ،مذكرات قدمها الدكتور عبدالرازق المرتضي سليمان لطلبة الدراسات العليا ،كلية القانون ،جامعة طرابلس (الفاتح سابقاً) 2003 .

للتحقق منها ،وهو ما يُتيح له رفض تنفيد الحكم ،وتأتي في مُقدمة هذه الشروط ،عدم تعارض الحكم مع النظام العام ،وهو مفهوم شديد الشمولية والمرونة ،ويحتوي على مجموعة من المبادئ الأساسية السياسية والإقتصادية والإجتماعية السائدة في دولة القاضي ،ويترخص القاضي بتقدير ذلك وفقاً لسلتطه التقديرية التي على ضوئها يُقرر تنفيد حكم التحكيم من عدمه،وهي حالة تُعيق تنفيدأحكام التحكيم ،وهو ما يقتضي إخضاعها لرقابة محكمة النقض ودون تركها لمطلق السلطة التقديرية للقاضي[1] ،كما أن شرط عدم تعارض الحكم مع أحكام الشريعة الإسلامية الذي جاءت به إتفاقية الرياض للتعاون القضائي [2] ،هو أيضاً من الشروط الموضوعية التي تُغرق موضوع حكم التحكيم في الإختلافات الشرعية التي قد تنتهي إلى رفض تنفيده.

4- **إستئناف أحكام المحكمين وإلتماس إعادة النظر فيها**:تُجيز المادة (767) من قانون المرافعات الليبي إستئنافأحكامالمحكمينبعدالتصديق...طبقاًللقواعدالمقررةلإستئنافالأحكامالصادرةمنالمحاكم ،كما تُجيز المادة (768)الطعنفي هذهالأحكامبالتماسإعادةالنظر،وهي أحول يتصل فيها القضاء إتصال مُباشر بنتيجة العملية التحكيمية .

5-**أحوالبطلانحكمالمحكمين** : وفي هذه الأحوال يُجيز القانون[3] طلببطلانحكمالمحكمينالصادرنهائياً،ولوأشترطالخصومخلافذلك،فيعدة أحوال لايتسع المقام لبيانها منها مايتعلق بصحة مشارطة التحكيم ،ومنها ما يتعلق بصحة تعيين المحكمين ، ومنها ما يتصل بسير الدعوى وإجراءاتها ونطاقها الزمني ،ومنها ما يتصل بالحكم من حيث مشتملاته وموضوعه ،وتعتبر دعوى

[1] - صادق ،هشام و عكاشة عبدالعال ،القانون الدولي الخاص ،دار المطبوعات الجامعية ،الإسكندرية :2007 ،ص 194 .

[2] - تنص المادة (30) علىأنهلايجوزتنفيدالحكمالأجنبيإذاكانمخالفاًلأحكامالشريعةالإسلاميةو ...فيالطرفالمتعاقدالمطلوبإليهتنفيدالحكم "

[3] - المادة (769) منقانونالمرافعات الليبي .

البطلان من أكثر الأحوال التي يتصل بها القضاء بنظام التحكيم ،وفيها تخول [1] المحكمة إحالة النزاعإلىالتحقيق إذا رأت مقتضىً لذلك،أو

إذاكانموضوعالنزاعمرتبطاًبنزاعآخرمنظورأمامجهةقضائيةأخرىأمرتبوقفتنفيذالحكمالمطعونفيه".

ومن خلال ذلك يتبين أن نظام التحكيم لايزال رهيناً للنظام القضائي في جوانب واسعة من عملية التحكيم ،مما يُصدق وصفه بأنه نظام قضائي خاص ،أووسيلة إستثنائية لتسوية المنازعات[2]،أما فيما يتعلق بالمزايا التي تُقدم له كأساس لأفضليتهعلى النظام القضائي كما تناولها المطلب الأول من هذا المبحث ،فإنها تُطرح بشكل مُبالغ فيه في عمومها ،ذلك لأن أوجه تفوق نظام التحكيم لم تأتي من تطور البناء التنظيمي لهذا النظام بقدر ما أتت من بعض العيوب التي يُعاني منها النظام القضائي ،وهي عيوب لامناص من معالجتها خصوصاً مع أهمية دور النظام القضائي عموما ،وفي نظام التحكيم بوجه خاص وهو ما يُحتم معالجة أوجه القصور فيه ،وهي هنا تلك التي شكلت أساساً لتفوق نظام التحكيم على نظام القضاء متمثلةً في جوانب السرعة والكفاءة والسرية تحديداً ،وذلك في ضوء ماتوصلت له بعض التجارب القانونية أوالقضائية ،بالإضافة إلى محاولة تسخير الوسائل العلمية الحديثة في ذلك ،وهو في الواقع ما هجرته للأسفالنظم التشريعية والدراسات العلمية على الرغم من الأهمية الجوهرية للنظام القضائي للدولة والمجتمع .

المبحث الثاني :تقييم النظام القضائي وتقويمه :

سبقت الإشارة إلى أن لامناص من الدور الأساس الذي يتولاه النظام القضائي في الدولة كصاحب الولاية العامة فيها،كما أنه لامناص من الرجوع للقضاء من قِبل التحكيم ذاته ،عليه فإنه من الأهمية

[1] – المادة (771) من قانون المرافعات الليبي .

[2] – حكممحكمةالنقضفي 1971/2/16م،مجموعةأحكامالنقض،س22ق، 179 ،حكممحكمةالنقضفي 1978/2/16م،مجموعةأحكامالنقض،س29ق، 472) .

بمكان إصلاح نظام القضاء وتقويمه وإعادة النظر فيه ،وهو ما هجرته الدراسات [1] وأنكبت على دعم نظام التحكيم على الرغم من دوره الثانوي في تسوية المنازعات ،ولا تدعي هذه الدراسة بأنها ستفعل ذلك بقدر ما تحاول أن تُسلط الضوء على الجوانب التي يتأخر فيها النظام القضائي عن نظام التحكيم مع تقديم ما لها من من مقترحات مقرونةً بالتجارب النادرة المقدمة في هذا الشأن ،وذلك من خلال مطلبين يتناول أولهما جانب البطء في فض المنازعات في النظام القضائي ،فيما يتناول ثانيهما جانبي الكفاءة والسرية ،وهي في الواقع الجوانب التي لاحظت الدراسة تفوق نظام التحكيمعن النظام القضائي فيها ،أو بالأحرى تأخر نظام القضاء عن نظام التحكيم فيها:

المطلب الأول : الجوانب المتعلقة ببطء العدالة :

لاشك بأن معالجة بطء العدالة تقتضي عملاً موسوعياً يعيد النظر في كُل المنظومة القانونية المتصلة بالدعوى ،عليه فإننا لن نخوض ضِمن هذه الوريقات إلا في تلك الجوانب القانونية والقضائية التي تمنح آجالاً تتسبب بشكل مُباشر في بطء العدالة ،وفيها نقتصر على الدعوى منذ إقامتها حتى الحكم فيها دون التطرق إلى الطعن فيه وتنفيده ،مع تقديم ما أمكن تقديمه من مُقترحات ضمن هذا الإطار :

أولاً : الجوانب القانونية :

1-الإعلانات القضائية : يُعتبر الإعلان القضائي المدخل الرئيسيلتحريك الدعوى ،وهو عمل إجرائي يقترن بمواعيد حددها القانون ،وقد كان المشرع دقيقاً في هذا الجانب بنصه على أنه "

إذانصالقانونعلىميعادحتميلرفعدعوىأوطعنأوأيإجراءآخريحصلبالإعلان،فلايعتبرالميعادمرعياًإلاإذاتمإعلانالخصم

[1] – قُدمت بعض الدراسات النادرة للإيجاد بعض الحلول لبطء العدالة في النظام الجنائي نزولاً عن تنفيد العهد الدولي للحقوق المدنية والسياسية لسنة 1966 منها ورقات قُدمت في ندوة إستقلال القضاء في المغرب على ضوء المعايير الدولية والتجارب في المنطقة المتوسطية أنعقدت بالرباط – المغرب في 2-4 /فبراير 2006 .

خلاله" (المادة 6 من قانون المرافعات الليبي) ،وعليه فإن للميعاد في الإعلان القضائي دور هام من حيث إنعقاد الدعوى وبُطلانها،ويتصل الإعلان بكل الأوراق القضائية ويفرض القانون آجالاً مختلفة لإتمامه ،وهي آجال تحتاج إلى إعادة النظر فيها لمواكبة التطور الناجم في وسائل الإتصالات والمواصلات الحديثة التي تُساعد على التقليل من إهدار الوقت لرفع الدعوى ،أو السير فيها ،وتُسلط الدراسة الضوء على مواعيد المسافة ذات الصلة بالإعلانات موضوع نص المادة (17) من ذات القانون التي تنص تحت عنوان زيادةالمواعيدبسببالمسافات على أنه

"إذاعينفيالقانونميعادللحضورأولمباشرةإجراءفيهزيدعليهيوملكلمسافةمقدارهاخمسةوعشرونكيلومتراًبينالمكانالذي يجبالانتقالمنهوبينالمكانالذييجبالانتقالإليه

،ومايزيدمنالكسورعلىخمسةعشركيلومتراًيزادلهيومعلىالميعاد،ولايجوز بأيةحالأنيتجاوزميعادالمسافةثمانيةأيام.

ويكونميعادالمسافةعشرينيوماًبالنسبةلمنيقعموطنهفيمناطقالحدودوللساكنينفيالدواخل ،فضلاً عما تمنحه المادة (18) من ذات القانون للقاطنين في الخارج من آجال متفاوتة وهي (30) يوملللبلادالواقعةعلىشواطئالبحرالأبيضالمتوسط ،و (60) يوم لبلاد أوروبا ،و (150) يوم للبلدان الأخرى " وهي آجال في الواقع لم تعد مقبولة بأي حال من الأحوال نظراً لإنتفاء المبررات التي سُنت لأجلها ،خصوصاً وأن القانون منح للقاضيضمن إطار هذه المادة مُكنة تحديد مواعيد الحضور بناءً علىطلبذويالشأن،كما أنه منح لقاضيالأمورالوقتية صلاحية

الأمربنقصهذهالمواعيدتبعاًلسهولةلمواصلاتوظروفالاستعجال ،إلا أنه مع ذلك يظل هذا الإجراء هو الإستثناء على الأصل العام وهو التقيد بمواعيد المسافة ،وهو أمر بطبيعة الحال يحتاج إلى تدخل تشريعي لتصويبه ،إلا أنه مع ذلك بالإمكان تلافي ذلك بتنظيم إداري ضمن المؤسسة القضائية حرصاً على وقت التقاضي وتلافي البطء .

2–إنعقاد الدعوى وبدء السير فيها : دونما حاجة للخوض في إجراءات إنعقاد الدعوى بين الإيداع والإعلان ،فإنه ما يعنينا هنا هو الإشارة إلى أثر إنعقاد الدعوى على سرعة الفصل فيها وبطء العدالة بشكلٍ عام ،ويهمنا هنا أن نشير إلى أهمية ما أمكن تسميته بصحة وجهة الدعوى ،نظراً لما له من أثر على إهدار الوقت و المساس بصحة وسلامة تحقيق العدالة ،ولا يُرتب الإيداع في حد ذاته إشكالية قائمة في هذا الشأن بقدر ما يُراد له أن يلعب دوراً موضوعياً وفعالاً في تقويم وجهة الدعوى من حيث الإختصاص ،حيث أنه نظراً لما تثيره قواعد الإختصاص القضائي من إختلافات فقهية خاصة فيما يتعلق بالإختصاصات الإستثنائية للمحاكم الجزئية [1] ،وإختصاصات القضاء الإداري والعادي ،وهي إختلافات تُهدر مراحل قضائية بِرُمتها وتستغرق إجتهادات وإستئنافات وطعون تصل إلى المحكمة العليا ،التي تُعيدها أحياناً إلى محكمة الموضوع وهو ما يقتضي السير فيه لسنوات تصل إلى عقدٍ من الزمان ،وهي في الواقع تحتاج إلى معالجة تشريعية لوضع تفاصيل تستوعب كل قواعد الإختصاص ،إلا أنه بالإمكان معالجتها أيضاً بشكل تنظيمي بتشكيل هيئة قضائية مختصة بتحديد الإختصاصات سلفاً منذ إيداع الدعوى إستناداً إلى ما تُقرره المحكمة العليا في هذا الشأن ،أو على أقل تقدير تنظيم الحكم في مسألة الإختصاص من أول جلسة لنظر الدعوى ،أو ما يُسمى "الإختصاص بالإختصاص" [2] ،وهو ما يلعب دور فعال في معالجة بطء العدالة .

3–آجال السير الدعوى : معلوماً أن السير في الدعوى يكون على مراحل ،وهذه المراحل لانعني بها هنا المراحل المألوفة من تحقيق ومرافعة وحكم ،وإنما نعني بها تلك الآجال التي تسبب البطء في الفصل في النزاع والحكم فيه ،وهي في الواقع كثيرة بشكل يتجاوز هذه الوريقات وهو ما يقتضي تسليط الضوء على

[1] – معروف ،فرج أحمد ،بطء البت في الدعوى – الإختصاص القضائي ،ورقة مقدمة للمؤتمر السابع لرؤساء المحاكم العليا في الدول العربية ،23–26 / 10/ 2016 مسقط – عمان .

[2] – وهو من المبادئ المعترف بها في المعاهدات الدولية وقوانين التحكيم ،أنظر عبد الحميد الأحدب ،موسوعة التحكيم ،التحكيم الدولي– الجزء الثاني ،دار المعارف ،ص162 .

أهمها من وجهتنا وهي تعدد الآجال والمدد بينها ،ولعله من الأهمية والإنصاف أن نشير إلى أن بعض الآجال تستند إلى أسباب قانونية يقتضي الواقع تقويمها بوسيلةٍ أو بأخرى خدمة للعدالة ،أما البعض الآخر فتخضع لسلطة القاضي ،وهو ما سنتناوله ضمن إطار الأوجه القضائية لاحقاً .

وأما بالنسبة للأسباب القانونية للتأجيل فنعني بها تلك الأسباب التي يقتضي القانون تأجيل الفصل في الدعوى لحين إستنفادها بشكل أولي ،وهي متعددة ،لعل أهمها أولوية القضاء الجنائي عن القضاء المدني[١] ،ومسألة إستنفاد الوسائل التوفيقية قبل الفصل في الدعوى بالشكل الذي تفرضه قوانين التوفيق [٢] والتحكيم[٣] ،وطلب بعض الآراء الفنية سواء من الخبراء أو من بعض المؤسسات المختصة ،كالمجالس المعنية بتقرير المسئولية الطبية[٤] ،يُضاف إلى ذلك مسألتيالإرتباط بين الدعاوى المنظورة من محاكم متعددة وضم ملفات الدعاوى المحكومة المتعلقة بالدعوى ،وهي في الواقع أحوال تخلق مُبررات قانونية للتأجيل وتشكل أحد أهم أسباب بطء العدالة ،وبطبيعة الحال تُعد السلطة التشريعية صاحبة الإختصاص الأصيل في إعادة النظر في هذه التشريعات ،إلا أنه نظراً لما لذلك من آثار سلبية على تحقيق العدالة ،فإنه بالإمكان معالجة هذه الأسباب بشكل تنظيمي وعملي بعيداً عن السلطة التشريعية وما تستغرقه من وقت ،ويتم ذلك على سبيل المثال من خلال وضع قيود على قبول الدعاوى تحد من التوسع في الإثبات من خارج الملف ،وذلك بإيداع ملف متكامل الإثبات عندالقيد ،ومن اليسير تحقيق ذلك في مسائل متعددة محل تأخير أمام المحاكم ،كإثبات الحالة من خلال أمر ولائي وعرض الأمر على لجان التوفيق والتحكيم قبل اللجوء إلى القضاء ،وتتبع مسألة الإرتباط بشقيه المدني والجنائي ،تبقى مسألة

[١] – الماد (22) من القانون الليبيرقم (6) لسنة 1374و.ربشأننظامالقضاء ،والمادة (238 فقرة 1) من قانون الإجراءات الجنائية الليبي .

[٢] – القانون الليبيرقم (4) لسنة 2010 بشأنالتوفيقوالتحكيم.

[٣] – المادة (36) من القانون الليبي رقم 10 لسنة 1984 بشأن الزواج والطلاق وأثارهما.

[٤] – المادة (27) من القانون الليبيرقم (17) لسنة 1986 مبشأنالمسئوليةالطبية (والخاصة بتحديد المسئولية الطبية من قبل المجلس الطبي) .

التأخير في ضم ملفات الدعاوى المحكومة ذات العلاقة بِمُكنة القاضي معالجتها بإصدار أوامره المباشرة إلى قلم الكتاب ،وبذلك نحقق مجال واسع من العدالة .

ثانياً : الأوجه القضائية :

ونعني بها أسباب بطء العدالة التي تكون لسلطة القاضي دوراً فيها،أي تلك الأسباب التي يجد فيها القاضي مجالاً واسعاً لسلطته نظراً لصمت المشرع عنها ،فمعلوماً أن المشرع لم يُقيد القاضي بآجال محددة للفصل في الدعوى حرصاً على عدم التأثير عليه ،أو إفتراضاً منه تحقيق العدالة فيه،إلا أن الواقع أثبت أن عدد الآجال الممنوحة في كل قضية تتنافى مع أي وصف للعدالة ،ويتمثل ذلك في آجال التقاضي وآجال النطق بالحكم :

1-آجال التقاضي : تُعد آجال التقاضي السبب المباشر وراء بطء العدالة ،وهو أمر يخضع في حقيقته لسلطان المحكمة ،وقد قُضي بأنه "تأجيل نظر الدعوى من إطلاقات محكمة الموضوع ،وليس حقاً للخصوم يتحتم إجابتهم إليه ،ولا تثريب عليها إن هي حجزت الدعوى للحكم دون تصريح بتقديم مذكرات أو مستندات ،طالما وجدت في الأوراق مايكفي لتكوين عقيدتها" [1]وهي مسألة تُعاني منها معظم الدول بنسبٍ متفاوتة لاسيما الدول ذات الكثافة السكانية العالية ،ففي لبنان على سبيل المثال وجدت دراسة إحصائية أن عدد الآجال الممنوحة في الدعاوى المدنية في عينة بعدد (1514) ملف (1099) مرة للمدعي ،و (1511) مرة للمدعي عليه ،أما حالات الآجال الممنوحة في نفس العينة لتكليف محام بلغت (151) مرة [2] ،وأنتهت الدراسة إلى أن الآجال هي السبب الرئيسي لبطء العدالة ،وفي دراسة

[1]- حكم محكمة النقض المصرية في الطعن رقم 580 لسنة 65 قضائية ،أحوال شخصية ،جلسة 2001/4/21 .

[2]- الإختناق القضائي في لبنان ،دراسة أعدت عام1994 لصالح وزارة العدل اللبنانية بدعم من البنك الدولي ،ص 99 .

أخرى تتراوح المدة بين أجل وآخر من أربعة إلى ستة أشهر [1]،وللحد من ذلك حول قانون المرافعات المصري وفق تعديله في مادته (98)أن يضع حداً للتأجيلات بنصه على أنه لايجوز تأجيل الدعوى أكثر من مرة لسببٍ واحد من ذات الخصم وألا تتجاوز فترة التأجيل ثلاثة أسابيع ،إلا أنه لم يُرتب آثاراً قانونية لذلك[2]،وتتقدم الخبرة الفنية الأسباب الرئيسية لبطء العدالة نظراً لمنح القانون صلاحية تقييدها لقاضي الموضوعدون ممارسة الأخيرلدور يُذكر تُجاه الخبيرعلى الرغم مما له من صلاحيات تُجاهه تقتضي مواجهته بسبب تأخيره وتغييره إن إقتضى الأمر [3]،ولذلك فإن بعض التشريعات [4]حاولت تقييد دور القاضي في اللجوء إلى الخبرة الفنية إلا في أضيق الحدود ،وذلك بإستعاضتها بإثبات الحالة قبل رفع الدعوى ،نظراً لما لها من آثار مُباشرة في بطء العدالة ،وبشكل أصبحت معه الخبرةوسيلةيُلقيبهاالقاضيأعبائهعلىالخبير [5].

وعلى الرغم من الدور المباشر للآجال في بطء العدالة وتأخير الفصل في الدعوى ،إلا أن معظم التشريعات لم تُفرض آجالاً محددة للفصل في الدعوى ،خصوصاً فيما يتعلق بالقضاء المدني [6]،ففي فرنسا مثلاً فقد حدد متوسط أجل البث في الدعوى المدنية بتسعة أشهر في محكمة أول درجة ،وخمسة أشهر في محكمة الدرجة الثانية ،وقد أُدين القضاء الفرنسي بسبب ذلك لعدة مرات [7] ،ومع ذلك لايزال لفظ (الأجل المعقول) هو السائد في هذا الجانب وهو لفظ أورده القضاء الفرنسي نفسه بنصه على أنه

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[1]- الأمن القضائي وجودة الأحكام ،دراسة أعدتها منظمة عدالة بالإشتراك مع مؤسسة فريدريش ايبرت بدعم من وزارة الخارجية الألمانية 2013 ،ص 40 .

[2]- هندي ،أحمد ،التعليق على قانون المرافعات ،الجزء الثاني ،دار الجامعة الجديدة للنشر :الإسكندرية2008 ،ص 227 .

[3]- المواد 203و204 منقانونالمرافعاتالليبي .

[4]- منهاقانونالمرافعاتالفرنسي .

[5]- زكي ،محمود جمال ،الخبرة في المواد المدنية والتجارية ،دراسة إنتقادية ،مطبعة جامعة القاهرة : القاهرة–1990 ،ص 14 .

[6]- تنص المادة (9) من العهد الدولي للحقوق المدنية والسياسية على أنه (يُقدم الموقوف أو المتهم بتهمة جزائية **سريعاً** إلى أحد القضاة .... ويكون من حقه أن يُحاكم في مهلة **معقولة** ...) وهو ما أكدتا عليه المحكمتين الأوروبية والأمريكية لحقوق الإنسان .

[7]- الأمن القضائي وجودة الأحكام ،مرجع سابق ،ص 44 .

"يحقللمتهمالمعتقلمحاكمةداخلآجالمعقولة."[1] ،وهو ذات اللفظ الذي أختاره الدستور المغربي لسنة 2011 بنصه في الفصل (120) منه على أنه "لكل شخص الحق في محاكمة عادلة وفي حكم يصدر داخل أجل معقول"،وعلى الرغم من غياب النص القانون على تحديد الأجل المعقولإلا أن القضاء المغربي [2]قدم معايير يُمكن من خلالها معرفة الأجل المعقول ،وهو الأجل الذي يجب أن يُراعي جسامة الخطاء والضرر الناتج عن البت للقول بمسئولية الدولة عن الخطاء القضائي الناجم عن إحترام الإلتزام الدستوري بالبت في الأجل المعقول ،وذلك من خلال البحث عن أسباب التأخير ومدى جديتها مع مراعاة طبيعة القضية ودرجة تعقيدها ودور الأطراف في عرقلة تجهيز الملف قصد البت فيه وجسامة الضرر الناتج عن هذا التأخير ،كما بين بأن "تجاوز الأجل الإفتراضي لا يُمكن أن يُرتب المسئولية المباشرة للقاضي مادام القول بخلاف ذلك قد يؤدي إلى أحكام متسرعة لم تستنفد وقت مناقشتها بالشكل الذي يضمن حقوق الدفاع وهو ما من شأنه المساس بحقوق وحريات المتقاضيين ،ويبقى القيد القانوني الوحيد هو ما نص عليه الدستور من عدم تجاوز الأجل المعقول للبت والذي يُحيل إلى الخرق السافر لإجراءات التقاضي الذي ينتج عنه تمطيط المسطرة دون مبرر موضوعي ،مع تقدير القاضيلمسئوليته لتوفير ضمانات المحاكمة العادلة وكفالة حقوق الدفاع دون إمكانية فرض رقابة قضائية موازية على هذه السلطة ،مادامت التأخيرات لها ما يُبررها سواءً من حيث أسباب التأخير أو من حيث تعقيد القضية موضوع التحقيق ،كما أنها لم تتجاوز الأجل المعقول للبت الذي ينُم عن الخرق السافر لإجراءات التقاضي ،وهو ما يُنفي مسئولية الدولة عن الخطاء القضائي .

2-آجال النطق بالحكم :ونعني بها الآجال الخاصة للنطق بالحكم إبتداءً من قرار المحكمة قفل باب المرافعة في الخصومة ،وهي مرحلة تلقي على عاتق القاضي مسئولية التأخير فيها نظراً لما تُهدره من وقت

[1]- حكم محكمة الإستئناف في رين / فرنسا بتاريخ 21/يونيو /2016 .

[2]- المحكمةالإداريةبالرباط – حكمرقم 1650 بتاريخ 2017/5/2 ملفرقم 78/ 7112 / 2017 .

وما يتخللها من إعادة ،حيث أن المحكمة تقضي بقفل باب المرافعة من تلقاء نفسها ويجوز لها العدول عن هذا القرار وإعادة الدعوى للمرافعة ،وهي مرحلة جديدة تتطلب إعلان جديد وهو أول أسباب إهدار الوقت غير المبرر ،أما إذا قررت المحكمة المضئ قُدُماً في قرارها ،فيعني أنها تتهيأ للنطق بالحكم في أجلٍ تُحدده وقد يكون عُقب المداولة مباشرة في نفس اليوم بعد رفع الجلسة مؤقتاً،وقد يتأجل إلى أجلٍ آخر ،وهنا تلعب السلطة التقديرية للقاضي [١] دوراً واسعاً في إهدار الوقت قبل النطق بالحكم وبعده ،وتمثل الحالات الحالات التي تسبق النطق بالحكم في إعادة الدعوى للمرافعة ومد أجل النطق بالحكم الذي يتأجل لعدة مرات على الرغم من نص القانون على أنه

"وبانتهاءالمداولةيحررالرئيسمنطوقالحكمويوقععليه[٢] ..."،أما بعد النطق بالحكم ،فيأتي إهدار الوقت في إيداع الأسباب ثم في إعداد مسودة الحكم وإيداعها على الرغم من نص القانون على أن

"تودعالأحكامقلمالكتابفيخلالمدةلاتتجاوزثلاثينيوماًمنتاريخالمداولة،وفيمايتعلقبأحكامالقاضيالجزئيتكونالمدة ع شرينيوماًمنآخرجلسة"[٣] ،وهي آجال هامة لاسيما وأنها تفتح ميعاد الطعن في الحكم ،وهي في الواقع تستغرق آجالاً طويلة دونما مبررات مقنعة ،إلا أنها تبقى مسألة تنفيدية يتفاوت القضاة بشأنها في التقيد بقواعدها المشار إليها من عدمه ،وهو ما قد يُثار في هيئآت التحكيم أيضاً ويضر بأطراف النزاع .

المطلب الثاني : الجوانب المتعلقة بالكفاءة والسرية:

أولا : الجوانب المتعلقة بالكفاءة :

لا شك بأن الكفاءة تلعب دوراً هاماً في تعزيز نظام الحكم في المنازعات تحكيماً وقضاءاً ،وتتصل تعزيز الكفاءة في النظام القضائي ثلاثة جوانب أساسية؛وهي الجانب الإداري أو الفني المتصل بالآداء وجودة

[١] – عمر ،نبيل إسماعيل ،النظام القانوني للحكم القضائي ،دار الجامعة الجديدة للنشر : الاسكندرية 2006 ،ص 20 .
[٢] – المادة (272) من قانون المرافعات الليبي .
[٣] – المادة (274) من نفس القانون .

التقاضي في الدعوى ،والجانب البشري المتمثل في الكوادر المتصلة بالدعوى ،والجانب المؤسسي المتمثل في المؤسسة القضائية ،وفيما يلي سنورد توضيحاً لهذه الجوانب مقترناً بما أمكن تقديمه من مقترحات :

1-الجوانب المتعلقة بالكوادر المتصلة بالدعوى : ونعني بها الجوانب المتصلة بالقضاة والمحامين والكتبة والخبراء والمترجمين وغيرهم ،ويُراد بالكفاءة والجودة في عمل هؤلاء الإرتقاء بالدور الذي يقومون به ،كلٌ حسب مهامه وهم يستشعرون جميعهم أنهم يقومون على تحقيق العدالة ،وذلك ليس من خلال الأداء بمعناه التقليدي ،وإنما بمعناه الإبداعي لاسيما وأنهم معنيون بتطبيق القانون على الواقع المتطور والمتغير ،وذلك من خلال التحرر من التقليد والجمود – وهو جانب لم تعره الدراسات إهتمامها – بطبيعة الحال القاضي يواجه عند عدم الحكم بجريمة إنكار العدالة ،إلا أنه بسبب ذلك فإنه أميل[1] إلى البحث عن سبباً لرفض الدعوى أو عدم قبولها أو عدم الإختصاص عِوضاً عن الخوض في موضوعها ،وهو في الواقع عمل يُشين عمل المؤسسة القضائية ،وكما يأتي ذلك من قبل القاضي بسبب عدم إلمامه بالتطورات التشريعية بكل مستوياتها في الدولة بالإضافة إلى تطورات المفاهيم القانونية وغيرها لمعرفة مضمون النظام العام المختص بإعماله ،فإن الأطراف الأخرى أيضاً مطالبة بذلك ؛فعلى المحامين الإرتقاء بمستوى المخاصمة للخوض في مفاهيم ومعاني لم تُطرق بعد ولو بطرق أبواب دفوع أخرى غير مألوفة لإثراء القانون وإرساء قواعد التنافس الشريف بدلاً من تكرار الخطوات التي يتبعها أقرانهم ،والعمل على إستغلال هفوات الغير والعمل على عامل الزمن لإلحاق الضرر بالخصم ،ذات الحديث يُقال عن الخبراء عن عدم مواكبتهم للتطورات العلمية في مجال المهام التي يُقيدون كخبراء فيها ،فالمطلوب منهم الإفادة بالعلوم بمعناها العلمي الدقيق لا المفاهيم العامة في ذلك العلم ،أما عن الكتبة فيجب تعاضدهم مع المتصلين بالدعوى وترقية إدارة الملف والبحث عن حلول مبتكرة لأي إرتباك يمس ملف الدعوى .

[1] – أنظر : التقدير القضائي المستقبلي في قانون المرافعات ،نبيل إسماعيل عمر ،دار الجامعة الجديدة : الإسكندرية ،2011 .

2- الجوانب المتعلقة بالمؤسسة القضائية : وهي جوانب تتصل بالمؤسسة ذاتها ،وأخرى تتصل بدورها تجاه العاملين ضمن إطارها ،وأما بالنسبة للجوانب التي تتصل بالمؤسسة ذاتها يبرز جانبين أساسيين وهما تعزيز نظام التخصص في الدوائر القضائية ،وميكنة إدارة القضاء ،فأما بالنسبة للتخصص ؛فنعنيتكوين دوائر قضائية متخصصة نوعياً ضمن المؤسسة القضائية تكون مهمتها تقتصر على نظر منازعات تندرج ضمن نوع واحد بشكل أكثر تخصصاً مما هي عليه الآن ،فلم يعد يكفي القول بأنها تجارية ،فيجب تقسيم الأنشطة التجارية إلى فئآت وعلى ضوئها تُشكل الدوائر ،وأن تُنيط بها قضاة مُتخصصين منذ بدء تكوينهم وتأهيلهم[1] وهو ما يتبعه نوع من التخصص بطبيعة الحال بالنسبة للمحامين ،وهو تخصص وإن لم تفرضهم عنهم قوانين المحاماة ،إلا أنه تخصص سيفرض نفسه بحكم الواقع ويرفع من القيمة الموضوعية لمستوى الخصومة.

وأما بالنسبة لميكنة إدارة القضاء فنعني به الإستفادة من التكنولوجيا الحديثة في العمل القضائي ،ذلك لأن التطور الحاصل في جوانب العمل الإلكتروني بِمُكنتها تحقيق أقصى معدلات الكفاءة والجودة والسرعة ،بطبيعة الحال بعض الجوانب تحتاج إلى تدخل المشرع فيما يخص الإعلانات بواسطة الوسائل الإلكترونية وغيرها ،وهو مدعوٌ إلى إعمال ذلك ،ولكن هناك جوانب أخرى بالإمكان إعمالها بشكل تنظيمي كالأرشفة الإلكترونية نظراً لما لها من أهمية في إجراءات ضم الملف والإطلاع وغيرها من الأوجة ،وهي في الواقع في مجملها من أهم الجوانب التي يجب إعمالها لإنقاد الوضع المتردي لعمل النظام القضائي .

أما في جانب العاملين في المؤسسة القضائية فإنه يقع عليها واجب تأهيل الكوادر للإنفتاح الفكري والإلمام الواسع بالآليات الحديثة في العمل ومتابعة التطورات القانونية في القانون المقارن أو في الإتفاقيات الدولية وهو ما يثري العمل القضائي ويجدده من خلال مواكبة تطورات المفاهيم القانونية.

[1]- معروف ،فرج أحمد ،مرجع سابق ،ص 9 .

3– الجوانب المتعلقة بالآداء وجودة التقاضي :وهي تلك الجوانب التي تهدف إلى ترقية الأداء القضائي المتعلق بالدعوى ،أو كما أمكن تسميتها بهندسة الدعوى،ولانعني بذلك نمدجة الأوراق القضائية كما تجمعها الكتب التي تعج بها المكتبات ،ولا نعني بذلك العبارات الجارحة أو المخلة بالآداب في الأوراق التي أَسند القانون [1] للقاضي مُهمة محوها ،وإنما نعني التركيز على الدقة والمنهجية في صياغة الأوراق القضائية ،ذلك لأنه وعلى الرغم مما ينص عليه القانون [2] من ضرورة الإيجاز في صياغة هذه الأوراق ،إلا أن التكوين الأدبي للكوادر القضائية ظل له أثراً واسعاً في العمل القضائي من حيث الصياغة والمرافعة الشفوية أيضاً ،خصوصاً وأن القانون لم يشترط صيغة معينة بالنسبة لِمتن هذه الأوراق ،بخلاف ما نص عليه بشأن البيانات الجوهرية والطلبات،وهو ما يُطنب [3] فيه ذوي الصلة بالعمل القضائي ،وهنا يجب أن يسود بالإضافة إلى المنطق القانوني بفلسفتة الخاصة مبداء المنهجية والكتابة العلمية في سرد الوقائع وبيان الحقيقة مع هجر التزيد والإطناب وتتبع المناهج الأدبية ،ويجب على الكاتب أن لا يغفل على أنه لا يتجهمما يكتبه إلى العامة ،وإنما يتجه به إلى فئة متخصصة على دراية مما يقول سواءً كان الكاتب محامياً في صحف الدعوى أو مذكرات الدفاع أو غيرها ،أو كان قاضياً في صياغة الحكم وحيثياته وأسبابه مع الإحتراس من الوقوع في الأخطاء الفنية واللغوية التي تُشين العمل وتمحق جودته ،وهي في مجملها تُشكل عوامل تقوض العدالة التي هي غاية القضاء .

ثانياً : الجوانب المتصلة بالسرية :

[1]– المادة (135) من قانون المرافعات الليبي .

[2]– المادة (82) من قانون المرافعات الليبي .

[3]– أنظر يوسف المصاروة ،تسبيب الأحكام ،دار الثقافة والنشر : عمان الأردن ،الطبعة الثانية :2010 ،ص 277 .

سبقت الإشارة إلى أن العلانية هي من أهم سِمات القضاء تحقيقاً لرقابة الشعب مصدر السلطات على القضاء[١]،وتبرز علانية القضاء في جانبي المرافعة والحكم ،فكما أوجب القانون أن تكون المرافعات أو الجلسات علنية ،فإن الأحكام أيضاً يجب أن تكون علنية ومُتاحة للجميع للإطلاع والنسخ [٢]، المشرع عن هذا المبداء إلا أن المشرع كما أجاز للقاضي مُكنة الخروج عن مبداء العلانية إلى السرية ،فإنه خرج في أحوالٍ أخرى على مبداء العلانية ،إلى السرية ،ويهمنا هنا ونحن بمعرض البحث عن أوجه يُمكن للنظام القضائي إعمالها دراسة مدى نطاق الخروج عن مبداء العلانية ليستوعب بعض المنازعات ذات الطبيعة التجارية التي تهجر القضاء وتختار التحكيم لهذا السبب ،وتجدر الإشارة هنا إلى أنه فضلاً عما يقضي به قانون المرافعات عن الخروج عن مبداء العلانية وفقاً لما يُقدره القاضي وفقاً لسلطته التقديرية حفاظاً على حرمة الأسرة في دعاوى الأحوال الشخصية ،أو حفظاً للنظام العام والآداب،فإن هناك حالات أخرى ينص فيها القانون على الخروج عن العلانية إستقلالاً ،ومن ذلك ما ينص عليه القانون المصري لضرائب الدخل رقم (157 لسنة 1981) ،الذي يُجيز للمحكمة نظر الدعاوى الضريبية التي تُرفع من الممول أو عليه في جلسة سرية ،وذلك لأن النزاع في هذه الدعاوى يكشف تحديد الأرباح التجارية والصناعية الخاضعة للضريبة ،وهو ما يُبرر نظره بصورة سرية [٣]،عليه ومن باب أولى حماية سرية العمليات التجارية التي تؤدي إلى الأرباح ،وهو أمر يندرج في الواقع ضمن نطاق النظام العام بمفهومه الإقتصادي لحماية المعلومات التي يتم تداولها في الدعوى.

أما بالنسبة لعلانية الحكم ،فإنه وفي جميع الأحوال حتى وإن كانت الجلسة سرية فإن النطق بالحكم يجب أن يكون علنياً نزولاً عند صراحة نص القانون وعدم إتاحته أي مُكنة تجعل منه سرياً ،فضلاً عن إتاحته

[١]- هندي ،أحمد ،مرجع سابق ،ص 263 .

[٢]- أعبودة ،الكوني علي ،مرجع سابق ،ص 87 .

[٣]- هندي أحمد ،نفس المرجع ،ص 265 .

الإطلاع عن الحكم وأخذ صورة منه [1] ،إلا أنه وبالرجوع إلى الغاية من السرية في نظام التحكيم غالباً ما تكون في مرحلة التقاضي أو سير الدعوى لأنها تكشف عن حقائق الموضوع ،أما بالنسبة للحكم فإنه عنوان الحقيقة التي لايخشى أطراف الخصومة ديوعه في العادة ،خاصة وأنه سوف يُقدم للقضاء لتنفيده وفقاً لإجراءات التنفيد التي تُتيح تداوله بين الكتبة والمحضرين والمحاميين والقضاة .

خاتمة :وفي نهاية الدراسة يتبين أن نظام التحكيم لا يتمتع بأفضلية حقيقية يتميز بها عن نظام القضاء في تسوية المنازعات ،حيث أنه وفضلاً عما يعتري التحكيم من عيوب تتعلق بالكلفة وضِعف ضمانات النزاهة والحياد ،فإنه يظل غير قادر على الإستقلال عن النظام القضائي في كل جوانب عملية التحكيم لاسيما في تنفيد حكمه ،كما أن تفوقه عن النظام القضائي في جانبي السرعة والعلانية اللذان أظهرت الدراسة تفاوت في جانبهما لم يكن نتيجة تقدم حقيقي في هذا النظام ،وإنما بسبب ترهل النظام القضائي نظراً للظروف المحيطة به كمرفق عام يؤدي خدمة العدالة في الدولة ،وهي ظروف تقتضي التصدي لها ومعالجتها بحثاً وتشريعاً ،لاهجرها لمحاولة إقامة نظام بديل ،وهو ما توصي الدراسة بإنصافه بحثاً وتشريعاً ،مع محاولة تقديم تطوير حقيقي لنظام التحكيم ينبع من إبتكار آليات خاصة به بإمكانها أن تحدث تطوراً نوعياً في نظام تسوية المنازعات،نظراً لأهميته في تسوية بعض المنازعات وللمساهمة في التخفيف عن كاهل القضاء .

[1] – المادة (276) من قانون المرافعات الليبي .

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ورقة عمل مقدمة إلى المؤتمر العالمي عن تسوية المنازعات

أثر التحكيم الدولي في فض المنازعات

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المقدمة :

يعتبر مبدأ التسوية السلمية للمنازعات الدولية من المبادئ الأساسية في القانون الدوليالذي أكدته مؤتمرات السلام التي عقدت في لاهاي بهولنده عامي 1899 و 1907.ففي اتفاقية التسوية السلمية للمنازعات الدولية التي صدرت عن المؤتمر الثاني عام 1907، قررت المادة الأولي منها: أنه حتى يمنع، بقدر الإمكان، اللجوء إلي القوة في العلاقات بين الدول، المتعاهدة علي بذل أقص الجهد لكفالة التسوية السلمية للخلافات الدولية.ونصت المادة الثانية من ميثاق الأمم المتحدة علي أن من بين مبادئ الأمم المتحدة التي تلتزم الأمم المتحدة والدول الأعضاء فيها بالعمل وفقاً لها، تسوية المنازعات الدولية بالطرق السلمية علي وجه لا يجعل السلم والأمن والعدل الدولي عرضه للخطر. وتعرضت المادة 33 من الميثاق لبيان الطرق السلمية لتسوية المنازعات الدولية بقولها "يجب علي أطراف أي نزاع من شأن استمراره أن يعرض حفظ السلم والأمن الدولي للخطر أن يلتمسوا حاله بادئ ذي بدء بطريق المفاوضة والتحقيق والوساطة والتوفيق والتحكيم والتسوية القضائية، أو أن يلجئوا إلي الوكالات والتنظيمات الإقليمية أو غيرها من الوسائل السلمية التي يقع عليها اختيارها، وما جاء في هذه المادة هو تقنين لما جري عليه العمل الدولي من وسائل سلمية لتسوية الخلافات الدولية، بالإضافة إلي ما اقتضاه عصرا لتنظيم الدولي من طرق حديثة للتسوية السلمية، وقام الباحث بتقسيم هذا الفصل إلى ثلاثة مباحث يتناول المبحث الأول مفهوم النزاعات الدولية وأنواعها أما المبحث الثاني فيتناول التسوية السلمية للنزاعات الدولية أما المبحث الثالث فيتناول الوسائل الدبلوماسية لحل النزاعات الدولية. ويمكن تقسيم الوسائل السلمية في حل النزاعات الى وسائل دبلوماسية والتي ترتبط بدور المنظمات الدولية وكذلك وسائل قضائية والتي ترتبط بالتحكيم والقضاء الدوليين وتحاول هذه الورقة تسليط الضوء على وسيلة التحكيم من حيث قدرتها على حل النزاعات بين الاطراف الدولية في الوقت الحاضر وكذلك طرح بعض النماذج الدولية والتي كان للتحكيم دوراً واضحاً في حل نزاعاتها .

الاهداف :

(١) تسليط الضوء على وسيلة التحكيم من حيث ماهيتها ونشأتها

(٢) القاء الضوء على بعض النماذج التي استخدمت وسيلة التحكيم كحل لنزاعاتها

(٣) طرح الرؤية الاسلامية في مسألة التحكيم الدولي

(٤) القاء الضوء على بعض الاتجاهات الحديثة في مسألة التحكيم الدولي

مفهوم النزاع الدولي:

يعبر النزاع عن خلاف بين اتجاهات دولتين أو أكثر حول مسائل أو قضايا محددة ويمكن أن ينشأ بين الأفراد والجماعات داخل الدولة الواحدة.

ويحدث النزاع نتيجة تعارض أو تصادم بين اتجاهات مختلفة أو عدم توافق في المصالح بين طرفين أو أكثر مما يدفع بالأطراف المعنية مباشرة إلي عدم القبول بالوضع القائم ومحاولة تغييره، فيكمن النزاع إذن في عملية التفاعل بين اثنين علي الأقل.

وعرفت محكمة العدل الدولية النزاع الدولي بأنه عدم اتفاق علي نقطة حقوقية أو وقائع قرار أو اختلاف وتناقض قضايا قانونية أو مصالح بين شخصين.ثم وضحت محكمة العدل الدولية أن النزاع ينشأ عندما تعترض الدولة علي موقف محدد لدولة أخرى، وأن الادعاء مرفوض ويجب التوضيح أن احتجاج أحد الأطراف يصدم بالتناقض المبين من الأخر.ويعتبر موضوع النزاع من أهم المواضيع التي واكب البرية في جميع الميادين ولهذا لا يمكن دراسة أي نزاع معزل عن هذا التطور، والدارس للنزاعات يجد حدتها قد زادت بعد الحرب العالمية الثانية نظراً للتطور السريع في أغلب المجالات.

وتميزت الأوضاع النزاعية بعد الحرب العالمية الثانية بازدياد عدد النزاعات بشكل عام مع الفترات السابقة، وإن الملاحظ سيورد فيما يلي:

- حصول النزاعات ولا تزال في العالم الثالث (آسيا أفريقيا أمريكا اللاتينية) يقابل ذلك غياب النزاعات المسلحة في أوربا نتيجة ميزان الرعب النووي بين القوتين العظمتين.

- حصل ازدياد في عدد النزاعات الداخلية أو التي تبدأ علي المستوي الداخلي وتتحول إلي المستوي الإقليمي والدولي نتيجة قوي خارجية عسكرياً وسياسياً، وقابل ذلك انخفاض الحروب أو النزاعات المسلحة التقليدية بين الدول وخاصة الحروب الاستعمارية.

- بالإضافة إلي ازدياد التدخل الخارجي في المنازعات بشكل ملحوظ وتحديداً الذي طبع المرحلة حتى أخر الستينات، وبعد ذلك صار مجمل أنواع التدخل من النوع غير المباشر.

- كما انتهت حروب التحرير الوطني من الاستعمار والتي قامت في الخمسينيات والستينيات وبداية مرحلة بناء الدولة.

- ازدادت درجات العنف في الحروب الداخلية و الحروب التقليدية، ودل علي ذلك ارتفاع عدد الضحايا، وزيادة حجم الأضرار المادية التي تلحق المتنازعين.

ويعرف النزاع الدولي، على أنه خلاف بين دولتين علي مسألة قانونية أو حادث معين أو سبب تعارض وجهات نظرها القانونية أو مصالحها.

كما يعرف النزاع الدولي بأنه " خلاف حول مسألة قانونية"، كتفسير معاهدة دولية، أو خلاف حول سير خط الحدود المتمثلة في تناقض أو تعارض الآراءالقانونية لشخصين أو أكثر من أشخاص القانون الدولي.

أي أن النزاع يمثل حالة تتضمن تباين وجهات النظر واختلافها. وعرفت المحكمة الدائمة للعدل الدولي النزاع علي أنه : "خلاف حول نقطة قانونية، أو واقعية، أو تناقض، أو تعارض للأطروحات القانونية أو المنافع بين دولتين".

التسوية السلمية للنزاعات الدولية

يقصد بالتسوية السلمية للمنازعات الدولية " حل المنازعات دون الالتجاء إلي القوة". وهناك من يعرف تسوية المنازعات الدولية علي أنها، إنهاء النزاع عن طريق اتفاق متبادل بين الأطراف ذات العلاقة، وهي بهذا المعني تعني أيضاً حل المنازعات الدولية دون الالتجاء إلي القوة، أي بالطرق السلمية، ولكن من الواضح أن هذا ليس هو الطريق الوحيد لإنهاء النزاع، فأحيان تتم تسويته بواسطة فرض القوة أو التهديد باستخدامها علي طرف أو عدد من الأطراف، علي أن إنهاء النزاعات إذن أما أن تسوي سلمياً أو قسراً وقس الحالة الأولي فإن التسوية تسمي بالحل السلمي حيث يكون العنصر السائد فيه عنصر الموافقة المتبادلة والحالة الثانية تسمي بالحل القسري القوة أو التهديد بها هي العنصر السائد في التعامل.

وهناك طريق ثالث، في حالة عدم الاستطاعة في حل النزاع سلمياً أو بطريق الإكراه والقسر، يتم اللجوء إليه عندما يصل النزاع إلي درجة بالغة التعقيد والتكلفة هو ترك الصراع وتسكينه أو هجره بمعني عدم المواصلة الفعلية لطرف أو أطراف الصراع ذات العلاقة بالنزاع.

وهناك من يري أن التسوية تعني الاتجاه نحو التنمية السلمية للنزاع، والإقلال من الاتجاه نحو الحرب، لأن خطورة الحرب جعلت العالم لا يتصور التفكير في جولة أخري " وهذا ما ينطبق علي الصراع العربي الإسرائيلي وهناك من يري التسوية تعني التفاوض، والتفاوض يتطلب المرونة وتقديم التنازلات من قبل الأطراف للوصول إلي حل وسط ومن الذين يؤيدون هذا الرأي أيضاً، الدكتور هنري كيسنجر، وزير الخارجية الأمريكي الأسبق.

حيث يري أن التسوية تعني التفاوض؛ والتفاوض يتطلب المرونة وتقديم التنازلات من قبل الأطراف المتخاصمين، وصولاً إلي حالة عدم التعارض بين أهداف الطرفين، والسؤال الحقيقي، كما يقول، هو ليس ما نقدمه من مقترحات عامة، ولكن ماذا نحن علي استعداد للإصرار عليه باستخدام الضغط في حالة الضرورة.

ويري أخرون: المفاوضات التي يتوقف عليها الكثير فقط في المناورة والتدبير الدبلوماسيين، بل أيضاً علي التغير النفسي، ويترتب علي كل طرف بان يعد موقفه تجاه الطرف الأخر. أن سر التفاوض هو التسوية أنك تقبل اليوم ما كنت تقسم في الأسبوع الماضي بأنك لا تقبله أبداً أن أساس التسوية هو مبدأ التنازل.

علي ضوء ما تقدم يمكننا أن نعرف التسوية بأنها تلك الجهود التي تسعي لمعالجة مسألة متنازع عليها من أجل وضع حل لها، والتسوية السياسية، بهذا المعني، تعني جهوداً دبلوماسية تسعي للتوفيق بين مواقف أطراف النزاع، وكما هو معروف أن التسوية بالطرق الدبلوماسية هي إحدى وسائل تسوية المنازعات الدولية، إلا أن إيجاد الحل دائماً يتأثر بقانون التوازن، وأن أي اختلال فيه يؤدي إلي فرض إرادة طرف علي إرادة طرف أخر إلي حد ما. أن المتغير الأساسي في حل المنازعات الدولية هو قانون التوازن، حيث أن المنازعات ترتبط دائماً بالتوازن، وأن تسويتها أيضاً ترتبط بتوازن القوي والتي قد تكلل بتقنين الإجراءات المتخذة، أي بمعاهدة، ويمكننا أن نقول أن معظم الدول بدأت تؤكد علي السلام وتعتبره هدفاً مركزياً من أهداف سياستها الخارجية، وعلي ما يبدو أنه اكتسب أهمية كبيرة في هذا القرن عنه في أي وقت مضي.

الوسائل الدبلوماسية لحل النزاعات الدولية

ارتبط وجود وسائل لتسوية المنازعات الدولية نشوء العلاقات الدولية فقد عرفت المفاوضات أو أشكال من الوساطة التي يتولاها طرف ثالث بغية تسهيل اتفاق الأطراف المتنازعة في الحضارات القديمة، كما عرف التحكيم في العلاقات ما بين المدن اليونانية، وأدي تطوير هذه التقنيات مع مرور الزمن إلي نشوء قواعد عرفية، كما أدي تطوير العلاقات الدولية في القرنين التاسع شعر والعشرين علي ظهور تقنيات جديدة كالتحقيق والتوفيق والتسوية القضائية واللجوء إلي المنظمات الدولية. وحظيت هذه الوسائل باهتمام خاص في ميثاق الأمم المتحدة نتيجة ربطها بمبدأ تحريم القوة في العلاقات الدولية والمحافظة علي السلم، فقد التزمت الدول بالبحث عن حلول مقبولة وعادلة لمنازعاتها

الدولية في عهد لم يكن فيه استعمال القوة محرماً قانونياً، حيث أن مبدأ التسوية السلمية للمنازعات الدولية دخل نطاق القانون الدولي في مرحلة تاريخية سابقة، فقد نصت أحدي اتفاقيات لاهاي لسنة 1907 علي : " أن الدول المتعاقدة اتفقت علي بذل كل جهودها لتأمين التسوية السلمية للمنازعات وذلك بغية الحيلولة قدر الإمكان دون اللجوء إلي القوة".

وقد عددت المادة: 33 من ميثاق الأمم المتحدة بعض الوسائل المعتادة لتسوية المنازعات الدولية بنصها: "يجب علي أطراف أي نزاع دولي من شأن استمرار أن يعرض حفظ السلام والأمن الدولي للخطر أن يلتمسوا حله بادئ ذي بدء بطرق المفاوضات والتحقيق والتوافيق والتحكيم والتسوية القضائية، أو يلجؤا إلي الوكالات والتنظيمات الإقليمية أو غيرها من الوسائل السلمية التي تقع عليها اختيارهم.

ويتضح من جملة: " أو غيرها من الوسائل السلمية.." أن هذه التعداد علي سبيل المثال وليس علي سبيل الحصر، ومن الوسائل المألوفة للتسوية السلمية التي لم تذكرها هذه المادة " المساعي الحميدة" والتي نجدها من بين الوسائل التي عددتها وثائق أخري خاصة بالتسوية السلمية للمنازعات الدولية كإعلان مانيلا للتسوية السلمية.

التحكيم الدولي كآلية لتسوية النزاعات الدولية:

ماهيــة التحكيـم

يحظى التحكيم بأهمية خاصة، حيث يساعد على فضّ المنازعات بطريقة ودية وسهلة تحافظ على بقاء العلاقة ومتانتها بين طرفي التحكيم، وتظهر ماهية التحكيم وأهميته من خلال نشأة التحكيم وأنواعه وصوره.

ويعرف التحكيم لغة بأنه التفويض في الحكم ومصدره حكم والتحكيم في الاصطلاح الفقهي هو: "تولي الخصمين حكماً يحكم بينهما.

ويعرف أيضاً التحكيم بأنه عبارة عن اتخاذ الخصمين حكماً برضاهما لفصل خصومتهما ودعواهما.

ويلاحظ أن تعريف التحكيم لدى فقهاء القانون لم يختلف كثيراً عن هذه التعريفات؛ حيث تم تعريف التحكيم بأنه طريق خاص للفصل في المنازعات بين الأفراد والجماعات، قوامه الخروج عن طريق التقاضي العادي وما تستغله من ضمانات، ويعتمد أساساً على أن أطراف النزاع موضوع الاتفاق على التحكيم هم الذين يختارون قضاتهم، بدلاً من الاعتماد على التنظيم القضائي للبلد الذي يقيمون فيها.

ومن خلال هذه التعريفات السابقة نجد

أن نظام التحكيم يتم الالتجاء إليه بوصفه وسيلة من الوسائل السلمية لفض المنازعات بين الأفراد والجماعات بعيداً عن تدخل الدولة. ويسمى في بعض الأحيان بالقضاء الخاص مقارنة مع القضاء العام الذي يمثل الدولة.

لقد مر التحكيم بعدة مراحل يمكن التطرق إليها باختصار وهي:

المرحلة الأولى: مرحلة ما قبل الإسلام. كان العرب قبل الإسلام عبارة عن مجموعات منتشرة من القبائل، ولم تكن هناك أية سلطة مركزية معروفة يمكن الولاء إليها غير القبيلة، وكانت القبائل تتقاتل لأسباب مختلفة، ولم تكن هناك أية وسيلة لحفظ الأمن والنظام داخل هذا المجتمع لعدم وجود أي سلطة تمتلك القدرة على السيطرة؛ حيث إن القبيلة ممثلة بشيخ القبيلة الذي كان كثيراً ما يقوم بدور المحكم بين أفراد قبيلته، وفي حال الخلاف بين قبيلتين مختلفتين كان يتم اللجوء إلى محكم خارجي يتم اختياره من قبل القبائل المختلفة، وهذا ما يعرف بالتحكيم الاختياري، أما من حيث إجراءات تحفظية قبل إصدار قراره، أي أن يضع الأطراف الشيء المتنازع عليه لدى شخص ثالث ليتسنى تنفيذ القرار عند صدوره بطريقة سهلة، وهذا يعني أن الخصوم قد حددوا مسبقاً وسيلة التنفيذ.

أما إذا كان الشيء المتنازع عليه لا يمكن نقله فإنه يتم وضع كفيل عن كل طرف يكون معروفاً وموثوقاً لدى الطرفين، حتى يتسنى له في النهاية تنفيذ حكم التحكيم.

المرحلة الثانية: التحكيم في الشريعة الإسلامية، أقر الإسلام شريعة التحكيم، حيث ورد ذكره في القرآن الكريم عدة مرات منها قوله تعالى: **﴿إِنَّ اللهَ يَأْمُرُكُمْ أَن تُؤَدُّواْ الأَمَانَاتِ إِلَى أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ النَّاسِ أَن تَحْكُمُواْ بِالْعَدْلِ﴾**[58: النساء].

وكذلك قوله ﷻ: **﴿فَلاَ وَرَبِّكَ لاَ يُؤْمِنُونَ حَتَّىَ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ ثُمَّ لاَ يَجِدُواْ فِي أَنفُسِهِمْ حَرَجاً مِّمَّا قَضَيْتَ وَيُسَلِّمُواْ تَسْلِيماً﴾**[65: النساء].

نجد أن الآية الكريمة الأولى كانت بمثابةخطاب لجميع المسلمين تكريساً للمبدأ العام للتحكيم، في حين أن الآية الثانية جاءت تحدد بوضوح مجال التحكيم في حال المنازعات.

كما أقرت الشريعة الإسلامية مبدأ التحكيم في العديد من الأمور بعضها ورد النص علي صراحة كما هو الحال في بعض المنازعات بين الزوجين؛ حيث جاءت الآية الكريمة: **﴿وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُواْ حَكَماً مِّنْ أَهْلِهِ وَحَكَماً مِّنْ أَهْلِهَا﴾**[35: النساء].

حيث يعد نظام التحكيم ونظام الصلح من أقدم الأنظمة المتبعة في حل المنازعات والطرق السليمة، وكانتا معروفتين في جميع الشرائع القديمة.

المرحلة الثالثة: التحكيم الدولي والداخلي، ومع تطور العصور أصبح هناك التحكيم الداخلي الذي يدور ضمن إقليم معين أو بين فئة معينة من الأشخاص، وهذا النوع ليس على درجة كبيرة من الانتشار مقارنة مع التحكيم الدولي الذي أصبح في مقدمة الوسائل التي يتم اللجوء إليها لفض المنازعات بين الدول أو أطراف القانون العام، حيث يعرف التحكيم الدولي بأنه وسيلة من وسائل التسوية السليمة للمنازعات التي تنشأ بين الدول، وقد أقرت المادة 37 من اتفاقية التسوية السلمية للمنازعات

الدولية، والتي توصل إليها مؤتمر السلام الدولي الثاني بلاهاي في عام 1907، تعريفاً سائداً للتحكيم الدولي.

من أهم تعريفات التحكيم ما حددته المادة 37 من اتفاقية لاهاي الولي المعقودة عام 1907 بشأنالتسوية السلمية للمنازعات الدولية حيث جاء في هذه المادة تعريف التحكيم بأنه تسويةالمنازعات بين الدول بواسطة قضاة من اختيارها وعلى أساس احترام القانون ، وانالرجوع إلى التحكيم يتضمن تعهدا بالخضوع للحكم بحسن نية .ويبين هذا التعريف أن ليسثمة فرق بين التحكيم والتسوية القضائية ، حيث إنهما أسلوبان لتسوية المنازعاتالدولية والفرق بين التحكيم والقضاء الدولي هو فرق شكلي ففي ينشأ التحكيم علي أساساتفاقي وذلك بموجب معاهدة ثنائية تعقدها هذه الأطراف ، وذلك التسوية نزاع معين دونسواه فأن الجهاز القضائي الدولي معين سلفاً

إن التحكيم الدولي هو تسوية المنازعات بين الدول بوساطةِ قضاة من اختيارها، وعلى أساس من احترام القانون، وأن اللجوء إلى التحكيم ينطوي على تعهد بالخضوع للحكم بحسن نية.

أنواع التحكيم:

النوع الأول: التحكيم الإجباري، وهو التحكيم الذي تنعدم إرادة أطراف النزاع سواء فيما يتعلق باللجوء إليه أو فيما يتعلق باختيار الجهة المختصة، وتعد تلك الأحكام من النظام العام، ولا يجوز لأطراف الاتفاق مخالفتها، وكذلك لا يجوز لأطراف النزاع في المنازعات التي تخضع لهذا النوع من التحكيم الاتفاق على عدم اللجوء إليه، وكذلك لا يستطيعون الاتفاق على هيئة أخرى بخلاف المنصوص عليه، حيث إن بعض الدول أصدرت قانوناً خاصاً للتحكيم الإجباري كما هو الحال في جمهورية مصر العربية، حيث صدر القانون رقم: 97 لسنة: 1983، والقانون رقم 95 لسنة 1992، كذلك صدور حكم تحكيم هيئة سوق المال الذي تناول تحديد نطاق المنازعات التي يجب عرضها على التحكيم الإجباري المنصوص عليه في المادة: 52 من القانون رقم 95 لسنة 1992.

النوع الثاني: التحكيم الاختياري: وهو التحكيم الذي يتم اللجوء إليه واختيار الهيئة أو الجهة التي تنظر النزاع مرهوناً بإرادة الأطراف، ويختص هذا النوع من التحكيم بنظر كافة المنازعات التي يمكن التحكيم بها، حيث جاءت نص المادة: 16 فقرة: (أ) من قانون التحكيم الأردني (الطرفي التحكيم الاتفاق على اختيار محكمين وعلى كيفية وتاريخ اختيارهم).

الاتفاقات المنشئة للتحكيم

لا يتم اللجوء الى التحكيم إلا بموافقة الاطراف وقد تتحقق هذه الموافقة قبل حدوث اى نزاع وقد تتحقق بعد حدوث النزاع فعلا ففى العديد من المعاهدات قد يدرج شرط تحكيمى ضمن المعاهدة تتفق بموجبه الاطراف على اللجوء فى جميع او بعض منازعاتهم المقبلة المتعلقة بالمعاهده وقد تتفق الاطراف ايضا على اللجوء الى التحكيم عن طريق اتفاق خاص او مشاركة تحكيمية بعد حدوث النزاع.

والشرط التحكيمى هو نص فى المعاهدة يقضى بالتسوية عن طريق التحكيم لجميع المنازعات او جزء منها التى قد تطرا بشان تفسير او تطبيق المعاهدة وكثير من الشروط التحكيمية تصاغ بعبارات عامة. وبينما تعبر الشروط التحكيمية عن اتفاق الاطراف على اخضاع جميع انواع المنازعات للتحكيم او انواع معينة منها الا انها تفتقر بوجه عام الى التحديد فيما يتعلق بقواعد انشاء وتشغيل المحكمة.

لذلك فإنه من أجل اخضاع النزاع للتحكيم بموجب شرط تحكيمى فان على الاطراف ان يعقدوا اتفاقا خاص مشارطة تحكيم ، وتعتبر الاتفاقيات الخاصة لمشارطات التحكيم هى مع ذلك اكثر شمولا لانها تعالج الجوانب البنيوية لمحكمة التحكيم المنشأة وفى مشارطة التحكيم قد تبحث اطراف النزاع اذن القضايا التالية تكوين المحكمة بما فى ذلك حجم التعيينات وطريقتها وملء الشواغر وتعيين وكلاء اطراف النزاع والمسائل التى ينبغى للمحكمة ان تقررها والنظام الداخلى واسلوب عمل المحكمة بما فى ذلك اللغات المستخدمة حيث يلزم والقانون الواجب التطبيق والمقر والجوانب الادارية للمحكمة والترتيبات المالية لنفقات المحكمة والطابع الملزم لقرارات المحكمة والتزامات وحقوق الاطراف ذات الصلة.

تشكيل محاكم التحكيم

عادة تشكل محاكم التحكيم من أى عدد يتفق عليها الاطراف او تحدده الادارة القانونية المنشئة للتحكيم وقد يتولى التحكيم فرد وحديد كما قد تتولاه هيئة مكونة من عدة اشخاص ولا يوجد حد اعلى لعدد افراد هيئة التحكيم ولكن بالطبع يجب ان يكون ذلك العدد معقولا.

ويمكن أن يتولى التحكيم محكم وحيد من ذلك على سبيل المثال تعيين ملك ايطاليا محكما وحيدا بموجب معاهدة 6 نوفمبر 1901 المبرمة بين المملكة المتحدة والبرازيل فيما يتعلق بنزاع الحدود بين غينيا البريطانية والبرازيل وتعيين ماكس هيوبر محكما وحيدا فى قضية جزيرة بالماس وهناك بعض الاتفاقات المتعددة الاطراف التى تنص كذلك على تعيين محكم واحد وذلك مثل اتفاقية المنظمة الهيدروجرافية الدولية المبرمة فى 3 مايو 1967(المادة السابعة) والاتفاق الاوربى فى 9 ديسمبر 1971 بشان برنامج لتوابع الملاحة الجوية (المادة 13) والاتفاق المبرم فى 19 اكتوبر 1973 بشان انشاء منظمة الارصاد الجوية لمنطقة البحر الكاريبى (المادة 23) وقد يتولى التحكيم مجموعة يغلب ان تكون فردية العدد وهذا ما يشير اليه مراجعة معظم معاهدات التحكيم فتحدد بعض هذه المعاهدات عدد المحكمين بخمسة اشخاص مثال ذلك قانون جنيف العام لتسوية المنازعات الدولية بالوسائل السلمية المادة (22) والاتفاق بين المملكة المتحدة وفرنسا المعقود فى 10 يوليو 1975 المتعلق بانشاء محكمة تحكيم لحل منازعات تعيين حدود الجرف القارى فى القناة الانجليزية، الذى يقضى بانشاء محكمة تحكيم تتالف من خمسة اعضاء وبموجبه تقوم كل من فرنسا والمملكة المتحدة بتعيين عضو واحد وثلاثة اعضاء محايدين

وقد انشات مشارطة التحكيم المعقود فى 11 سبتمبر 1986 بين مصر واسرائيل بشان النزاع على الحدود فى طابا محكمة تحكيم تتالف من خمسة اعضاء وقد عين كل طرف منهما عضوا واحدا واشترك الطرفان فى تعيين الاعضاء الثلاثة الباقيين كان الرئيس واحدا منهم.

النظام الداخلى والمرافعة

منحث مشارطة التحكيم لمحكمة التحكيم ذاتها سلطة كاملة فى وضع نظامها الداخلى واسلوب العمل والمرافعة امامها وقد تقيد هذه السلطة فلا تتمتع هيئة المحكمة سوى بصلاحية محدودة فى هذا الشأن وذلك تحت هيمنة واشراف الاطراف المتنازعة.

فمن جهة اولى تخول بعض مشارطات التحكيم للمحكمة تقرير كافة المسائل الاجرائية مثال ذلك المادة الخامسة من مشارطة التحكيم المبرم فى 22 يناير 1963 بين فرنسا والولايات المتحدة بشان تفسير اتفاق خدمات النقل الجوى التى تقضى بان على المحكمة ان تقرر رهنا باحكام هذه المشارطة، واجراءتها الخاصة وجميع المساءل التى تؤثر على سير التحكيم وكذلك المادة الخامسة من مشارطة التحكيم فى 23 يناير 1925 بين الولايات المتحدة وهولندا بشان قضية جزيرة بالماس التى تنص بان على المحكم ان يقرر ايه مسالة او اجراء قد يظهر فى اثناء مجرى التحكيم وايضا المادة الثالثة من مشارطة التحكيم المبرم فى 10 يوليو 1975 بين فرنسا والمملكة المتحدة بشان تعيين حدود الجرف القارى لهما التى تقتضى بان تقرر المحكمة رهنا باحكام هذا الاتفاق نظامها الداخلى وجميع المسائل التى تؤثر فى سير التحكيم.

وقد وردت اى قيد كان بوضع الاجراءات واتخاذ القرارات الاخرى التى قد تنشأ نتيجة للمسألة المعروضة والتى قد تكون تمشيا مع حكمها ضرورية لتسهيل تنفيذ اغراض هذه الاتفاقية على نحو عادل ومشرف وذلك فى المادة الاولى من مشارطة التحكيم المبرمة فى 12 يناير 1922 بين المملكة المتحدة وكوستاريكا بشأن ادعاءات معينة ضد كوستاريكا (قضية تينوكو) ومن جهة اخرى استخدمت بعض مشارطات التحكيم اسلوبا اكثر تقييدا فى منح صلاحية كاملة للمحكمة فى وضع النظام الداخلى فعلى سبيل المثال قرر الاتفاقية المبرمة فى 3 اغسطس 1935 بين الولايات المتحدة وكندا بشأن المشاكل الناجمة عن تشغيل مصهر تريل بعد ان عينت النظام الداخلى لمحكمة التحكيم الما يلى: لدى تعيين المزيد من الاجراءات وترتيب اجتماعات

لاحقة فان على المحكمة ان تنظر فى الطلبات المنفردة او المشتركة الصادرة عن الحكومتين. وكذلك قررت معاهدة التوفيق والتسوية القضائية والتحكيم (ومرفقاتها) المبرمة فى 7 يوليو 1965 بين المملكة المتحدة لبريطانيا العظمى وايرلندا الشمالية وسويسرا انه على المحكمة التاكد من اراء الاطراف قبل وضع نظام داخلى معين . ومن ناحية اخرى، فان الاطار العام للتحقيقات التى تجريها محاكم التحكيم واسلوب المرافعة امامها واسلوب عملها بصفة عامة تكاد تتشابه مع بعضها البعض اجمالا امام القضاء الدولى الدائم. فمن المسلم به ان يعين اطراف النزاع وكلاء عنهم لتمثيلهم امام المحكمة وعادة ما تنص مشارطات التحكيم على هذا الحق للاطراف ومع ذلك فهناك بعض المشارطات لا تشير الى مسالة تعيين هؤلاء الوكلاء مثال ذلك مشارطة التحكيم الموقعة فى يونيو 1964 بين ايطاليا والولايات لمتحدة والمتعلقة باتفاق النقل لجوى المشترك بينهما.

الا ان عدم معالجة هذه المسالة لا يخل بضرورة تعيين كل طرف لوكلاء ينوبون عنه امام المحكمة وهذا ما جرى عليه العمل فى كل محاكم التحكيم الدولية . ولهؤلاء الوكلاء الحق عادة فى تعيين وكلاء مساعدين حسب مقتضيات الحال وقد يساعدهم كذلك مستشارون ومحامون وموظفون وفقا لما يراه الوكيل لازما.

وللاطراف المتنازعة الحق وعليهم واجب تقديم الادلة والوثائق اللازمة لاثبات دعاواها ونفى دعاوى الخصوم او دفوعهم.

وفى هذا تقضى المادة(75) من اتفاقية لاهاى لعام 1907 بان تتعهد الاطراف بالقيام على اكمل وجه تراه ممكنا بتزويد المحكمة بجميع المعلومات المطلوبة من أجل البت فى النزاع.

وتملك محكمة التحكيم كل الصلاحيات التحقيق التى تمكنها من اثبات وقائع النزاع وتكييفها وتطبيق القانون عليها.

فللمحكمة ان تستمع الى الشهود وان تستفيد من لخبراء الذين يقدمون رايا تخصصيا للمحكمة بشان القضية المنظورة امامها. ولكل من لمحكمين واطراف النزاع الحق فى استجواب هؤلاء الشهود ويكثر استخدام هذه الصلاحيات فى منازعات

الحدود التى قد تلجأ فيها محاكم التحكيم بالاضافة الى ما ذكر لى زيارة المواقع المتنازع عليها.

واعمالا لحق الدفاع فللاطراف حق ابداء اسباب دعاواهم ودفوعهم امام المحكمة وفى هذا الاطار يجرى العمل استنادا الى مشارطات التحكيم ذات الصلة او النظام الداخلى لمحكمة التحكيم على ان يقدم وكلاء اطراف النزاع مرافعات تحريرية فى شكل مذكرات ومذكرات مضادة وقد تقدم بالترتيب وفى اطار الحدود الزمنية المعينة من جانب المحكمة.

وهذا الاساليب قد تقررها المحكمة كذلك بالنسبة للمرافعات الشفوية ومن امثلة مشارطات التحكيم التى تنظم هذا الاسلوب فى المرافعات المادة (5) من مشارطة تحكيم 24 فبراير 1955 المعقودة بين اليونان والمملكة المتحدة فى تحكيم امباتيلوس.

علما بان بعض مشارطات التحكيم لا تنظم مسالة المرافعات الشفوية ويتركها البعض الاخر لتقدير المحكمة.

وفيما يتعلق بتحكيم طابا تنص المادة الثامنة من مشارطات التحكيم على ما يلى:

تشمل الاجراءات على المذكرات المكتوبة، والمرافعات الشفوية، والزيارات للموقع التى تعتبرها المحكمة وثيقة الصلة، وذلك وفقا للجدول لزمنى التالى:

أ – تتضمن المذكرات المكتوبة لوثائق التالية:

– مذكرة يقدمها كل طرف للمحكمة خلال 150 يوما من تاريخ الجلسة الاولى للمحكمة.

– ومذكرة مضادة يقدمها كل طرف للمحكمة خلال 150 يوما من تاريخ تبادل المذكرات.

– مذكر الرد اذا ما قام طرف بعد ابلاغ الطرف لاخر بابلاغ المسجل خلال 14 يوما من تاريخ تبادل المذكرات المضادة بينية فى ايداع مذكرة رد وفى

حالة قيام طرف يمثل هذا الابلاغ بحق للطرف الاخر ايضا تقديم مذكرة رد وتقدم مذكرات الرد للمحكمة خلال 45 يوما من تاريخ الابلاغ.

ب – تجرى المرافعات الشفوية والزيارات طبقا للنظام وعلى النحو الذى تقرره المحكمة. وتسعى المحكمة لانهاء زياراتها والمرافعات الشفوية خلال (60) يوما من الانتهاء من تقديم المذكرات المكتوبة.....

القانون الواجب التطبيق

عادة ما تحدد مشارطة التحكيم القواعد القانونية التى تطبقها محكمة التحكيم وفى بعض الاحيان تخلو المشارطة من الاشارة الى القواعد واجبة التطبيق وفى حالة اشتمال المشارطة على القواعد التى تطبقها المحكمة، فان بعض المشارطات تقيد سلطى المحكمة فى هذا الشان، وتحدد لها قواعد خاصة لا ينبغى للمحكمة ان تتجاوزها مثال ذلك معاهدة واشنطن المبرمة فى 6 مايو 1871 والتى اشتملت على اساسها محكمة التحكيم فى قضية ادعاءات الباما بين لولايات المتحدة والمملكة المتاحدة وايضا المعاهدة المبرمة بين بريطانيا وفنزويلا بشان تعيين خط الحدود الفاصل بين مستعمرة غيانا البريطانية وفنزويلا.

وقد ينحصر دور محكمة التحكيم فى مجرد تطبيق احكام بعض الاتفاقات الدولية بحيث يكون دورها تفسيريا لاحكام هذه الاتفاقات مع الاخذ بالاعتبار الاصول القانونية العامة وقواعد الاثبات القانونى مثال ذلك تحكيم طابا بين مصر واسرائيل والذى جاء بمشارطته الموقعة فى 11 سبتمبر 1986 المادة الثانية ان تفصل المحكمة فى النزاع وفقا لاتفاقية السلام المصرية الاسرائيلية المبرمة فى 26 مارس 1979 والاتفاق الموقع بين البلدين فى 25 ابريل 1982 والملحق. علما بان المادة الثانية من اتفاقية السلام المذكورة تقرر ان الحدود الدائمة بين مصر واسرائيل هى الحدود الدولية المعترف بها بين مصر وفلسطين تحت الانتداب وبذلك تكون تلك المحكمة مقيدة بخط الانتداب المذكور والاتفاقات المشار اليها.

وهناك بعض المشارطات تكون اكثر رحابة فتحيل بصفة عامة الى القانون الدولى او مبادئ القانون الدولى كما بينتها المادة(38) من النظام الاساسى لمحكمة

العدل الدولية من حيث ان محاكم التحكيم ينبغى ان تقضى فى المنازغات التى تطرح عليها وفقا لاحكام القانون وهذا هو غير ما اوصلت به المادة (28) من القانون العام المنقح لعلام 1949 حيث تنص على انه:

اذا لم يرد شئ فى الاتفاق الخاص او اذا لم يكن هناك اتفاق خاص فان على المحكمة ان تطبق القواعد المدرجة فى المادة 38 من النظام الاساسى لمحكمة العدل الدولية فيما يتعلق بجوهر النزاع. وبالقدر الذى لا تكون هناك قواعد منطبقة على النزاع يتعين على المحكمة ان تقرر مراعاه العداله والحسنى .

مقر محكمة التحكيم

يتفق الاطراف فى معظم الاحيان على تحديد مقر محكمة التحكيم فى المشارطة فعلى سبيل المثال تنص المادة (5/1) من مشارطة التحكيم المصرية الاسرائيلية الخاصة بتحكيم طابا على انه: يكون مقر المحكمة فى سويسرا.

اما حينما لا يكون هناك اتفاق بهذا الصدد فللمحكمة ذاتها تعيين المكان الذى تمارس فيه اعمالها، بناء على توصية رئيسها مثال لذلك المادة الخامسة من مشارطة التحكيم المبرمة فى 10 يوليو 1975 بين فرنسا والمملكة المتحدة فى القضية المتعلقة بتعيين حدود الجرف القارى.

وقد يتولى اتفاق التحكيم تحديد المكان الذى تجتمع فيه المحكمة لاول مرة وللمحكمة بعد ذلك صلاحية اختيار مكان انعقاد الجلسات التالية. ويتخذ قرار اختيار مكان الجلسات عادة على ضوء التسهيلات الادارية الماحة والاعتبارات المالية . ويتحمل اطراف النزاع النفقات المتعلقة بهم ويتقاسمون التكاليف الادارية للمحكمة وقد جرى العمل على ان يتحمل اتعاب المحكمين كلا الطرفين على قدم المساواة.
وتقضى بعض مشارطات التحكيم احيانا بان يسدد كل طرف من الاطراف اجور المحكم الذى عينة مثال ذلك الاتفاقية المبرمة فى 29 فبراير 1892 بشان تحكيم المسائل المتعلقة بحقوق الولاية فى بحر بيرينج المادة 12 ةمشارطة التحكيم المبرمة فى 16 يونيو 1930 بين هندوراس وجواتيمالا، والمادة التاسعة عشرة، ومشارطة التحكيم المبرمة فى 22 يناير 1963 بين الولايات المتحدة وفرنسا المادة الثامنة.

حكم محكمة التحكيم

تصدر محاكم التحكيم احكاما نهائية وملزمة للاطراف وتنص جميع مشارطات التحكيم على ان تتعهد الاطراف بتنفيذ قرار المحكمة المصرية مثال ذلك ما تقضى به المادة (14) من مشارطة التحكيم المصرية الاسرائيلية بشأن نزاع (طابا) بأن:

- تتفق مصر واسرائيل على قبول حكم المحكمة بوصفة نهائيا وملزما لها.
- يتعهد الطرفان بتنفيذ الحكم باسرع ما يمكن وبحسن نية وفقا لمعاهدة السلام.

وتصدر احكام التحكيم عادة مكتوبة وموقعة ومؤرخة. وتقضى بعض مشارطات التحكيم بان يتخذ قرار المحكمة باغلبية اصوات اعضائها من ذلك على سبيل المثال المادة السادسة من مشارطة التحكيم المبرمة فى 22 يناير 1963 بين الولايات المتحدة وفرنسا فى القضية المتعلقة بتفسير اتفاقهما المتبادل بشان خدمات النقل الجوى وكذلك المادة (2/4) من مشارطة التحكيم المصرية الاسرائيلية. بينما تمنح مشارطات اخرى للمحكمين الحق فى تقديم راى مستقل او مخالف مثال ذلك المادة التاسعة من مشارطة التحكيم المبرمة فى 10 يولية 1975 بين المملكة المتحدة وفرنسا فى القضية المتعلقة بحدود الجرف تنص على انه لكل عضو فى المحكمة الحق فى تقديم راى منفرد او راى مخالف ويعتبر الراى المنفرد او المخالف جزء من الحكم.

وبعد ان يصدر الحكم فانة يكون خاضعا للتصويت او التنقيح فيما يتعلق بالاخطاء مثل الاخطاء الكتابية او المطبعية او الحسابية.

ويخضع الحكم ايضا للتفسير اذ تقضى المادة 82 من اتفاقية لاهاى لعام 1907 بالاختصاص العام لمحكمة التحكيم بتفسير الحكم الذى اصدرته. وتقضى بعض اتفاقيات التحكيم بامكانية تفسير الحكم على سبيل المثال معاهدة التوفيق والتسوية القضائية والتحكيم المبرمة بين المملكة المتحدة وسويسرا المادة 34. وايضا

مشارطة التحكيم المبرمة فى عامى 1963، 1977 بين فرنسا والولايات المتحدة . وقد تشير مشارطة التحكيم كذلك الى وجوب اعلان الحكم بالشكل الذى صدر به بالتاريخ الذى تتفق عليه الاطراف على سبيل المثال. المادة السادسة(ب) من مشارطة التحكيم بين فرنسا والولايات المتحدة المذكورة اعلاه.

وتتمثل المرحلة الاخيرة من التحكيم فى تنفيذ حكم التحكيم ورهنا بطبيعة النزاع قيد البحث، قد تدرج الاطراف ضمن مشارطة التحكيم الخطوات اللازمة التى يجب اتباعها من اجل تنفيذ الحكم ففى نزاع الحدود مثلا قد تتفق الاطراف على انشاء لجنة اخرى او تعيين خبراء لرسم الحدود بمجرد صدور الحكم وبناء على اتفاقية لاهاى لعام 1907 فان اى نزاع قد ينشأ بين الاطراف فيما يتعلق بتفسير او تنفيذ الحكم ينبغى ان يرفع الى محكمة التحكيم التى اصدرته ما لم تتفق على خلاف ذلك.

أهمية التحكيم الدولي

شهد التحكيم الدولي في العصر الحديث قفزة نوعية، من خلال اتفاقية لاهاي سنة 1899، حيث سعت الدول جدياً إلى إنشاء محكمة تحكيمية دولية، حيث نصت على الاتفاقية الخاصة ببعض المنازعات الدولية بالطرق السلمية بواسطة المساعي الحميدة والوساطة والتحكيم، وتضمنت هذه الاتفاقية النص صراحة على إنشاء محكمة دولية دائمة للتحكيم، أطلقت عليها تسمية المحكمة الدائمة للتحكيم، ثم سعت الدول بعد الحرب العالمية الثانية إلى إنشاء منظمة الأمم المتحدة بغية تحقيق الأمن والسلم، التي فشلت العصبة في تحقيقهما، وفي تاريخ 28 ابريل سنة 1949 تأسست الجمعية العامة للأمم المتحدة بناء على مبادرة من الوفد البلجيكي بإعادة النظر في الميثاق العام للتحكيم، حتى يمكنه التكيف مع الأوضاع الدولية الجديدة، وقد تم قبول هذا الاقتراح من طرف الجمعية العامة التي أوصت جميع الدول الأعضاء بالانضمام إلى الصيغة الجديدة المعدلة في الميثاق العام للتحكيم، حيث أصبح نافذا ابتداء من تاريخ 1950/09/20 واستمرت هذه الجهود إلى أن انتهت سنة 1958

إلى وضع نموذج لقواعد إجراءات التحكيم، ليكون دليلا مرشدا للدول عبر التوقيع على تعهدات باللجوء إلى التحكيم.

وعلى الرغم من هذه المحاسن إلا أن الجمعية العامة للأمم المتحدة، لم تصادق على هذا المشروع النموذجي بسبب معارضة العديد من الدول، وعلى رأسها الاتحاد السوفيتي سابقا واكتشفت الجمعية العامة سنة 1958 بجعا اعتبار هذه المشروع نموذجا تقتدي به الدول عند إبرام اتفاقيات للإحالة إلى التحكيم، حيث يعتبر التحكيم إن صح التعبير هو الخيار الأول أمام المتعاملين في حقل التجارة الدولية لكونه يعد الوسيلة المثالية الأكثر ملائمة مع متطلبات الدول، وتكمن أهمية التحكيم في تحقيق العديد من المزايا والفوائد التي كانت السبب في كثرة اللجوء إليه في المنازعات، بدلا من القضاء العادي للدول وأهم هذه المميزات:

– السرعة: حيث يلعب عامل الوقت دورا هاما في تحديد ومدى نجاعة نظام التحكيم، لذا يوجد في مقدمة ما يؤخذ على القضاء المدة الطويلة التي يستغرقها في الفصل في القضايا

–السرية: تمتاز السرية في التحكيم بضمان سرية تامة لكل ما يجري خلالها والحفاظ على أسرار الحياة الخاصة، والحميمية للأطراف كما تحفظ هذه السرية مهما كانت نتيجة اللجوء إلى هذه البدائل، بغض النظر عن النتيجة النهائية سواء كانت بتسوية أو تعذرت التسوية

– المحافظة على استمرار العلاقات بين الأطراف: يتلاشى الحقد بين الأطراف لأنهم اتفقوا على اللجوء إلى التحكيم بإرادتهم الحرة، وقبلوا مسبقا ما يصدره المحكم من قرارات ويقومون بتنفيذها طواعية واختيارا منهم، هو ما يجعل حكم المحكم وكأنه صادر من مجلس العقد، ومن ثمة يترتب عليه إحلال الوئام محل الخصام، ويكون له أثر فعال كما تتطلب في تحقيق السلم الاجتماعي واستمرار المعاملات واستقرارها مستقبلا إجراءات التحكيم الحضور الشخصي لأطراف النزاع، ومشاركتهم في كافة أطوار الإجراءات، وهو ما يتيح لهم فرصة القيام بمكاشفة ومصارحة بعضهم لبعض، بدون وسيلة ويمكنهم من تفريغ كل المآخذ المتبادلة ،ومن

ثم النفوذ إلى جوهر النزاع في جو أقل عدوانية إن لم يكن أخويا وحميميا في بعض الأحيان ولقد أظهر التحكيم تطورا كبيرا اعتبارا لمميزاته العديدة، ولئن كان القضاء الوطني لم تعد له القدرة على التصدي لفض منازعات التجارة الدولية بالكفاءة والحسم اللازمين لأنه مقيد بالقواعد الجامدة التي تختلف اختلافا تاما من دولة لأخرى، من شأنه عرقلة التجارة الدولية عند النزاع

لذا أصبح التحكيم مرتعا خصبا وقضاء أصيلا للمعاملات الداخلية والخارجية بصفة عامة والتجارة الدولية بصفة خاصة نتيجة للتطور العالمي الحالي المتزايد، وتختلف أهمية التحكيم باختلاف الزاوية التي ينظر إليها، ومجال التعامل الذي أملته الظروف والضرورات الاقتصادية والصناعية، التي أملت كذلك أحكامها في التعاملات الدولية بين كافة الدول وتبلورت مفاهيم التجارة الدولية وانسيابية حركتها في شرايين العالم الذي أصبح أشد اتصالا وأكثر ارتباطا وأوسع نطاقا وبالتالي لا شيء يبرر اللجوء إلى القضاء على اعتبار هذا الأخير أصبح ضيقا بالنسبة لهذه المعاملات ولا يمكن أن يستوعبها من هنا ظهرت أهمية التحكيم . إن تطور فكرة أهمية التحكيم وازدهار أسلوبه قد واكبه وساعد على تحقيقه نشاط الحركة التشريعية في بعض الدول، من أجل سن قوانين ترمي من ناحية إلى التخفيف من على كاهل القضاء الوطني إلى تحرير التحكيم من رقابة القوانين ورقابة الأجهزة القضائية.

الخاتمة :

تناولت الدراسة مسألة التحكم الدولي وطريقته المثلى في فض المنازعات دون اللجوء الى القضاء ويعتبر التحكيم بقواعده وشروطه من احدث الاتجاهات الممكنة والمتاحة في فض المنازعات وهناك الكثير من النماذج الدولية التي اثبتت فعالية هذه الوسيلة وجدواها من حيث سرعة الوقت والتكلفة ، لذا أرى انه من اهم الاتجاهات الحديثة في مسائل فض النزاعات بين الدول وقد تصبح الوسيلة المعتمدة والمفضلة دائما" وذلك بسبب ما ذكرته عن ميزات وعيوب هذه الوسيلة وأرى ايضا" ان تهتم الدول بمسألة سن القوانين التجارية التي تساعد المستثمرين على معرفة شروط واساليب التحكيم لديها لأن هذا من شأنه تسهيل إجراءات العقود والاستثمارات بل ويشجع تلك الشركات والدول على المزيد من التعاون .وقد اقر الإسلام مبادئ التحكيم بصفته الحالية حيث أنه كان معروفا" بين العرب وقد تركت مسألة تنفيذ أحكامه الى العرف او الخشيه من الإقتتال وقد كانت تسند مهام المحكين الى اهل الأمانة والصدق بين الناس اما فيمايتعلق بمقاصد التشريع الإسلامي يرى الشارع ان التحكيم يحقق مقصد إقامة العدل بين الناس ومن هنا برزت مكانة التحكيم واهميته والتي تتمثل في :

الإسراع في فض المنازعات .

إبعاد الحقد والبغضاء بين الخصوم .

أنه يحفظ العلاقة الطيبه وخاصة بين التجار .

أن فيه روح الإعتدال . ويقطع النزاعات داخل المجتمه المسلم .

أنه يتيح للمتخاصمين إختيار من يحكم بينهم .

أنه يبعث الى الطمأنينه وخاصة للشركات المتعددة الجنسات .

انه قد يتأثر قضاء بعض الدول بالضغوط السياسية .

ان التحكيم يتيح للمحكين اختيار المذهب الفقهي الذي يرغبونه في التحكيم

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الوسائل البديلة لتسوية المنازعات بالطرق الودية

دراسة تحليلية حول (المفاوضات، والوساطة الدولية)

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الملخص

تزايد في العقود الأخيرة اللجوء للوسائل البديلة لتسوية المنازعات بالطرق الودية فأصبحت قضاء المنازعات الدولية بلا منازع، وذلك لما تتميز به هذه الوسائل من سرعة وسرية، ومشاركة الأطراف في إيجاد الحلول لمنازعاتهم، ومرونة وحرية اختيار الطريقة والأشخاص الذين يتولون هذه المهمة. وحيث أن ميثاق الأمم المتحدة يتضمن المحافظة على السلم والأمن الدوليين، إلا أنه في حال حصول نزاع دولي بسبب تعارض المصالح الاقتصادية أو السياسية أو العسكرية، فإن الميثاق ينص على فض هذه النزاعات وفق الوسائل السلمية التي تأخذ عدة أشكال، ويشار إليها بمصطلحات مثل المفاوضات والوساطة، وهذه المصطلحات تستخدم بشكل متزايد دولياً ومحلياً كبديل للتقاضي، واستخدام هذه الطرق لتسوية النزاع، يعود بفوائد كبيرة مثل:فض النزاعات المسلحة بسرعة، واستدامة الحل بسبب صناعته من قبل الأطراف المتنازعة. ويهدف البحث الى التعرف على ماهية الوسائل البديلة لفض النزاعات والمقارنة بين احكام ومفهوم وطبيعة المفاوضات والوساطة الدولية واهميتهما في في تسوية النزاعات الدولية. ونظرا لطبيعة البحث تم

الاعتماد على المنهج الاستقرائي، تم استقراء الآليات التي تعتمدها المنظمات الدولية لفض النزاعات الدولية، وكذلك المنهج التحليلي، حيث تم تحليل تلك المادة العلمية، لمعرفة طبيعة كل وسيلة من الوسائل البديلة وخصائصها، وكذلك المنهج المقارن بإجراء المقارنة بين المفاوضات والوساطة الدولية من جهة وبين القضاء من جهة اخرى. ومن اهم النتائج التي توصلت اليها الدراسة ان نظام الوسائل البديلة ضماناً له مفعول أكثر من قرار المحكمة، وتخلق بيئة استثمارية جاذبة، ويكون تنفيذ اتفاقية التسوية رضائياً.

الكلمات الافتتاحية:المفاوضات، الوساطة، المصالحة، التوفيق.

المقدمة:

وهناك صلة مشتركة بين كافة الوسائل البديلة، وهي حسم النزاع بعيداً عن قاعات المحاكم ومنصات القضاة، وما شهده العالم مند نصف قرن ويزيد من حركة فقهية وتشريعية لتنظيم الوسائل البديلة، وما تمثله في الحاضر من فعل مؤثر على صعيد التقاضي كان من الطبيعي أن تعمل الدول جاهدة لإيجاد إطار ملائم؛ يضمن لهذه الوسائل تقنينها ثم تطبيقها لتكون بذلك أداة فعالة لتحقيق وتثبيت العدالة وصيانة الحقوق، فقد اتجهت المعاهدات والاتفاقيات الدولية لتفعيل دور هذه الوسائل على المستوى الدولي.

مفهوم المفاوضات الدولية

إن حاجة البشرية إلى التفاوض قديم منذ الأزل، ولن تنتهي هذه الحاجة أو تنتفي بل تزداد هذه الأهمية، كلما نمت العلاقات بين الدول وتشعبت سواء على المستوي الاقتصادي أو الاجتماعي أو السياسي، وهو المخرج أو المنفذ الوحيد الممكن استخدامه لمعالجة القضية المتنازع عليها والوصول إلى حل للمشكلة المتنازع بشأنها، و في هذا المبحث سوف نتناول إحدى الوسائل البديلة غير الملزمة، والتي تقتصر فيها المشاركة على أطراف النزاع فقط لحل نزاعاتهم، وتسمى هذه الإجراءات المفاوضات، حيث تم تقسيم هذا المبحثلمطلبين، المطلب الأول: تعريف المفاوضات والاستراتيجية والتكتيك التفاوضي وأنواع التفاوض، والمطلب الثاني: مبادئ التفاوض وصفات المفاوض ومراحل العملية التفاوضية.

المطلب الأول:تعريف المفاوضات والاستراتيجية والتكتيك التفاوضي وأنواع التفاوض

الفرع الأول: تعريف المفاوضات والاستراتيجية والتكتيك التفاوضيتعريف التفاوض هو: "عملية اتصال بين شخصين أو أكثر، يدرسون فيها البدائل للتوصل لحلول مقبولة لديهم أو بلوغ أهداف مرضية لهم".[1]

التفاوض: "هو موقف تعبيري حركي، قائم بين طرفين أوأكثر حول قضية من القضايا، يتم من خلاله عرض وتقريب وتكييف وجهات النظر، واستخدام كافة أساليب الإقناع للحفاظ على مصالح قائمة أو الحصول على

[1] مقال بعنوان: **التفاوض علم وخبرة وأخلاق**، الاسترجاع بتاريخ 22 جولاي 2016 من http://www.startimes.com

منفعة جديدة، بإجبار الخصم على القيام بعمل معين أو الامتناع عن عمل معين، في إطار علاقة الارتباط بين أطراف العملية التفاوضية تجاه أنفسهم أو تجاه الغيـر".[٢]

ويرى الباحث أن المفاوضات أو التفاوض هو آلية لتسوية النزاع، قائم على الحوار المباشر بين الطرفين المتنازعين سعياً لحل الخلاف، بدون مشاركة طرف ثالث، بل يعتمد على الحوار المباشر بين الطرفين، ويمكن تمثيل المتنازعين بواسطة محامين أو وكلاء لهم، يملكون سلطة اتخاذ القرار عن موكليهم.

الاستراتيجيات التفاوضية:

يتبع المفاوضون عدة استراتيجيات أثناء عملهم وذلك وفقاً لطبيعة النزاع والأطراف والزمان:

أولاً– استراتيجيات منهج المصلحة المشتركة: يقوم هذا المنهج على علاقة تعاون بين طرفين أو أكثر، يعمل كل طرف منهم على تعميق وزيادة هذا التعاون وإثماره لمصلحة كافة الأطراف،

ثانياً– استراتيجيات منهج الصراع: وتشملالاستراتيجية الأولى: استراتيجية (الإنهاك)، والاستراتيجية الثانية: استراتيجية التشتيت (التفتيت)، والاستراتيجية الثالثة: استراتيجية إحكام السيطرة (الإخضاع)، والاستراتيجية الرابعة: استراتيجية الدحر (الغزو المنظم)، والاستراتيجية الخامسة: استراتيجية التدمير الذاتي (الانتحار).[٣]

– تكتيكات التفاوض:

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[٢] محسن أحمد الخضيري، **تنمية المهارات التفاوضية**، القاهرة: الدار المصرية اللبنانية،1993 م، ص25

[٣] انظر: عبد الله جماعة، **التفاوض أصول عملية ومهارات وفنون**، مصر: مركز التعليم المفتوح في جامعة بنها، ص20.

تكون وفق الإجراء الوقتي أو اللحظي الذي يستدعيه الموقف التفاوضي القائم، لأن التكتيك يمتاز بأنه الأقصر زمناً والأقل شمولاً، قياساً باستراتيجيته وهناك العديد منها:

أ – تكتيك كسب الثقة والاحترام المتبادل . ب – تكتيك إثارة الشهية أو الإغراء المادي . ج – تكتيك الطيب والشرير (الصقر والحمامة) . د – تكتيك عكس الاتجاه وتبديل المواقف .هـ – تكتيك التهديد والترغيب. و – تكتيك وضع العراقيل لكسب الوقت .ز – تكتيك الإرهاق الجسدي.ج – تكتيك الحلول الوسط.

الفرع الثاني: أنواع التفاوض

1– اتفاق لصالح طرفين:مبدأ " اكسبْ أنت وأكسبُ أنا "ويكون التركيز على ما يحقق مصلحة الطرفين.

2– التفاوض من أجل مكسب لأحد الأطراف وخسارة للطرف الآخر: مبدأ (أكسبُ أنا – اخسرْ أنت).

3– التفاوض الاستكشافي:يهدف لاستكشاف أجندة الأطراف التفاوضية.

4– التفاوض الإسترخائي: من أجل تمييع أو تسكين الأوضاع.

5- تفاوض التأثير في طرف ثالث: للتأثير في طرف ثالث لجذبه لوجهة نظر معينة، أو تحديد دوره بخصوص صراع مع الخصم المباشر.[٤]

المطلب الثاني:مبادئ التفاوض وصفات المفاوض ومراحل العملية التفاوضية

الفرع الأول: صفات المفاوض

صفات المفاوض يجب أن يتمتع بها، لتساعده على حسن سير العملية التفاوضية:

- النظرة الثاقبة للأمور والقدرة على التمييز بين القضايا الأساسية والفرعية.
- القدرة على التحليل والاستنباط
- معرفته بنقاط القوة والضعف وتحليل المكسب والخسارة
- الحكمة والصبر والانتظار حتى تظهر الصورة بأكملها
- القدرة على الاستماع للطرف الاخر بعقل متفتح
- الالتزام بالموضوعية وعدم البعد عن الموضوع
- الاستعداد والالتزام بالتخطيط الدقيق لكل التفاصيل وايجاد البدائل
- امتلاك البصيرة للنظر إلى الموضوع بوجهة نظر الطرف الاخر
- الشجاعة في الاستعانة بالفريق المساعد في الوقت المناسب

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[٤] انظر: فؤاد الصادق، **المفاوضات للمفاوضات أم للتحالفات**، الاسترجاع بتاريخ 13 نوفمبر 2016 من http://www.siironline.org

- الثقة بالنفس القائمة على العلم والمعرفة
- الالتزام بالنزاهة والقدرة على ارضاء كافة الاطراف
- القدرة على التفاوض بفاعلية مع الطرف الاخر وكسب ثقته

وأهم المزايا والمهارات التي يجب أن يتميز بها المفاوض الناجح:

1- أن يتعرف الطرفان المتفاوضان بقدرة المفاوض وفعاليته، والمفوض الجيد ليس الذي يستطيع أن يصل إلى اتفاق نتيجة المفاوضات، بل أن يكون اتفاقاً جيداً وذا قيمة وتقدير.

2- المفاوض الجيد والناجح عندما يقرر، يجب أن يحزم بدون تردد لأن التردد فيه أخطار قد تكون أقسى من أخطار الأقدام والجزم.

3 - أجمع الباحثون في فن التفاوض على أن المفاوض الناجح، هو الذي يتقن طريقة طرح الأسئلة والاقتراحات، فإن فن طرح الاسئلة له تأثير كبير في تقدم المفاوضات ونجاحها.[٥]

الفرعالثاني: مراحل العملية التفاوضية

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[٥] انظر: **مواصفات المفاوض الناجح**، الاسترجاع بتاريخ 11 سبتمبر 2016 من http://www.siironline.org

للتفاوض خطوات يجب على المفاوض أن يعلمها ويتقنها وهي:

الخطوة الأولى: تحديد وتشخيص القضية التفاوضية، والخطوة الثانية: تهيئة المناخ للتفاوض، والخطوة الثالثة: قبول الخصم للتفاوض، والخطوة الخامسة: بدء جلسات التفاوض الفعلية، والخطوة السادسة: الوصول إلى الاتفاق الختامي وتوقيعه.

ويمكن تقسيم هذه الخطوات إلى مرحلتين:

أولاً: مرحلة ما قبل العملية التفاوضية: وتشمل:

أ– التحضير للتفاوض: وذلك بموافقة الأطراف على مبدأ التفاوض: وتعني اقتناع الطرفين بأهمية وضرورة العملية التفاوضية، وذلك عبر اتصال دبلوماسي، أو وسائل الإعلام والمنظمات الدولية، وكذلك تحديد وتشخيص القضية التفاوضية، وتشمل: تحديد الموضوعات محل التفاوض، وتصنيف الأهداف المرغوب تحقيقها، وتحليل الوضع التفاوضي: استناداً لمعرفة أهداف الأطراف الأخرى، والتعرف على البدائل المتاحة، والميزانية المخصصة للطرف الآخر المفاوض، وأثناء مرحلة التحضير للتفاوض يجب مراعاة عدة شروط أهمها: إعطاء وقت كاف للتحضير، والعمل على خلق أجواء تفاوضية مناسبة تنجح التفاوض.

ب– التمهيد والإعداد للعملية التفاوضية: ويشمل: اختيار أعضاء الفريق المفاوض، وتوافر المعلومات الوافية المدروسة عن الطرف الآخر، وتحديد موعد ومكان العملية التفاوضية، ويجب تنسيق اتصالات بين الطرفين قبل العملية التفاوضية، وتحديد الأهداف والأولويات الرئيسية، ووضع وتحديد الاستراتيجية التفاوضية والتكتيكات المناسبة لها.

ثانياً–مرحلة الجلسات التفاوضية:وتشمل:

أ–الإجراءات التفاوضية:في هذه المرحلة يستخدم الفريق المفاوض كل أساليب الإقناع، وعادةً ما تحدث مجموعة من العمليات والإجراءات التفاوضية الهامة وهي:

– اختيار التكتيك التفاوضي المناسب للموضوع التفاوضي.

– الاستعانة بكل الأدوات التفاوضية المناسبة.

– ممارسة الضغوط التفاوضية على الطرف الآخر.

– تبادل الاقتراحات وعرض وجهات النظر، في إطار الخطوط العريضة لعملية التفاوض، ودراسة ومعرفة ومناقشة الخيارات المعروضة من الجانب الآخر.

– المساومة.

ولكي تكون ناجحة يتوجب على كل طرف أن يحدد ما يريده من الآخر، مقابل تنازلات متبادلة يقدمها، حيث أثناء الجلسات التفاوضية يتمثل التكتيك فيما يلي:

البدء بمناقشة القضايا ذات الاختلاف الكبير، ويجب أن تكون الشروط صعبة في البداية والتنازلات قليلة، وعدم مقاطعة الطرف الآخر حتى ينتهي من حديثه، والإمساك عن الكلام وعدم التكلم إلا عند الضرورة، وأثناء العروض التفاوضية: عدم تقديم عروض سخية في البداية، ثم إتاحة المجال للمساومة، وعند نهاية

الجلسات التفاوضية: القيام بتلخيص ما يريده الطرف الآخر، واستحضار المعلومات، وتبيان الأخطاء والهفوات.

ب– نهاية التفاوض و الوصول إلى الاتفاق الختامي وتوقيعه: وهي المرحلة الأخيرة والنهائية في المفاوضات، عن طريق قيام أحد الأطراف أو كليهما، بتقديم تنازل رئيسي يشجع من خلاله الطرف الآخر ويدفعه إلى التوقيع النهائي، في شكل اتفاقية موقعة وملزمة للطرفين المتفاوضين، ويجب صياغة الاتفاقية بأن تكون شاملة وتفصيلية تحتوي على كل الجوانب، ومراعي فيها اعتبارات الشكل والمضمون، من حيث جودة وصحة ودقة اختيار الألفاظ والتعبيرات، لكيلا تنشأ أي عقبات أثناء التنفيذ الفعلي للاتفاق التفاوضي.

المبحث الثاني: الوساطة الدولية

في هذا المبحث سوف نتناول الوسائل البديلة غير الملزمة والتي يشارك فيها الأطراف، شخص ثالث إجراءات حل نزاعاتهم، وتسمى هذه الإجراءات إما الوساطة أو التوفيق والمصالحة، وهي ألفاظ لها مدلول عملي واحد، يتجلى بقيام شخص ثالث يسمى (الوسيط، الموفق، المصالح) بمهمة تقريب وجهات النظر بين أطراف النزاع، وذلك بغية توصلهم لحل هذا النزاع،حيث أن الباحث سوف يستخدم لفظ الوساطة عند تناول هذه الإجراءات، ولفظ الوسيط عند الحديث عن الشخص الثالث المحايد.

وتم تقسيم هذا المبحث لمطلبين، المطلب الأول: تعريف الوساطة وأنواعها وتعريف الوسيط وشروطه، والمطلب الثاني: مجال الوساطة ومراحل وسير إجراء الوساطة.

المطلب الأول: تعريف الوساطة وأنواعها وتعريف الوسيط وشروطه

تعتبر الوساطة من الوسائل الأكثر شيوعاً لحل النزاعات، بهدف التوصل إلى تسوية مرضية بين الفرقاء المتنازعين، وهي تؤكد على حماية مصالح الفريقين أو الفرقاء الموافقين عليها، وهي اختيارية ولا تتبع قواعد إجرائية، وإنما تستلزم حواراً مفتوحاً على قدم المساواة بكل حرية وثقة، والقرار فيها ذاتي دون تدخل الوسيط وإنما يقرره الفرقاء بأنفسه، فهي تدخُّل طرف ثالث، يتوسط بين قطبَي النزاع، إذْ يضع الثالثُ نفسه وسط خصمين اثنين – سواءً كانا شخصين أم جماعتين أم شعبين – يتواجهان ويتضادان، فالوساطة تهدف إلى نقل القطبين من حالة (الخصومة) إلى حالة (المحادثة)، أي تهدف إلى الوصول بهما إلى الالتفات كل منهما نحو الآخر، للتحادث والتفاهم وإيجاد تسوية،

الفرع الأول: تعريف الوساطة وصورها وأنواعها

– تعريف الوساطة:

الوساطة: هي عملية تتسم بالمرونة والسرية التي يتولى بموجبها شخص محايد، يعين بواسطة أطراف النزاع أو نيابة عنهم، لمعاونتهم بشكل فعَّال ليتوصلوا إلى تسوية النزاع أو الخلاف، مع تحكمهم الكامل في قرار التسوية وكذلك بنود اتفاق التسوية.[٦]

[٦] انظر: **قواعد الوساطة لمركز الوساطة والمصالحة في مركز القاهرة الإقليمي للتحكيم التجاري**، لعام 2013م.

الاسترجاع بتاريخ 5 جولاي 2016 من

http://www.crcica.org/rules/mediation/crcica_mediation_rules

الوساطة: "وسيلة لحل النازعات من خلال تدخل شخص ثالث نزيه وحيادي ومستقل يزيل الخلاف القائم، وذلك باقتراح حلول عملية ومنطقية تقرب وجهات نظر المتنازعين، بهدف إيجاد صيغة توافقية، وبدون أن يفرض عليهم حلاً أو يصدر قراراً ملزما ".[٧]

ويرى الباحث تعريف الوساطة: بأنها وسيلة يلجأ إليها الأطراف لحل نزاعهما، بمساعدة شخص ثالث محايد يسمى الوسيط، حيث يتم نقل المتخاصمين من مقاعد المرتقب والمنتظر لمقاعد الحكم، وتجعلهم يساهمون في بناء حيثيات حكمهم بمساعدة الوسيط، وهي تسعى للوصول لكي يربح الجميع فيه، عندما يساهمون بالتوصل لحل متفق عليه، وليس حل مفروض عليهم.

صور الوساطة:

يجب أن يكون اتفاق الوساطة مكتوباً، وأشكال الكتابة: إما بعقد رسمي أو عرفي وإما بمحضر يحرر أمام المحكمة، ويعتبر اتفاق الوساطة مبرماً كتابة، إذا ورد في وثيقة موقعة من الأطراف أو في رسائل متبادلة أو اتصال بالتلكس أو برقيات، أو أية وسيلة أخرى من وسائل الاتصال تثبت وجوده.

أنواع الوساطة:

[٧] انظر: بن حمري الهادي، **الطابع القانوني لنظام الوساطة كبديل لفض النزاعات على ضوء أحكام قانون الإجراءات المدنية والإدارية**، محاضرة ألقيت بمجلس قضاء المسيلة-الجزائر2009م.

للوساطة عدة أنواع فهي إما وساطة قضائية أو قانونية ويعتبر هذان النوع واحداً مع بعض الفروق، ووساطة اتفاقية وهي الأكثر استخداماً وانتشاراً.

قضائية: إذ يحيل القاضي النزاع إلى وسيط معين ضمن قائمة أسماء الوسطاء، حيث تتم من خلال قضاة البداية والصلح الذين يختارهم رئيس محكمة البداية لتولي هذه المهمة، ويطلق عليهم اسم (قضاة الوساطة).[٨]

قانونية: وذلك حين يحيل النص التشريعي إلى اتباع طريق الوساطة قبل المرور إلى المحاكمة،وتتم من خلال أشخاص خارجين عن مرفق القضاء، يملكون الخبرة اللازمة ويتمتعون بالحيدة والنزاهة، يتم تنصيبهم من طرف وزير العدل، و تعيينهم من طرف القضاة في النزاعات المطروحة أمام القضاء، وفقا للقائمة المعتمدة والمعدة مسبقاً على مستوى كل مجلس قضائي، وكذلك يطلق عليها تسمية وساطة خاصة: وتتم من خلال القضاة المتقاعدين والمحامين والمهنيين وغيرهم من أصحاب الاختصاص المشهود لهم بالحياد والنزاهة، ويسميهم رئيس المجلس القضائي بتنسيب من وزير العدل، ويطلق عليهم اسم (وسطاء خصوصيون).[٩]

اتفاقية: حين يتفق الأطراف على إحالة النزاع إلى الوسيط المتفق عليه،إما في عقد سابق أو لاحق لنشوء النزاع،ويتم اختيار الوسيط من قبل الأطراف أنفسهم، حيث يتفقون على تسمية وسيط معين يجدون لديه القدرة الكافية والكفاءة لحل النزاع، وعند اختيار هذا الوسيط يتم التقدم بطلب للقاضي الذي ينظر في

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[٨] انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، رقم 12 لسنة 2006، المادة 2؛ **قانون الإجراءات المدنية والإدارية الجزائري**، لعام 2008م، المادة /994/.

[٩] انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، المادة 3.

الدعوى، إذا كانت هناك دعوى مقامة، ويقوم هذا الأخير بإحالة النزاع لهذا الوسيط، وتعتبر هذه الوساطة الأكثر شيوعاً، وقد أخذت بهذا النوع من الوساطة أغلب التشريعات ومنها التشريع الأردني والمغربي.[١٠]

الفرع الثاني: تعريف الوسيط وشروطه

تعريف الوسيط:

الوسيط :" هو كل شخص مكلف بإدارة الوساطة، بفعالية وحياد وكفاءة مهما كانت طريقة تعيينه، وذلك لمساعدة أطراف النزاع على التواصل إلى تسوية ودية".[١١]

الوسيط" يقصد به: شخص محايد يقوم بعملية الوساطة؛ ويشمل "الوسيط" أي شخص يتم تكليفه من قبل وسيط آخر للمساعدة في عملية الوساطة أو للتواصل مع المشاركين في عملية الوساطة".[١٢]ويعهد بالوساطة إلى شخص طبيعي أو شخص معنوي.

شروط الوسيط:

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[١٠]انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، المادة 3؛ و**القانون رقم 08-05 الخاص بالتحكيم والوساطة الاتفاقية المغربي**، الفصل 327/56.

[١١]تعلمية الاتحاد الأوربي للوساطة، رقم CE/52/2008 ، المادة1/3.

[١٢] سكوت ميكوين، **برنامج تبادل خبرات منفذي القانون لعام ،2011 أساسيات القانون الأمريكي**

(ولاية كاليفورنيا)، كلية توماس جيفير سون للقانون .

للوسيط شروط خاصة يجب أن يتمتع بها وأهمها أن يكون ذو عقل راجح، ويتمتع بحسن السلوك والاستقامة والنزاهة، وألا يكون قد تعرض إلى عقوبة عن جريمة مخلفة بالشرف، وألا يكون ممنوعاً من حقوقه المدنية، وأن يكون مؤهلاً للنظر في المنازعة المعروضة عليه، وأن يكون محايداً ومستقلاً في ممارسة الوساطة، حيث يجب عليه أن يفصح عما قد يثير الشكوك حول حياده واستقلاله.[١٣]

حدود المسؤولية: لا يسأل الوسيط سواءً كان شخصاً طبيعياً أو معنوياً، عن أي عمل أو امتناع عن فعل ذلك فيما يتصل بأي وساطة قامت، مالم يكن متعمداً بسوء نية، ويتعين ألا يكون الوسيط تحت أي التزام قانوني لتقديم أي بيان إلى أي شخص عن أي مسألة تتعلق بالوساطة، ولا يجوز أن يسعى أي طرف لجعل الوسيط شاهداً في أي إجراءات قانونية أو أخرى ناشئة عن وساطة.[١٤]

المطلب الثاني: مجال الوساطة ومراحل سير إجراء الوساطة

الفرع الأول: نطاق الوساطة ومجال مهمة الوسيط

إن مجالات التسوية من خلال الواسطة تشمل جميع المجالات السياسية والتجارية والمدنية، وإنَّ نطاق تطبيق قواعد تسوية النزاعات ودياً لدى غرفة التجارة الدولية وفقاً المادة 1، أنه يجوز إحالة جميع نزاعات الأعمال،

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[١٣] انظر: **قانون الإجراءات المدنية والإدارية الجزائري**، المادة /998/، **وقانون الوساطة الأردني**، المادة /2/.

[١٤] انظر: **وقواعد الوساطة في مركز التحكيم المشترك لمركز دبي المالي العالمي ومحكمة لندن للتحكيم** ، لعام 2012م، المادة الحادية عشر. **وقواعد الوساطة لمركز الوساطة والمصالحة في مركز القاهرة الإقليمي للتحكيم التجاري** ، لعام 2013م، المادية الثانية عشر والثالثة عشر؛ و**قواعد التسوية الودية للنزاعات الخاصة بغرفة التجارة الدولية بباريس**، المادة السابعة.

سواء كان لها طابع دولي أم لا، لإجراءات تسوية النزاعات ودياً بموجب هذه القواعد، وجميع النزاعات تكون محلاً للوساطة باستثناء قضايا شؤون الأسرة والقضايا العمالية، وكل ما من شأنه أن يمس بالنظام العام. [١٥] و "لا يجوز إجراء المصالحة على الأوقاف ولا على أموال القصر ولا على ما يحتاج النظر فيه إلى الغبطة والمصلحة".[١٦]

وعلى الصعيد الدولي ليست كل النزاعات الدولية قابلة للوساطة، وهناك بعض المؤشرات التي تدل على إمكانية أن تكون الوساطة فعَّالة، ففي المقام الأول: يتعيَّن أن تكون أطراف النزاع الرئيسية قابلة لمحاولة التفاوض بشأن التسوية، وثانياً: يتعيَّن أن يحظى الوسيط بالقبول، وأن يكون ذا مصداقية، وأن يكون مدعوماً إلى حدٍّ كبير؛ وثالثاً: يتعيَّن أن يكون هناك توافق عام في الآراء على الصعيدين الإقليمي والدولي على دعم العملية، وعندما تتعرقل عملية وساطة فعَّالة، قد يكون مطلوباً بذل جهود أخرى لاحتواء النزاع أو للتخفيف من المعاناة الإنسانية، إلا أنه ينبغي مواصلة الجهود لاستمرار المشاركة، من أجل التعرف على الآفاق الممكنة لفرص الوساطة في المستقبل واستغلالها.

ومهمة الوسيط: لا تتجاوز تقريب وجهات النظر، واتخاذ كافة الإجراءات التي تكفل ذلك، إضافة إلى أن رأي الوسيط غير ملزم للأطراف وليس له سلطة عليهم، وإن وجدت هذه السلطة فهي أدبية تتجسد في حث المتنازعين، على قبول اقتراحاته وتوصياته التي تشكل مدخلاً وسبيلاً لحل النزاع القائم، فيجوز للوسيط أن يستمع إلى الأطراف وأن يقارن بين وجهات نظرهم، لأجل تمكينهم من إيجاد حل للنزاع القائم بينهم،والمشرع

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[١٥] انظر: **قانون الإجراءات المدنية والإدارية الجزائري**، المادة /995/

[١٦] **قواعد العمل في مكاتب المصالحة وإجراءاتها بوزارة العدل السعودية**، المادة الخامسة عشرة.

الجزائري أشار إلى المهام الأساسية للوسيط، والمتمثلة: في تلقي وجهات نظر كل واحد منهم، ومحاولة التوفيق بينهم، ويمكنه كذلك سماع كل شخص يرى في سماعه فائدة لتسوية النزاع، وذلك بعد موافقة أطراف الخصومة.[١٧]

فعلى الوسيط المتخصص، اتباع نهج احترافي، يوفر منطقة عازلة لأطراف النزاع، وغرس الثقة بين الأطراف في عملية الوساطة، و يوفر الاعتقاد بأن التوصل إلى حل سلمي أمر قابل للتحقيق، والوسيط الجيد يعزز التبادل من خلال الاستماع والحوار، ويوجد روحاً من التعاون من خلال حل المشكلات، ويضمن أن الأطراف المتفاوضة لديها ما يكفي من المعارف والمعلومات والمهارات اللازمة للتفاوض بثقة، وينجح الوسطاء إلى أقصى حدٍّ في مساعدة الأطراف المتفاوضة، في إبرام اتفاقات عندما يتحلَّون بالإلمام الواسع، والصبر، والتوازنفيما يتخذونه من قرارات.

الفرع الثاني:مراحل سير إجراء الوساطة

هناك خطوط عريضة للأسس الرئيسية للوساطة، من أجل الوصول إلى عملية وساطة فعَّالة، يجب أن يحيط بها الوسيط قبل البدء بإجراءات الوساطة وهي:

1- الاستعداد.2- الموافقة. 3- الحياد. 4- الشمول.

[١٧] انظر: **قانون الإجراءات المدنية والإدارية الجزائري**، المادة /665/

المحتمل بين الشمول والكفاءة، فعمليات الوساطة تصبح أكثر تعقيداً (وقد تصير مثقلة) حينما تتوسع قاعدة التشاور و/أو تُستخدم منتديات متعددة لإشراك الجهات الفاعلة على مستويات مختلفة.[١٨]

مراحل الوساطة:

المرحلة الأولى: إقامة علاقة مع الأطراف المتنازعة:

المرحلة الثانية: اختيار استراتيجية لقيادة عملية الوساطة:

المرحلة الثالثة: تجميع وتحليل خلفية المعلومات:

المرحلة الرابعة: تصميم مفصلية للوساطة:

المرحلة الخامسة: بناء الثقة والتعاون:

المرحلة السادسة: بداية جلسة الوساطة:

المرحلة السابعة: تحديد القضايا ووضع جدول أعمال:

[١٨] انظر: **توجيهات الأمم المتحدة من أجل الوساطة الفعَّالة**، لعام 2012م، الاسترجاع بتاريخ 5 أغسطس 2016 من http://www.peacemaker.un.org.

المرحلة الثامنة: كشف المصالح الخفية للأطراف المتنازعة:

المرحلة التاسعة: إيجاد خيارات للتسوية:

المرحلة العاشرة: تقييم خيارات التسوية:

المرحلة الحادية عشر: المساومة الأخيرة:

•توصل إلى اتفاق عبر تغيير المواقف تدريجياً، أو القفز إلى تحقيق التسوية، أو تطوير معادلة تلقى إجماعاً في الرأي أو عبر توظيف آليات إجرائية للوصول إلى اتفاق ملموس.

المرحلة الثانية عشر: إنجاز التسوية الرسمية:

•حدد الخطوات الإجرائية لوضع الاتفاقية موضع التنفيذ.

•اتخذ إجراءات للتقييم والمراقبة، وقم بصياغة اتفاق التسوية ووضع آلية للالتزام والتنفيذ.[١٩]

إجراءات الوساطة:

إجراءات الوساطة متشابه لكن هناك بعض الضوابط في الوساطة القضائية، حيث سوف نستعرض إجراءات الوساطة القضائية، وإجراءات الوساطة الاتفاقية من خلال مراكز الوساطة:

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[١٩] انظر: كريستوفر مور، **عملية الوساطة: استراتيجيات عملية لحل النزاع**، ترجمة وتحقيق فؤاد سروجي – عماد عمر، القاهرة: الأهلية للنشر والتوزيع، 2006م.

إجراءات الوساطة القضائية لدى القضاء:

- **كما رسمها المشرع الأردني في قانون الوساطة:**

1- إحالة ملف الدعوى إلى قاضي الوساطة: حيث يحال إليه الملف كاملاً، ويجوز له تكليف الخصوم بتقديم مذكرات موجزة بأقوالهم، وأهم البيانات والبيّنات التي يستندون إليها.

2- أما إذا كانت الإحالة إلى وسيط خصوصي فلا يحال إليه ملف الدعوى، ويكون أطراف النزاع ملزمين خلال خمسة عشر يوماً من تاريخ الإحالة بتقديم مذكرة موجزة بأقوالهم وبياناتهم وبيّناتهم، ودون الحاجة لتبادل هذه المذكرات والمستندات فيما بينهم.

3- تعيين موعد جلسة وتبليغه لأطراف النزاع أو وكلائهم القانونيين.

4- حضور أطراف النزاع ووكلائهم جلسات الوساطة للاستماع والمداولة، ويحق للوسيط الاجتماع بكل طرف منفرداً على حدا.

5- اتخاذ الوسيط ما يراه مناسبا لتقريب وجهات النظر وتسهيل إجراءات الوساطة، كإبداء الرأي، وتقييم الأدلة، وعرض الأسانيد القانونية والسوابق القضائية.[٢٠]

[٢٠] انظر: **قانون الوساطة لتسوية النزاعات المدنية- الأردني**، المادة 4.

- **نستعرض إجراءات الوساطة كما رسمها المشرع الجزائري:**

أولاً– عرض الوساطة: القاضي أثناء نظره النزاع، عليه أن يعرض الوساطة على الخصوم، خلال دراجات التقاضي، فعرض النزاع من قبل القاضي وجوبي، والرضى بها من قبل الخصوم جوازي، ولا تتم الوساطة إلا بموافقة الأطراف عليها.

ثانياً–تعيين الوسيط: إذا وافق الخصوم على الوساطة، يقوم القاضي بتعيين الوسيط بموجب أمر يتضمن اسم الوسيط وعنوانه والمهام الموكلة إليه، وتحديد الآجال الأولى للوساطة على ألا تتجاوز مدتها ثلاثة أشهر، ويمكن تجديدها لمرة واحدة لمدة ثلاثة أشهر، بطلب من الوسيط وموافقة الأطراف، وتقوم المحكمة بتبليغ نسخة من أمر التعيين للوسيط وللخصوم، وعلى الوسيط إعلام القاضي بقبوله لمهام الوساطة، حيث يقوم القاضي بعد ذلك بدعوة الجميع لأول جلسة، علماً أن تحويل النزاع للوسيط لا يرفع يد القاضي عن النزاع مثل التحكيم، بل يبقى القاضي يراقب سير الوساطة، وله اتخاذ الإجراءات والتدابير لحسن سيرها.

ثالثاُ–جلسات الوساطة: بعد موافقة الأطراف على الوساطة وقبول الوسيط مهمة الوساطة، يتم الدعوة للجلسة الأولى التي يجب حضورها من قبل الأطراف أو ممثليهم، حيث يقوم الوسيط بالتعريف بنفسه ويطلب منهم التعريف بأنفسهم، ثم يشرح لهم دور الوسيط، وأنه حيادي تجاه الجميع، ويؤكد على سرية الوساطة، ويدعوهم لضرورة وجود الثقة فيما بينهم لأنها العامل الأهم لنجاح الوساطة، ثم تبدأ مرحلة التفاوض حيث

على المدعي عرض دعواه وما يؤيدها، كما على المدعى عليه كذلك عرض دفوعه وأدلته، ثم يقوم الوسيط بتحديد نقاط الخلاف وترتيبها ويعمل لتقريب وجهات نظر الأطراف، من خلال جلسات منفردة وجلسات مشتركة، حيث يقوم بمساعدة الأطراف على إيجاد حل للنزاع بأنفسهم، وله سماع أشخاص من الغير بعد موافقة الأطراف، وكذلك له طلب الاطلاع على الوثائق المتعلقة بالنزاع، وتنتهي جلسات الوساطة، إما بنجاح الوساطة وذلك بتوصل الأطراف لحل، حيث يتم تنظيم محضر بذلك يوقع من الأطراف والوسيط، ويرفع للقاضي في الجلسة المحددة لذلك مسبقاً ليصادق عليه، حيث يعتبر الاتفاق قطعي غير قابل للطعن ويعد سنداً تنفيذياً، وذلك مرفقاً بالوثائق المقدمة خلال جلسات الوساطة وكذلك جدول بأتعابه، علماً بأن القاضي عند نظره الاتفاق للمصادقة عليه، يتأكد من عدم تجاوز الوسيط لحدود المهمة الموكلة إليه، وأن الاتفاق الذي توصل إليه الأطراف لا يتعارض مع النظام العام، ويمكن أن تنتهي الوساطة بالفشل، وكذلك للقاضي إنهاء الوساطة وذلك لعدم حسن سير الوساطة، أو بطلب من الوسيط عند استحالة توصل الأطراف لحل ودي، أو بطلب من الخصوم إذا وجدوا عدم جدوى الوساطة لحل نزاعهم، حيث في هذه الحالة يحرر الوسيط محضر فشل الوساطة، يرفعه للمحكمة الناظرة بالنزاع، ومواصلة إجراءات التقاضي.[٢١]

إجراءات الوساطة الاتفاقية لدى مراكز الوساطة:

في حالة وجود اتفاق مسبق على الوساطة بين الأطراف، يتقدم طالب الوساطة للمركز بطلب خطي للوساطة (طلب وساطة)، والتي يجب أن يذكر فيه بإيجاز طبيعة النزاع وقيمة المطالبة، وينبغي أن تكون مصحوبة بنسخة

[٢١] انظر: **قانون الإجراءات المدنية والإدارية الجزائري**، رقم 09/08 تاريخ 2008م، منشور بالجريدة الرسمية العدد 21 /2008م، المواد 990 – 1005؛ **والمرسوم التنفيذي** رقم 100/09 تاريخ 2009م منشور بالجريدة الرسمية العدد 16 /2009م.

من اتفاق الوساطة المسبق، وأسماء، وعناوين، وأرقام الهاتف والفاكس وأرقام التلكس وعناوين البريد الإلكتروني أطراف الوساطة، وممثليهم القانونيين (إذا كان معروفين) واسم الوسيط المقترح (إن وجد) من قبل الطرف أو الأطراف طالب الوساطة، وطلب الوساطة يجب أن يكون مصحوباً برسوم التسجيل المقررة، حيث بعد ذلك يتم تسجيل طلب الوساطة، وتعيين الوسيط من قبل المركز وفق شروط اتفاق الوساطة، وإذا لم يكن هناك اتفاق مسبق على الوساطة فأنه تتبع ذات الإجراءات السابقة:

أ) الطرف الذي يرغب في بدء وساطة يقوم، في نفس الوقت، إرسال نسخة من طلب الوساطة الى الطرف الآخر أو الأطراف الأخرى.

ب) يتعين على الطرف أو الأطراف الأخرى، في غضون 14 يوماً من تلقي طلب الوساطة، أن يرد كتابة هل هو موافق أم لا على الوساطة في النزاع، وفي حال الطرف أو الأطراف الأخرى لم يوافق على الوساطة، أو فشل في الاتفاق على الوساطة خلال ال 14يوماً، لن تكون هناك وساطة، وإذا تم الموافقة على الوساطة، فيجب على المركز تعيين وسيط في أقرب وقت ممكن بعد بدء وساطة، مع إيلاء الاعتبار الواجب للمعايير الاختيار المتفق عليها خطيا من قبل الطرفين، حيث قبل تعيينه من قبل المركز، على الوسيط أن يزود المركز والأطراف بالسيرة الذاتية والوظائف الفنية السابقة والحالية؛ وأن يوقع إعلاناً مفاده أنه لا توجد ظروف معروفة له، من المرجح أن تؤدي إلى أي شكوك لها ما يبررها حول حياده أو استقلاله، ولأي طرف الحرية في الاعتراض على تعيينه، وفي هذه الحالة يجب على المركز تعيين وسيط آخر، وللطرفين حرية الاتفاق بأي شكل يتم إبلاغ الوسيط ببيانات الأطراف، وما لم يتفق على خلاف ذلك، كل طرف يقدم إلى الوسيط، في موعد أقصاه 7 أيام قبل موعد المتفق عليها بين الوسيط والأطراف لجلسة وساطة المقرر الأول، وهو بيان مكتوب باختصار

يلخص القضية وخلفية النزاع والقضايا التي يتعين حلها، وأن يرافق كل بيان مكتوب نسخ من أي وثائق يشير إليه، ويجب على كل طرف، في الوقت نفسه، تقدم نسخة من البيان المكتوب والوثائق الداعمة لطرف أو الأطراف الأخرى، حيث يناقش الوسيط والأطراف آلية التسوية التي ستستخدم، ويسعون للوصول إلى اتفاق بشأنها، وفي حالة عدم اتفاق الأطراف على آلية التسوية الودية المستخدمة، للوسيط أن يجري الوساطة في الطريقة التي يراها مناسبة، مع الأخذ في الاعتبار في جميع الأوقات ملابسات القضية ورغبات الطرفين، ويسترشد بمبادئ العدل والحياد ، وللوسيط أن يتواصل مع الأطراف شفوياً أو خطياً، جنباً إلى جنب، أو بشكل فردي، ويمكن عقد اجتماع أو اجتماعات في مكان يحدده الوسيط بعد التشاور مع الطرفين، وعلى الوسيط عدم إفضاء أي أسرار يطلع عليها في الجلسات المنفردة للطرف الأخر، بدون موافقة الطرف الأول، ويخطر كل طرف الطرف الآخر والوسيط بعدد وهوية الأشخاص الذين سيحضرون أي اجتماع يعقده الوسيط، ويحق لكل طرف تحديد كتابةً ممثل له مخول تسوية النزاع نيابة عن هذا الطرف، وما لم يتفق الطرفان على خلاف ذلك، فإن الوسيط يقرر اللغة (اللغات) التي تجري بها الوساطة، إذا تم الاتفاق على بين الأطراف على تسوية النزاع، بمساعدة الوسيط ، يجب أن يتم كتابة اتفاقية التسوية والتوقيع عليها من الأطراف والوسيط، وفي ختام وساطة، المركز بتحديد التكاليف، علماً أنه ما لم يتفقوا على خلاف ذلك، وعلى الرغم من الوساطة، ويجوز للطرفين بدء أو مواصلة أي تحكيم أو إجراءات قضائية فيما يتعلق بالنزاع الذي هو موضوع الوساطة، وجميع جلسات الوساطة تكون خاصة، بالوسيط، والأطراف، أو الأشخاص الذين يتفق الأطراف على حضورهم، وعملية الوساطة سرية وجميع المفاوضات، والبيانات والوثائق التي أعدت لأغراض الوساطة، يجب أن

تكون سرية- ما لم يتم الاتفاق بين الطرفين، أو يقضي القانون خلاف ذلك- ولا يحق للوسيط ولا الأطراف أن الكشف إلى أي شخص أي معلومات بشأن الوساطة أو شروط التسوية، أو نتيجة الوساطة.[٢٢]

حالات انتهاء الوساطة

تنتهي الوساطة في إحدى الحالات التالية:

أ- عند انسحاب أحد الأطراف من عملية الوساطة.

ب- عندما يقرر الوسيط أنه لم يتم التوصل إلى تسوية ودية.

ج- عند إبرام اتفاق تسوية ودية مكتوب.[٢٣]

ح- عند انتهاء أي آجال محددة لإجراءات تسوية النزاعات ودياً، ما لم يقم الأطراف بتمديدها، ويقوم الوسيط بإخطار الأطراف بهذا الانتهاء كتابياً.

خ- عند عدم إتمام تسديد أحد الأطراف الدفعات المستحقة كأجور الوساطة، أو عدم التمكن من تعيين وسيط من الجهة المنوط فيها التعيين.[٢٤]

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[٢٢] انظر: **قواعد محكمة لندن للوساطة 2012م**، المواد/ 2-3-4-5- 10/؛ **وقواعد الوساطة في مركز التحكيم المشترك لمركز دبي المالي العالمي ومحكمة لندن للتحكيم**؛ وقواعد الوساطة **لمركز الوساطة والمصالحة في مركز القاهرة** الإقليمي للتحكيم التجاري، لعام2013م؛ **وغرفة التجارة الدولّية بباريس**، المادة الثانية. **والمركز الدولي لتسوية النزاعات** في جمعية التحكيم الأمريكية.

[٢٣] انظر: **قواعد الوساطة لمركز الوساطة والمصالحة في مركز القاهرة الإقليمي للتحكيم التجاري**، لعام2013م.

هـ- بإقرار كتابي أو شفهي من جميع الأطراف يفيد بانتهاء إجراءات الوساطة.

د. عندما لا يتوفر أي اتصال بين الوسيط، وأي طرف أو ممثله لمدة ٢١ يوماً بعد اختتام جلسة الوساطة.[٢٥]

و- ويمكن للقاضي انهاء إجراءات الوساطة تلقائياً، عندما يتبين له استحالة السير الحسن لها.[٢٦]

نتائج الوساطة:

أ- في الوساطة القضائية إذا توصل الأطراف مع الوسيط إلى تسوية النزاع كلياً أو جزئياً، يقدم إلى قاضي إدارة الدعوى أو قاضي الصلح تقرير بذلك ويرفق به اتفاقيات التسوية الموقعة من أطراف النزاع، لتصديقها وتعتبر هذه الاتفاقية بعد التصديق عليها بمثابة حكم قطعي،[٢٧] ويكتسي الصلح بين الأطراف قوة الشيء المقضى به، ويمكن أن يذيل بالصيغة التنفيذية، من رئيس المحكمة المختصة محليا للبت في موضوع النزاع.[٢٨]

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[٢٤] انظر: **قواعد التسوية الودية للنزاعات الخاصة بغرفة التجارة الدولية بباريس (ICC)**، المادة السادسة.

[٢٥] انظر: **الوساطة في المركز الدولي لتسوية المنازعات في جمعية التحكيم الأمريكية(AAA)**.

[٢٦] انظر: **قانون الإجراءات المدنية والإدارية الجزائري**، المادة /1002/

[٢٧] انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، المادة 7.

[٢٨] انظر: **القانون رقم 08-05 الخاص بالتحكيم والوساطة الاتفاقية المغربي**، الفصل 327/69. **قانون الإجراءات المدنية والإدارية الجزائري**، المادة /1003/

ب- إذا لم يتوصل الوسيط لتسوية النزاع فعلية تقديم تقرير إلى قاضي إدارة الدعوى أو قاضي الصلح، يذكر فيه عدم توصل الأطراف إلى تسوية على أن يوضح في هذا التقرير مدى التزامهم ووكلائهم بحضور جلسات الوساطة.

د- إذا فشلت التسوية بسبب تخلف أحد أطراف النزاع أو وكيله عن حضور جلسات التسوية، فيجوز لقاضي إدارة الدعوى أو لقاضي الصلح فرض غرامة على ذلك الطرف أو وكيله، لا تقل عن مائة دينار ولا تزيد عن خمسمائة دينار في الدعاوى الصلحية، ولا تقل عن مائتين وخمسين دينار في الدعاوى البدائية.

هـ- عند انتهاء الوساطة يعيد الوسيط إلى كل طرف، ما قدمه إليه من مذكرات ومستندات ويمتنع عليه الاحتفاظ بصور عنها تحت طائلة المسؤولية القانونية.[٢٩]

المحكمة واتفاق الوساطة:

-يجب على المحكمة المحال إليها نزاع في مسألة أبرم الأطراف في شأنها اتفاق وساطة، أن تصرح بعدم القبول إلى حين استنفاد إجراء الوساطة أو بطلان اتفاق الوساطة.[٣٠]

ميزات الوساطة:

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[٢٩] انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، المادة 7

[٣٠] انظر: **القانون رقم 08-05 الخاص بالتحكيم والوساطة الاتفاقية المغربي**، الفصل 327/40.

1- ضمان السرية والخصوصية، حيث تعتبر إجراءات الوساطة سرية ولا يجوز الاحتجاج بها أو بما تم فيها من تنازلات من أطراف النزاع أمام أي محكمة أو أي جهة كانت. [٣١]

2- محدودية التكاليف مقارنة بإجراءات التقاضي أو التحكيم.

3- تحقيق مصلحة طرفي النزاع.

4- المرونة والخروج بحلول إبداعية وخلاقة.

5- المحافظة على العلاقة الودية بين الخصوم.

6- استثمار الوقت.

7- عدم تحمل أدنى درجة من المخاطرة، نظرا لحرية الخصوم في الرجوع عن أي عرض تقدموا به أثناء جلسات الوساطة ما لم يتم تثبيته خطياً.

ويرى الباحث أنَّ الوساطة الفعَّالة في القضايا الدولية،تحتاج وجود بيئة خارجية داعمة؛ لأن معظم النزاعات لها بعد إقليمي ودولي مؤثر، ويمكن أن تساعد الإجراءات التي تتخذها الدول الأخرى، في تعزيز التوصل إلى حل عن طريق الوساطة أو الانتقاص منه، ويحتاج الوسيطإلى الصمود أمام الضغوط الخارجية، وتجنب المواعيد النهائية غير الواقعية مع العمل، كذلك الحصول على دعم متنام من الشركاء لجهود الوساطة،

[٣١] انظر: **قانون الوساطة لتسوية النزاعات المدنية الأردني**، المادة 8.

وفي بعض الظروف يمكن أن تكون قدرة الوسيط على استعمال الحوافز أو الروادع التي تقدمها الجهات الفاعلة الأخرى مفيدة للتشجيع على التزام الأطراف بعملية السلام، حيث أنَّ عملية الوساطة تؤثر بطبيعتها في ميزان القوى والحسابات السياسية داخل المجموعات المختلفة وبينها، ومن الضروري أن يكون لدى الوسطاء والمجتمع الدولي، بوصفهم الجهات الفاعلة الموفرة للدعم، حساسية للآثار الإيجابية والآثار السلبية المحتملة لعملية الوساطة على حدٍّ سواء، ومن الضروري أن يحتفظ الوسطاء بخيار تعليق مشاركتهم أو الانسحاب، إذا ما رأوا أن الأطراف تواصل المحادثات في جو من سوء النية، أو إذا كان الحل الذي في طريقه إلى الخروج للنور، يتعارض مع الالتزامات القانونية الدولية، أو إذا كانثمة جهات فاعلة أخرى تتحكم بالعملية، وتحدُّ من المساحة المتاحة أمام الوسيط للمناورة، وهذا القرار يحتاج إلى التفكير ملياً في مخاطر الانسحاب، مقابل قيمة إبقاء الأطراف على الطاولة عند تعثر عملية الوساطة، مع استكشاف وسائل بديلة لتسوية المنازعات بالوسائل السلمية.

ومن خلال ما تم دراسته في هذهالورقة تبين لنا أهمية الوسائل البديلة في حل النزاعات المدنية والتجارية، وكذلك النزاعات السياسية والمسلحة، وذلك لما تتمَّيز به هذه الإجراءات،**وأهم مزايا استخدام الوسائل البديلة:**

1- تقليل عدد الدعاوى التي تحال على القضاء، فقد أثبتت تجارب البلدان التي أخذت بهذا النظام بأنها ساهمت بشكل مباشر في تخفيف العبء على المحاكم.

2- محدودية التكاليف واستغلال الوقت: تؤدي الوسائل البديلة لتوفير الوقت والجهد والنفقات على الخصوم ووكلائهم من خلال إنهاء الدعاوى في مراحلها الأولى، فالوصول إلى حل خارج القضاء يكون من دون شك أسرع وأوفر.

3- خلق بيئة استثمارية جاذبة.

4- يمثل نظام الوسائل البديلة ضماناً له مفعول أكثر من قرار المحكمة، لأنها تكون مبنية على الواقع الحقيقي للأحداث، بينما يشوه هذا الواقع عندما يعرض أمام القاضي، لذا يمكننا القول بأن هذا النظام أقرب إلى الواقع من القضاء.

5- الخصوصية: يكفل هذا النظام محافظة طرفي النزاع على خصوصية النزاع القائم بينهما وذلك بغية خلق روابط جيدة بين الأشخاص أو المؤسسات، كما هو الشأن في الوساطة العائلية فهذا النظام يتيح للزوجين تقييم الأمور والبحث عن مصلحة الأبناء، وإيجاد طرق أفضل للمستقبل بالحوار والاحترام المتبادل مما يساهم في المحافظة على الروابط الاجتماعية.

6- تحقيق مكاسب مشتركة لطرفي النزاع: فالتسوية النهائية لهذا النظام (خاصة الوساطة) قائمة على حل مرض لطرفي النزاع.

7- المرونة: تتسم إجراءات هذا النظام بالمرونة لعدم وجود إجراءات وقواعد مرسومة محددة.

8- المحافظة على العلاقات الودية بين الخصوم: تبقى العلاقات الودية بين الخصوم قائمة بعكس الخصومة القضائية التي تؤدي في الغالب إلى قطع مثل تلك العلاقات.

9- توفير ملتقى لأطراف النزاع قبل بدء المحاكمة: تساعد جلسات الوساطة على توفير ملتقى أخير بين الخصوم قد يساهم في حل النزاع.

10- الحلول الخلاقة التي يمكن التوصل إليها: تساعد جلسات نظام الوسائل البديلة على تجاوز العقبات وتوفير الحلول الخلافة والإبداعية لحل النزاع.

11- تنفيذ اتفاقية التسوية رضائياً: لما كانت اتفاقية التسوية من صنع أطراف النزاع، فإن تنفيذها على الأغلب سيتم برضائهم بعكس حكم القضاء الذي يتم تنفيذه جبراً.

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الاتجاهات الحديثة في الاليات الفاعلة لتسوية المنازعات: دراسة تجريبية على دور العشيرة في حل المنازعات في ليبيا

نجاة العابد

ملخص البحث

تهدف هذه الورقة البحثية الى دراسة دور العشيرة واهميته ضمن الاتجاهات الحديثة كأليه لتسوية المنازعات داخل الدولة. سوف يركز الباحث على اهمية ودور العشيرة في التخفيف من حدة المنازعات التي قد تحصل جراء القتل والحوداث التي تقود الى الموت. سوف يتبع الباحث المنهج النوعي وذلك عن طريق اجراء مقابلات مع شيوخ العشائر (8 شيوخ من عشائر مختلفة) في ليبيا وسوف تتمحور اسئلة المقابلة كتالي: هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة، ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة. اشارت نتائج هذه الدراسة الى انه لا يمكن الاستغناء عن دور العشيرة في حل النزعات والخلافات بين الافراد والاطراف وايضا يكان ان يكون حل النزعات عن طريق العشيرة وشيخ العشيرة في القرن الحادي والعشرون اهم من المحاكم المدنية والسلطات الحكومية ويرجع سبب ذلك الى صفات المجتمع الليبي الذي يتصف بالمجتمع العشائري الذي تحكمه العادات والتقاليد المورثه عن الاباء والاجداد.

Abstract

This research paper aims to study the role of the clan and its importance within modern trends as a mechanism for settling conflicts within the state. The researcher will focus on the importance and role of the clan in alleviating the conflicts that may occur as a result of

the killings and accidents leading to death. The researcher will also follow the qualitative approach by interviewing clan's elders (8 elders from various clans) in Libya. The questions of the interview will be as follows: Can we consider the role of the clan in conflict resolution from the modern trends that cannot be solved in conflict resolution, There is a positive effect in resolving conflicts between people and parties through clan intervention or clan rule, and what outcomes can be reflected in conflicts between people after clan intervention.

The results of this study indicate that the role of the clan cannot be dispensed with in resolving conflicts and disputes between individuals and parties. It is also almost impossible to resolve the trends through the clan and the clan elder in the twenty first century more important than the civil courts and government authorities due to the characteristics of Libyan society which is characterized by society where the clan customs and traditions inherited from parents and grandparents.

الكلمات المفتاحية: العشيرة، النزاعات، الافراد، شيخ العشيرة، ليبيا.

المقدمة

يشير مصطلح العشيرة الى اسم لكل جماعة من أقارب الرجل، وسموا بذلك لأن الرجل يعاشرهم ويعاشرونه. والقبائل هي التي يقبل بعضها على بعض وهي جمع قبيلة والقبيلة جمع العمائر والعمائر تجمع البطون والبطون تجمع الأفخاذ والأفخاذ تجمع الفصائل والفصائل تجمع العشائر، وأخيرا اخذ مصطلح العشيرة يطلق على اجتماع مجموعة من الناس والتزامهم بتقاليد معينة (تقاليد العشيرة) حتى وان لم يكونوا متعارفين من جهة النسب بل يكفي التفافهم حول عشيرة معينة ليحسبوا عليها، وهم يؤدّون الطاعة لرئيس واحد هو كبير العشيرة، وتأخذ العشيرة اسمها في الغالب من اسم جدها الأعلى الذي تنسب إليه مثل بني تميم وبني أسد وكنانة...الخ(القطارنه، 2009: حميد، 2011).

تشكل العشيرة او القبيلة في المجتمع الليبي الحجر الاساس التي يرتكز عليها الافراد في تعريفيهم لهويتهم بحيث يعتبر الانتماء للعشيرة من الامور الاساسية في المجتمع العربي خاصة. والاعتماد على العشيرة يعتز ويفتخر بها الكثيرون لا سيما انها تشكل وحدة الاربتباط والتماسك المجتمعي لهم. وتلعب العشائر الليبية دور مهما في تنظيم علاقات الافراد مع بعضهم وايضا تنظيم علاقات المجتمع مع الدولة وتقدم العشيرة دورا مهما ورئيسا في حل الكثير من النزعات التي تنشأ بين الافراد وهي بذلك تعتبر عنصر فعال لتحقيق الامن والسلم الاجتماعي بين الناس(يحي مرسي عيد،2010).

وقد برزت أهمية العشائرية قديما وما زلت تعتبر اسلوبا حديثا لحل النزعات في ظل غياب القانون الذي ينظم العلاقة بين الأفراد قبل نشوء المجتمع المدني والنظام القضائي الموجود حاليا (مُحَمَّد حسن أبو حماد، 1987: إدريس مُحَمَّد صقر، 1986). حيث ما زلت الكثير من الدول خاصة الدول العربية ترتكز بشكل اساسي على العشيرة في حل النزعات. فهناك رجال العشائر مثل الشيوخ او القضاة العشائريين الذين يتمتعون بالسمعة الطيبة والتقدير الكبير في المجتمع ويكون لهم دور فعال في تسوية النزاعات(عمرو خيري، 2007).

اسئلة الدراسة

تحاول الدراسة عرض مشكلة البحث وتحديد أبعادها من خلال الإجابة عن الأسئلة التالية:

١. هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات؟
٢. هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة؟
٣. ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة؟

اهداف الدراسة

وبناء على ما تقدم فإن أهداف الدراسة تتلخص في العناصر التالية :

١. لبيان دور واهمية العشيرة كأتجاه حديث في حل المنازعات.

٢. لدراسة الاثر الايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة.

٣. لعرض النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة.

أسباب اختيار الموضوع

لقد دفعت الباحث جملة الأسباب لإختيار هذا الموضوع منها:

١. يعتبر الموضوع من المواضيع الهامة التي تستدعي الدراسة والتحليل لما له من علاقة هامة وقوية على الحد من النزاعات بين الافراد والاطراف .

٢. الكشف عن دور العشيرة في حل النزاعات حيث تعتبر العشيرة من اهم الاساليب التي يلجئ لها المتخاصمين في حل النزاعات خصوصا في المجتمعات العشائرية.

٣. قلة الدراسات العلمية حول هذا الموضوع، فأغلب الدراسات تركز على حل النزاعات عن طريق القضاء او الحكومة، فدراستنا ستضع لكل موضوع نصيب كافٍ.

حدود الدراسة

وتتمثل حدود هذة الدراسة كالتالي

اولا: الحدود الموضوعية

تقتصر هذه الدراسة علي تناول الاتجاهات الحديثة في الاليات الفاعلة لتسوية المنازعات: دراسة تجريبية على دور العشيرة في حل المنازعات في ليبيا.

ثانيا: الحدود البشرية

تقتصر هذه الدراسة علي شيوخ العشائر في ليبيا

ثالثا: الحدود المكانية

تقتصر هذه الدراسة علي ليبيا فقط

رابعا: الحدود الزمنية

تم تنفيذ هذه الدراسة خلال العام الجامعي(2017-2018).

المنهجية

اتبع الباحث المنهج النوعي وذلك عن طريق اجراء مقابلة مع شيوخ القبائل في ليبيا. حيث تم اجراء ثمان مقابلات مع شيوخ العشائر الليبية وقام الباحث بتوجية االاسئلة التاليه لهم هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير ايجابي

في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة، ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة.

كما قام الباحث بتسجيل اجبات كل شيخ ومن ثم تحليلها تحليل دقيق للوصل الى اهم النتائج التي سوف تساعد الباحثين والمهتمين بموضوع النزعات على حل هذه النزعات بالطرق السلمية والحد من هذه النزعات لما تسببه من اذا بشري ومادي.

كما قام الباحث بالرجوع الى الكتب والبحوث والمقلات المنشورة في المجلات المحكمة المتعلقة بموضوع العشيرة ودورها في الحد من النزعات حيث قام الباحث بمراجعة المراجع والمصادر وجمع المعلومات وتحليلها وتفسيرها للوصول الى اهم النتائج المتعلقة بدور العشيرة في الحد من النزاعات.

النتائج والمناقشة

قام الباحث باجراء مقابلة مع شيوخ العشائر في ليبيا والبالغ عددهم ثمان ية شيوخ حيث قام الباحث بتوجية الاسئلة التالية لهم هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة، ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة.

أولا لمحة عن ليبيا و المجتمع الليبي

تقع ليبيا في شمال قارة افريقيا وتبلغ مساحتها نحو 1,8 مليون كيلو متر مربع ويبلغ عدد سكانها نحو 6 مليون نسمة وعاصمتها طرابلس وتتكون من ثلاثة مناطق جغرافية هي طرابلس وبنعازي وسبها(مُحَّد المومني، 2016).

يسود معظم انحاء ليبيا مناخ صحراوي بما يزيد عن 85% من المساحة الكلية ومعظم سكان المناطق الصحراوية هم من البدو الرحل والمقيمين (المستقرين) في الواحات الصحراوية مثل واحة الكفرة وبئر الذكر في الركن الجنوبي الشرقي من ليبيا قرب الحدود المصرية والسودانية، والمجتمع البدوي في هذا الجزء له علاقات مع البدو من الجانب الاخر في مصر والسودان وتشاد وهم جميعا من اصول عربية ولهم نفس العادات والتقاليد.

اما سكان منطقة جغبوب في ليبيا فهم بدو لهم علاقات مع بدو سكان واحة سيوة في مصر. كما يقطن واحة سبها الواقعة في جنوب غرب ليبيا بدو ايضا من اصول عربية وافرايقية لهم صفات بدوية مشتركة مع البدو في جنوب شرق الجزائر وبدو شمال النيجر(محمود السيد، 2010: المولدي الأحمر،2010).

لا شك ان المجتمع البدوي في ليبيا له نفس الصفات والعادات والتقاليد السائدة لدي المجتمعات البدوية في الشام والجزيرة العربية والصحراء الكبري والتي اهمها:

١ -الالتزام التام بالانتماء للعشيرة اولا والسلطات الحكومية ثانيا.

٢ -تفضيل حل النزعات والخلافات بين الافراد والاطراف عشائريا وليس لدى المحاكم النظامية والمدنية.

٣ -قبول مبدأ المصالحة عند النزاع بما يقره شيخ العشيرة.

ثانيا نتائج السؤال الاول (هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحدبثة التي لا يمكن الاستغناء عنها في حل النزاعات؟)

اشارات نتائج السؤال الاول (هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات؟) الى ان شيوخ العشائر اجمعو على اهمية دور العشيرة قديما وحديثا في حل النزاعات حيث اشار بعض الشيوخ الى ان المجتمع العربي يحترم العادات والتقاليد ويحترم رأي العشيرة وشيخ العشيرة. كما اعتبر شيوخ العشائر ان حكم العشيرة مربوط بنظام الدولة ويعني ذلك قد تستعين الدول احي انا بالعشيرة في حل النزاعات التي تتسبب بين الافراد مثل القتل وحوادث الطرق وغيرها.

يمكن الاقرار بأن دور العشيرة في المجتمع البدوي في حل المنازعات والخلافات في القرن الحادي والعشرون هو دور مقبول لدي المجتمعات البدوية وهو دور ليس بجديد فهو دور موروث عن الاباء والاجداد منذ الالف السنين ومقبول ايضا لد ى افراد العشيرة ولدي افراد المجتمع البدوي بالاضافة الى انه معتمد من قبل السلطات الحاكمة والنظام الحاكم سواء كان ملكي او جمهوري او غيره من انظمة الحكم في الوطن االعربي.

ان دور العشيرة في حل المنازعات والخلافات في القرن الحادي والعشرون لا يمكن الاستغناء عنه وهو بديل مقبول للمحاكم المدنية والقوانين الحكومية والسلطات المحلية.

ثالثا نتائج السوال الثاني (هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة؟

اما فيما يخص السوال الثاني (هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة؟) اشارات نتائج المقابلة الى ان هناك اثر ايجابي في حل النزعات بين الافراد والاطراف عند الاحتكام الى العشيرة او شيخ العشيرة وهذا يدل الى اهمية دور العشيرة في حل النزعات وتخفيف

حدة النزعات واضرار النزعات التي قد تؤدي الى قتل المزيد من الافراد والجلوة للعائلة. وتعني الجلوة اي رحيل عائلة القاتل او المتسبب بالنزاع الى منظقة اخرى وهذا بدوره يحرم عائلة المتسبب بالنزاع من الاقامة في منطقة التي ولد وترعرع فيها.

لا بد من الاعتراف ان حل المنزعات والخلافات بين الافراد في المجمتع البدوي له تاثير ايجابي على سلوك المتنازعين فيما بعد، اي بعد حل النزع او الخلاف من قبل شيخ العشيرة بعد اخذ ما يسمي بالعطوة بين الشخصين المتنازعين. واكاد ان اجزم بأن الحلول العشائرية هي اقوي في حل النزاعات، ويمكن للمجتمعات والافراد من البدو الالتزام بما يحكم شيخ العشيرة ويمكن رفض الحل ان كان عن طريق المحكام المدنية او السلطة الحاكمة ذات الشأن.

رابعا نتائج السوال الثالث (ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة؟

واخيرا كانت نتائج السوال الثالث (ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة؟) فقد اشار الشيوخ الى ان دور العشيرة مهم في حل النزعات ولا يمكن ان يستغني عنه لما له من نتائج ايجابية في حل النزعات وتهدئة النفوس وكما ذكرنا سابقا ان الدولة او النظام يستعين في بعض الاحيان بحكم العشيرة عندما تعجز الدولة او النظام عن حل النزاع ومن النتائج الايجابية لحكم العشيرة في حل النزعات ما يلي: ان العشيرة تعتبر نظام اجتماعي يساعد على الاستقرار وفض النز اعات وتعمل على تماسك المجتمع

بعكس الدول الغربية التي يكون فيها نظام العشيرة ضعيف ولذلك نجد ان المجتمعات الغربية تتسم بالتفكك. تعمل العشيرة على ضبط سلوك الافراد وتحث الافراد على اتباع العادات والتقاليد.

من الغريب ان المحبة والتعامل تعود سريعا بين المتخاصمين اذا كان الحكم صادر عن شيخ العشيرة وكأن شيأ لم يكن حتي لو كانت المشكلة قتل او نهب او سلب. بينما تبقي الكراهية سائدة فيما بعد بين المتنازعين في حالة صدور الحكم من المحكام المدنية او النظامية.

خلاصة القول تشير حل المنزاعات حاليا بين افراد المجتمع البدوي في الصحاري العربية وفي الواحات والتي سبق وان اشرنا الى ان هذه المساحة الصحراوية في ليبيا تبلغ نحو 85% من مساحة الدولة، وهي لا تقل عن هذه النسبة في معظم الدول العربية الاخري با تزيد عن ذلك في بعضها. تشير الى ضرورة الاستمرار في تبني الدولة لحل النزاعات لسكان هذه المناطق عن طريق شيخ العشيرة واعتبارة من الاتجاهات الحديثة والافضل من تطبيق القانون او القضاء في حل المنازعات في المجتمعات البدوية.

الخاتمة

هدف هذا البحث الى دراسة دور العشيرة كأسلوب لفض النزعات بين الافراد والاطراف. وقد قام الباحث بأجراء مقابلة مع شيوخ العشائر وتوجية الاسلئة التالية لهم هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير ايجابي في حل النزاعات بين الاشخاص والاطراف عن طريق تدخل العشيرة او حكم العشيرة، ما هي النتائج التي ممكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة.

واشارات نتائج الدراسة الى التالي:

١ -أن المجتمع في ليبيا هو مجتمع عشائري تعلب فيه العشيرة دورا مهما وفي جميع المجالات السياسية والاقتصادية والاجتماعية ....الخ.

٢ -ان العشيرة كانت وما زالت وحدة سياسية واجتماعية واقتصادية متكاملة وهي سر تماسك المجتمع.

٣ -تمارس العشيرة دورا مهما في ضبط سلوك افراد المجتمع وكذلك تعلب دورا رئيسا في حفظ كيان المجتمع من الاخطار الخارجية.

٤ -للعشيرة الدور الأكبر في فض النزاعات والصراعات وكذلك معالجة المشاكل التي تواجه الافراد.

٥ -تحافظ العشيرة على تجانس وتماسك افرادها بصورة خاصة وباقي أفراد المجتمع بصورة عامة . تبين من دراستنا هذه ان العشيرة لها قوة على الساحة الاجتماعية نتيجة ضعف أو خلل في اجهزة الدولة.

التوصيات

١ -الحكم العشائري من اهم الاساليب الحديثة التي تساهم في زرع المحبة بين الافراد والاطراف المتنازعين لذلك يجب عدم استثناء العشيرة في حل النزعات.

٢ -ان دور العشيرة في حل المنازعات والخلافات في القرن الحادي والعشرون لا يمكن الاستغناء عنه وهو بديل مقبول للمحاكم المدنية والقوانين الحكومية والسلطات المحلية.

٣ -لا بد من الاعتراف ان حل المنازعات والخلافات بين الافراد في المجمتع البدوي له تاثير ايجابي على سلوك المتنازعين فيما بعد، اي بعد حل النزع او الخلاف من قبل شيخ العشيرة بعد اخذ ما يسمي بالعطوة بين الشخصين المنتمازعين.

٤ -تبني الدولة لحل النزعات بين الافراد والاطراف عن طريق شيخ العشيرة واعتبارة من الاتجاهات الحديثة والافضل من تطبيق القانون او القضاء في حل المنزعات في المجتمعات.

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حتمية مأسسة التحكيم لتسوية منازعات المنتجات الحلال

The inevitability of institutionalizing arbitration to settled Halal products disputes

بحث قدمه كلاً من :

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للمشاركة في المؤتمر العالمي لتسوية المنازعات ضمن محور الإتجاهات الحديثة في الآليات الفاعلة لتسوية

المنازعات المنعقد في كلية أحمد إبراهيم للقانون بالجامعة الإسلامية العالمية ماليزيا في الفترة من :

(10/9- أغسطس – 2017 - كوالالمبور – ماليزيا)

[1] – طالب دكتوراه في كلية أحمد إبراهيم للقانون، الجامعة الإسلامية العالمية ماليزيا.

[2] – أستاذ مشارك بقسم الشريعة، كلية أحمد إبراهيم للقانون. الجامعة الإسلامية العالمية ماليزيا ، موبايل0132189737 ،إيميل

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مقدمة : تشهد المنتجات الحلال رواجاً تجارياً عالمياً منقطع النظير ،إلا أنه على الرغم من ذلك فإنها لازالت تفتقر إلى نظام قانوني قادر على التصدي للمنازعات التي تُثيرها سواءً من حيث الإطار القانوني الواجب التطبيق على هذه المنازعات ،أو من حيث الجهة التي يُمكن الركون إليها لتسوية النزاع ،فمن حيث الإطار القانوني الواجب التطبيق فإن هذه المنتجات تخضع إلى حِزمة من النظم القانونية والشرعية والفنية والتجارية ،المحلية والدولية المتنوعة التي تمتزج في إطار قانوني يتجاوز المفهوم القانوني المألوف لدى المؤسسات المعنية بتسوية المنازعات ،وأما من حيث الجهة التي يُمكن اللجوء إليها لتسوية النزاع ،فإن المنتجات الحلال لم تحظى حتى الآن بمؤسسة مُختصة بتسوية منازعاتها على الرغم مما تتميز به من طبيعة خاصة تكاد تتجاوز الوسائل التقليدية المعمول بها في النظم القضائية والودية ،وهو ما يقتضي تناول هذه الوسائل في ضوء الطبيعة الخاصة لهذه المنتجات لبيان مدى إنسجامها ،على الرغم من إفتراض الدراسة لملائمة التحكيم المؤسسي لطبيعة هذه المنتجات من حيث إستيعاب الجوانب المتصلة بها ،وهو ما يُملي تمحيص خصائص هذا النوع من التحكيم ،مع محاولة إجراء مُقاربة بين المؤسسات ذات الصلة بالمنتجات ،سواءً من حيث إختصاصها بتسوية المنازعات ذات الطبيعة المتشابهة في بعض جوانبها مع المنتجات الحلال ،أو من حيث المؤسسات العاملة في الجوانب الفنية المتعلقة بالمنتجات ،أو تلك المؤسسات الإسلامية عالمية التواجد ،والتي يُمكن أن تُقدم دوراً في تسوية هذه المنازعات ،وصولاً إلى قاعدة يُمكن الإستناد إليها لتأسيس مؤسسة تحكيم مُتخصصة في تسوية منازعات المنتجات الحلال ،لتدليل الصعوبات التي تواجهها بشكل يكفل تحقيق أهميتها التجارية ويُحافظ على طبيعتها الفنية والشرعية ،وذلك من خلال مبحثين يتناول أولهما الطبيعة القانونية للمنتجات الحلال ومدى ملائمة الوسائل القضائية والوسائل البديلة لتسوية منازعاتها ،فيما يتناول ثانيهما دور التحكيم المؤسسي في تسوية منازعات المنتجات الحلال .

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المبحث الأول :الطبيعة القانونية للمنتجات الحلال ومدى ملائمة الوسائل القضائية والوسائل البديلة لتسوية منازعاتها.

تُشكل طبيعة المنتجات الحلال أساس البحث عن الوسيلة المناسبة لتسوية المنازعات المثارة بشأنها ،وهو ما يقتضي بحث الطبيعة القانونية للمنتجات الحلال في مطلبٍ أول ،ثم بيان مدى ملائمة الوسائل القضائية والوسائل البديلة لتسوية المنازعات للطبيعة الخاصة لهذه المنتجات في مطلبٍ ثان :

المطلب الأول : الطبيعة القانونية للمنتجات الحلال :

تنفرد المنتجات الحلال بطبيعة قانونية خاصة أملتها الجوانب المتنوعة والمتعددة المتصلة بها ،بما في ذلك النظم القانونية ذات العلاقة بالمنتجات محلياً ودولياً والتي تشكل فيما بينها الإطار القانوني لهذه المنتجات ،وهو ما يُملي بيان مضمون هذا الإطار من حيث الجوانب المتصلة به والنظم والقوانين الحاكمة له ،ثم بيان الطبيعة الخاصة للتنظيم القانوني للمنتجات :

أولاً : مضمون الإطار القانوني للمنتجات الحلال :

يعرَف الفقه القانوني المنتَج بتعريفات مختلفة ،نورد منها تعريفاً له بأنه "كل منقول مادي قابل للبيع و الشراء تجارياً ،وكذلك تعريفه "بأنه كل منقول سواء تعلق الأمر بمادة أولية تم تحويلها صناعيا أو لم يتم تحويلها و سواء تعلق الأمر بمنقول أندمج في منقول أو لم يندمج"[١] ،كما تُعرف المنتجات الحلال بأنها المنتجات المباحة وفقاً للشريعة الإسلامية [٢]،ومما تقدم يتبين أن المنتجات الحلال تجمع بين صفات

[١] - قنطرة ،سارة ،المسئولية المدنية للمنتج وأثرها على حماية المستهلك ،ماجستير مقدمة إلى كلية الحقوق والعلوم السياسية بجامعة محمد لمين دباغين – سطيف 2 الجزائر 2016 : 2017 ،ص 14 .

[٢] – وفقا للمبادئ التوجيهية المعتمدة في الدورة 22 لهيئة الدستور الغدائي ،(CAC-GL – 24 – 1997) .

المنتجات عموماً ،بالإضافة إلى الضوابط الشرعية للإباحة وفقاً لأحكام الشريعة الإسلامية ،وهي جوانب متعددة ومتداخلة يقتضي الأمر توضيحها لبيان أثرها على تكوين طبيعة هذه المنتجات :

– **الجوانب الفنية** : وفيها تكاد تتطابق المنتجات الحلال مع نظيراتها من المنتجات غير الحلال ،ونعني بها كل ما يتصل بالمنتج من حيث مكوناته وموادها الأولية ومصادرها وغيرها من الخواص الفنية المتعلقة بالمواد ،فضلاً عن عملية التصنيع وما تتطلبه من أسسٍ فنية ،وهي أسس ترتبط إرتباط مباشر بمعايير السلامة والجودة[1] وغيرها من النظم المتعلقة بالإنتاج والتسويق وغيرها وصولاً إلى المستهلك النهائي ،وهي نظم تختلف حسب المواصفات القياسية للمنتجات من دولةٍ لأخرى ،وهنا تبرُز إشكالية تتمثل في الطبيعة المركبة للمنتج ومكوناته ،حيث أنه بفعل التكامل التجاري والتطورات الصناعية أصبحت المنتجات تحوي عناصر ومحتويات ترد من دولٍ متعددة تتبنى نظمٍ قانونية مختلفة ،كأن تخضع لقانون من حيث مواده الأولية وآخر من حيث عملية الإنتاج وثالث من حيث الإعتماد ،وآخر بشأن التوصيف بوصف الحلال ،إلى أن يصل إلى المستهلك في قانونٍ آخر ،وهي جوانب تحتاج إلى تدقيق مرحلي بشأن التحقق من وصف الحلال فيها ،وهو ما ينعكس على عمق الإشكاليات والمنازعات المثارة بشأن هذه المنتجات في هذا الجانب[2].

– **الجوانب الشرعية** : سبقت الإشارة إلى أن المنتجات الحلال عبارة عن منتجات مطابقة للشريعة الإسلامية ،إلا أنه مع تطور النظم العلمية المتعلقة بالمنتجات باتت هذه الصناعة تثير مسائل شرعية لايُمكن نظرها بمعزل عن تمحيص الجوانب الفنية المرتبطة بها ،وهي مسائل تُثار بشأن كل جوانب المنتج كمكوناته وعملية إنتاجه وإعتماده وتسويقه ،وهو ما يقتضي التعرض إلى قواعد شرعية متعددة كقواعد

[1] – هناك تفريق بين الحلال والطيب ،ويُراد بالطيب هو موافقة المنتج لمعايير الجودة وفقاً للأحكام العامة للشريعة الإسلامية ،سمنار مقدم بمركز أبحاث الحلال بالجامعة الإسلامية العالمية ماليزيا بتاريخ 2017/7/12 ،مقدم من د.نورالهدى أحمد فضيلة .

[2] - HAJAH ZAWIAH ABDUL MAJID ,halal logistics , seminar INHART IIUM 23/may/2017

الإستحالة الشرعية والإستهلاك والإستقلاب ،فضلاً عن ضوابط الشبهات وقواعد الضرورة وقدرها وغيرها ،وهي مسائل محل إختلاف واسع بين المذاهب الشرعية ،وهو ما ينعكس بشكل مباشر على إختلاف المؤسسات المانحة لشهائد الحلال وتوصيف المنتجات فيما بينها تبعاً لإختلاف المذاهب المعتمدة من قبلها ،خصوصاً مع غياب معايير متعارف عليها للمنتجات الحلال .

– **الجوانب العلمية** : تلعب الجوانب العلمية دوراً هاماً في المنتجات ،ولا نعني بالجوانب العلمية هنا تلك الجوانب المتعلقة بتطوير المنتجات ،وإنما نعني بها الجوانب المتصلة بتداول المنتج وإعتماده ،وهي جوانب يختلف الفقه القانوني حول آثارها القانونية لضمان المنتَج وسلامته ،وتقف هذه الجوانب كعائق حقيقي أمام المنتجات الحلال وذلك بإثارة جوانب تثير الشك في صحة وصف الحلال وفقاً للضوابط الشرعية ،ويؤخد على هذه المنتجات عدم مواكبتها للتطورات العلمية لموائمة الجوانب الشرعية لهذه المنتجات[1] ،كما يؤخد عليها في بعض الأحيان عدم توفر الإمكانيات اللازمة للتحقق من الحلال خاصة فيما يتعلق بتقنيات النانو والجزيئيات متناهية الصغر في المنتجات [2] ،كما يلعب اليقين العلمي دوراً بارزاً أيضاً في تداول المنتجات وإعتمادها ،ومن ذلك الجوانب المتعلقة بتداول المنتجات المعدلة جينياً [3] ،وهي جوانب تنعكس على الإختلاف حول صحة وصف الحلال في المنتج .

– **الجوانب التجارية** : تتمتع المنتجات الحلال بميزة إضافية وهي إستئثارها بفئة تستهلك هذه المنتجات وفقاً لإلتزاماتها الدينية ،وهي بذلك تشهد رواجاً تجارياً عالمياً منقطع النظير بمعدل تداول بلغ 3.5

-7- See : Shaheed Tayob ,Consuming, Producing, Defining Halal: Halal Authorities and Muslim Consumers in South Africa , Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author. University of Cape Town, 2012 .

[2] – مجلة الجزيرة عدد 54– أغسطس /2016 بعنوان صناعة الحلال ،ص 14

[3] –من المادة 11 من إتفاقية AIA كما وردت في الجزء ط من المرحلة الثالثة من نموذج الدليل التعريفي لإعداد أطر السلامة الإحيائية الوطنية – مشروع لجنة الأمم المتحدة للبيئة ومرفق البيئة العالمي ص 11 .

تريليون دولار في 2012 ومتوقع أنه يصل إلى 4.6 تريليون في 2020[1] وهو ما يوضح الوتيرة التجارية المتسارعة لها ،والتي تُملي تطوير كل الآليات المتعلقة بهذه التجارة وفي مقدمتها نُظم تسوية المنازعات بشكل يكفل تلبية المتطلبات التجارية لهذه المنتجات ويكفل ميزتها التنافسية العالمية .

– **التعددية والعالمية** : ونعني بها المستهلك والمنتَج أو المنتوج ،فأما المستهلك فنُعني به الفئة الإستهلاكية المعنية بالمنتجات الحلال ،أي المسلمين وتعددهم وإنتشارهم حول العالم بنِسبٍ متفاوتة ،بين دول تتبنى نظم إسلامية وأخرى تحتوي على غالبية مسلمة ،وأخرى تُشكل أقلية في بلدان لاتتبنى النظم الإسلامية ،وهو ما يُخضع هذه المنتجات إلى نظم قانونية مختلفة عند إنتاجها ضِمن هذه الدول أو إستيرادها إليها بشكل يتجاوز نطاق القضاء المحلي ،أما المنتَج فيراد به تداوله ضمن الأسواق التجارية كمُنتَج قابل للإستهلاك ،أو كمواد مصنعة بقدر أو بآخر وهو ما يُخضعه إلى نظم وقوانين متنوعة ومتعددة محلية ودولية .

– **تعدد القوانين الحاكمة** : تخضع المنتجات إلى عدد من القوانين والنظم التشريعية والتنظيمية والفنية المحلية والإقليمية والدولية المتنوعة التي لاتقع تحت حصر ،وهي بذلك تُبرِزُ إشكاليات يُمكن حصرها في فئتين رئيسيتين ،تكمن أولهما في تعدد النظم القانونية بشكل يتجاوز النطاق الذي يلم به القاضي ،وتكمن ثانيهما في المحتوى الفني لهذه النظم بما يجعلها مدعاة للإستعانة بخبير قضائي يتولى تمحيصها وبيان جوانبها الفنية ،وهي إشكاليات تزداد تعقيداً تبعاً لتعدد النظم الحاكمة للمنتجات عند تداولها في الأسواق العالمية ،أو عند تصنيعها تبعاً للنظم الحاكمة لمكوناتها كما تقدم ،ويأتي ذلك من خلال الفراغ التنظيمي الذي تعانيه هذه المنتجات على المستوى الدولي على الرغم من وجود مبادئ توجيهية لمنتجات

[1] – بيانات من المؤتمر الدولي لإقتصاديات المنتجات الحلال المنعقد في جامعة سقاريا بتركيا في 19–20 /مارس /2015 .

الغذاء الحلال ضمن دستور الغذاء العالمي [1] ،إلا أنها لاتزال تُعاني ضُعف يعجز عن حل المنازعات التي تثار بشأن هذه المنتجات ،وهو ما ينعكس على دور القائم على تسوية هذا النزاع.

ثانياً : التنظيم القانوني للمنتجات الحلال :

ينعكس تعدد الجوانب المتصلة بالمنتج على النحو المتقدم على وضع الآلية القانونية لتنظيم المنتجات ،وهو جانب راعتهُ معظم التشريعات من خلال سن قانون ذو طبيعة تستوعب التطورات الناجمة عن المنتجات ومتابعتها حالةٌ بحالة دونما إجراء تعديلات تشريعية ،وذلك من خلال منح السلطة التنفيذية صلاحية توصيف المنتجات من الناحية الفنية ومنح المواصفات القياسية لها [2]،ومن ذلك ما نص عليه القانون الليبي رقم 5 لسنة 1990[3] بشأن إنشاء المركز الوطني للمواصفات القياسية الذي ينص في مادته الأولى على إختصاص المركز بكافة مايتعلق بضبط الجودة وإعداد المواصفات وإعتمادها والرقابة عليها وفقاً للأصول العلمية والحضارية .. ،وتأسيساً على ذلك يتولى المركز المذكور إعداد وإعتماد المواصفات القياسية للمنتجات المستجدة ،أو تلك التي طراءت عليها تغييرات وفقاً للظروف المحيطة ،وذلك بإعلان المواصفة لتنفيدها والتقيد بها من قبل المصنعين والمستوردين والعمل بمقتضاها من قبل المؤسسات الضبطية المعنية بالمنتجات كجهاز الجمارك وأجهزة مراقبة المنتجات والحرس البلدي وغيرها ،وهذه المواصفات تتغير تِبعاً للتطورات الفنية والعلمية التي تطراء عليها من جهة ،وتِبعاً لإختلاف معايير إعتماد المواصفات من دولة إلى أخرى حسب الظروف الداخلية لكل دولة ،وهو ما يخلق صعوبات حقيقية تواجه القائم على

[1] – أعتمدت في الدورة 22 لهيئة الدستور الغذائي ،(CAC-GL – 24 – 1997)

[2] – وفقاً لتعريف المواصفة القياسية الدولية ISO 9001:2000.،والمواصفة القياسية الليبية رقم (0) لسنة 2005 المواصفة القياسية هى وثيقة صيغت بالتعاون والتراضي أو الموافقة من جميع الأطراف ذات العلاقة بموضوع المواصفة وهى تستند إلى النتائج العلمية والعملية وتهدف إلى تحقيق المصلحة العامة وتصدر عن هيئات معترف بها على المستوى الوطني أو الإقليمي أو الدولي .

[3] – قانون إنشاء المركز الوطني للمواصفات القياسية الليبي رقم 5 لسنة 1990 ،صدر في 15/الماء/1990.

تسوية المنازعات التي تُثار بشأن هذه المنتجات خصوصاً إذا تجاوزت نطاق الدولة الواحدة ،لاسيما مع ضعف النظام القانوني للمنتجات الحلال على المستويين المحلي والدولي ،ذلك لأنه وعلى الرغم مما قدمته بعض الدول من أطر قانونية لتنظيم المنتجات الحلال وفي مقدمتها ماليزيا إلا أنه مع ذلك تظل هذه الصناعة تفتقر إلى معايير أو مواصفات موحدة تستوعب كل الجوانب المتصلة بالمنتج ،وفي مُقدمتها الجوانب الشرعية التي يقتضي مفهوم الحلال صحة مراعاتها في كل الجوانب المتعلقة بالمنتج ،الأمر الذي لايزال يُعاني من إختلافات واسعة يصعب معها توحيد المعايير وفقاً لأحكامها .

المطلب الثاني :مدى ملائمة الوسائل القضائية والوسائل البديلة لتسوية منازعات المنتجات الحلال.

لاتنفك منازعات المنتجات الحلال أن تتصل بكل الجوانب الإجرائية المتعلقة بالمنازعات في النظام القضائي ،إلا أنه نظراً للطبيعة الفنية لهذه المنتجات التي تقتضي إعمال الخبرة الفنية بشأنها من قِبل القضاء ،سوف نقتصر على إستعراض مدى كفاية الإستناد إلى الخبرة الفنية في تسوية منازعات المنتجات الحلال.

أولاً : مدى ملائمة الوسائل القضائية لتسوية منازعات المنتجات الحلال .

يهمنا وفقاً للدراسة بحث مدى ملائمة الآليات التي يُعملها القضاء للتصدي لمنازعات المنتجات الحلال ،وتنحصر هذه الآليات في الخبرة الفنية أساساً ،وهي الوسيلة التي يلجاء إليها القضاء لنظر المنازعات ذات الجانب الفني ،والخبرة الفنية عبارة عن إجراء للتحقيق يعهد به القاضي إلى شخص خبير في جانب فني معين لغرض بحث واقعة معينة أو تقديرها أو إبداء رأي علمي أو فني بشأنها ،وهي واقعة تتجاوز فهم الشخص العادي ،كما تتجاوز نطاق معارف القاضي ،ويخضع اللجوء للخبرة الفنية للسلطة التقديرية

للمحكمة[1]،كما ينعقد لسلطتها أيضاً الأخد بتقرير الخبير من عدمه كلياً أو جزئياً [2]،كما أن المحكمة تترخص بسلطة تعيين الخبير من عدمه كونها صاحبة الولاية في تقدير أهمية دور الخبير في الدعوى [3]،ومما تقدم يتضح أن الخبرة الفنية لاتعدوا كونها وسيلة من وسائل الإثبات التي تترخص المحكمة بالإستناد إليها أوالإلتفات عنها إلى جانب ما يخضع له الخبير من سُلطات قضائية أخرى تتعلق برده وإستبداله ،ومما تقدم يتضح أن القضاء غير قادر على إستيعاب الجوانب الفنية المتعددة التي تُثار بمناسبة منازعات المنتجات الحلال من خلال اللجوء إلى الخبرة الفنية ،وذلك من حيث عدم إلزامية اللجوء إلى الخبرة الفنية وخضوعها المطلق لسلطة القضاء من حيث إعمالها وإهمالها وهو ما قد يؤدي إلى الفصل في المنازعة على غير أساس فني ،فضلاً عن أن مهمة الخبير في الخبرة الفنية تكاد تكون محددة وتقتصر على خبير أو أكثر في مجال معين ،وهو ما لايكفل الإحاطة بالجوانب التي تُثيرها المنتجات الحلال والتي تمتزج فيها الجوانب العلمية إلى الحد الذي يوجب تناولها كمزيج علمي دونما فصل فيما بينها وهو ما لن ينصفه الإستعانة بخبير ولا فريق من الخبراء ،ولن يُلبي مقتضياتها التجارية ،مما ننتهي معه إلى عدم ملائمة القضاء لتسوية منازعات المنتجات الحلال .

ثانياً : مدى ملائمة الوسائل البديلة لتسوية المنازعات المنتجات الحلال .

الوسائل البديلة هي عبارة عن وسائل أو طرق يتم اللجوء إليها من أطراف المنازعة لتسويتها خارج القضاء ،وهي وسائل بسيطة وعملية ومرنة تستأثر بمكانتها في فض المنازعات بدلاً من التقيد بالإجراءات القضائية التي قد لاتتناسب مع طبيعة النزاع المعروض ،وهي أسباب أدت إلى نُكران صفة

[1] – المادة (201) من قانون المرافعات المدنية والتجارية الليبي .

[2] – أنظر حكم المحكمة العليا الليبية في جلستها المنعقدة في (2007/6/25) في الطعن المدني رقم (52/351ق) ، وحكمها في في الجلسة المنعقدة بتاريخ (2007/7/4) في الطعن المدني (رقم 52/130ق) .

[3] – حكم المحكمة العليا الليبية في جلستها المنعقدة بتاريخ (2006/3/15) في الطعن رقم (50/283ق) .

الوسائل البديلة عليها نظراً لما باتت تتمتع به من أولوية لدى أطراف النزاع في تسوية منازعاتهم لصالح تسميتها بالطرق الملائمة أو المناسبة أو الودية ،ويرى فيها هذا الجانب حفاظها على العلاقات الودية بين أطراف العلاقة وذلك من خلال تجاوزها للنطاق القانوني إلى النطاق الإجتماعي ومحاولة التوفيق بين المصالح والرؤى المتعارضة حتى قبل حدوث النزاع [1] ،وهذه الوسائل رغم تشابهها من حيث خروجها عن النظام القضائي ،إلا أنها تختلف من حيث الآليات المتبعة ضمن إطارها لتسوية النزاع ،ونورد منها ضمن هذا الإطار الصلح والوساطة والتحكيم .

– **الصلح** [2] : وهو عبارة عن وسيلة ودية يتفق فيها طرفين أو أكثر لتسوية نزاع قائم أو محتمل بينهما ،ويعرفه القانون المدني الليبي [3] بأنه عبارة عن "عقد يحسم به الطرفان نزاعاً قائماً أو يتوقيان به نزاعاً محتملاً وذلك بأن ينزل كلٌ منهما على وجه التقابل عن جزء من إدعائه " ،والصلح نوعان إما أن يكون قضائياً يتم بين الخصوم في دعوى قضائية منظورة بإرادتهم المنفردة أو بمساعي من قبل المحكمة ،وإما أن يكون غير قضائي بحيث يرتكن له طرفي النزاع بإرادتهم المنفردة خارج القضاء ،ويتضح من ذلك أنه عبارة عن وسيلة يُمكن اللجوء إليها من أي شخص لتسوية نزاع معين يواجهه في حياته اليومية ،إلا أنه على الرغم من أهميتها تسوية المنازعات بشكل فوري وبسيط يُمكن إختياره في أي منازعة لاسيما منازعات المنتجات ،إلا أنها لايُمكن التعويل عليها كوسيلة فعالة في تسوية هذه المنازعات نظراً لما تحتويه من جوانب يستعصي تسويتها على نطاق شخصي وعرضي .

[1] –سفيان ،سوالم ،الطرق البديلة لحل المنازعات المدنية في القانون الجزائري ،أطروحة دكتوراه ،كلية الحقوق بجامعة مُحَمَّد خيضر بسكرة:2014 ،ص 13 .

[2] – أنظر المادة (205) من قانون المرافعات الليبي .

[3] – أنظر المادة (548) من القانون المدني الليبي .

– **الوساطة** : وهي عبارة عن مفاوضات غير ملزمة يقوم بها طرف محايد يسعى إلى التوسط بين طرفي النزاع لمساعدتهم لتسوية النزاع القائم فيما بينهم معتمداً على قدراته ووسائله الشخصية الخاصة مع الحفاظ على سرية المعلومات التي يطلع عليها [1]،وقد هجرت معظم التشريعات هذا اللفظ لصالح لفظ التوفيق دونما تفريق بينهما ،ومن ذلك ما ينص عليه قانون الأونسترال النموذجي للتوفيق التجاري الدولي لسنة 2002 الذي يقضي في مادته الأولى على أنه "لأغراض تنفيد هذا القانون يقصد بمصطلح التوفيق أي عملية سواءً أشير إليها بتعبير التوفيق أو الوساطة أو بتعبير آخر ذو مذلول مماثل أن يُطلب فيها الطرفان من شخص أو أشخاص آخرين مساعدتهما إلى التوصل إلى تسوية ودية لنزاعهما ..." ،وهو اللفظ الذي أختاره القانون الليبي [2] ويُفرق فيه بين ثلاثة أنواع ،يُمكن تسميتها توفيق قضائي وتوفيق إداري وتوفيق خاص ؛وأما القضائي فهو المهمة التوفيقية التي تؤكلها المحكمة إلى وسيط أو خبير يتولى عملية التوفيق بين الخصوم في منازعة معروضة أمامها وفقاً لأحكام قانون المرافعات المدنية والتجارية ،وأما الإداري هو الذي تتولاها لجنة مكونة من وزارة العدل ضمن النطاق الإداري الذي وقعت فيه المنازعة ،ويتم اللجوء إليها من قبل طرف أو أكثر من أطراف النزاع ،وإذا توصلت اللجنة إلى التوفيق بين الأطراف أعدت محضراً بذلك وصدقته من قبل المحكمة الجزئية بموجب أمر من القاضي بشكل يُنهي الخلاف ،أما النوع الثالث والأخير وهو الوساطة أو التوفيق الخاص ،وفيه يتوسط شخص أو أكثر طرفي النزاع بإرادته المنفردة أو بناءً على لجوء أحد الأطراف أو كليهما إليه ،إلا أن التوفيق وعلى الرغم من الدور الذي يتولاه لتسوية المنازعات بشكلٍ عام ،إلا أنه لايُمكن أيضاً التعويل عليه بشكل كلي لتسوية

[1] – لمزيد من التعريفات يُنظر : أنور مُحَمَّد صدقي و د بشير زغلول ،الوساطة في إنهاء الخصومة الجنائية "دراسة تحليلية نقدية" مجلة الشريعة والقانون ،العدد الأربعون ،أكتوبر 2009 – ص 294 ومابعدها .

[2] – القانون الليبي رقم (4) لسنة 2010 بشأن التوفيق والتحكيم .

منازعات المنتجات الحلال نظراً لما لها من خصوصية تقتضي تسويتها بشكل مؤسسي قادر على الإحاطة بكافة الجوانب المتصلة بها .

– التحكيم : ويُمكن تعريفه بأنه إتفاق يقضي بعرض النزاع القائم أو المحتمل بين الأطراف على فرد يُسمى المحكم ،أو مؤسسة مختصة بالتحكيم مع إختيارهم لكيفية الفصل في النزاع والقانون الواجب التطبيق خارج نطاق القضاء[1] ،وفضلاً عما يحتويه نظام التحكيم من خصوصية من حيث مُكنة الإتفاق على طريقة تسوية النزاع والقانون الواجب التطبيق ،فإنه يتميز عن غيره من الوسائل الودية الأخرى في جانبه المؤسسي الذي يتضمن نظام مُتكامل يُمكن التعويل عليه بشكل يستوعب طبيعة هذه المنتجات ،وهو ما يقتضي من الدراسة أن تُفرِد له مبحثاً مستقلاً لتتناوله بشئ من التفصيل .

المبحث الثاني : دور التحكيم في تسوية منازعات المنتجات الحلال :

يشهد التحكيم تطورات تنظيمية واسعة تكاد تحجب نطاق واسع من المنازعات عن نظر القضاء رغم ما للقضاء من ولاية عامة في نظر المنازعات ،ويأتي ذلك من خلال ثقة المتنازعين في الآليات البديلة التي يُقدمها لتسوية المنازعات والتي تُقدم كمزايا لنظام التحكيم ،وللتحقق من مدى ملائمة التحكيم للطبيعة الخاصة لمنازعات المنتجات الحلال ،حريٌ بنا تقييم مزاياه في ضوء الطبيعة الخاصة للمنتجات الحلال ،وذلك ما سنتناوله في مطلبٍ أولْ ،ثم بيان المؤسسات المختصة بالتحكيم ،وتلك المعنية بالمنتجات والجوانب المتصلة به والتي يُمكن من خلالها تأسيس مؤسسة تُعنى بتسوية منازعات المنتجات الحلال ،وهو ما سنتناوله في المطلب الثاني.

[1] – أنظر في تعريف التحكيم مثلاً ،فوزي مُحَمَّد سامي ،التحكيم التجاري الدولي ؛دار الثقافة للنشر والتوزيع ؛الطبعة الأولى ،2006 عمان ،ص 13 .

المطلب الأول : مدى فاعلية التحكيم في تسوية منازعات المنتجات الحلال :

تُقدم لنظام التحكيم مزايا متعددة لعلها تُلبي في جوانب منها خصوصية منازعات المنتجات الحلال ،وهو ما يقتضي تناول هذه المزايا[1] للتوقف على مدى ملائمة نظام التحكيم لهذه المنازعات :

- **السرعة في حسم النزاع** : يذهب الفقه إلى قدرة التحكيم على تسوية النزاع بشكل سريع يتخطى أي تعقيدات إجرائية ،كتلك التي يتبعها القضاء في نظره للمنازعة والفصل فيها من إجراءات سير الخصومة والمرافعة والحكم وطرق الطعن ومواعيدها ،كما أنه يتولى الفصل في النزاع بشكل نهائي غير قابل للإستئناف ،وهو بذلك يحسم النزاع بشكل سريع ونهائي ،وهو الشغل الشاغل لأطراف النزاع في المعاملات التجارية[2] لاسيما تجارة المنتجات الحلال ،بل أن خصوصية السرعة في تجارة المنتجات قد تكون أكثر أهمية ليس فقط لأهميتها التجارية ،وإنما لإحتوائها لظروف الإستعجال خوفاً مما تتعرض له من أضرار التلف وغيره ،وهو بالتالي يُلبي خصوصية هامة لمنازعات المنتجات الحلال .

– حرية إختيار القانون الواجب التطبيق : يمتاز التحكيم بأنه يُخول الأطراف فيه إختيار القانون الواجب التطبيق على النزاع بدلاً عن القانون الواجب التطبيق على النزاع أساساً ،ومن خلال ذلك يُمكن الأطراف من إختيار القوانين الأنسب لحل نزاعهم ،خاصة إذا تعلق الأمر بإختلاف القوانين أو الأنظمة القانونية ،وهي جوانب لاتُتاح في القضاء العادي نظراً لتقيده بتطبيق قانون القاضي بشكلٍ أساسْ ،دونما إلتفات إلى مدى مناسبة هذه القوانين للنزاع المعروض ،وفي هذا الجانب يقدم التحكيم مُكنة هامة لأطراف الخصومة لتطبيق القوانين المحلية أو المشتركة أو الأعراف الخاصة بالمنتجات الحلال التي يخضع لها موضوع النزاع ،بما في ذلك القواعد الشرعية وتفاصيها المذهبية الخاصة بالضوابط الشرعية لوصف الحلال

[1] – والي ،فتحي ،قانون التحكيم في النظرية والتطبيق ،منشاة المعارف : الإسكندرية ،الطبعة الأولى :2007 ،ص 14 .

[2] – رضوان ،أبوزيد ،الأسس العامة للتحكيم التجاري الدولي ،دار الكتاب الحديث (دون بيان مكان نشر) طبعة1996 ،ص 17 .

الحلال في المنتجات ،وتجدر الإشارة ضمن هذا الإطار إلى أنه نظراً لتميز التحكيم بالمرونة في إطار تعدد الثقافات القانونية في المنازعة الدولية بين الأطراف ،فقد إتجهت نحو 80% من الشركات والمؤسسات الإسلامية إلى إختيار التحكيم لتسوية المنازعات التي تنشاء عن العقود المبرمة مع الأطراف الأخرى [١] ،وفي سوابق التحكيم أمثلة كثيرة عن لجوء هيئة التحكيم إلى تطبيق أحكام الشريعة الإسلامية ،نذكر منها ما أورده المحكم ديبوي في حيثيات حكمه في دعوى التحكيم المرفوعة من شركة تكساكو ضد الحكومة الليبية سنة 1977 ،التي أستند فيها إلى قاعدة الوفاء بالعقود إستناداً إلى الشريعة الإسلامية [٢] ،كما أن هيئة التحكيم أحياناً تتطرق إلى الإختلافات الفقهية القائمة بين المذاهب ،ومن ذلك ما ذهبت إليه هيئة التحكيم في خلاف وقع بين وكيل لإحدى شركات الطيران العاملة في المملكة العربية السعودية والشركة الأم حول مستحقات مالية ناشئة عن عقد وكالة يقضي للوكيل ببيع تذاكر الطيران للشركة مع تحويل المبالغ لها بعد خصم عمولته ،يدعي فيه الوكيل أنه لم يخصم عمولته مُستنداً إلى فتوى شرعية تقضي بمكنته حجز ما في يده من أموال للشركة لحين تسديد عمولته كوكيل (أنتهت مهمته) ،وقد كان عليه هيئة التحكيم بأن الرأي الذي يستند له المدعي مستمد من مجلة الأحكام العدلية وهي مبنية على المذهب الحنفي ،في حين أن المذهب السائد في المملكة السعودية هو المذهب الحنبلي ،والعقد ينص على الأخد بأحكام الشريعة الإسلامية كما هي مطبقة في المملكة السعودية [٣] ،الأمر الذي يُقدم فيه التحكيم وجه آخر من مقتضيات منازعات المنتجات الحلال وما يُثار بشأنها من إختلافات ،بما يجعله يتلائم معها .

[١] –المنايلي ،هاني مُحَّد ،إتفاق التحكيم وعقود الإستثمار البترولية ،دار الفكر الجامعي : الإسكندرية ،الطبعة الأولى2011 ،ص51 .

[٢] – مذكرات قدمها الدكتور عبدالرازق المرتضي سليمان لطلبة الدراسات العليا ،كلية القانون ،جامعة طرابلس (الفاتح سابقاً) 2003

[٣] – علم الدين ،محي الدين إسماعيل ،منصة التحكيم التجاري الدولي ،الجزء الرابع ،النسر الذهبي : عابدين ،مصر ،ص267 .

- **كفاءة المحكمين** : يكون المحكم عادةً شخص ملِم إلمام كافي بجوانب النزاع ويتمتع بخبرة ومعرفة فنية واسعة تجعل منه محل إختيار أطراف النزاع لتسوية المنازعة الناشئة فيما بينهم ،لاسيما في نظام التحكيم المؤسسي الذي يُتيح للطالبي التحكيم عدد من المحكمين للإختيار فيما بينهم ،وهم غالباً يتميزون بقُدُرات خاصة وتخصصية في تسوية المنازعات ،وهو ما يُلبي جانب الطبيعة الخاصة للمنتجات الحلال وما يُثار بشأنها من منازعات .

- **الحياد** :يُقدم الحياد كميزة خاصة لنظام التحكيم من حيث التهرب من إختصاص القضاء المحلي في نظر المنازعات ،وذلك من حيث التشكيك في قدرة القضاء المحلي ونزاهته خصوصاً في المنازعات ذات العنصر الأجنبي ،وهو ما يتوافق إلى حدٍ ما مع مقتضيات الطبيعة الخاصة للمنتجات الحلال وذلك من حيث الطبيعة الفنية الخاصة لهذه المنتجات على النحو المتقدم بيانه ،ومن حيث تعدد النظم الحاكمة للمنتجات بشكل يتجاوز النطاق القانوني الضيق محل تطبيق القضاء ،بما يجعل التحكيم وسيلة مناسبة لتسوية منازعات المنتجات الحلال في هذا الجانب أيضاً .

- **السرية** : تعتبر السرية من أهم الجوانب في المعاملات التجارية ،ويتميز التحكيم بكونه قائماً على السرية بعكس القضاء الذي يقوم على مبداء العلانية ،وهو ما يوفر جوانب حمائية هامة للمنتجات خاصة فيما يتعلق بالمنازعات ذات الصلة بالمعلومات الفنية غير المفصح عنها والأسرار التجارية ومضامين الإختراعات وغيرها من الأعمال التي تبرز جوانب المنافسة في المنتجات ،بما يجعل التحكيم يُقدم ضمانة هامة لأطراف النزاع في هذا الجانب .

ومما تقدم يتضح أن التحكيم التجاري المؤسسي يُقدم مزايا جدية تُلبي الطبيعة الخاصة للمنتجات الحلال بما يجعله من أهم الوسائل لتسوية منازعاتها ،وهو ما يُحتم اللجوء إليه لتسوية هذه المنازعات والنظر في المؤسسات ذات العلاقة لإمكانية تأسيس مؤسسة تحكيم متخصصة في منازعات المنتجات الحلال .

المطلب الثاني : المؤسسات ذات العلاقة بتسوية منازعات المنتجات الحلال :

سبقت الإشارة إلى أنه لامناص من تسوية منازعات المنتجات الحلال من خلال التحكيم المؤسسي ،إلا أنه بالإطلاع على نُظم مؤسسات التحكيم العاملة يتبين أنه لاتوجد مؤسسة خاصة بالتحكيم لتسوية منازعات المنتجات الحلال ،على الرغم من وجود بعض المؤسسات التي يُمكن أن تُساهم في تسوية منازعات المنتجات الحلال من خلال إتصالها بأدوار تتعلق بالمنتجات الحلال سواءً من حيث طبيعتها الشرعية أو الفنية أو التجارية ،والتي يُمكن من خلالها بيان المؤسسات وثيقة الصلة بهذه المنتجات التي من شأنها أن تسهم في تأسيس مؤسسة تحكيم خاصة لتسوية منازعات هذه المنتجات ،وهو ما يُملي إستعراض هذه المؤسسات إبتداءً بتلك المؤسسات المعنية بتسوية المنازعات وفقاً لنظم الشريعة الإسلامية ،أو تلك التي تقدم أدواراً فنية أو إستشارية متعلقة بالمنتجات بمكنتها تقديم الدعم الفني للمؤسسات المعنية بتسوية المنازعات ،أو تلك المؤسسات ذات الإنتشار العالمي الواسع ذو الطبيعة الإسلامية التي يُمكن من خلالها تقديم أدوار فعالة في تسوية المنازعات في الدولة المضيفة لها .

أولاً : مؤسسات التحكيم ذات الطابع الإسلامي :

ويُراد بإستعراض هذه المؤسسات محاولة بيان تجربتها فيما يتعلق بتطبيقها لقواعد الشريعة الإسلامية على المنازعات ،وهو ما يُقدم جانب من الجوانب الأساسية للنظم الحاكمة لمنازعات المنتجات الحلال

1– مركز كوالالمبور الإقليمي للتحكيم [1] **(KLRCA)** وهو أول مركز تحكيمي إقليمي آسيوي يعمل على نطاق دولي ،وقد تم تأسيسه سنة 1978 ،ويعتمد المركز تطبيق قواعد اليونسترال للتحكيم بصيغتها المعدلة لسنة 2010 ،وقواعد التحكيم الإسلامي وقواعد الوساطة الخاصة بالمركز ،وقواعد التحكيم الإسلامي الخاصة بالمركز هي ذاتها قواعد اليونسترال للتحكيم بصيغتها المعدلة لسنة 2010 مع تعديلها بشكل يتوافق مع قواعد الشريعة الإسلامية في كل الجوانب المتصلة بعملية التحكيم ،ويتم تطبيقها بناءً على طلب أطراف النزاع لإعتمادها كقانون حاكم للنزاع ،مع إتاحة مُكنة الرجوع إلى قواعد اليونسترال الأصلية ،ويحظى المركز بثقة واسعة فيما يتعلق بتسوية المنازعات التجارية ،خصوصاً من حيث تطبيقه لقواعد الشريعة الإسلامية ،إلا أنه لايختص أساساً بتسوية منازعات المنتجات الحلال ،إلا أنه يُمكن اللجوء إليه لتسوية منازعات المنتجات الحلال مع التنويه إلى ضرورة تأسيس مركز مُتخصص للتحكيم في تسوية منازعات المنتجات الحلال .

2 – المنظمة الإسلامية للتجارة [2] : وهي مؤسسة أهلية غير حكومية تأسست في 2015/6/23 ،وتهذف إلى تنظيم التجارة بين الدول الإسلامية وتطويرها على أسس تتفق وقواعد الشريعة الإسلامية ،ويقع من ضمن أهدافها حلّ الخلافات التجارية عن طريق آليات فض المنازعات التي تخضع للتحكيم الإسلامي سواءً من خلال المنظمة ذاتها أو من خلال المركز الإسلامي الدولي للمصالحة والتحكيم (دبي) مع دعم المركز المذكور ليصبح مركزاً عالمياً لتسوية المنازعات ،كما تتولى المنظمة متابعة مدى إنسجام تطبيق القواعد التجارية مع ضوابط وأحكام الشريعة الإسلامية وذلك من خلال علاقاتها مع المؤسسات ذات الصلة كغرفة التجارة الإسلامية ،ومركز الجودة الإسلامية ومعايير المنتجات الحلال بالكويت ،وهيئة

[1] - < https://klrca.org/ >
[2] - < www.islamictrade.org>

المعايير الشرعية في هيئة معايير المحاسبة والمراجعة للمؤسسات المالية الإسلامية (الأيوفي) بالبحرين ،فضلاً عما لها من أنشطة ترويجية لتجارة المنتجات والخدمات الحلال ،ومما تقدم يتبين أن المنظمة تُشكل حلقة وصل تتمكن من خلالها من المساهمة في تسوية منازعات المنتجات الحلال على الرغم من عدم إختصاصها المباشر بذلك على وجه التحديد .

3– المركز الإسلامي الدولي للمصالحة والتحكيم – دبي[1] : وهو مركز دولي يقع مقره في دبي بدولة الإمارات العربية المتحدة ،تم تأسيسه في 2005/4/9 بدعم من البنك الإسلامي للتنمية بناءً على إتفاقية بين دولة الإمارات والمجلس العام للبنوك والمؤسسات المالية الإسلامية كممثلاً للصناعة المالية الإسلامية وفقاً لمقررات البنك الإسلامي للتنمية ،ويختص المركز أساساً بفض منازعات المالية الإسلامية وفقاً لأحكام الشريعة الإسلامية ،ويعتبر المركز أحد أهم ركائز صناعة المالية الإسلامية في العالم في مجال فض المنازعات المالية التي تختار تطبيق الشريعة الإسلامية لتسويتها ،وهو مركز في الواقع غير معني بمنازعات المنتجات الحلال ،إلا أنه يظل يتميز بتطبيقه لقواعد الشريعة الإسلامية على المنازعات المعروضة عليه ،وهو ما يُمكن أطراف النزاع الخاصة بهذه المنتجات من اللجوء إليه مع التنويه إلى ضرورة تأسيس مركز مُستقل ومُتخصص بتسوية منازعاتها .

4–الغرفة الإسلامية للتجارة والصناعة [2] : وهي إحدى المؤسسات المنتمية لمنظمة المؤتمر الإسلامي ،ويقع مقرها في كراتشي عاصمة جمهورية باكستان ،وتضم في عضويتها الغرف الوطنية وإتحادات غرف التجارة والصناعة في البلدان الأعضاء ،وتهدف الغرفة إلى تعزيز التعاون التجاري وذلك من خلال وتوثيقه في المجالات التجارية والمالية وكافة الجوانب المتصلة بها ،كما أنها يقع من بين أهدافها تسوية النزاعات

[1] - <http://www.iicra.com>
[2] - < www.icci-oic.org >

التجارية والصناعية من خلال التحكيم ،والتي يُمكن اللجوء إليها لتسوية منازعات المنتجات الحلال نظراً لطبيعة الجوانب المتصلة بعملها والمنسجمة مع الطبيعة الخاصة للمنتجات الحلال في جوانبها التجارية والشرعية .

ثانياً : المؤسسات الفنية والإستشارية :

تتعدد المراكز الدولية التي تقدم أدواراً فنية وإستشارية يُمكن توظيفها في دعم تسوية منازعات المنتجات الحلال ،ويقع من ضمن هذه المراكز بعض المؤسسات التي تقدم أدواراً تتصل إتصالاً مباشراً بالمنتجات من جوانبها الفنية أو التجارية التي نستعرضها فيما يلي:

1-الهيئة الإسلامية العالمية للحلال [1] : وهي إحدى الهيئات التابعة لرابطة العالم الإسلامي وتهدف أساساً إلى تعزيز الإهتمام والإلتزام بتحقيق الإباحة الشرعية في المنتجات الحلال ،وذلك من خلال التعريف بالمنتجات الحلال والتوعية بها وتقديم الإستشارات الفنية اللازمة لذلك ،بالإضافة إلى تحديد الضوابط الشرعية في المنتجات الغدائية والدوائية من خلال الرقابة والإشراف على صناعة الحلال وتقديم الإستشارات اللازمة لتطبيقها ،كما تتولى رسم الآليات الخاصة بمنح شهائد الحلال وفقاً للمعايير الدولية للإصدار ،وإدارة المختبرات الخاصة ببحوث الغداء الحلال ،بالإضافة إلى دعم صناعة الحلال والتقنيات والبرامج المتصلة بها ،وهي بذلك تقدم جوانب تنظيمية وإستشارية هامة يُمكن تطويرها في جانب تسوية المنازعات أو الإستناد إليها كداعم فني للمؤسسة المعنية بتسوية المنازعات.

[1] - <http://www.iiho.org/ar>

2–معهد المعايير والمقاييس للبلدان الإسلامية [1] : وهو إحدى المؤسسات المنتمية لمنظمة المؤتمر الإسلامي ،تم تأسيسه في مايو 2010 ،ويقع مقره في إسطنبول بالجمهورية التركية ،وذلك ضمن إطار مُحاولة المنظمة البحث عن آلية لتوحيد المعايير بين البلدان الإسلامية من خلال اللجنة الدائمة للتعاون الاقتصادي والتجاري (الكومسيك) ،ويهدف المعهد أساساً إلى توحيد المعايير والمقاييس والإختبارات المعملية ونشاطات توحيد المعايير بين الدول الأعضاء وإزالة أي معوقات تجارية تتصل بالمعايير الخاصة بالمنتجات ومتابعتها ،وذلك لإزالة الحواجز الفنية التي تعيق تجارة المنتجات في هذا الجانب من خلال توحيد الأنظمة الخاصة بالإعتماد والإعتراف المتبادل لشهادات المطابقة ، وحيث أن المنازعات حول المنتجات الحلال تنحدر أساساً من عدم وجود معايير ومواصفات فنية إسلامية موحدة تتفق حولها المؤسسات المانحة لشهائد الحلال ،فإن المعهد سوف يُقدم دور فني هام للمؤسسات القائمة بتسوية المنازعات المنتجات ،فضلاً عما يُقدمة للمنتجات ذاتها من خلال توحيد معاييرها على أسس إسلامية موحدة للحد من منازعاتها ،فضلاً عما تُقدمه اللجنة الدائمة للتعاون الإقتصادي والتجاري (كومسيك)[2].

ثالثاً :المؤسسات الإسلامية العالمية :

ونعني بها المؤسسات الإسلامية ذات الإنتشار العالمي ،وهي مؤسسات إلى جانب طبيعتها الإسلامية التي تتفق مع المنتجات الحلال ،فإنها تتواجد في معظم دول العالم وتتمتع بثقة واسعة في كل الدول المضيفة نظراً لما تقدمه من أدوار دعوية وتعليمية وإنسانية ،وهو تتصل بالنظم الداخلية للدول المظيفة بشكل مُباشر ،وهو ما يؤهلها لأن تقدم دور مناسب في تنفيد النظم المتعلقة بالمنتجات الحلال وتسوية منازعاتها

[1] - < www.smiic.org > -

[2] –وهي إحدى اللجان الوزارية المنبثقة عن المؤتمر الإسلامي والهادفة إلى متابعة تطبيق قراراته التجارية
< www.comcec.org>

،خصوصاً من حيث طبيعتها الحكومية التي تُسهل عملية تأسيس مركز متخصص بتسوية منازعات المنتجات الحلال ،و تُرجح بعض المؤسسات التي ترى أهميتها في تأسيس هذا المركز :

1–منظمة التعاون الإسلامي [1] **:(منظمة المؤتمر الإسلامي سابقاً)** : وهي منظمة دولية أنشئت في 25/سبتمبر/1969 بالمملكة المغربية ،وتتخد من جدة بالمملكة العربية السعودية مقراً لها ،وتعتبر ثاني أكبر منظمة حكومية دولية بعد الأمم المتحدة، حيث تضم في عضويتها سبعًا وخمسين دولة ،وترتبط المنظمة بعلاقات تشاور وتعاون مع الأمم المتحدة وغيرها من المنظمات الحكومية الدولية ،كما تعمل ضمن إطارها عدة مؤسسات متخصصة منها البنك الإسلامي للتنمية، والمنظمة الإسلامية للتربية والعلوم والثقافة (الإيسيسكو) ،وتهذف المنظمة إلى تعزيز التعاون التجاري الإسلامي لإنشاء سوق إسلامية مشتركة وذلك من خلال المنظمة ،أو من خلال المؤسسات التابعة لها ،وهي بذلك مؤهلة لأن تُنشئ مركز قادر على تسوية منازعات المتعلقة بالمنتجات الحلال نظراً لما تتمتع به من تواجد في كل الدول الإسلامية أو المعتبرة للنظم الإسلامية بشكل يتيح لها الموائمة بين كل النظم القانونية المحلية في هذه الدول وتسوية المنازعات ،فضلاً عن إمكانية التنسيق لتوحيد النظم القانونية لهذه المنتجات .

2–رابطة العالم الإسلامي [2] : وقد تم إنشاؤها بموجب قرار المؤتمر الإسلامي العام الذي عقد بمكة المكرمة في 18 مايو 1962م ،ويقع مقرها في مكة المكرمة ،وللرابطة دور دعوي وتنسيقي يتمثل في دعم العمل الإسلامي المشترك وتنسيق جهود القائمين به ،بالإضافة إلى بعض الأعمال الإنسانية والإغاثية ،وتتولى أعمالها من خلال عدد من المكاتب والمراكز المنتشرة في عدد من دول العالم ،وتُمثل الرابطة بصفة مراقب في كل من ؛المجلس الاقتصادي والاجتماعي للأمم المتحدة ،ومنظمة المؤتمر الإسلامي و في

[1] - <http://www.oic-oci.org >

[2] - < http://www.themwl.org/web >

منظمة التربية والتعليم والثقافة (اليونسكو) ومنظمة الطفل العالمية (اليونيسيف) ،وتتميز بتواجد عالمي مميز وعلاقات واسعة يُمكن توظيفها للعمل على تأسيس مركز خاص لتسوية منازعات المنتجات الحلال ،أو دعم المؤسسات المعنية بذلك .

3–جمعية الدعوة الإسلامية العالمية [1] : وهي منظمة غير حكومية ،تأسّست عام 1970م بناءً على توصية المؤتمر الإسلامي ويقع مقرّها بالعاصمة الليبية طرابلس ،وتعمل في المجال الديني والثقافي والتربوي ،فضلاً عن جوانب الحوار الديني والتواصل الثقافي والعمل الإنساني ،وتحظى بعضوية عدد من المنظمات الدولية والإقليمية ،كالمجلس الاقتصادي والاجتماعي بالأمم المتحدة، ومنظمة الأمم المتحدة للتربية والثقافة والعلوم "اليونيسكو" ،ومنظمة التعاون الإسلامي ،التي تتولى من خلالها تنفيد عدة برامج مشتركة في عدد من دول العالم بحكم تواجدها ،وهي بذلك تستطيع أن تقدم دور فعال في جانب تسوية المنازعات المعنية بالمنتجات الحلال نظراً لما لها من كوادر متخصصة وتواجدها في عدد كبير من الدول الذي يُتيح لها الإلمام بنظمها وقوانينها المحلية التي تساعد على الإلمام بالنظم الحاكمة للمنتجات الحلال والمساهمة في تأسيس مركز يتولى تسوية منازعاتها .

خاتمة : ننتهي في خاتمة الدراسة إلى أن الوسائل التقليدية لتسوية المنازعات بشقيها القضائي والودي غير قادرة على إستيعاب الجوانب المتصلة بالمنتجات الحلال ،وهو ما يقتضي دراية وإلمام خاص لايُمكن أن يتوفر إلا من خلال عمل مؤسسي ،وذلك بواسطة مؤسسة تحكيم متخصصة في تسوية منازعات المنتجات الحلال تُحيط بكل الجوانب المتصلة بها ،وتكفل خصوصياتها التجارية وضوابطها الشرعية لتحقيق إزدهار هذه التجارة بالإستعانة بالمؤسسات المعنية ذات الصلة المنتجات.

[1] - < http://www.wicsociety.ly/ >

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دور الأعراف والتقاليد القبلية في حل النزاعات في المال المغصوب في الصومال: في ضوء الشريعة الإسلامية

أسمهان علي فارح عثمان[١]
أ.د عارف على عارف[٢]

ملخص البحث:

من أعظم المعاصي التعدي على حقوق العباد، والتي يتولد عنها النزاعات والتطاحن بين الناس؛ وقد وجدنا حلولًا قانونية نظامية وكذلك عرفية تقليدية يُتوقى بها نزاعًا قائمًا أو محتملاً بسبب هذا التعدي. ويعد المجتمع الصومالي من المجتمعات التي لها عادات وأعراف وقيم دينية واجتماعية، فالصوماليون قد سلّموا منذ آلاف السنين بالعدالة العرفية، ومن اللافت للانتباه في الفترة الأخيرة توسع نفوذ العدالة العرفية للفصل في النزاعات وإرجاع الحقوق إلى أهلها لاسيم ا بعد غياب نظام الدولة . يهدف هذا البحث المقتضب إلى تسليط الضوء على المنازعات القائمة بين يدي القضاء الصومالي العاجز، ولاسيما في المال المغصوب إثر الحروب الأهلية، وبيان البدائل التي لجأ إليها المجتمع الصومالي للتحاكم إليها في فصل نزاعاته. وسيظهر خلال هذا البحث مدى اعتماد المجتمع الصومالي على الأعراف القبيلة في فصل منازعاتهم. وقد اعتمدت الباحثة في تناول قضايا هذا البحث على المنهج الوصفي الاستقرائي. ومن أهم المقترحات والحلول لهذه المشكله تقنين الأسس المتبعة من قبل الأعراف القبلية لتسوية المنازعات بين الناس في ضوء عُرفين في الصومال وهما " الحير" و " الجورتي"، ويقترح البحث إنشاء لجنة تضم مجموعة من الشيوخ الفقهاء ومن كوادر القانونيين بحيث تجمع القانون والعرف في فصل النزاع.

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[٢] أستاذ الفقه وأصوله بقسم الفقه وأصول الفقه، كلية معارف الوحي والعلوم الإسلامية، الجامعة الإسلامية العالمية بماليزيا.

الكلمات المفتاحية: المال المغصوب، تسوية النزاعات، الحرب، العرف، الصومال.

المقدمة:

الحمد لله رب العالمين نحمده حمد الشاكرين، ونشكره شكر الحامدين، والصلاة والسلام على رسول الله وعلى آله وصحبه ومن والاه إلى يوم الدين.

أما بعد! إن للصلح أهمية كبيرة في المجتمع خاصةً لمجتمعٍ أكل الحرب أخضرها ويابسها مثل الصومال، وقد تولدت بسبب هذه الحروب النزاعات والخصومات حول الأموال المغصوبة. ثم إن الحكومة المركزية الصومالية قد سقطت فسقطت على إثر ذلك الهيئات القضائية؛ فمن المؤكد أن الناس بحاجة إلى من يُرجعون إليهم حقوقهم بالعدل سواء تم ذلك عن طريق القانون القضائي أو الصلح القضائي أو عن طريق التحكيم التقليدي العرفي، فالمهم إرجاع الحقوق إلى أهلها وأن يعيش الناس في سلام وأمان.

ويعد المجتمع الصومالي من المجتمعات التي لها عادات وأعراف وقيم دينية واجتماعية، تربى عليها كل فرد من أفراد المجتمع منذ نشأته ويكون حريصاً على التمسك بها؛ لأنه يؤمن بأنها تلبي حاجتة وحاجة الجماعة التي ينتمي إليها. ودور القبيلة في المجتمع الصومالي كما له سلبيات فإن له إيجابيات كثيرة؛ فعقب انهيار النظام ظلت القبيلة توفر ولو اليسير من احتياجات أبنائها مثلما ظلت المرجعية الرئيسية لحل الخلافات وإيجاد نظام للتكافل الاجتماعي . ومن خلال هذا البحث ستقوم الباحثة بمحاولة التتبع لمعرفة الأعراف السائدة في المجتمع الصومالي وتحديد أهمية دور هذه الأعراف في حل الكثير من النزاعات خاصةً في الأموال المغصوبة، ولمعرفة دور العادات والتقاليد في حفظ النظام واستقرار المجتمع وإرجاع الحقوق إلى أهلها والذي له دور مهم لابد من تعزيزه.

هيكل البحث:

المبحث الأول: وجهة نظر الشرع حول الأساليب العرفية التقليدية لحل المنازعات

المبحث الثاني: نبذة تاريخية عن المفاهيم العرفية في مجتمع الدراسة

المبحث الثالث: عوامل لجوء الفرد الصومالي إلى التحكيم العرفي التقليدي

المبحث الأول:

وجهة نظر الشرع حول الأساليب العرفية التقليدية لحل المنازعات

ويتضمن هذا المبحث من خمس مطالب:

المطلب الأول: الصلح في نظر الشرع

تعريف الصلح:

ورد عدة تعاريف عن الصلح في اللغة ولاصطلاح الفقهي منها:

أولاً: تعريف الصلح في اللغة : يقال صلح الشيء، وصلح صلوحاً، فهو صالح: من الصلاح الذي هو خلاف الفساد، قال ابن فارس:" الصاد واللام والحاء أصل واحد يدل على خلاف الفساد. يقال صلُح الشئُ يصلح صلاحًا"[٣].

[٣] أحمد بن فارس بن زكريا، **معجم مقاييس اللغة**، ج3، ص303.

وقال الراغب: الصلاح ضد الفساد، وهما مختصمان في أكثر الاستعمال بالأفعال، والصلح يختص بإزالة النقار بين الناس، ومنه يقال: اصطلحوا وتصالحوا. قال تعالى: ﴿ أَن يُصْلِحَا بَيْنَهُمَا صُلْحًاۚ وَالصُّلْحُ خَيْرٌ﴾[النساء:128]، ﴿**وَإِن تُصْلِحُوا وَتَتَّقُوا**﴾[النساء: 129]، ﴿**فَأَصْلِحُوا بَيْنَهُمَا**﴾[الحجرات:9][٤].

وعلى هذا فالمراد بالصلح عند أهل اللغة: إزالة الفساد الواقع بين الناس وذلك بالمسالمة بعد المنازعة، والاتفاق بعد الاختلاف، ومن ثم فهو يختص بإزالة النقر بين الناس، لتحقيق الخير والصلاح بعد الشر والفساد[٥].

ثانيًا: تعريف الصلح عند الفقهاء: لقد اختلف الفقهاء في المراد من الصلح لاختلاف مقاصده عندهم:

فذهب الأحناف إلى :"أن الصلح عبارة عن عقد وُضع لرفع المنازعة"[٦].

وقال ابن عرفة المالكي:" أنه انتقال عن حق أو دعوى بعوض لرفع نزاع أو خوف وقوعه"[٧].

وعرفه النووي فقال: "أنه عقد يحصل به قطع النزاع"[٨].

وذهب ابن قدامة الحنبلي إلى أنه معاقدة يتوصل بها إلى الإصلاح بين المختصمين[٩].

والراجح من التعريفات: هو تعريف ابن عرفه لدقة تعريفه؛ حيث بين فيه أن رفع النزاع في الصلح يكون بالتنازل عن بعض الحق، وليس باستيفاء كل الحق الذي هو موضوع الحكم والقضاء[١٠]. وهذا التعريف هو الذي يخصنا هنا؛ حيث ذكر أن طريقة العرف في الصلح بعد حصول النزاعات بين الناس أو الخشية من وقوعها أي قبل حصولها فيأتي هنا

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[٤] الحسين بن مُحَمَّد الراغب الأصفهاني، **المفردات في غريب القرآن**، ص373.

[٥] يُسري عبد العليم عجُّور، **الصلح في ضوء الكتاب والسنة**، ص32.

[٦] كمال الدين مُحَمَّد بن عبد الواحد السيواسي المعروف بابن الهمام، **شرح فتح القدير**، ج8، ص423.

[٧] أحمد بن مُحَمَّد الخلوتي، الشهير بالصاوي المالكي، **حاشية الصاوي على الشرح الصغير**، ج3، ص405.

[٨] زكريا بن مُحَمَّد بن زكريا الأنصاري، شهاب أحمد الرملي،مُحَمَّد بن أحمد الشوبري، **أسنى المطالب في شرح روض الطالب وبهامشه حاشية الرملي تجريد الشوبري**، ج2 ،ص214.

[٩] موفق الدين ابن قدامة، **المغني، ج7، ص6**.

[١٠] يُسري عبد العليم عجُّور، **الصلح في ضوء الكتاب والسنة**، ص 33.

الصلح ويمنع ذلك، أما التعاريف الأخرى فقد ركزت أكثر في الصلح الذي يحصل بين المتعاقدين على البيع وغيره أي في العقود. وقال أيضًا ابن جرير الطبري، وابن عاشور "أن الصلح يمكن أن يتم قبل وقوع النزاع وقاية، وذلك بتوقي منازعة محتملة الوقوع وهو ما نص عليه القرآن الكريم في قوله تعالى: ﴿ **فَمَنْ خَافَ مِن مُّوصٍ جَنَفًا أَوْ إِثْمًا فَأَصْلَحَ بَيْنَهُمْ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ** ﴾ [البقرة: 182].

المطلب الثاني: تعريف الصلح في النظام الصومالي

عرف القانون المدني الصومالي الصلح في المادة:(512) بأنه" عقد يحسم به الطرفان نزاعًا قائمًا أو يتوقيان به نزاعًا محتملاً، وذلك بأن ينزل كل منهما على وجه التقابل عن جزء من ادعائه"[١١].

كما ذكر القانون المدني الصومالي في مادتي (513،514) أركان الصلح كالتالي:-

يشترط فيمن يعقد صلحًا أن يكون أهلاً للتصرف بعوض في الحقوق التي يشكلها عقد الصلح.

لا يجوز الصلح في المسائل المتعلقة بالحالة الشخصية أو بالنظام العام. ولكن يجوز الصلح على المصالح المالية التي تترتب على الحالة الشخصية، أو التي تنشأ عن ارتكاب إحدى الجرائم.

المطلب الثالث: مشروعية الصلح في الكتاب والسنة والإجماع:

لقد ثبت الصلح في القرآن الكريم والسنة المطهرة وإجماع الأمة على النحو التالي:

أما الكتاب:

فيقول سبحانه وتعالى: ﴿ **لَّا خَيْرَ فِي كَثِيرٍ مِّن نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ ۚ وَمَن يَفْعَلْ ذَٰلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا** ﴾[النساء:114]، والآية فيها دلالة على

[١١] القانون المدني الصومالي، رقم: 37/ الصادر يونيو لعام1973م، ص125.

فضل الصلح في كل شيء يقع فيه النزاع والتخاصم بين المسلمين، ويقول ابن رشد في هذا الصدد:" فالإصلاح بين الناس فيما يقع بينهم من الخلاف والتداعي في الأموال وغيرها من نوافل الخير المرغب فيها المندوب إليها"[١٢].

وكما يقول القرطبي أيضًا في قوله تعالى: ﴿ **أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ** ﴾، عام في الدماء والأموال والأعراض، وفي كل شيء يقع التداعي والاختلاف فيه بين المسلمين، وفي كل كلام يراد به وجه الله تعالى"[١٣].

وقولة تعالى:﴿ **وَلَا تَجْعَلُوا اللَّهَ عُرْضَةً لِّأَيْمَانِكُمْ أَن تَبَرُّوا وَتَتَّقُوا وَتُصْلِحُوا بَيْنَ النَّاسِ وَاللَّهُ سَمِيعٌ عَلِيمٌ** ﴾[البقرة: 224]، وقوله تعالى: ﴿ **فَمَنْ خَافَ مِن مُّوصٍ جَنَفًا أَوْ إِثْمًا فَأَصْلَحَ بَيْنَهُمْ فَلَا إِثْمَ عَلَيْهِ ۚ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ**﴾[البقرة:128].

أما في السنة:

فقد قال الرسول ﷺ:" كل سُلامى من الناس عليه صدقة، كل يوم تطلع فيه الشمس يعدل بين الناس صدقة"[١٤].

وقال الرسول ﷺ:" ليس الكذاب الذي يصلح بين الناس ينمي خيرًا أو يقول خيرا"[١٥].

وعن أبي هريرة ﷺ قال رسول الله ﷺ:" الصلح جائز بين المسلمين" وفي رواية" إلا صلحًا حرم حلالاً أو أحل حرامًا" وزاد: والمسلمين على شروطهم إلا شرطًا حرم حلالاً أو أحل حرامًا"[١٦].

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[١٢] مُحَمَّد بن أحمد بن رشد القرطبي أبو الوليد، **المقدمات الممهدات**، ج2، ص151.

[١٣] القرطبي، **الجامع لأحكام القرآن**، ج5، ص384.

[١٤] البخاري، **صحيح البخاري**، كتاب الصلح: باب فضل الإصلاح بين الناس والعدل بينهم. ص 71.

[١٥] البخاري، **صحيح البخاري**، كتاب الصلح: باب ليس الكاذب الذي يصلح بين الناس، ص354.

[١٦] مُحَمَّد علي الشوكاني، **نيل الأوطار من أسرار منتقى الأخبار** ص269– 405؛ رواه أبو داود وأبن ماجه والترمذي، وقال الترمذي: هذا حديث حسن صحيح.

أما بالإجماع:

ثبتت مشروعية الصلح بالإجماع؛ لدى جمهور الفقهاء، وإن كان بينهم بعض الاختلاف في بعض صوره[١٧].

المطلب الرابع: حكم الغصب في الفقه الإسلامي

للغصب أحكام ثلاثة: الإثم لمن علم أنه مال الغير، ورد العين المغصوبة مادامت قائمة، وضمانها إذا هلكت وفيما يلي التفصل:-

١ - الحكم الأول- الإثم: وهو استحقاق المؤاخذة في الآخرة، إذا فعل الغصب عالمِا أن المغصوب مال الغير؛ لأن ذلك معصية، وارتكاب المعصية عمدًا موجب للمؤاخذة، قال ﷺ« من غصب شبراً من أرض، طوقه الله تعالى من سبع أرضين يوم القيامة»[١٨].

فعند المالكية أنه " يجب على الغاصب حقان: أحدهما: حق لله تعالى، وهو أن يضرب ويسجن، زجرًا له ولأمثاله؛ على حسب اجتهاد الحاكم"[١٩]. أما عند الحنفية :" فحكمه الإثم لمن علم أنه مال الغير... وحكمه لغير من علم أنه مال الرد أو الغرم فقط دون الإثم " [٢٠]. وعند الشافعية:" الإجماع على أن من فعله مستحلاً: أي وهو ممن لا يخفى عليه تحريمه كان كافراً، ومن فعله غير مستحلّ كان فاسقاً" [٢١]. وعند الحنابلة يقول الشيخ ابن عثيمين في كتابه الشرح الممتع:" ولم يُفصح المؤلف – رحمه الله- بحكمه الشرعي، وحكمه الشرعي أنه حرام ... وإذا كان في حق اليتامى ونحوهم من القُصّار صار أشد إثماً... قد لا نجزم أنه من كبائر الذنوب ونقتصر على ما ورد فيه . ضمان الشيء الذي

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[١٧] ابن قدامه، **المغني**، ج7،ص6؛ الشربيني، **مغني المحتاج**، ج2، ص180؛ الصاوي المالكي، **الشرح الصغير**،ج3، ص405؛ أبو إسحاق برهان الدين، **المبدع شرح المقنع**، ج4، ص378.

[١٨] أخرجه البخاري في **صحيحه**، في كتاب المظالم، باب إثم من ظلم شيئاً من الأرض، رقم2320.

[١٩] مُحَمَّد بن أحمد بن جزي الغرناطي، **القوانين الفقهية**، ص496.

[٢٠] مُحَمَّد أمين الشهير بابن عابدين، **رد المحتار على الدرّ المختار شرح تنوير الأبصار**، ج9، ص263.

[٢١] الشربيني، **مغني المحتاج**، ج3، ص335.

يمكنه أن يتخلص منه برده إلى ما كان في يده وعبارتهم فيه: " الغاصب ضامن لما غصبه، سواء تلف بأمر الله، أو من مخلوق"[٢٢].

وكيفية الضمان أو قاعدته: أنه يجب ضمان المثل باتفاق العلماء إذا كان المال مثليًا، وقيمته إذا كان قيمياً، فإن تعذر وجود المثل وجبت القيمة للضرورة[٢٣].

أما ضمان المثل فلقوله تعالى: ﴿ **فَمَنِ اعْتَدَىٰ عَلَيْكُمْ فَاعْتَدُوا عَلَيْهِ بِمِثْلِ مَا اعْتَدَىٰ عَلَيْكُمْ ۚ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ مَعَ الْمُتَّقِينَ**﴾ [البقرة: 194]، **وقولة تعالى:** ﴿ **وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا ۖ فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ ۚ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ** ﴾[الشورى:40]، "ولأن المثل تمامًا أقرب إلى الأصل التالف، فكان الإلزام به أعدل، وأتم لجبران الضرر، والواجب في الضمان الاقتراب من الأصل بقدر الإمكان تعويضًا للضرر، وأما ضمان القيمة فلأنه تعذر الوفاء بالمثل تمامًا صورة ومعنى، فيجب المثل المعنوي وهو القيمة؛ لأنها تقوم مقامه، ويحصل بها مثله، واسمها ينبئ عنه"[٢٤].

وذهب جمهور الفقهاء إلى أن أحكام الغصب تجري في العقار إذ يمكن غصبه، ويجب الضمان على الغاصب[٢٥]، وخالف في ذلك أبو حنيفة وأبو يوسف[٢٦].

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[٢٢] القوانين الفقهية: ص331.

[٢٣] وهبة الزحيلي، **الفقه الإسلامي وادلته**، ص720.

[٢٤] نفس المرجع.

[٢٥] انظر: الدسوقي، **الشرح الكبير**، 443/3، ابن الرشد، **بداية المجتهد**، 311/2، **ومغني المحتاج**،275/2، ابن قدامه، **المغني**، 223/5، وكشف القناع83/4.

[٢٦] الموسوعة الفقهية الكويتية، باب غصب العقار، ج30، ص196.

المطلب الخامس: آثار غصب الأموال العامة والخاصة (الأراضي والعقارات) في المجتمع الصومالي

وهو ما يمكننا أن نطلق عليه التكلفة التي يتكبدها الفرد والمجتمع من إنتشار آفة جريمة الغصب فهذه التكلفة ليست فقط مادية وإنما هي مجموعة من الآثار السلبية التي تدمر الإنسان والمجتمع على مختلف الأصعدة؛ وأثرها على الأفراد ظاهرة، وذلك بالاستيلاء على أموالهم، ومدخراتهم، ومقدراتهم، وأما آثارها على المجتمع فمن خلال عدة جوانب وهي كالتالي:

أولاً: الآثار السلبية على الجانب الاجتماعي:

تؤدي جريمة الغصب إلى تبديل معايير المجتمع الاجتماعية، ليكون معيار المجتمع، وشعاره أكل حق الغير بالذراع والظلم والاستبداد، ومن الآثار التي تتولد منها هذه الظاهرة أيضًا التالي:

- تأثر الجاني والمجني عليه بسبب هذه الظاهرة ؛ وذلك أن المغصوب يتضرر نفسيًا ومادياً مما يأثر في مساهمته في المجتمع الذي ينتمي إليه. أما الغاصب فيصبح منبوذاً في المجتمع بالإضافة إلى معاناة أسرته مادياً ومعنويًا،كما سيفقد تواصله الاجتماعي بعد انقضاء عقوبته.
- إنتشار الغصب يمثل تهديدًا للقيم السائدة والمنشودة في المجتمع.
- يؤثر في الاستقرار الأسري بحيث تصبح الأسرة بلا مؤى ولاسكن بسبب غصب بيوتها فتكون عالة على المجتمع والدولة.
- إن البنية الاجتماعية الصومالية مبنية على أساس قبلي وهي أس الحروب الراهنة في الصومال مما يعني جريمة الغصب سوف تُفاقم الأزمات بين هذه القبائل.
- يساهم في انتشار الفقر والفساد ولغة السلاح.

ثانيًا: الآثار السلبية على الجانب التنظيمي:-

ينتج عن جريمة غصب الأموال العامة والخاصة عدة آثار سلبية على الجانب التنظيمي منها:

– فقدان ثقة المواطن بالأنظمة الرسمية، وفاعليتها في تحقيق الأهداف العظيمة التي أنشئت من أجلها مثل تحقيق الأمن والعدل.

– ضعف أوتلاشي الأمل في إصلاح المجتمع خاصةً في مجتمع أنهكته الحروب.

– إهدار القوانين واللوائح، وعدم الالتزام بها، لثبوت عدم جدواها في الحد من ظاهرة غصب حقوق الناس.

ثالثاً الآثار السلبية على الجانب الاقتصادي:

في الواقع الاقتصادي والمعيشي، يُعد الصومال من الدول التي تعاني الفقر والجوع بسبب الحروب والظواهر الطبيعة مثل قلة الأمطار، ويقع الصومال على هذا الصعيد في ذيل قائمة دول العالم ومناطقه على الإطلاق ، وبالتالي فإن انتشار جريمة الغصب في الصومال يؤدي إلى إزهاق للجانب الاقتصادي من خلال:

– انتشار البطالة والفقر؛ وذلك بسبب قيام نزاع مستمر حول هذه العقارات فيتم تعطيلها وعدم استغلالها.

– فقدان الاستثمارات الأجنبية، وعدم الثقة بالاستثمارات الداخلية ، بسبب الخوف من أن تكون هذه الأموال مغصوبة من شخص ما فيطالبها فتنشأ من ذلك منازعات لا حل لها.

– واغتصاب الأراضي العامة يعود بأثر سلبي على نمو المخططات السكنية النظامية، وتراجع عمليات البيع والشراء في سوق العقار النظامي بسبب تزايد نزاعات الغصب الحاصلة في العقارات.

– إن إتنشار جريمة الغصب في المجتمع يقابله الحاجة إلى نشر مزيد من التوسع في الأجهزة الأمنية والقضائية مما ينعكس ذلك سلباً على النواحي الاقتصادية والتنمية الاجتماعية التي تحتاج إلى إنفاق مستمر على خدماتها وهذا ما لا تستطيع الحكومة الصومالية الجديدة تكبُّد عناء ذلك.

الآثار السلبية على الجانب الأمني:

ومن الآثار الأمنية التي يخلفها غصب الأموال العامة والخاصة تزايد الخصومات الممقوتة التي هددت أمن المجتمعات وأحدثت الاضطراب فيها، وبث الفوضى في أرجائها. ومن أفضع الأضرار الأمنية المترتبة على الغصب؛ سفك الدماء والتقاتل بين أفراد القبائل مما يؤدي إلى نشر الفساد في الأرض والذي حرمه الله في كتابه العزيز.

وأخيراً ونظرًا لكون جريمة غصب الأموال العامة والخاصة من العقارات والأراضي منتشرة في المجتمع الصومالي ويسعى لتقويض بنيانه، وهدم أخلاقياته ولكون الآثار السلبية الناجمة منه كثيرة على الجانب الاجتماعي، أو النظام الاقتصادي وغيرهما مما ذكرناه أعلاه، فإنه لابد من السعي لمعالجة هذه الجريمة، والحد من انتشاره، وترى الباحثة أن الأساليب العلاجية التي لابد من تفعيلها ما يلي:

١ -سن نظام خاص بهذه الجريمة يحدد نوعية الجريمة وبيان عقوبتها، وإنشاء مركز تُجمع فيه الشكاوي خاصة في ما يتعلق بأمور الغصب حتى يتبين نسبة معاناة الناس من هذه الجريمة فتُحل مبكرًا قبل تفاقمها.

٢ -توعية المجتمع بكل شرائحه بخطر جريمة الغصب من خلال وسائل الإعلام المتنوعة، وشهر أسماء المتورطين في هذه الجريمة زجرًا لهم، وردعًا لأمثالهم.

٣ -نشر الوعي الديني، وتنمية الوازع الرقابي عند الأفراد بزرع الخوف من الله، وحرمة مال المسلم، وعدم الاستيلاء عليه إلا برضى صاحبه.

٤ -تناول مناهج الدراسة لهذا الموضوع، وأشباهه تحذيراً، وتنذيراً، وتربيةً على الأخلاق الفاضلة، واحترام حقوق الآخرين، وأموالهم.

٥ -تشديد العقوبات الجزائية على الغاصبين والمتعدين على حقوق الغير.

٦ -تطهير المؤسسات القضائية من الفساد حتى يتم إعادة الحقوق المغصوبة بالعدل والإنصاف بين الطرفين الغاصب والمغصوب منه.

٧ إنشاء لجنة متكونة من علماء الشريعة والقضاة لنظر في قضايا غصب الأموال والخروج بحلول فعّالة لإرجاع الحقوق إلى أهلها للحد من الآثار السببة الناتجة من ظاهرة غصب الأموال.

٨ التوجه إلى التحكيم العرفي المنتشر بين المجتمع لحل النزاعات القائمة بهذا الصدد.

المبحث الثاني: نبذة تاريخية عن المفاهيم العرفية في المجتمع الصومالي

من المفاهيم العرفية في حل المنازعات ما يلي:

المطلب الأول: مفهوم الحير

الحير في اللغة: حارَ يحَارُ وحَيراً وحَيرانًا وتَحَيّر واستَحارَ: نظر إلى الشيء، فغشي عليه، ولم يهتد لسبيله، فهو حيران وحائر، والحائر: مجتمع الماء، والمكان المطمئن، والبستان، وتحير الماء: دار واجتمع، والحَيرُ: شِبهُ الحظيرة أو الحمى[٢٧].

يقول الراغب الأصفهاني: والحيرة: موضع، قيل سُمي بذلك لاجتماع ماء كان فيه[٢٨].

ومما نستخلصه من التعريف اللغوي أن الحير هو التحير في أمر ما أو إجتماع شيئ ما في موضع معين وهذا ما يعنينا في بحثنا وهو أن شيوخ العشيرة في الصومال يجتمعون تحت شجرة على شكل حلقة لإيجاد حلول لأمر ما حيرهم أو لفصل النزاعات بشكل عام لذا سمي هذا الاجتماع بالحير.

الحير اطصلاحاً: هو نظام قانوني يستمد شرعيته من الأحكام العرفية والقوانين المعروفة بين العشائر وليس هناك أي وكالة أو هيئة أو جهة احتكارية معينة توضح ماهية القانون والحكم المتبع في حالة قضائية معينة، ويُعتبر "الحير" نظاما

[٢٧] الفيروز آباديّ، **القاموس المحيط**، ص382.

[٢٨] الراغب الأصفهاني، **مفردات غريب القرآن**، ص263-264.

قانونيًا ابتدع وازدهر في الصومال منذ القرن السابع للميلاد إذ لا يوجد أي دليل على وجوده أو تطوره في أي مكان آخر كما لا يوجد أي دليل على تأثره بأي قانون سواء كان وضعياً أو عشائرياً أجنبياً على الإطلاق ولعل خلو المصطلحات القانونية من أي دخائل لغوية دليل قاطع على أن "الحير" هو قانون داخلي صومالي برمته ، ويتسم هذا النظام بأنه قد تختلف تطبيقاته بين القبائل، بل من سنة لأخرى، ومن حدث لغيره، ومن مبادئ وقوانين هذا النظام التالي[٢٩]:

- دفع الدية في الجرائم الموجهة ضد الأفراد مثل التشهير والسرقة والإيذاء الجسدي والاغتصاب والقتل، بالإضافة لتقديم العون ماديا ومعنويا لأهالي الضحية لفترة زمنية معينة.
- الحض على إقامة علاقات جيدة وإرساء روح الإخاء داخل العشيرة الواحدة بالإضافة للعشائر بعضها البعض وذلك عن طريق حسن معاملة النساء والتفاوض مع مبعوثي السلام من العشائر الأخرى بصدق وحسن نوايا بالإضافة إلى الحرص على حياة المؤمنين على أرواحهم من الأطفال والنساء وأهل الدين والشعراء والأدباء والضيوف.
- الحرص على إقامة الالتزامات العائلية مثل دفع المهور عند الزواج كذلك تنفيذ عقوبات النشوز.
- وضع القوانين المنظمة لاستخدام الموارد بأنواعها المختلفة مثل المراعي والمياه وباقي الموارد الطبيعية الأخرى.
- توفير العون المادي للنساء حديثي الزواج وكذلك حديثي الإنجاب.
- مساعدة الفقراء والمحتاجين عن طريق منحهم الدواجن الحية لتربيتها والاستفادة منها.

[٢٩] موسوعة التكامل الاقتصادي العربي الأفريقي، **المؤشرات الاقتصادية لجمهورية الصومال**، 2014م، <41http://www.enaraf.org/page/> تاريخ الإطلاع: 16-3-2017م، وأنظر: تقرير الخبير المستقل المعني بحالة حقوق الإنسان في الصومال" ص13

المطلب الثاني: مفهوم الجورتي

الجورتي في اللغة: الجور: نقيض العدل، وضد القصد، والجارُ: المجاورُ، والذي أجرته من أن يظلم.

ويقول الرغب الأصفهاني: " وقد تصور من الجار معنى القرب، فقيل لمن يقرب من غيرة: جاره، وجاوره. وباعتبار القرب قيل: جار عن الطريق، ثم جعل ذلك أصلاً في العدل عن كلّ حق، فَبُني منه الجور، قال تعالى: ﴿ وَمِنْهَا جَائِرٌ﴾[النحل:9]، أي عادلٌ عن المحجّة، وقال بعضهم: الجائر من الناس: هو الذي يمتنع من التزام ما يأمر به الشرع[٣٠].

لا يمكننا أن نجزم أن المعنى اللغوي يوضح المقصود من كلمة الجورتي في المصطلح الصومالي، ولكن ترى الباحثة أن هناك تقارب في المقصد فبما أن من المعاني اللغوية لكلمة الجور تعني الجار أي القرب لذا فإن الجورتي هو آلية مهمة لإشراك جميع أفراد مجتمع الصومال وتقريبه من بعض وحل نزاعاته بهذه الوسيلة، فقد كان الجورتي أداة في إعادة بناء البلاد بعد أن فرقته النزاعات القبلية في الحرب.

الجورتي إصطلاحاً: يعرف الجورتي بأنه عبارة عن منتدى تقليدي للشيوخ من أجل الوساطة أُنشئ إثر مؤتمر الشيوخ في بوراما وهي محافظة في الصومال في عام 1993م وهذا المجلس مكون من 82 عضواً. ومنذ زمن بعيد كان هذا المجلس وسيلة لتسوية النزاعات ، وقد اعتاد الشيوخ الاجتماع تحت ظل شجرة السنط للتحكيم في النزاعات مستخدمين عملية قانونية عرفية معروفة في الصومال باسم" أكسير". وتقوم الأطراف المتنازعة بعرض مشاكلها على الشيوخ حيث تتواصل المباحثات إلى أن يتم التوصل إلى قرار[٣١].

[٣٠] الراغب الأصفهاني، الحسين بن مُحَمَّد، **مفردات غريب القرآن**، ص211.

[٣١] مقالة في شبكة الأنباء الإنسانية (إيرن)، بعنوان: جدل حول إصلاح مجلس الشيوخ في أرض الصومال، تاريخ2013م، (تاريخ المشاهدة، 1-5-2017م. < http://www.irinnews.org/ar/report/3812>

المبحث الثالث: عوامل لجوء الفرد الصومالي إلى التحكيم العرفي التقليدي

لكون الباحثة فرد من أفراد مجتمع الدراسة ومن خلال معايشتها واقع المجتمع وجدت أن هناك عدة أسباب أدت إلى لجوء الفرد الصومالي للتّحكيم العرفي التقليدي وقبل أن نسرد ذلك سوف نتناول بعض التقارير المهمة الصادرة لأعوام مختلفة من قبل منظمة الأمم المتحدة المختصة في وصف الأحوال الراهنة في الصومال؛ فمما ورد في هذه التقارير الصعوبات التي تواجهها المحاكم الصومالية الحالية في الفصل في القضايا المتعلقة في النزاعات الحاصله بسبب غصب الأراضي والعقارات، فتحاول الباحثة تسليط الضوء على الكلمات المفتاحية في هذه التقارير التي تبين الأسباب التي أدت بالمجتمع الصومالي إلى صرف النظر عن المحاكم النظامية والتوجة إلى التحكيم العرفي.

المطلب الأول: تحليل تقارير تشير إلى صعوبة حل النزاعات المتعلقة بغصب الأراضي والعقارات بعد الحرب الأهلية

إن من أهم القضايا المعروضة في المحاكم الصومالية هي قضايا النزاع حول ملكية الأراضي والممتلكات الخاصة المغصوبة، فهذا ما تم ذكرة وتوثيقة في تقارير الأمم المتحدة عن الصومال كالآتي:

التقرير الأول الخبيرة المستقلة تقول" تعتبر قضايا النزاع حول ملكية الأراضي والممتلكات الخاصة المغصوبة من أكثر القضايا صعوبة أمام القضاء الصومالي منذ أن تم إعادة تفعيل المؤسسات القضائية في مرحلة ما بعد الحرب الأهلية في البلاد، وقد يطول النزاع بعض الأحيان دون البت عبر الوسائل الشرعية مما يؤدي إلى اللجوء إلى العنف واستخدام السلاح الناري في كثير من الأحيان"[٣٢].

تحليل التقرير الأول: أهم المعطيات المستفادة من توثيق هذا التقرير التالي:

[٣٢] تقرير وطني مقدم وفقًا للفقرة 5 من مرفق قرار مجلس حقوق الإنسان، ص9.

"إعادة تفعيل المؤسسات القضائية": معنى هذا أن المؤسسات القضائية كانت غير مفعلة من قبل بسبب سقوط الحكومة المركزية الصومالية لمدة عقدين من الزمن، كما نستنبط أيضا عند ركود الشيء لفترة طويلة ويتم تفعليه من جديد وهذا معناه أنه سوف تبرز مشاكل كثيرة في هذا المجال؛ فمنها: بروز قلة الخبرة في إمكانية إيجاد حلول للفصل في نزاعات قضايا الأموال المغصوبة لأنها ببساطة لم يتم الفصل فيها من قبل فهي مشكلة جديدة، وعدم توفر كوادر أكفاء من قضاة ومحامين بالإضافة إلى ذلك وجود مشاكل في فعالية النظام القضائي ومصداقيته واستقلاليته. والنقطة الثانية أن كمية القضايا المتعلقة بهذا الموضوع كثيرة ومن الصعوبة بمكان استيعابها في هذه المحاكم الصغيرة والجديدة الخبرة.

"وقد يطول النزاع بعض الأحيان دون البت عبر الوسائل الشرعية": يعنى أن هذه القضايا سوف تمكث في أدراج المحاكم لفترة طويلة ولا يتم الفصل فيها في وقت وجيز؛ لعوامل سلبية كثيرة. والملاحظ على عبارة: " عبر الوسائل الشرعية" تدلنا على أن هناك وسائل غير شرعية ونظامية يلجأ إليها المواطن الصومالي لاسترجاع حقه؛ على سبيل المثال اللجوء إلى التحكيم العرفي، هذا إن كان شخصًا مسالما، فإن لم يكن فسوف يلجأ إلى العنف كما بين ذلك التقرير السابق وهذا مؤشر خطير قد يؤدي استمرار العنف والحرب بين الناس بسبب هذه القضايا لعدم الفصل فيها في وقت وجيز.

والتقرير الثاني يقول:" إن ملكية الأراضي مسألة بالغة الحساسية والتعقيد في الصومال، وخاصةً في مقديشو. فقد أسفر الاندفاع للحصول على الأراضي في أنحاء المدينة عن عدة نزاعات. وكثير من الأراضي المميزة متنازع عليها نظرًا للاستيلاء على أجزاء كبيرة من الأراضي خلال الحرب الأهلية في عام 1991 وعودة الملاك السابقين للمطالبة بها، ومقاومة الغاصبين، ولم تنشيء الحكومة الصومالية حتى الآن هيئة قانونية لتناول هذه المسألة. وتدعي المحاكم المحلية في مقديشو أنها مثقلة بالأعباء نتيجة حجم القضايا ومدى تعقيدها. ومما يزيد المشكلة هو عدم وجود وثائق يمكن

الاعتماد عليها ويمكن استخدامها للتحقيق من الملكية الصحيحة للأراضي والفصل فيها نظرًا لسنوات غياب الحكم المركزي ولأن هناك تاريخًا من الملكية الجماعية للأراضي"[٣٣].

تحليل التقرير الثاني: المعطيات المستفادة من توثيق هذا التقرير كالتالي:

إن أكثر الأماكن التي تحوي نزاعات الأراضي المغصوبة هي عاصمة الصومال مقديشو.

أنه تم الاستيلاء أو غصب هذه الأراضي في فترة الحرب الأهلية.

بعد عودة ملاك هذه الأراضي من مناطق داخلية أو من الغربة طالبوا بإرجاع حقوقهم.

مقاومة الغاصبين لهذه الأراضي ورفضهم إرجاع حقوق الآخرين لأسباب عدة يطول شرحها وهنا ليس مجالها.

اعتراف المحاكم بعدم قدرتها على استيعاب الكمية الهائلة من هذه القضايا، وعدم قدرتها للفصل فيها للتعقيدات الكثيرة لهذه القضايا.

عجز الحكومة الصومالية عن إيجاد حلول قانونية فعالة ومناسبة أو اتخاذ خطوة إيجابية نحو هذه المعضلة لضعف سُلطاتها في أنحاء البلاد.

وأكبر مشكلة تواجهها المحاكم الصومالية هي عدم توفر وثائق لكلا المتنازعين بحيث يمكن الاعتماد عليها ليتم الفصل في هذه القضايا؛ وذلك بسبب الحروب المدمرة لكل شيء وهروب الناس من مساكنهم.

وهناك مشكلة أخرى وهي وجود ملكيات جماعية بسبب القوانين الاشتراكية المفروضة في عهد الرئيس زياد بري حيث أنه ألغى حقوق الملكية الخاصة وفرض حقوق الملكية الجماعية.

[٣٣] بهام توم نياندوغا، تقرير الخبير المستقل المعني بحالة حقوق الإنسان في الصومال ص10؛ وانظر: International Organization for Migration, Department of Operations and Emergencies, Dimension of Crisis on Migration in Somalia, Working Paper February 2014(Geneva), p.25.

ويقول التقرير الثالث أنه :" أصدرت المحاكم الصومالية عدداً من الأحكام المهمة التي استشهدت بشكل مباشر بنصوص دستورية وقوانين وطنية أخرى. تشمل هذه الأحكام أحكاماً صادرة عن اللجنة الوطنية للنظر في شكاوى الأراضي بهدف ردّ حقوق الملكية إلى أصحابها الشرعيين الذين فقدوا ملكيتهم بحكم الواقع بسبب وضعهم كأقليات أو لافتقارهم إلى الموارد. وتُستخدم في ذلك، مؤقتًا، معلومات تسجيل الأراضي التي جُمعت قبل عام 1990 وإفادات الشهود"[٣٤].

تحليل التقرير الثالث : المعطيات المستفادة من توثيق هذا التقرير التالي:

محاولة المحاكم إصدار الأحكام في قضايا الأموال المغصوبة؛ وهذا جهد طيب وتطور فعال فمع وجود تحديات وصعوبات تواجهها المحاكم إلا أنها تحاول إصدار الأحكام ولكن هناك صعوبات أخرى تحول دون تنفيذ هذه الأحكام من أهمها ضعف سلطة الحكومة ونفوذها في البلاد وبالتالي هناك صعوبات جمة تحول دون تنفيذ القوانين بشكل فعال.

تشمل هذه الأحكام أحكاماً صادرة عن اللجنة الوطنية[٣٥]: التي من مهامها إعادة الممتلكات المغصوبة إلى أصحابها.

إن أصحاب هذه الممتلكات فقدوها بسبب الحروب الأهلية في الصومال ولم يستطيعوا استرجاعها بسبب فقدانهم للوثائق التي تثبت حقهم في ممتلكاتهم.

وأن أصحاب الحقوق المالية المغصوبة يستندون على وثائق تسجيلات الأراضي التي هي في يد موظفي الحكومة الصومالية السابقين فيجدون صعوبة في بعض الأحيان للوصول إليها.

[٣٤] تقرير وطني مقدم وفقًا للفقرة 5 من مرفق قرار مجلس حقوق الإنسان 16/ 21، (الدرة الرابعة والعشرون، 18-29 يناير-216م)، ص9.

[٣٥] " اللجنة الوطنية" هي لجنة مشكلة من أعضاء يمثلوا جميع القبائل الصومالية، أُنشأت على إثر توصيات مؤتمر المصالحة الوطنية المنعقدة في عاصمة إثيوبيا " أدس أبابا" في عام1993م، ومن ضمن مهام هذه اللجنة إعادة الممتلكات وتسوية المنازعات. أنظر: موسوعة المقاتل، المبحث السادس، جهود المصالحة الوطنية. <http://www.moqatel.com> (شوهد في 1 مايو 2017م).

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" ومع تدهور الثقة بالجهاز القضائي النظامي، فإن النظام التقليدي وخاصة مع تعاظم قوة العشائر أخذ يكتسب زخماً، وبما أن الصوماليين عموما هم شعب من الرُّحَّل فقد وفر لهم النظام التقليدي طريقة أكثر كفاءة لحل المنازعات، ويقوم جوهر النظام التقليدي على التعويض المادي عن الأخطاء المرتكبة، والنظام يعمل بسرعة وتطبيقه فوري، كما أن تطبيق أحكام الشريعة الإسلامية أخذ يكتسب زخمًا في قضايا الأحوال الشخصية"[٣٦].

بالإضافة إلى ما سبق ذكره في التقرير أعلاه **ترى الباحثة بناءً على** استقرائها، ومعايشتها لحالة المجتمع الصومالي أن هناك عدة عوامل أدت بالمجتمع الصومالي للجوء إلى التحكيم العرفي التقليدي وتفضيله على الهيئات القضائية النظامية وهي كالتالي:

- سقوط الحكومة المركزية الصومالية مما أثر ذلك على غياب دور الهيئات القضائية.
- علو قيمة القبيلة في حياة الفرد الصومالي فهي توفر له الأمن؛ تنصره ظالماً أو مظلومًا بغض النظر عن معايير الحق، وتدعمه سياسيًا واقتصاديًا كما بينا ذلك في نظام الحير.
- ويلجأ الفرد الصومالي إلى التحكيم العرفي لقلة تكاليفها ومساهمة قبيلته معه في تحمل ذلك.
- عدم وجود شك في نزاهة حكم الشيخ مقارنة بأحكام بعض القضاة المرتشين الذين يحيدون عن الحق عند إصدارهم الأحكام؛ وخاصة في حالة المحاكم القضائية الصومالية ومع معضلاتها الحالية.
- اعتياد الناس في معظم الأحيان حل قضاياهم عن طريق الأعراف بسبب قوة النفوذ القبلي في المجتمع الصومالي.

[٣٦] تقرير المقررة الخاصة، السيدة منى رشماوي، المقدّم عملاً بقرار لجنة حقوق الإنسان 47/1997.ص12.

– سرعة الفصل في القضايا عن طرق التحكيم العرفي بينما يطول الفصل فيها في القضاء أو تضيع القضية في أدراجها.

– فقدان الوثائق التي تثبت الملكية لهذه الأراض والعقارت في الحرب وصعوبة إثبات حقه في هذه الملكية فيضطر إلى الحل السلمي العرفي والتسليم للحكم الذي يصدره الشيوخ.

الخاتمة: أهم النتائج والتوصيات

بعد هذه المعالجة لموضوع دور الأعراف والتقاليد القبلية في حل النزاعات افي المال المغصوب في الصومال: في ضوء الشريعة إسلامية توصلت الباحثة إلى ما يلي:

أولًا: نتائج البحث:

١ ثبوت مشروعية الصلح في القرآن الكريم والسنة المطهرة وإجماع الأمة.

٢ ان موقف الشريعة واضح حيال التعدي على اموال وحقوق الغير وقد أجمع الفقهاء على تحريمه ونصت الآيات والأحاديث على حرمة الغصب والتعدي على أموال الغير.

٣ اتضح أن مجتمع الدراسة يتبع أساليب عرفية تسمى الحير والجورتي لحل النزاعات المختلفة خاصةً النزاعات الخاصة بالأموال المغصوبة.

٤ تعد غصب الأموال من النزاعات التي برزت مؤخراً في الصومال بسبب سقوط الحكومة المركزية الصومالية.

٥ فشل القضاء النظامي في الفصل بين النزاعات المتعلقة بالأموال المغصوبة لأسباب عدة أهمها ضعف سلطة الحكومة ومؤسساتها وعدم فعالية تنفيذ الأحكام الصادرة من قبلها.

٦ قوة سلطة القبيلة في الصومال.

٧ -من أهم العوامل التي أدت بالمجتمع للجوء إلى التحكيم العرفي التقليدي: سقوط الحكومة المركزية الصومالية، علو قيمة القبيلة في حياة الفرد الصومالي، عدم وجود شك في نزاهة حكم الشيخ، سرعة الفصل في القضايا عن طرق التحكيم العرفي، وغيرها من العوامل.

٨ -اتضح أن دور التحكيم العرفي القبلي في المجتمع الصومالي له نفوذ قوية مؤثرة في المجتمع؛ خصوصًا في حل النزاعات الكائنة في المجتمع سواء كانت نزاعات متعلقة بالأموال أو بالعقارات أو بالأراضي الزراعية أو بالآبار أو بالدماء، لكونه من المجتمعات البدوية والقروية.

ثانيًا: التوصيات:

١ -العمل على توعية الناس بحرمة الاعتداء على حقوق الغير وبأهمية الصلح لضمان استقرار، وأمن، ومستقبل باهر للمجتمع.

٢ -تقنين الأسس المتبعة من قبل الأعراف القبلية لتسوية المنازعات بين الناس وهما " الحير" و " الجورتي"، وإنشاء مؤسسة تضم مجموعة من الشيوخ الفقهاء ومن كوادر القانونيين بحيث تجمع القانون والعرف في فصل النزاع وإيجاد أدوات فعّالة لتطبيق هذه القوانين كالتعليم والتثقيف بها.

وآخر دعوانا أن الحمد لله رب العالمين.

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فاعلية التحكيم كضمانة إجرائية لحماية الشركات النفطية الأجنبية
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الخلاصة.

يبين البحث أن شرط التحكيم في عقود البترول يعتبر الوسيلة القانونية الإجرائية الفعّالة لضمان حقوق الشركات النفطية الأجنبية ضد تصرفات الدولة المضيفة الانفرادية الماسة بحقوقهم، ليس لكونه الوسيلة المثلى لفض المنازعات الناشئة بينهم فحسب، بل لكون أن تأثيره في ضمان الحماية يبدأ من مجرد النص عليه وقبل البدء في ممارسته، آي أن البحث يرصد أثر بعض المبادئ القانونية الناتجة عن النص على التحكيم في ترسيخ الحماية القانونية للمتعاقد الخاص الأجنبي، وقد كان نموذجنا العقود النفطية الليبية.

إن إشكالية البحث: تكمن في التساؤل التالي: كيف يمكن لشرط التحكيم باعتباره آلية من الآليات الفاعلة لتسوية المنازعات الدولية من ترسيخ الحماية القانونية للمتعاقد الخاص الأجنبي ؟.

أما هدف البحث: فهو إبراز بعض المبادئ القانونية واستظهار تأثيراتها الإيجابية في تقرير وترسيخ الحماية القانونية للشركات النفطية الاجنبية، مع التعرض لموقف الممارسة التعاقدية الليبية في مجال العقود النفطية لتأكيد ذلك، والإستعانة ببعض قضايا التحكيم الدولية في مجال النفط والتي كانت ليبيا طرفاً فيها.

أما أهمية البحث: فتكمن في بيان الجوانب الإيجابية من إدراج شرط التحكيم كوسيلة لفض المنازعات في العقود النفطية بالنسبة للشركات النفطية الأجنبية، والجوانب السلبية بالنسبة للدول المضيفة.

لذلك سنتناول الموضوع باستخدام **المدخل** الكيفي وباستعمال **أدوات** تحليل النصوص والوثائق، والدراسات المكتبية، مع الاستعانة **بالمناهج** الوصفية، والإستقرائية، والتحليلية، والتي نراها الأنسب لمعالجة الإشكالية، وبالتالي الوصول لنتائج نعتقدها، أهمها: إن وجود شروط التحكيم يؤثر على سيادة الدولة، فيسلبها بعض خصائصها، كالحصانة القضائية، بمجرد موافقتها على إدراج شرط التحكيم.

الكلمات المفتاحية:- التحكيم، المنازعات النفطية، الإستثمارات النفطية، العقود النفطية، استقلالية التحكيم.

المقدمة

لا يخفى على أحد أهمية الاستثمارات بصفة عامة والأجنبية منها بصفة خاصة، حيث تعمل الدول المتقدمة والنامية على حد سواء على الاستفادة من الاستثمار لما له من أثر في الإسهام في عملية التنمية لهذه الدول. فالدول الرأسمالية تمتلك رأس المال، وتمتلك المقدرات التكنولوجية والمهارات الإدارية، بينما الدول النامية تمتلك الموارد الطبيعية والقوى العاملة الأقل تكلفة، وبتفاعل بين الدول المصدرة لرأس المال التي تبحث عن المزيد من الربح والدول النامية التي تحتاج إلى الاستفادة من مقدرات الدولة الرأسمالية وشركاتها المتعددة الجنسية يتم إبرام عقود الاستثمار.

إلا أن هذه التعاقدات يتوقف إبرامها على العديد من العوامل المهمة المتمثلة في الضمانات التي تقدمها الدول المضيفة للمتعاقدين الأجانب خاصةً ، أهمها الضمانات التشريعية التي تنص عليها قوانين الاستثمار أو القوانين الخاصة في الدول المضيفة مثل– قانون النفط– وماتشمله من محفزات للاستثمار، ومن مزايا مالية كالإعفاءات الضريبية وحرية التحويلات المالية ، إلا أن أهم الضمانات التي ينشدها المستثمرون الأجانب هي الضمانات الحمائية المتمثلة بالوسائل المتاحة لتسوية ما قد يثار من منازعات الاستثمار والتي قد تنشأ نتيجة انتهاك أحد طرفي العقد للحقوق، والالتزامات المنصوص عليها، أو اتخاذ اجراء من شأنه الاضرار بالطرف الأخر.

ويمكن القول بصفة عامة إن هذه الأسباب تنجم عن الإجراءات الفردية المتخذة من قبل الدولة المضيفة للاستثمارات الأجنبية، كتلك الناتجة عن استيلاء الدولة على الاستثمارات عن طريق نزع الملكية أو المصادرة أو التأميم، أو الناجمة عن قيام الدولة المضيفة بتغيير تشريعاتها المنظمة للاستثمار.

وبما أن عقود الاستثمارات النفطية تعد من العقود التي تتميز بالزمنية– طول المدة– وبالتالي يطرأ خلالها تغير في الظروف المحيطة بالعقد كتغير الظروف الاقتصادية أو السياسية مما يؤدي إلى اختلال التوازن العقدي وبالتالي

يتعرض العقد إلى الانتهاء أو الإلغاء لاستحالة تنفيذ الالتزام كما في حالة القوة القاهرة، أو تنفيذ الالتزام ولكن بشكل يرهق المستثمر كما في المنازعات الناتجة عن الظروف الطارئة،

وأيا كانت أسباب النزاع فقد أصبح لزاماً أن يلجأ أطرافه إلى تسويته بالطرق السلمية أو الودية كالوساطة والتوفيق، وفي حال باتت تلك الجهود بالفشل ينتقل الأطراف إلى الطرق الإلزامية المتمثلة في القضاء سواء الدولي أو الداخلي. ونظرا للصعوبات التي قد تواجه الأطراف في هذه الطرق نظرا لضعف المركز القانوني للمتعاقد الخاص الأجنبي حيث لا يستطيع الوقوف في مواجهة الدولة كطرف أصيل أمام القضاء الدولي ممثلا في محكمة العدل الدولية إلا في حالة تبني دولة جنسيته لقضيته عبر ممارسة الحماية الدبلوماسية وهذا نادر لحرص الدول على المحافظة على علاقاتها الدبلوماسية فيما بينها ، وكذلك لنفور المستثمر من التوجه للقضاء الداخلي للدولة المضيفة نتيجة للظروف المحيطة بهذه الوسيلة والتي أدت إلى ضعف ثقة المستثمر الأجنبي فيها وعدم اطمئنانه على نتيجة عرض دعواه لدى قضائها، أدى ذلك إلى ضرورة الالتجاء إلى آلية تلقى القبول من جميع الأطراف وهي التحكيم كوسيلة مناسبة وفعّالة لتسوية المنازعات لارتكازها على مبدأ إرادة الأطراف الذين لهم الاختيار بين التحكيم الحر أو التحكيم المؤسسي بناء على اتفاق تحكيم منصوص عليه ضمن بنود العقد.

هذه الآلية ستكون محور بحثنا هذا، إلا أن مايمكن لفت النظر إليه هو أن البحث لايتناول عرض لآلية التحكيم كوسيلة مثلى وملائمة لفض المنازعات الناشئة في اطار العلاقات التعاقدية بين أطراف العقود الدولية فحسب، بل أضافة لذلك إستظهار أثر تلك الآلية وتقرير فاعليتها في ترسيخ وضمان الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية الاجنبية) من خلال البحث في الأدوات القانونية القبلية المرتبطة بها.

إن الأدوات القانونية القبلية المرتبطة بنجاح آلية التحكيم كوسيلة لحماية المتعاقد الخاص الاجنبي ليس المقصود بها الوسائل المادية لممارسة الحماية التحكيمية بالمعنى الشكلي، بل المقصود بها نتائج الأخذ بشرط التحكيم والمتمثلة في بعض المبادئ القانونية الدولية التي تضمن وترسخ الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية

الأجنبية) حتى قبل مباشرة آلية التحكيم. لذلك سنحاول القراءة في هذا الموضوع من خلال تلك الزاوية وعلى مستوى محورين: من خلال ضمان خضوع الدولة المضيفة للتحكيم (المبحث الأول)، ثم من خلال ضمان مبدأ مساواة الأطراف أمام المحكمة (المبحث الثاني).

المبحث الأول: من خلال ضمان خضوع الدولة المضيفة للتحكيم.

هنا سوف نتعرض بالتحليل لعدد من الأدوات والتي تعتبر مبادئ قانونية رسخت الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) الناتجة عن قبول الدولة المضيفة لآلية التحكيم، ولمعرفة أكثر وضوحاً التعرض لبعض الأثار الناتجة عن النص على خضوع الدولة المضيفة للتحكيم في العقود النفطية والتي تؤتي أُكْلها لتعزيز الحماية القانونية للشركات النفطية الأجنبية قبل بدء إجراءات التحكيم وذلك من خلال، القراءة في العديد من المبادئ القانونية المرسخة لتلك الغاية وهي أثر اتفاق التحكيم على التمسك بحصانة الدولة القضائية **(المطلب الأول)**، وأثر إستقلال شرط التحكيم عن العقد النفطي في خضوع الدولة المضيفة للتحكيم **(المطلب الثاني)**، وأثر عدم قبول دفع الدولة وأجهزتها العامة بعدم أهليتهما للخضوع للتحكيم **(المطلب الثالث)**، وأثر إختصاص المحكمين بالفصل في النزاع- مبدأ الإختصاص بالإختصاص- **(المطلب الرابع)**.

المطلب الأول: أثر اتفاق التحكيم على حصانة الدولة القضائية في ترسيخ الحماية.

إذا ماقبلت الدولة المضيفة اللجوء للتحكيم فإن هذا القبول سوف ينتج عنه أثر سلبي لها، ذلك أن موافقة الدولة المضيفة على اللجوء للتحكيم الدولي لتسوية منازعاتها مع الشركات النفطية الأجنبية يعد بمثابة التنازل الضمني عن حصانتها القضائية، حيث تعد الحصانة القضائية للدول من المبادئ المستقرة في القانون الدولي، وهو مبدأ مسلم به في مختلف دول العالم، ولقد كان الاتجاه السائد في العالم حتى أوائل القرن المنصرم هو تمتع الدولة بالحصانة القضائية المطلقة، فلم يكن من الجائز أن تخضع الدولة لمحاكم دولة أخرى في كافة المنازعات

التي تكون طرفاً فيها. [1] غير أن مبدأ الحصانة المطلقة للدول بدأ يتقلص بعد الحرب العالمية الأولى نتيجة لاتساع دور الدولة وقيامها بأعمال تخرج عن إطار نشاطها التقليدي، خاصة بعد تدخلها في المجال الخاص واتساع نشاطها التجاري والاقتصادي، لذلك بدأ أنه ليس من العدل أن يسمح للدولة بالتعامل مع الأفراد الخواص مع حرمان هؤلاء الأفراد من الضمان الأساسي اللازم لحماية حقوقهم، وبالتالي أخذت الكثير من الدول تحيد تدريجياً عن مبدأ الحصانة القضائية المطلقة. [2] وبدأت وفقاً لمصلحتها بالتنازل نسبياً عن بعض من حصاناتها خاصةً القضائية. وكل ما يشترط لكي يحدث هذا التنازل أثره أن يكون واضحاً لا لبس فيه، وقد يكون كذلك ضمنياً ويظهر من اتباع الدولة مسلكاً يتضح منه نزولها عن الحصانة القضائية، كأن لاتدفع في دعوى مرفوعة عليها بحصانتها القضائية، أو أدرجت في العقد المبرم بينها وبين الشخص الخاص الأجنبي نص يحيل المنازعات

المثارة بين الطرفين الى محاكم دولة أجنبية [3]. إلا أن السؤال الذي يطرح نفسه الآن: هل يعتبر قبول الدولة لإدراج شرط التحكيم في العقود النفطية تنازلاً منها عن التمسك بحصانتها القضائية أمام محكمة التحكيم ؟

يرفض الفقه الغالب ممن تعرضوا لهذه المسألة الاعتراف للدولة بالحق في التمسك بحصانتها القضائية أمام المحكمين ويرون أن هذا التمسك لا قيمة له. وقد برر بعضهم ذلك بالقول بأن قبول الدولة اللجوء للتحكيم وخاصة في عقود التنمية الاقتصادية والتي منها بطبيعة الحال العقود النفطية يعد بمثابة تنازل من قبل الدولة عن التمسك بحصانتها القضائية، والذي قبلت بمحض إرادتها الخضوع له، وذهب آخرون للقول بأن فكرة الحصانة

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[1] أنظر : إبراهيم، إبراهيم أحمد. 2006م. القانون الدولي الخاص-الكتاب الأول-الاختصاص القضائي الدولي والآثار الدولية للأحكام. القاهرة: دار النهضة العربية. ص. 88.

[2] راجع: فؤاد رياض وسامية راشد. 2002م. *الوسيط في القانون الدولي الخاص- الجزء الثاني- تنازع القوانين وتنازع الاختصاص القضائي الدولي* . القاهرة: دار النهضة العربية. ص. 389. أيضاً: إبراهيم، أحمد إبراهيم. 2006م. *القانون الدولي الخاص-الكتاب الأول-الاختصاص القضائي الدولي والآثار الدولية للأحكام* . القاهرة: دار النهضة العربية. ص. 91. أيضاً: الحداد، حفيظة السيد. د.ت. *الموجز في القانون القضائي الخاص الدولي* . الإسكندرية: دار الفكر الجامعي. ص. 162.

[3] إبراهيم، أحمد إبراهيم. 2006م. *القانون الدولي الخاص-الكتاب الأول-الاختصاص القضائي الدولي والآثار الدولية للأحكام*. القاهرة: دار النهضة العربية. ص. 126.

القضائية ذاتها لا محل للتمسك بها أمام قضاء التحكيم، على أساس انعدام التوافق بين فكرة التحكيم وفكرة الحصانة القضائية وذلك لاختلاف الأساس الذي تستند إليه الحصانة القضائية عن طبيعة نظام التحكيم، كما ذهب فريق ثالث إلى القول بأنه من الأمور التي تحمل بين طياتها التناقض أن يعترف بالحصانة القضائية للدولة والتي تحرم الهيئة القضائية التي يتمسك بها أمامها من سلطة القضاء أمام محكمة التحكيم على الرغم من أن محكمة التحكيم لا تستمد سلطتها القضائية إلا من تولية الأطراف لها. [1] وعلى النقيض من ذلك يرى البعض من الفقه أن التحكيم يمس مبادئ القانون العام التي تخول الدولة سلطة تقديرية تسمح لها بأن تأتي بما تراه مناسباً للصالح العام ومن ثم فإن اشتراط التحكيم لا يقيم على الدولة التزاماً قانونياً وإنما هو التزام أولى فحسب.

إلا أن الفقه في مجمله يرى أن الدولة التي تتفق على الالتجاء إلى التحكيم لتسوية المنازعات الناشئة عن العقد النفطي المبرم بينها وبين أحد الأشخاص الخاصة الأجنبية لا يمكنها بعد ذلك أن تتمسك بحصانتها القضائية أمام محكمة التحكيم. وإذا ألقينا نظرة صوب أحكام التحكيم الدولية في قضايا نفطية كانت ليبيا طرفاً فيها، نجد أن المحكمين يرفضون قبول الدفع بالحصانة القضائية الذي تمسكت به الدولة الليبية في العديد من قضاياها، حيث يمكن أن نذكر على سبيل المثال لا الحصر حكم التحكيم الصادر في قضية (ليامكو) ضد الدولة الليبية في 1977/4/12م[2]. ففي هذه القضية، رفضت الدولة الليبية المشاركة في إجراءات التحكيم بحجة أن التحكيم يتعارض مع سيادتها إلا أن المحكم الوحيد في هذه القضية الأستاذ (صبحي المحمصاني) رفض هذه الحجة مؤكداً على أن الدولة يمكنها دائماً أن تتنازل عن حقوقها السيادية وتوقع على اتفاق التحكيم وتظل ملزمة به.

خلاصة القول: أنتهى الفقه في مجموعه، وكذلك أحكام التحكيم في قضايا نفطية كانت الدولة الليبية طرفاً فيها إلى أن الدولة التي وافقت على اللجوء للتحكيم لتسوية المنازعات الناشئة عن العقد النفطي المبرم بينها

[1] أنظر: أبوزيد، سراج حسين. 2004م. التحكيم في عقود البترول (رسالة دكتوراة). كلية الحقوق جامعة عين شمس. ص. 426-427.
[2] راجع حكم تحكيم ليامكو ضد الدولة الليبية الصادر بتاريخ 1977/4/12م.

وبين أحد الأشخاص الخاصة الأجنبية، لا يجوز لها الاحتجاج بحصانتها القضائية أمام محكمة التحكيم، وبالتالي فإن المتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) تمتع بضمان أوّلي نتج عن النص على آلية الحماية الإجرائية (التحكيم) وسابق لإعمالها تمثل في إمكانية إخضاع الدولة الليبية لسلطة محكمة التحكيم، ومن ثم إمكانية اصدار حكم ضدها. وبناءً عليه نستنتج من ذلك لو أن الدولة المضيفة وافقت على إدراج شرط التحكيم في عقودها مع شركات النفط الأجنبية، وهو الفرض الشائع، لا يجوز لها فيما بعد أن تتمسك بحصانتها القضائية أمام محكمة التحكيم التي تشكل للفصل في النزاع الذي قد ينشأ بينهما بمناسبة تنفيذ هذا العقد.

المطلب الثاني: آثر إستقلال شرط أو مشارطة التحكيم عن العقد النفطي في ترسيخ الحماية.

في هذا الفرض سوف نتناول كيف يكون مبدأ استقلال شرط أو مشارطة التحكيم عن العقد الناتج

عن قبول خضوع الدولة المضيفة لشرط التحكيم ضمانة هامة للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) ؟

بداية نؤكد أن معظم التشريعات الحديثة بشأن التحكيم قد أخذت بمبدأ استقلال اتفاق التحكيم عن العقد الأصلي، كما أقرت قواعد التحكيم ذات الطبيعة الدولية بمبدأ استقلال اتفاق التحكيم، أيضاً أخذت العديد من أحكام التحكيم الصادرة في إطار المعاملات الدولية الخاصة، سواء الصادرة عن محاكم التحكيم الحر، أو من محاكم التحكيم المشكلة لدى مراكز التحكيم ذات الطابع الدولي بذات المبدأ. [1] وبناءاً عليه يترتب على مبدأ استقلال اتفاق التحكيم تجاه العقد المتعلق به أثر هام وحيوي بالنسبة للمتعاقد الخاص الأجنبي يتمثل في عدم ارتباط مصير اتفاق التحكيم بمصير العقد، أي أن صحة اتفاق التحكيم ونفاذه لا تتوقف أو تتأثر بصحة العقد الذي يتعلق به هذا الاتفاق، ومن ثم فإن بطلان العقد أو فسخه أو انتهاءه من قبل الدولة المضيفة– وهو معرض

[1] أنظر: راشد، سامية. 1990م. *التحكيم في العلاقات الدولية الخاصة–الكتاب الأول–اتفاق التحكيم* . القاهرة: دار النهضة العربية. ص. 127–128. كذلك: الحداد، حفيظة السيد. د.ت. *الموجز في القانون القضائي الخاص الدولي*. الإسكندرية: دار الفكر الجامعي. ص. 39.

لذلك– لا يترتب عليه أي أثر سلبي بالنسبة لاتفاق التحكيم، إذا كان هذا الاتفاق صحيحاً في ذاته. ومن ثم ضمان تطبيق الحماية الإجرائية المنصوص عليها بين الطرفين في اتفاق التحكيم، أي أن الأخذ بمبدأ استقلال شرط التحكيم عن العقد يمثل ضمانه تنفيذ لآلية التحكيم وبالتالي مثول الدولة المضيفة أمام الضمانة الإجرائية (محكمة التحكيم). وهذا ما ينسحب بطبيعة الحال على إتفاق الأطراف بصدد العقود النفطية، وقد أخذت أحكام التحكيم الصادرة في المنازعات الناشئة عن عقود النفط المبرمة بين الدول أو الأشخاص العامة التابعة لها من جهة وشركات النفط الأجنبية، بهذا المبدأ. ففي أحكام التحكيم الثلاثة، [1] الصادرة في المنازعات التي نشأت بين الدولة الليبية وبعض من شركات النفط الأجنبية، على أثر قيام الدولة الليبية باتخاذ إجراءات التأميم ضدها، طبق المحكمون مبدأ استقلال اتفاق التحكيم، وأكدوا على أن اتفاق التحكيم يظل قائماً على الرغم من قيام ليبيا بوضع نهاية لعقود الامتياز المبرمة بينها وبين هذه الشركات بطريق التأميم. حيث أصدر المحكم الوحيد الاستاذ (جان ديبوي) في قضية (تكساكو) ضد الدولة الليبية حكماً تمهيدياً بشأن اختصاصه في 1975/11/27م، رفض فيه وجهة النظر التي تمسكت بها الدولة الليبية والتي مفادها أن إجراءات التأميم مادامت قد وضعت نهاية لعقود الامتياز ذاتها المبرمة بينها وبين هذه الشركات، فإن هذا الأثر يجب أن يمتد إلى شروط التحكيم الواردة في هذه العقود، حيث استند المحكم ديبوي إلى مبدأ استقلال شرط التحكيم عن العقد الوارد فيه [2]. كذلك فإن المحكم الوحيد الأستاذ (صبحي المحمصاني) في قضية (ليامكو) ضد الدولة الليبية، قد ذهب في الحكم الذي أصدره بتاريخ 1977/4/12م،[3] إلى أنه "من المسلم به عموماً في الواقع وفي القانون الدوليين أن شرط التحكيم يظل باقياً بعد فسخ الدولة بإرادتها المنفردة للعقد الذي يتضمنه، وأن هذا الشرط يظل نافذ المفعول حتى بعد هذا الفسخ". وكذلك يمكن القول بأن المحكم الوحيد الأستاذ (لاجارجرين) في قضية (b.p) ضد الدولة الليبية قد أخذ

[1] راجع أحكام التحكيم المتعلقة بهذه القضايا في ترجماتها العربية ، المصدر : وثائق المؤسسة الوطنية للنفط ليبيا.

[2] حكم محكمة تحكيم. 1977م. دعوى شركتي كاليفورنيا وتكساكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.

[3] حكم محكمة تحكيم. 1979م. دعوى شركة ليامكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.

على نحو ضمني بمبدأ استقلال شرط التحكيم عن العقد الوارد فيه، وذلك في حكم التحكيم الذي أصدره في 1973/10/10م، فقد ذهب المحكم رداً على إدعاء الشركة بأن قانون التأميم لا أثر له على إنهاء عقد الامتياز الذي يظل صحيحاً وواجب التطبيق، إلى القول بأن "القانون الصادر بتأميم شركة (b.p) قد وضع نهاية لعقد الامتياز الممنوح لهذه الشركة، باستثناء أن هذا العقد يشكل أساساً لاختصاص هذه

المحكمة، ولحق الشركة المدعية في مطالبة المدعي عليه بالتعويض أمام هذه المحكمة" [١].

المطلب الثالث: آثر عدم قبول دفع الدولة وأجهزتها العامة بعدم أهليتهما للخضوع للتحكيم في ترسيخ الحماية.

يعنى ذلك أنه لايمكن للدولة المضيفة أو المؤسسة العامة التابعة لها أن تدفع بعدم أهليتهما للتوقيع على إتفاق التحكيم للتهرب من ذلك الإتفاق الذي سبق وأن وافقا عليه بإرادتهما مع المتعاقد الخاص الاجنبي [٢]. ويذهب رأي فقهي أن مبدأ عدم قبول دفع الدولة أو المؤسسة التابعة لها بعدم أهليتهما للتحكيم بعد الموافقة عليه يعتبر من المبادئ المستقرة في التحكيم الدولي [٣].

بالنسبة لليبيا توالت صدور التشريعات المتعلقة بالتحكيم وقد تأرجحت مابين منعه أو الحد منه أو إقراره إستثناءاً. حيث قبل المشرع الليبي بدايةً اللجوء إلى التحكيم متمثلاً في قانون النفط رقم 25 لسنة 1955م، كذلك نص عليه في العقود النموذجية المبرمة في إطاره، وإذا كانت الإجراءات التشريعية المتخذة بعد ثورة 1969م رفضت التحكيم التجاري الدولي في البداية ثم قيدت اللجوء إليه خاصة في العقود الإدارية، فإنه في مرحلة ثانية أجازت اللجوء له بعد التأكيد على أولوية اختصاص القضاء الوطني.

[١] حكم محكمة تحكيم. 1973م. دعوى شركة ب، ب ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.
[٢] أبوزيد، سراج حسين. 2004م. التحكيم في عقود البترول. (رسالة دكتوراة). كلية الحقوق جامعة عين شمس. ص. 304.
[٣] الأسعد ، بشار محمد. 2006م. عقود الإستثمار في العلاقات الدولية الخاصة. منشورات الحلبي الحقوقية. بيروت ص. 405.

إذن يمكن التأكيد على أن عدم قبول المحكمين بدفع الدولة المضيفة والأشخاص المعنوية التابعة لها بعدم أهليتهما للتحكيم سوف يجعل من النص علي التحكيم آلية ذات فاعلية ضد مماطلة الدولة المضيفة وتمسكها ببطلان إتفاق التحكيم للتهرب من اللجؤ إليه بعذر أن قانونها يمنعها من التحكيم في عقود التنمية، وهذا ما يعتبر ضمانة جد مهمة للشركات النفطية الأجنبية في مواجهة الدولة المضيفة.

المطلب الرابع: آثر إختصاص المحكمين بالفصل في النزاع في ترسيخ الحماية (مبدأ الإختصاص بالإختصاص).

ينتج عن إبرام اتفاق التحكيم أن يلتزم أطراف عقد امتياز النفط بعرض النزاع القائم بينهم على المحكمين الذين يتم اختيارهم للفصل في النزاع عوضاً عن التوجه للمحكمة القضائية المختصة بذلك، وهو مايمثل أثر إيجابي لإتفاق التحكيم، أما إمتناعهم عن عرض النزاع على القضاء الوطني فيمثل الأثر السلبي[١].

ومبدأ الإختصاص بالإختصاص هو مبدأ نتج عن مبدأ استقلال شرط التحكيم، وهو يعني أن يختص المحكم بتحديد إختصاصه، ونظر المنازعات المختص بنظرها، وتحديد إطار سلطته، وتقرير صحة المنازعة من عدمها[٢]. وعليه لو اعترضت الدولة المضيفة بعدم اختصاص محكمة التحكيم بالنظر في إجراءاتها الفردية الناتجة عن تغيير تشريعاتها في مجال التحكيم، أو الناتجة عن نقضها للعقد الذي تضمن الإتفاق التحكيمي، هنا تعامل الدولة على نقيض قصدها، وتقوم هيئة التحكيم بالفصل في ذلك تطبيقاً لمبدأ الإختصاص بالإختصاص، وتحقيقاً لمبدأ إستمرارية العلاقة التعاقدية ضماناً وموازنة بين الأطراف وهو مايؤدي إلى تأكيد فعالية التحكيم كآلية ضامنة لحسم المنازعات المثارة بين الأطراف من خلال السرعة.

[١] أبوزيد، سراج حسين. 2004م. التحكيم في عقود البترول. (رسالة دكتوراة). كلية الحقوق جامعة عين شمس. ص. 36.
[٢] إبراهيم، أحمد إبراهيم. 2007م. القانون الدولي الخاص. دار النهضة العربية. القاهرة. ص. 48 ومابعدها.

ويستمد مبدأ إختصاص الإختصاص أساسه القانوني من عديد القوانين الوطنية للدول [١]. والإتفاقيات الدولية المتعلقة بالتحكيم[٢]. وعديد لوائح التحكيم[٣]. وعديد أحكام التحكيم[٤].

إذن يمكن القول أن ميدأ الإختصاص بالإختصاص يتماشى مع الغاية من التحكيم والسرعة المطلوبة فيه على عكس القضاء، والأهم من ذلك أنه يدعم فاعلية التحكيم كآلية إجرائية لضمان الحماية والامن القانوني للشركات النفطية الاجنبية، بحيث يقطع الطريق امام الدولة المضيفة التي تحمل سوء النية لتعطيل إجراءات التحكيم فيما لو أجيز لها الطعن أمام القضاء باختصاص المحكمين.

المبحث الثاني: من خلال ضمان مبدأ مساواة الأطراف أمام المحكمة.

قبل الخوض في ذلك قد يدفعنا الفضول للتسائل عن كيفية ضمان مبدأ مساواة أطراف العقد أمام المحكمة ؟ إن كيفية ضمان مبدأ مساواة أطراف العقد أمام المحكمة تتحقق وتتجلى بوضوح في حالة استبعاد تطبيق قانوني طرفي العقد على إجراءات التحكيم، حيث يمثل ذلك ضمان إضافي قبلي للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) بعدم تطبيق قانون الدولة المضيفة على إجراءات التحكيم، أي أن المتعاقد الخاص الاجنبي في هذا الفرض يضمن لنفسه نوع من الحماية القانونية القائمة على مساواته بالدولة المضيفة أمام المحكمة وذلك عندما يتم إستبعاد قانون دولته وقانون الدولة المضيفة على إجراءات التحكيم، ويؤخذ بقانون إجراءات التحكيم لدولة مقر التحكيم أو غيرها، حيث تتضح النتيجة الإيجابية للأخذ بهذا المبدأ خاصةً في فرضية ممارسة السلطة القضائية لدولة قانون إجراءات التحكيم لحقها في الرقابة على التحكيم والتدخل في بعض الأحيان أثناء الإجراءات. أيضاً

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[١] أنظر: مصر. قانون التحكيم. المادة 22، فقرة 1. كذلك، فرنسا. قانون المرافعات. المادة 1466. كذلك، إنجلترا. قانون التحكيم. المادة 9، الفقرة 4.

[٢] مثل الإتفاقية الاوربية للتحكيم التجاري الدولي لسنة 1961م. المادة 5، فقرة 3. كذلك إتفاقية واشنطن لتسوية منازعات الإستثمارلسنة 1956م. المادة 1، فقرة 1.

[٣] أنظر: القانون النموذجي للتحكيم التجاري الدولي لسنة 1985م. المادة 16، فقرة 1.

[٤] مثل حكم التحكيم التمهيدي بين الشركة الإيرانية نيوك والشركة الفرنسية (ELFAQUITAINE) للمحكم الوحيد (B. GOMORD) الصادر في الدنمارك.

من نتائجها الإيجابية أن طرق الطعن في حكم التحكيم والاعتراف به وتنفيذه يتوقف على القانون الواجب التطبيق على إجراءات التحكيم،[1] وبالتالي فإنه في حال كان القانون الواجب التطبيق على إجراءات التحكيم هو قانون دولة ثالثة ضمن المتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) الإفلات من قانون إجراءات تحكيم الدولة المضيفة الذي قد يعرقل حصوله على حقوقه سواء أكان الحكم في غير صالحه (فرضية الطعن)، أو في صالحه (فرضية الإعتراف بالحكم وتنفيذه). وهذا مامن شأنه أن يكرس ضمان أكثر وحماية أوفر له. لذلك سنتناول تطبيق هذا المبدأ وهو مساواة الأطراف حول القانون الواجب التطبيق على إجراءات التحكيم في العقود النفطية الليبية، من خلال الممارسة التعاقدية للمشرع الليبي في (المطلب الأول)، وموقف أحكام التحكيم في منازعات نفطية كانت ليبيا طرفاً فيها (المطلب الثاني)

المطلب الأول: موقف الممارسة التعاقدية الليبية من هذا المبدأ.

في مجال الممارسة التعاقدية الليبية نصت بعض عقود النفط الليبية، والموقعة قبل تعديلات قانون النفط الليبي العديدة على إخضاع إجراءات التحكيم للقانون الدولي العام، وأهم مثال يمكن أن يذكر في هذا الصدد، عقود النفط التي أبرمتها ليبيا مع الشركات النفطية الأجنبية في ظل قانون النفط الليبي رقم 25 لسنة 1955م، في نسخته الأولى، حيث كانت تنص المادة (28) فقرة (6) من عقد الامتياز النموذجي الثاني الملحق بالقانون المذكور على أن "يقرر الحكم الثالث أو الحكم الفرد إجراءات التحكيم وعليه أن يسترشد بصفة عامة بقواعد الإجراءات الملائمة المقررة في المواد من (32) إلى (69) من قواعد إجراءات محكمة العدل الدولية الصادرة في السادس من مايو 1946م، وكذلك على الحكم الثالث أو

[1] أنظر: أبوزيد، سراج حسين. 2004م. التحكيم في عقود البترول (رسالة دكتوراة). كلية الحقوق جامعة عين شمس. ص. 455.

الحكم الفرد أن يعين مكان التحكيم وموعده" [1]. ثم صدر تعديل لقانون النفط الليبي في 1961/7/3م عدلت على أثره الفقرة (6) من البند (28) من ملحق عقد الامتياز على النص التالي "... يعين رئيس التحكيم أو الحكم المنفرد الإجراءات الواجب اتباعها في التحكيم" [2]. حيث أنه في هذا التعديل أعطى القانون حرية واسعة للمحكمين في اختيار إجراءات التحكيم مما يسمح لهم بتطبيق مبدأ المساواة بين أطراف العقد بعدم تطبيق قانوني الدولة المضيفة والشركة النفطية الأجنبية، بعدها صدر في 1965/11/20م تعديل آخر بمقتضى المادة (10) حيث عدل نص الفقرة (5) من البند (28) وفق الآتي "... ويكون تطبيق أحكام هذا البند وبيان الإجراءات الواجب اتباعها في التحكيم بقرار يصدر من الحكمين أو من الرئيس (في حالة عدم وصولهما إلى اتفاق خلال مدة ستين يوماً من تاريخ تعيين الحكم الثاني) أو من الحكم المنفرد (في حالة تعيين حكم منفرد)" [3]. كذلك أبقى هذا التعديل على حرية الحكمين في اتخاذ إجراءات التحكيم مع توضيح أكثر في مسألة عدم اتفاق المحكمين على اختيار إجراءات معينة.

إذن يستبين من ذلك أن الممارسة التعاقدية الليبية في شأن تطبيق إجراءات التحكيم قد ضمنت مبدأ مساواة الاطراف بحيث أتاحت للمحكمين المختارين من الأطراف حرية إختيار القانون الواجب التطبيق على إجراءات التحكيم بما يتفق ومبدأ المساواة بين الأطراف ولم تفرض تطبيق إجراءات تحكيم القانون الليبي، وهذا مايمثل ضمانة قبلية عن العمل بآلية الحماية الإجرائية التحكيمية.

المطلب الثاني: موقف أحكام التحكيم في قضايا ضد الدولة الليبية من هذا المبدأ.

لم تتخذ أحكام التحكيم الصادرة في منازعات ناشئة بين ليبيا وبعض الشركات النفطية الأجنبية بمناسبة

[1] أنظر: ليبيا. 1955م. قانون النفط الليبي في نسخته الأولى- الملحق الثاني لعقد الامتياز. البند 6/28.
[2] أنظر: الجريدة الرسمية. 1961م. عدد خاص- 1961/7/15م.
[3] أنظر: الجريدة الرسمية. 1965.-1965/12/26

عقود النفط المبرمة بينهم موقفاً موحداً تجاه إختيار القانون الواجب التطبيق على إجراءات التحكيم إلا أن الموقف الموحد الذي جمع بينهم هو تكريسهم لمبدأ المساواة القانونية بين أطراف النزاع، حيث تم استبعاد تطبيق قانوني أطراف النزاع على إجراءات التحكيم، وبالتالي تمتع المتعاقد الخاص الأجنبي بالمساواة مع الدولة الليبية في هذا الشأن، الأمر الذي وفر له حظاً أوفر من العدالة والإنصاف. وفي هذا الشأن سوف نتعرض لثلاثة أحكام تحكيمية دولية كانت ليبيا طرفاً فيها لنتحقق من تكريس مبدأ مساواة الأطراف فيما تعلق باختيار القانون الواجب التطبيق على إجراءات التحكيم.

1- حكم التحكيم الصادر في 1977/1/19م في دعوى شركة تكساكو ضد الدولة الليبية[1].

لقد بدأ المحكم الوحيد في هذه القضية الأستاذ جان ديبوي (DUPUY) في معرض بحثه عن القانون واجب التطبيق على إجراءات التحكيم، ببيان أنه في حالة عدم وجود اتفاق بين الأطراف، فإنه يجب على المحكم تحديد النظام القانوني واجب التطبيق على إجراءات التحكيم، وفي هذا الصدد هناك نوعان من الحلول يمكن الاستناد على أي منهما، الحل الأول والذي أخذ به الأستاذ كافين (CAVIN) في التحكيم الذي جرى بين الشركة الكندية سافير (Sapphir) والشركة الوطنية الإيرانية للبترول (نيوك) والذي يتمثل في إخضاع التحكيم لقانون وطني معين، وخصوصاً قانون الدولة مقر التحكيم، ولقد ارتأى الأستاذ ديبوي (DUPUY) أن هذا الحل كان له ما يبرره في القضية المذكورة وذلك على أساس أن النزاع لم يكن طرفاه دولاً ذات سيادة، كما أنه من المفضل من الناحية العملية أن يستند حكم التحكيم إلى نظام قانوني وطني عندما يراد تنفيذه. بيد أن المحكم قد قرر عدم ملائمة الأخذ بهذا الحل في القضية الحالية حيث أن الطرف المدعى عليه في هذه القضية دولة ذات سيادة هذا من ناحية، ومن ناحية أخرى

[1] حكم محكمة تحكيم. 1977م. دعوى شركتي كاليفورنيا وتكساكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.

فإن الاعتبارات المتعلقة بتنفيذ حكم التحكيم لا شأن للمحكم بها. أما الحل الثاني فهو الحل الذي أخذ به الحكم الصادر في قضية أرامكو والذي يتمثل في إخضاع إجراءات التحكيم للقانون الدولي العام مباشرة، وقد قدر المحكم أن هذا الحل هو الحل الأكثر ملائمة في القضية الحالية، ولقد استند في تبرير هذا الحل على نفس البواعث التي استند عليها الحكم السابق، فقد أوضح المحكم أنه عندما يكون أحد طرفي إجراءات التحكيم دولة ذات سيادة، فإن مبدأ الحصانة القضائية التي تتمتع بها الدولة يتعارض مع ما يمكن أن تمارسه السلطات القضائية في الدولة صاحبة المقر لحقها في الرقابة على التحكيم والتدخل في بعض الأحيان أثناء الإجراءات، وانتهى المحكم إلى أن التحكيم في القضية الحالية لا يمكن إلا أن يخضع مباشرة للقانون الدولي العام. ولقد استند المحكم على بواعث أخرى إضافية لصالح تطبيق القانون الدولي العام على إجراءات التحكيم فقد ارتأى المحكم الأستاذ ديبوي (DUPUY)، في طريقة تعيين المحكم الوحيد وبصفة خاصة النص على اللجوء إلى رئيس محكمة العدل الدولية لتعيينه، أن هذا يعني أن الأطراف قد اتفقوا على أن يكون التحكيم الحالي موضوعاً تحت رعاية منظمة الأمم المتحدة، وبالتالي فإن النظام القانوني الذي يحكمه هو القانون الدولي العام.

2- حكم التحكيم الصادر في 12/4/ 1979م في دعوى شركة ليامكو (LIAMCO) ضد الدولة الليبية[1].

وفي هذه القضية أوضح المحكم أن شرط التحكيم المنصوص عليه في المادة (28) الفقرتين (5-6) من عقد الامتياز المبرم بين الدولة الليبية وشركة ليامكو ينص على أن يتم تحديد مقر التحكيم والإجراءات واجبة الاتباع بواسطة محكمة التحكيم وذلك في حالة عدم وجود اتفاق بين الأطراف في هذا الشأن. وإعمالاً لهذا الشرط، ونظراً لعدم وجود اتفاق بين الأطراف بشأن تحديد مقر التحكيم والإجراءات واجبة الاتباع، قررت محكمة

[1] حكم محكمة تحكيم. 1979م. دعوى شركة ليامكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.

التحكيم في حكمها التمهيدي الصادر في 1975/6/9م أن "مدينة جنيف هي المقر الرسمي للتحكيم، هذا مع إمكانية عقد جلسات فرعية في مكان آخر لو قرر المحكم أن ذلك ضروري".

وفيما يتعلق بالإجراءات واجبة الاتباع، قرر المحكم الاهتداء بقدر الإمكان بالمبادئ العامة الواردة في مشروع الاتفاق بشأن إجراءات التحكيم والمعد بواسطة لجنة الأمم المتحدة للقانون الدولي عام 1958م، ولقد أوضح المحكم أن هذا المبدأ كان معتمداً من قبل العديد من الاتفاقيات الدولية والتي من أهمها اتفاقية البنك الدولي للإنشاء والتعمير لتسوية منازعات الاستثمار لعام 1965م المادة (44) والمعاهدة السويسرية بشأن التحكيم لسنة 1969م المادة (34)، كما ذكر أن هذا المبدأ كان متبعاً في العديد من قضايا التحكيم مثل تحكيم أرامكو ضد السعودية، وتحكيم سافير ضد الشركة الوطنية الإيرانية للبترول (نيوك).

وقد علق بعض الفقهاء على هذا الحكم بالقول بأن هذا الحكم يعد على جانب كبير من الأهمية والتي تتمثل في أن هذا الحكم يندرج ضمن التوجه العام السائد في مسائل التحكيم الدولي والذي يعمل على استقلال إجراءات التحكيم تجاه كل قانون وطني.

3- حكم التحكيم الصادر في 10/10/ 1973م في قضية (B.P) ضد الدولة الليبية[1].

وفي هذا الحكم أوضح المحكم أن القانون واجب التطبيق على إجراءات التحكيم سيكون محدداً منذ البداية، ثم تساءل المحكم عما إذا كانت إجراءات التحكيم تكون محكومة بالقانون الدولي أو أية قواعد قانونية أخرى لا تنتمي إلى نظام قانوني داخلي، وذلك باعتبار أن أحد طرفي التحكيم دولة ذات سيادة. وبعد أن عرض المحكم للحل الذي أخذ به حكم التحكيم الصادر في قضية أرامكو والحجج التي استند عليها، رفض أن يشارك هذا الأخير في حجته التي مفادها أن تطبيق قانون الدولة مقر التحكيم على إجراءات التحكيم يعد بمثابة اعتداء

[1] حكم محكمة تحكيم. 1973م. دعوى شركة ب، ب ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط. طرابلس.

على الحصانة القضائية للدولة الطرف في التحكيم، موضحاً أنه في الحدود التي يسمح بها القانون الدولي فإن السلطة القضائية أو التنفيذية في كل إقليم

تفرض في الواقع وفي القانون En Fait et en droit قيودا على الحصانة التي تتمتع بها الدول الأخرى. كما أوضح المحكم أنه بالنص على اللجوء إلى التحكيم كآلية وحيدة دون غيرها لحل المنازعات التعاقدية فإنه يجب افتراض أن الأطراف، حتى وإن كان أحدهم دولة، كان لديهم النية في إيجاد وسيلة فعّالة، كما أن فعالية حكم التحكيم عديم الجنسية Sanas Nationalite ، وهو الأمر الذي يتحقق عندما يكون القانون الدولي هو القانون واجب التطبيق على إجراءات التحكيم تكون أضعف بكثير من فعالية حكم التحكيم المبني على قانون إجراءات لنظام قانوني وطني معين، زد على ذلك حتى وإن كان المحكَمون لهم السلطة الكاملة في تحديد القانون واجب التطبيق على إجراءات التحكيم، كما هو الحال بالنسبة لمحكمة التحكيم الحالية، فإنه من المناسب والمفيد إسناد إجراءات التحكيم إلى نظام قانوني معين. وبناءاً على كل ذلك حدد المحكم مقر التحكيم في كوبنهاجن بالدنمارك، وبناءاً على الأسباب التي تقدم ذكرها ونظراً للحرية الكبيرة والاستقلال الذي تتمتع بهما محاكم التحكيم التي تفصل طبقاً لقانون الدنمارك، قدَّر المحكم أن القانون واجب التطبيق على إجراءات التحكيم هو القانون الدنماركي.

الخاتمة

ان دراسة فاعلية التحكيم كضمانة إجرائية لحماية الشركات النفطية الأجنبية قادتنا الى جملة من النتائج والمقترحات نلخصها في الأتي.

أولاً: النتائج.

1– يقوم نظام التحكيم على الإرادة الذاتية لأطراف العلاقة العقدية، لأن هذه الاخيرة تلعب دورا هاما في الفصل في منازعات التحكيم.

2– إن وجود شروط التحكيم يؤثر على سيادة الدولة، فيسلبها بعض خصائصها، كالحصانة القضائية، إذ أن الدولة بمجرد موافقتها على إدراج شرط التحكيم تكون قد تنازلت عن حصانتها القضائية.

3– يستلزم لتحقيق فعالية التحكيم كضمانة إجرائية لحسم منازعات الاستثمار، وترسيخ الحماية القانونية للشركات النفطية الأجنبية تبني العديد من المبادئ القانونية التي تخضع الدولة المضيفة للتحكيم والمتمثلة في استقلال شرط التحكيم عن العقد، واختصاص المحكمين بالفصل في النزاع (مبدأ الاختصاص بالاختصاص)، وعدم قبول دفع الدولة والأشخاص المعنوية التابعة لها بعدم أهليتها للتحكيم، فضلاً عن ذلك ضمان مبدا مساواة الأطراف أمام محكمة التحكيم.

ثانياً: المقترحات.

1– يجب أن تتمسك الدولة بأن يكون التحكيم داخليا في منازعات العقود الإدارية المتعلقة بالثروات الطبيعية، إعمالا لمبدأ سيادة الدولة، ولضمان تطبيق القانون الداخلي الذي يحكم هذه العقود، حيث أن قواعد الإسناد في القانون الدولي الخاص غالبا ماتقضي بذلك .

2– تهيئة المناخ التشريعي الملائم للأخذ بالتحكيم في منازعات العقود النفطية، خصوصاً في ظل التوجهات الإقتصادية للدول المضيفة نحو الاستثمار، وبما يشجع الإستثمار الأجنبي.

3– نظراً لتنامي دور التحكيم وتحوله الى فضاء اصيل في مجال العقود الدولية في كافة بلاد العالم نقترح التوجه الى دعم مؤسسات التحكيم في الدول الإسلامية لغرض توحيد وتشجيع التعاون بينها باعتبارها اجهزة متخصصة تسهم بدور فعال واساسي في مجال تشجيع الاستثمار والتجارة في هذه الدول، وذلك للحد من ما عانته تلك الدول من طابع تمييزي ضد مصالحها في القضايا التحكيمية التي تم نظرها امام هيئات تحكيم اجنبية. فضلا عن الاستعانة بالمحكمين المسلمين المشهود لهم والكفاءة والعدالة والعلم.

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بسم الله الرحمن الرحيم

حلُّ المنازعات في القضايا التي يرتكبها الأحداث الجانحون في القانون العُماني

مقدم إلى المؤتمر العالمي لتسوية المنازعات
المنعقد في الجامعة الإسلامية العالمية
للفترة 9–2017/8/10م

إعداد
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ملخص البحث

رغم إحتفاء المشرع العماني بوسائل وأنظمة حل المنازعات ودياً إلا أنه أهمل ذلك بشكل واضح فيما يتعلق بتسوية المنازعات في القضايا التي يرتكبها الأحداث الجانحون مطبقاً في ذلك ذات القواعد التي طبقها على البالغين، في حين أن الأحداث فئة خاصة يجب أن يوجه إليها إهتمام وعناية أكبر لتجنيبهم عناء المحاكمات وتعقيدتها التي تخلف أثراً سيئاً على الحدث.

ويسعى البحث إلى تحقيق جملة من الأهداف تتمثل في التعريف بمفهوم الحدث وقضاء الأحداث في القوانين العمانية، وعرض أنظمة حلّ المنازعات لقضايا الأحداث في النظام القضائي العماني، وبيان كيفية معالجة القانون العماني لحل المنازعات في القضايا التي يرتكبها الأحداث الجانحون في المجالين الجزائي والمدني واقتراح وسائل تحسين عملها.

ويرتكز البحث على جملة من مناهج البحث العلمي ، حيث يأخذ بالمنهج الإستقرائي من حيث استقراء المواد القانونية المقررة لتسوية المنازعات في النظام القانوني العماني ، والمنهج التحليلي من حيث تحليل المبادئ والقواعد العامة في القانون العماني في مجال تسوية المنازعات الخاصة بالحدث الجانح، و المنهج المقارن – عند الحاجة إليه – من خلال بيان موقف المشرع العماني من حل المنازعات في القضايا التي يرتكبها الأحداث الجانحون مقارنة بأحكام الشريعة الإسلامية.

وقد خلص البحث إلى نتائج أهمها وجود قصور تشريعي في القوانين العمانية في مجال تسوية منازعات الأحداث الجانحين يلزم معها سد هذا القصور بتشريع قوانين تلزم عرض الصلح في قضايا الأحداث من قِبَلِ القاضي كما تُلزم المجنى عليه (المضرور) بسلوك طريق الصلح قبل الشروع في محاكمة الحدث وإنشاء جهاز أو هيئة خاصة تُعنى بتسوية منازعات الأحداث الجانحين.

المقدمة

يأخذ موضوع تسوية المنازعات حيزاً جيداً في التشريعات والقوانين الوضعية الحديثة، إذ دأبت هذه التشريعات والأنظمة على سن القوانين التي تنظم عملية الصلح وتسوية المنازعات، وإن كانت هذه التشريعات لا تزال دون مستوى الطموح، غير أن وجودها بحد ذاته ميزة يلزم الإشادة بها والإستفادة منها، وقد تناولت هذه التشريعات موضوع تسوية المنازعات في جوانبه المختلفة، سواء كانت متعلقة بنزاع تجاري أو عمالي أو جزائي أو مدني، ولا شك أنه يشغل حيزاً واسعاً في مجال الأحوال الشخصية.

ورغم هذا الاحتفاء القانوني بمسألة حل المنازعات بأنواعها، غير أن هناك فئة من المجتمع يحتاجون إلى مزيد عناية واهتمام، والمقصود بهم الأحداث، فهم رجال المستقبل وأمهات الغد، ولا غرو أن يكونوا محط اهتمام وعناية الأمم التي تتطلع إلى مستقبل زاهر وغدٍ مشرق.

وفي ظل سماوات مفتوحة من الفضاء الإلكتروني الذي يزخر بالكثير من الأفكار والثقافات التي تبتعد عن قيم المجتمع ومُثُلِهِ العُليا وتُلقي بظلالها الكثيفة على وجهه المشرق ، فإن الأحداث يكونون عُرضة للجنوح وارتكاب الجرائم وبالتالي نُشوء قضايا تُتَداول في أروقة المحاكم، وهذه القضايا تكون في المجال الجزائي باعتبار أن هناك جريمة وقعت، كما تكون في المجال المدني لوجود عنصر التعويض وجبر الضرر الناتج عن هذه الجريمة، وهذا يدعونا إلى بحث مدى حاجة هذه الفئة إلى تسوية منازعاتهم، وإيضاح مدى استيعاب النظام القانوني في سلطنة عمان لتسوية هذا النوع من القضايا، ومقارنة ذلك ما أمكن مع أحكام الشريعة الإسلامية الغراء.

وتكمن إشكالية البحث في أن القوانين العمانية – الإجرائية منها والموضوعية – نظَّمت مسألة تسوية المنازعات بشكل عام، غير أنها في مجال حال المنازعات في القضايا التي يرتكبها الأحداث الجانحون

جاءت قاصرة عن توفير بيئة للحدث يمكن أن تكفيه عناء المحاكمات ورهبة المثول أمام الحاكم في سن يحتاج معه إلى معالجة نفسية واجتماعية أكثر من حاجته إلى مواجهة قضائية، فقد جاءت هذه النصوص قاصرة عن تلبية حاجة الحدث الجانح إلى تسوية منازعته والوصول بها إلى بر الأمان من خلال نصوص قانونية واضحة تحدد مسار الصلح في قضيته، وإنما أدمجت هذه النصوص مع تسوية المنازعات لدى البالغين رغم ما للحدث من خصوصية واضحة.

ونتيجة طبيعية للقصور التشريعي فقد ظهرت مشكلات عملية أثناء مراحل المحاكمة المختلفة تمثلت في محاكمة بطيئة لا تحقق عدالة ناجزة وسريعة الأمر الذي يضعنا أمام خشية حقيقية من أن يكون هذا القصور التشريعي والتطبيقي سبباً في صنع أحداث مجرمين في المستقبل نتيجة لهذه المعاملة ، ولذلك جاءت هذه الدراسة لتقف على هذا القصور وتضع الحلول والبدائل والمعالجات القانونية مستنيرة في ذلك بأحكام الشريعة الإسلامية. هذا وبالله التوفيق وعليه التكلان.

أولاً: مفهوم الحدث الجانح ومحكمة الأحداث في النظام القضائي العماني:

لأجل فهم عمل نظام حلّ المنازعات في القانون العماني في القضايا التي يرتكبها الأحداث الجانحون يلزم إبتداء إعطاء نبذة سريعة عن مفهوم الحدث الجانح في القانون العماني وتسليط الضوء على نظام عمل قضاء الأحداث.

– مفهوم الحدث الجانح في القانون العماني:

يطلق فقهاء الشريعة الإسلامية على الحدث عدة مسميات مختلفة مثل: القاصر والصغير والطفل والصبي، ويقصد به: كل من لم يصل إلى سن البلوغ أو الحُلُم، وتبدأ مرحلة الحداثة أو الطفولة في الفقه الإسلامي من خروج الطفل من بطن أمه حياً لدلالة الآية القرانية الكريمة (هُوَ الَّذِي خَلَقَكُم مِّن تُرَابٍ ثُمَّ مِن نُّطْفَةٍ ثُمَّ مِنْ عَلَقَةٍ ثُمَّ يُخْرِجُكُمْ طِفْلًا ثُمَّ لِتَبْلُغُوا أَشُدَّكُمْ ثُمَّ لِتَكُونُوا شُيُوخًا) (سورة غافر : الآية 67) فقد ذكرت الآية المرحلة الجنينية التي تعقبها مرحلة الطفولة بخروج الإنسان من بطن أمه حياً.

ويبدأ سن المسؤولية الجنائية لدى فقهاء الشريعة الإسلامية من البلوغ الذي يعتبر في ذات الوقت نهاية سن الحداثة، ويتنازع تحديد سن البلوغ في الفقه الإسلامي معياران، عضوي وعُمري، فالمعيار العضوي يهتم بالخصائص البيولوجية لجسم الطفل وما يظهر عليه من علامات تدل على انتقاله من مرحلة الحداثة إلى مرحلة التكليف، ومن هذه العلامات الإحتلام وإنبات الشعر في الذكر وظهور النهدين وبدء الدورة الشهرية عند الأنثى.

ويمتاز هذا المعيار بأنه واقعي يعكس التغيرات الجسمية لدى الحدث، ويعاب عليه بأنه لا يعكس دائماً النضج العقلي فضلاً عن الصعوبة التي تعتري تحديد المرحلة الإنتقالية لهذا السن [١]، ولذا فإن التشريعات الوضعية لم تعتد بهذا المعيار في تحديد مفهوم الحدث، وعلى العكس من ذلك ذهب فقهاء الشريعة الإسلامية إلى اعتبار هذا المعيار هو الأصل في تحديد سن البلوغ.

أما المعيار العمري فيأخذ بالسن بدلاً من الحالة الجسمية للحدث، وبالتالي يستند بالأساس إلى تحديد تاريخ ميلاد الحدث لمعرفة سن البلوغ، وقد تباينت أقوال الفقهاء في تحديد هذا السن، فذهب الشافعية والحنابلة والصاحبان من الحنفية [٢] إلى أن سن البلوغ هو خمسة عشر سنة لا فرق في ذلك بين الذكر والأنثى، ورأى أبو حنيفة أن سن البلوغ للصبي ثمانية عشر سنة وللفتاة سبعة عشر سنة، وذهب جمهور المالكية إلى أن سن البلوغ ثمانية عشر سنة لا فرق بين الصبي والفتاة [٣]، وذهب ابن حزم الظاهري إلى أن سن البلوغ تجاوز الفتى أو الفتاة سن التاسعة عشر [٤]، وغني عن البيان أن اعتماد الفقهاء لهذه الأعمار إنما يكون حسابها بالأشهر القمرية.

وأما في القانون، فيُعرَّف الحدث بشكل عام بأنه الصغير الذي لم يبلغ سن الرشد الجنائي [٥]، وتتفق أغلب القوانين على أن الحدث يعتبر جانحاً إذا ارتكب جرماً يعاقب عليه القانون قبل بلوغه سن الرشد الجنائي

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[١]- عبدالعزيز، نهلة سعد، **المسؤولية الجنائية للطفل**، (المنصورة: دار الفكر القانوني، ط 1، 2013م)، ص 20-21، وبهنام، رمسيس، **علم الإجرام**، (الإسكندرية: منشأة المعارف، ط1، 1970م)، ج1، ص 365.

[٢]- الأنصاري، زكريا بن مُحَّد بن أحمد، **شرح التحرير تنقيح اللباب في فقه الإمام الشافعي** ، (القاهرة: دار إحياء الكتب العربية ، د.ت)، ج1، ص205، والمقدسي، عبدالله بن أحمد بن قدامه ، **المغني**، على مختصر أبو القاسم الخرقي، (مكتبة ابن تيمية لطباعة ونشر الكتب السلفية، د.ت)، ج4، ص510، والكاساني، علاء الدين أبو بكر ين مسعود بن أحمد، **بدائع الصنائع في ترتيب الشرائع**، (بيروت: دار الكتب العلمية، ط2، 1986م)، ج7، ص172.

[٣]- قاضي زاده أفندي، شمس الدين أحمد بن قدور، **تكلمة فتح القدير**، (بيروت: مطبعة دار الفكر، ط2، 1977م)، ج9، ص270.

[٤]- الظاهري، علي بن أحمد بن سعيد بن حزم، **المحلى بالآثار** ، تحقيق: أحمد مُحَّد شاكر، (بيروت : مطبعة دار الفكر ، د.ت)، ج5، ص688.

[٥]- المهدي، أحمد والشافعي، أشرف، **المعاملة الجنائية للأحداث والأحكام الإجرائية الخاصة بهم**، (القاهرة: دار العدالة، ط2، 2006م)، ص1.

الذي ببلوغه يصبح مسؤولاً جنائياً مسؤولية كاملة، وكثيراً ما تربط القوانين في تحديد مفهوم الحدث الجانح بسنوات عمره، فمن خلال سِنِّي عمره تتحدد مسؤوليته الجنائية من عدمها والتي تبدأ بالميلاد وتنتهي ببلوغ سن الرشد الجنائي.

وقد عرَّف قانون مساءلة الأحدث العماني الحدث بشكل عام أنه "كل ذكر أو أنثى لم يكمل الثامنة عشر من العمر"[٦]، فمرحلة الحداثة تمتد من الميلاد وحتى إتمام الحدث سن الثامنة عشر من عمره، وعرفت ذات المادة الحدث الجانح بأنه "كل من بلغ التاسعة ولم يكمل الثامنة عشر وارتكب فعلاً يعاقب عليه القانون"[٧]، وعليه فإن الحدث يعتبر منحرفاً في نظر القانون عند بلوغه السن التي حددها للتمييز وحتى بلوغه سن الرشد الجنائي.

ومن هذا يمكن للباحث تعريف الحدث الجانح وفقاً لمفهومه في القانون العماني بأنه: القاصر الذي بلغ المرحلة العمرية التي تكون فيها المسؤولية الجنائية ناقصة أو مخففة وتكون من بلوغه التاسعة من العمر وحتى إتمامه الثامنة عشر.

ويستخلص الباحث وفقاً لتعريف قانون مساءلة الأحداث، أنه يشترط لاعتبار الحدث جانحاً توافر شرطين:

الأول: بلوغ الحدث التاسعة من العمر وعدم إتمامه سن الثامنة عشر، فلا يعتبر جانحاً من لم يبلغ التاسعة من عمره حتى لو ارتكب فعلاً معاقباً عليه قانوناً، كما يعتبر بالغاً من أتم الثامنة عشر من عمره.

الثاني: أن يرتكب فعلاً يعاقب عليه القانون خلال الفترة المذكورة.

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[٦] – **قانون مساءلة الأحدث** ، الصادر بالمرسوم السلطاني رقم (2008/30م) بتاريخ 2008/3/9م، منشور في الجريدة الرسمية العدد (859) بتاريخ 2008/3/15م، المادة (1/ج). ويلاحظ الباحث أن القانون العماني أفصح بشكل واضح أن الحدث من لم يكمل الثامنة عشرة من العمر، ويعني هذا أن سن الرشد الجنائي هو بدخول الحدث سن التاسعة عشرة من العمر، لأنه بذلك يكون قد أتم الثامنة عشرة من عمره.

[٧] – **المرجع نفسه**، المادة (1/د).

– قضاء الأحداث في سلطنة عُمَان:

نهجت أغلب الدول الإسلامية – ومنها سلطنة عُمان – على جعل التشريع الإسلامي قانوناً عاماً ينظم أوضاع الناس في تعاملاتهم وسلوكياتهم [٨]، وهذا ما كان عليه الحال في سلطنة عمان حتى عام 1970م عندما تولى قيادة البلاد حضرة صاحب الجلالة السلطا قابوس بن سعيد الذي عَنِي بوضع القوانين لتنظيم دولة عصرية حديثة تقوم على نظام مؤسسي تحكمه القوانين المستمدة من روح الدين الإسلامي آخذه بنواصي قيم المجتمع وأعرافه.

وفي 16/فبراير/1974م صدر المرسوم رقم (74/7) بإصدار قانون الجزاء الذي وضع لبنات النظام الجنائي في الدولة، وتضمن الفصل الثالث (في المسؤولية الجزائية والعقاب) من الباب الثالث (في شروط التجريم والعقاب) على مواد تتضمن (أحكام القاصرين) [٩] تَضمُّ أربع مواد (104-107) تشتمل على قواعد تحديد سن عدم المسؤولية وسن المسؤولية الناقصة والعقوبات المخففة التي توقع على الأحداث الجانحين.

ورغم هذا التطور التشريعي إلا أن قضاء الأحداث لم يكن مستقلاً، فقد ظل القضاء الجنائي العادي يتولى محاكمة الحدث الجانح وفق الإجراءات التي يتبعها في محاكمة المجرمين البالغين، وبدخول سلطنة عمان إلى الإتفاقيات الدولية المعنية بالأحداث والعدالة الجنائية المقررة لهم اقتضى الحال تطوير المنظومة القضائية بما يتفق والقواعد الدولية، فقد صدر قانون مساءلة الأحداث وعلى ضوئه تم إنشاء قضاء

[٨] – نص النظام الأساسي للدولة بأن "دين الدولة الإسلام والشريعة الإسلامية هي أساس التشريع". **النظام الأساسي للدولة**، الصادر بالمرسوم السلطاني رقم (96/101) بتاريخ 1996/11/6م، منشور في ملحق الجريدة الرسمية العدد (587) بتاريخ 1996/11/16م، المادة (2).

[٩] – القاصر: هو من لم يبلغ سن الرشد. مصطفى ، إبراهيم والزيات، أحمد حسن وعبدالقادر، حامد والنجار، مُحَمَّد على ، **المعجم الوسيط**، (استنبول . تركيا: دار الدعوى، 1989م)، مادة (قصر)، ج2، ص738. هو مصطلح مستمد من أحكام الشريعة الإسلامية، ومع تطور القوانين تم إبداله بمصطلح الأحداث.

مستقل بالأحداث تحكمة قواعد تتسم بقدر من الحماية والرعاية للتعامل مع مرتكبي الجرائم من الأحداث وقواعد إجرائية تختلف عن تلك المتبعة في قضاء البالغين.

وقد تطرقت المادة الأولى من قانون مساءلة الأحداث العماني في الفقرة (و) إلى تعريف المحكمة بأنها "الدائرة التي تختص بالنظر في قضايا الأحداث وفقاً لأحكام هذا القانون وتسمى محكمة الأحداث"، ويلاحظ من التعريف قيد اختصاص المحكمة على قضايا الأحداث وفقاً للأحكام قانون مساءلة الأحداث، وهي تكون في حالة ارتكاب الحدث لجريمة يعاقب عليها القانون أو ارتكاب البالغ لأحد الجرائم الواردة حصراً في قانون مساءلة الأحداث والتي بطبيعتها لها ارتباط بالحدث.

ويحتل قضاء الأحداث مكانة خاصة ضمن نظام العدالة الجنائية حيث يمثل صيغة متطورة لوظيفة القضاء الجزائي في المجتمع، وتقوم فكرته على الصفة الخاصة لشخصية الحدث الجانح لكونه لم يبلغ سن الرشد الجنائي ويحتاج إلى إبعاده عن الشكليات والإجراءات التي تحيط بالمحاكم العادية والتي يُخشى منها أن تنعكس سلباً على شخصية الحدث، كما يهتم قضاء الأحداث بإعادة تقويم السلوكيات المنحرفة لدى الأحداث عن طريق إجراءات تقويمية تهدف إلى حمايته وتقويم سلوكه حتى يتعود على تحمل المسؤولية واحترام القانون[١٠].

وتقوم فلسفة محكمة الأحداث على أساس الإصلاح وليس فرض العقوبة ، وأن الإجراء التقويمي يتعين اختياره بعد دراسة شاملة لحالة الحدث سواء فيما يتعلق بالظروف الإجتماعية التي تحيط به أو العوامل النفسية التي بداخله، وبالتالي فإن مظاهر الحماية تحيط بالحدث الجانح من بداية مساءلته الجنائية وصولاً إلى مرحلة عودته واندماجه في المجتمع.

[١٠] – إمام، هالة مُحَّد، **الجوانب الموضوعية والإجرائية للمسؤولية الجنائية للأطفال**، (القاهرة: دارة النهضة العربية، 2015م)، ص394-395.

وحكمة المشرع التي تغياها من إفراد هذا الإختصاص يكمن في بث الطمأنينة والثقة في نفوس الأحداث مع إبعادهم عن المحاكمات التقليدية بما يتخللها من قيود السجن والحراسة، يكون فيها القاضي بمثابة الأب الذي يرعى بنيه، يهمه الطفل قبل أن تهمه الجريمة، ويهتم بتكوين النشء وبناء المجتمع أكثر من الإهتمام بتوقيع العقاب[١١].

وتعتبر محكمة الأحداث أحد دوائر المحكمة الجزائية وتدخل من ضمن التنظيم القضائي للقضاء العادي غير أنها ذات طبيعة خاصة من جهتين:

الأولى: من جهة الأشخاص الذين يحاكمون أمامها، إذ المرجع في تحديد الإختصاص لهذه المحاكم هو لشخص الحدث وليس لنوع الجريمة.

والثاني: من جهة الإجراءات التي تتبع في نظر الدعاوى التي تختص بها والتي تعتبر في مجملها استثناء من القواعد الجنائية العامة[١٢].

ونظراً لهذه الطبيعة الخاصة لقضاء الأحداث فإن هناك دعوات بفصل مباني محاكم الأحداث عن مقار المحاكم العادية لطبيعتها الخاصة ولما تحتاجه من أجواء تبعث على الطمأنينة في نفس الحدث [١٣]، ، وهي غاية تحول بينها بعض الاعتبارات العملية والظروف الاقتصادية لكنها تبقى مطلباً طموحاً تتطلع إليه السياسة الجنائية لتحقيق الاستقلال الكامل لتخصص قضاء الأحداث، وهو ما يدعو إليه الباحث لأجل تحقيق استقلالية وخصوصية تامة في قضاء الأحداث في النظام القضائي العماني.

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[١١] – عبدالعزيز، **المسؤولية الجنائية للطفل**، ص179.

[١٢] – المحلاوي، أنيس حسيب السيد، **نطاق الحماية الجنائية للأطفال**، (مصر: دار الكتب القانونية، 2011م)، ص517.

[١٣] – الدبيسي، مدحت، **محكمة الطفل والمعاملة الجنائية للأطفال**، (الإسكندرية: المكتب الجامعي الحديث، 2011م)، ص105.

ثانياً: أنظمة حلّ المنازعات لقضايا الأحداث في النظام القضائي العماني:

تعددت أنظمة حل المنازعات في التشريع العماني بتعدد القوانين وتوسعها، وقد أخذ صوراً مختلفة من التنظيم، فمنها ما يكون في شكل هيئة خاصة لحل المنازعات مثل لجان التوفيق والمصالحة، ومنها ما يكون داخلاً في ضمن التنظيم القضائي العادي مثل الصلح القضائي، ومنها ما يأخذ شكلاً شبه قضائي كما هو الحال في التحكيم التجاري والمدني، ومنها ما يكون خاصاً لنوع معين من الدعاوى كما هو الحال في التحكيم الشرعي بين الزوجين، ومن جميع هذه الأنظمة فإن هناك نظامان فقط يعالجان قضايا الأحداث، الأول: الصلح القضائي، وهو أحد أنظمة حل المنازعات داخل المنظومة القضائية، والثاني: لجان التوفيق والمصالحة، وهو أحد أنظمة حل المنازعات خارج المنظومة القضائية.

– الصلح القضائي:

سُمي هذا الصلح قضائياً لأنه يتم بعد إقامة الدعوى أمام المحكمة والتصالح أثناء المحاكمة، وقد عُرِّف بأنه "عقد يتفق عليه الخصوم بأنفسهم ويطرحونه على المحكمة للمصادقة عليه أو اعتماده وجعله في قوة سند واجب التنفيذ"[١٤].

وتبدأ إجراءات هذا الصلح بأن يقوم القاضي بعرض الصلح على الخصوم، حيث نص قانون الإجراءات المدنية والتجارية أن على المحكمة أن تبدأ الجلسة الأولى من المحاكمة بعرض الصلح على الخصوم [١٥]، وذلك لأن الجلسة الأولى غالباً ما تكون قابلية الصلح فيها أكبر قبل الدخول في تفاصيل الدعوى التي

[١٤] – طلبة، أنور، **موسوعة المرافعات المدنية والتجارية**، (مصر: دار الكتب القانونية، 2003م)، ج2، ص118.

[١٥] – **قانون الإجراءات المدنية والتجارية**، الصادر بالمرسوم السلطاني رقم (2002/29م) بتاريخ 2002/3/6م، منشور في الجريدة الرسمية العدد (715) بتاريخ 2002/3/17م، المادة (99).

تتخللها المناوشات الكلامية والتي تتضاءل معها احتمالية الصلح، وقد وقع الخلاف في أن عرض الصلح أمر ملزم للقاضي بحيث يرتب عليه البطلان إن لم يقم بذلك أو أنه أمر جوازي له أن يأخذ به أو يتركه؟ وقد استقر الرأي أخيراً على أن الأمر جوازي للقاضي له أن يقوم به أو يتركه دون أن يؤثر على الدعوى بالبطلان، ويرى الباحث أن جعل الأمر وجوبياً وترتيب البطلان على تركه أمر يزيد من فرصة وقوع الصلح بين الأطراف، ولذا يقترح الباحث تعديل نص المادة بجعل عرض الصلح على الأطرف وجوبياً يرتب على مخالفته البطلان في إجراءات الدعوى خاصة في قضايا الأحداث.

فضلاً عن قيام القاضي بعرض الصلح على الأطراف، فإن للخصوم أنفسهم أن يطلبوا من المحكمة في أية حال تكون عليها الدعوى إثبات ما اتفقوا عليه في محضر الجلسة ويوقع عليه منهم أو من وكلائهم المفوضين لهم بذلك[١٦]، فإذا كانوا قد كتبوا ما اتفقوا عليه أُلحِق الإتفاق المكتوب بمحضر الجلسة وأثبت محتواه فيه، ويكون لمحضر الجلسة في الحالتين قوة السند التنفيذي وتُعْطَى صورته وفقاً للقواعد المقررة لتسليم صور الأحكام القضائية [١٧]، ويجوز للمحكمة أن تصدر حكماً مشتملاً على الشكل المقرر للأحكام منتهية فيه إلى إثبات ما اتفق عليه الخصوم، ولكن يظل هذا الحكم خاضعاً لكافة القواعد المقررة للصلح.

ومن هذا يتبين أن الصلح القضائي يتم أمام القاضي الذي ينظر الدعوى، غير أن عمل القاضي بالتصديق على الصلح وإثباته لا يكون حُكماً وإنما بمثابة سند واجب التنفيذ لتصديق القاضي عليه وفقاً لسلطته الولائية وليس بصفته القضائية، وهذا يعني أن ما حصل أمامه من اتفاق الخصوم وتوثيقه ليس له حجية الشيء المحكوم فيه وإن أُعطي شكل الأحكام عند إثباته، لأن القاضي لم يقوم بوظيفته القضائية

[١٦] – نصت المادة (78) من قانون الإجراءات المدنية والتجارية على أن هناك جملة من الأعمال يلزم فيها وجود توكيل خاص والنص عليها صراحة في عقد الوكالة حتى يصح للوكيل القيام عن موكله بهذه الأعمال، ومن ضمنها الصلح.

[١٧] – **قانون الإجراءات المدنية والتجارية**، المادة (105).

من وزن الأدلة وتقدير البينات والترجيح بينها للوصول إلى حكم فاصل، وإنما قام بتوثيق ما اتفق عليه الأطراف.

ويتميز الصلح القضائي بجملة من المميزات عن الأحكام القضائية وسائر الأعمال القضائية الأخرى، وهي كالتالي:

أولاً: لا يكون الحكم الصادر بإثبات الصلح القضائي قابلاً للطعن عليه بالطرق المقررة للطعن على الأحكام القضائية، بل يكون بطريق دعوى أصلية يطلب فيها إبطال الحكم الصادر بالتصديق على الصلح لنقص في الأهلية أو الغلط في الواقع أو التدليس أو لغير ذلك من أسباب البطلان.

ثانياً: يكون الصلح القضائي قابلاً للفسخ كسائر العقود، باعتبار أنه عقد تم بين أطراف الخصومة وقام القاضي بإثبات هذا العقد آخذاً الشكل المقرر للأحكام القضائية.

ثالثاً: يكون تفسير الصلح القضائي طبقاً للقواعد المقررة في تفسير العقود لا القواعد المتبعة في تفسير الأحكام القضائية، وهذا بناء على اعتبار أنه عقد وليس حكم.

رابعاً: لا يجوز للمحكمة التصديق على الصلح إلا بحضور الخصمين، لأن القاضي إنما يقوم بمهمة الموثق، ولا يجوز توثيق عقد إلا بحضور الطرفين حتى لو كان الطرف الغائب قد قَبِل التصديق على الصلح في غيبته، كما يجب عدم التصديق على الصلح إذا تضمن ما يخالف النظام العام والآداب أو ما يضر بمصالح الغير[١٨].

ويشترك الصلح القضائي مع الأحكام القضائية في أنه يعتبر سنداً تنفيذياً يجري تنفيذه بذات الطريقة التي تنفذ فيها الأحكام القضائية، حيث أوضح قانون الإجراءات المدنية والتجارية السندات التنفيذية التي

[١٨] – طلبة، **موسوعة المرافعات المدنية والتجارية**، ج2، ص104.

يجري بموجبها التنفيذ الجبري وجعل في المقام الأول الأحكام والأوامر القضائية، ثم يأتي في المرتبة الثانية المحررات الموثقة ومحاضر الصلح التي تصدق عليها المحاكم[١٩].

ولأن المادة التي أجازت عقد الصلح القضائي واردة في قانون الإجراءات المدنية والتجارية فإن الصلح إنما يصح في الدعاوى المدنية والتجارية ودعاوى الأحوال الشخصية لأن القانون ينظم إجراءات التقاضي في هذه الدعاوى، وأما الدعوى العمالية فإن الصلح يصح فيها كذلك لإندراجها ضمن القانون شريطة أن لا يمس الصلح حقوقاً يقررها قانون العمل، وأما الصلح على شكوى جنائية مقابل مبلغ من المال فإن ذلك يعد باطلاً لدخول ذلك ضمن الدعوى الجنائية[٢٠]، ولكن يجوز التصالح على الحقوق المالية التي تنشأ عن إرتكاب الجريمة كما هو الحال في التعويض عن الضرر الذي سببته الجريمة، فيجوز التصالح على مقدار التعويض.

وهذا النوع من الصلح يندرج – من الجهة الشرعية – تحت النصوص التي تحث على الصلح وتندب إليه مثل قول الله تعالى: (وَالصُّلْحُ خَيْرٌ) (سورة النساء: الآية 12) وقوله: (إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ) (سورة الحجرات: الآية 10) وقول الرسول ﷺ: (الصلح جائز بين المسلمين إلا صلحاً أحل حراماً أو حرم حلالاً)[٢١].

ويلاحظ الباحث أن هذا النوع من تسوية المنازعات لم يتضمن أحكاماً خاصة بالأحداث الجانحين، فهو نظام يشمل الأحداث والبالغين على السواء.

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[١٩] – **قانون الإجراءات المدنية والتجارية**، المادة (342/ب).

[٢٠] – طلبة، **موسوعة المرافعات المدنية والتجارية**، ج2، ص113.

[٢١] – أبو داود، سليمان بن الشعث، **سنن أبو داود**، (بيروت: دار الفكر، د.ت)، كتاب الأقضية، باب: في الإصلاح، ج 3، ص304، والترمذي، مُحَمَّد بن عيسى، **سنن الترمذي**، (بيروت: دار إحياء التراث العربي د.ت)، كتاب الأحكام، باب: ما ذكر عن الرسول ﷺ في الصلح بين الناس، ج3، ص626، والقزويني، مُحَمَّد بن يزيد، **سنن ابن ماجة**، (بيروت: دار الفكر، د.ت)، كتاب الأحكام، باب: الصلح، ج2، ص788.

– لجان التوفيق والمصالحة:

أُنشأت لجان التوفيق والمصالحة بموجب المرسوم السلطاني رقم (2005/98م) الصادر بتاريخ 2005/11/28م[٢٢]، وتنتشر في جميع ربوع عُمان، حيث تتوزع (46) لجنة على ولايات ومحافظات السلطنة[٢٣]، وتتبع إدارياً لوزارة العدل.

وتعتبر لجان التوفيق والمصالحة طريق غير قضائي لحل المنازعات، ومن خلال استقراء نصوص قانون لجان التوفيق والمصالحة يستخلص الباحث عدة خصائص تميز هذه اللجان كالتالي:

- أن اللجوء إلى هذه اللجان يكون بدون رسوم مهما كان سقف المطالبة المالية[٢٤].
- اللجوء إلى اللجان يكون اختيارياً لذوي الشأن[٢٥].
- اللجان غير ملزمة بقانون المحاماة في اشتراط توكيل محامٍ إن كانت المطالبة تزيد على قيمة خمسة عشر ألف ريال عماني[٢٦].
- عدم التزام هذه اللجان بقانون الإجراءات المدنية والتجارية من حيث تسجيل الطلب وآلية الإعلان والإستعانة بالخبرة،[٢٧] وهذا يعطيها مرونة وسرعة في اتخاذ الإجراء.

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[٢٢] – نشر في الجريدة الرسمية العدد (804) بتاريخ 2005/12/1م.

[٢٣] – الحوقاني ، بدر بن سيف، **جريدة عمان** . مقابلة مع مدير مكتب تنسيق لجان التوفيق والمصالحة ، 2/رمضان/1438هـ – 2017/5/28م.

[٢٤] – **قانون التوفيق والمصالحة**، الصادر بالمرسوم السلطاني رقم (2005/98م) بتاريخ 2005/9/28م، منشور في الجريدة الرسمية العدد (804) بتاريخ 2005/10/1م، المادة (10).

[٢٥] – **المرجع نفسه**، المادة (3) و(12). ورغم أن اللجوء إلى هذه اللجان يكون اختيارياً غير أن هناك دعوات بجعل هذا اللجوء إجبارياً في بعض الدعاوى مثل دعاوى الأحوال الشخصية وقضايا الأحداث، غير أن هذه النداءات لم تجد أذناً صاغية حتى الآن ويبقى الوضع القائم أن اللجوء إلى هذه اللجان اختياري.

[٢٦] – **المرجع نفسه**، المادة (10).

[٢٧] – **المرجع نفسه**، المادة (9) و(10).

- عدم تقيد اللجان في مكان وزمان انعقادها بمواعيد العمل الرسمية[٢٨]، وهو يعطيها سهولة عقد الصلح في غير أوقات العمل الرسمية.
- يكون محضر الصلح الذي يصدر عنها سنداً تنفيذياً ويجري تنفيذه بذات الطريقة التي تنفذ بها الأحكام القضائية النهائية[٢٩].
- اللجان لها طابع اجتماعي[٣٠]، حيث يتم عرض النزاع في جو هادئ وفي مكان مخصص يختلف عن قاعات المحاكم بعيداً عن الإجراءات الرسمية ورهبة المحاكمات.
- يكون قبول الصلح فيها اختيارياً للطرفين، فلا يوجد إكراه لأحدهما في قبول الصلح[٣١].
- يحق للطرفين إقامة دعوى أمام القاضي الطبيعي مباشرة إن لم يصل الأطراف إلى صلح يرضيهما[٣٢].

وقد أوضحت المادة (5) من قانون لجان التوفيق والمصالحة أن اللجنة تُشكل بقرار من وزير العدل، وتشكيلها يأخذ ثلاثة صور وفق ما ذكرته المادة وذلك على النحو التالي:

١) التشكيل القضائي: وذلك بأن تُشكل برئاسة أحد القضاة وعضوية اثنين منهم، وقد جعلت المادة المذكورة الأولوية للتشكيل بالهيئة القضائية حتى تكون أدعى إلى القبول عند الناس لما يَكُنُّه الأطراف من احترام للهيئة القضائية، كما أن القضاة أوعى بالدعاوى التي يجوز فيها الاتفاق على الصلح وبالتالي تكون متفقة مع صحيح القانون.

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[٢٨] – **المرجع نفسه**، المادة (3).

[٢٩] – **المرجع نفسه**، المادة (15).

[٣٠] – **المرجع نفسه**، المادة (7).

[٣١] – **المرجع نفسه**، المادة (14).

[٣٢] – **المرجع نفسه**، المادة (14).

٢) التشكيل المختلط: وذلك بأن تُشكل برئاسة أحد القضاة وعضوية اثنين من ذوي الخبرة ممن تتوافر فيهم الحكمة، فهذا التشكيل يتميز بالجمع بين العنصر القضائي ذو الخبرة القانونية والكفاءات القادرة على حلّ المنازعات.

٣) التشكيل من ذوي الخبرة: قد تواجه اللجنة ظرف شح القضاة وندرتهم أو انشغالهم بالعمل القضائي لديهم في منطقة من المناطق، وحتى لا تقف اللجنة عاجزة عن أداء دورها؛ أجاز القانون إذا اقتضت الحال أن تُشكل اللجنة من ذوي الخبرة برئاسة أحدهم، والجدير بالذكر أن اختيار هؤلاء الخبراء يكون من النسيج المجتمعي نفسه من ذوي الخبرة وأهل الرأي ومن ينظر إليهم المجتمع ويقدرهم من مشائخ العلم وأهل الفضل.

ورغم هذه المكانة التي تبوأتها لجان التوفيق والمصالحة غير أن اختصاصها بتسوية أي نزاع يكون قبل إقامة دعوى بشأنه أمام القضاء، فإذا أقيمت الدعوى أمام القضاء فإن اللجنة تكون غير مختصة بنظر المنازعة[٣٣].

كما أن اللجنة تختص بنوع معين من المنازعات التي يصح لها عقد الصلح فيها وهي ثلاثة أنواع[٣٤]:

١) المنازعات المدنية: والتي يكون موضوعها مدنياً ويطبق عليها قانون المعاملات المدنية.

٢) المنازعات التجارية: وهي التي يكون أحد أطرافها تاجراً أو أن موضوعها تجارياً، ويحكمها قانون التجارة.

٣) المنازعات في مسائل الأحوال الشخصية: وهي القضايا الشرعية المتعلقة بقضايا الأسرة والميراث والوصية والتي يحكمها قانون الأحوال الشخصية.

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[٣٣] – **المرجع نفسه**، المادة (4).

[٣٤] – **المرجع نفسه**.

وعلى هذا فإن بقية المنازعات لا يصح للجنة أن تعقد الصلح فيها لخروجها عن نطاق اختصاصها القانوني مثل المنازعات المتعلقة بقانون الجزاء وقانون العمل والقضايا الإدارية والمنازعات المتعلقة بملكيات الأراضي.

ويظهر من العرض السابق أن هذا النظام من التسوية لم يتضمن أحكاماً خاصة للأحداث، وإنما هو عام لهم ولغيرهم من البالغين في القضايا التي تدخل من اختصاصه، ويتمنى الباحث على المشرع العماني توسيع دائرة عمل هذه اللجان بحيث تشمل القضايا الجزائية التي يصح التصالح عليها وخاصة في قضايا الأحداث التي هي في حاجة ماسة للتسوية.

ونخلص من خلال ما سبق عرضه، أن من بين أنظمة حل المنازعات في القانون العماني يمكن الاستعانة بنظامين فقط في تسوية قضايا الأحداث الجانحين هما: الصلح القضائي ولجان التوفيق والمصالحة، وهما يشملان البالغين والأحداث على السواء، ويظهر جلياً عدم وجود نظام تسوية مستقل أو حتى هيئة أو لجنة خاصة تهتم بتسوية القضايا التي يقع فيها الأحداث رغم الحاجة الماسة لهذه الفئة من المجتمع لتسوية منازعاتها تجنيباً لها من تعقيدات المحاكمات ورهبتها التي تنعكس سلباً على شخصية الحدث، وهو لعمري قصور تشريعي يجب على المشرع العماني تداركه بإنشاء جهاز مستقل لتسوية منازعات الأحداث الجانحين أو إنشاء لجنة أو هيئة مختصة بذلك تتبع محكمة الأحداث أو أية جهة أخرى، وهو ما يقترحه الباحث على المشرع العماني.

ثالثاً: حلُّ المنازعات في القضايا التي يرتكبها الأحداث الجانحون:

رأينا أن قضايا الأحداث الجانحون تُنظر أمام محكمة خاصة تسمى "محكمة الأحداث" واتضح من ذلك أن القضايا التي يرتكبها الأحداث الجانحون تكون قضايا جزائية تنظر أمام محكمة خاصة بالأحداث غير أنه يترتب على ذلك نشوء مطالبات مدنية ناتجة عن الجريمة، ويقتضي الأمر الحديث أولاً عن حل المنازعات في القضايا الجزائية ثم الانتقال إلى حل المنازعات في القضايا المدنية.

– حلُّ المنازعات في القضايا الجزائية:

يُعرَّفُ قانون الجزاء بأنه مجموعة القواعد التي تسنها الدولة لتنظيم حقها في العقاب، إذ أن من واجبات الدولة أن تعمل على استتباب الأمن وحفظ السلام في داخل المجتمع، ولما كانت الجريمة عارضاً يخلُّ بها فإن على الدولة أن تتخذ من الإجراءات ما يكفل مكافحتها، ووسيلتها في ذلك توقيع جزاء على المجرمين[٣٥]، وينشأ عن ذلك قيام الدعوى الجزائية والتي تسمى أيضاً "الدعوى العمومية" والتي يتولاها الادعاء العام الذي يقوم بالتحقيق في الدعوى وإحالتها بعد ذلك للمحكمة باعتباره الأمين على كيان المجتمع والممثل لهم.

وعند ارتكاب الحدث الجانح لجريمة من الجرائم فإن دائرة خاصة في الادعاء العام تتولى التحقيق مع الحدث[٣٦] وتكفل له كافة الضمانات القانونية والحماية الضرورية تمهيداً لتقديمه لمحكمة الأحداث، ونظراً إلى أن الإجرام لدى الحدث الجانح أمر عارض وليس غريزة متأصلة فيه، فإن تسوية المنازعات في القضايا

[٣٥] – السعيد، السعيد مصطفى، **الأحكام العامة في قانون العقوبات**، (القاهرة: دار المعارف، ط4، 1964م)، ص1.

[٣٦] – **قانون مساءلة الأحداث**، المادة (7).

التي تنشأ عن ذلك أمر متحتم لما ترتبه المحاكمة من أضرار نفسية وجسدية لا تخفى، فالصلح الجنائي يؤدي إلى تلافي المساوئ التي تكتنف العقوبات السالبة للحرية لكونه لا يتضمن مساساً بالحرية أو الشرف والسمعة، كما أنه لا يخدش المكانة الاجتماعية للحدث الجانح ويجنبه مخالطة معتادي الإجرام.

ويثور التساؤل هنا عن مدى قابلية تسوية المنازعات في القضايا الجزائية التي يرتكبها الأحداث الجانحون؟ وجواباً على ذلك، فإن القاعدة العامة في الدعاوى الجزائية أنه لا يجوز التصالح على الجريمة لأنها حق عام للمجتمع وليست لشخص محدد، كما لا يصح التصالح على تحديد المسؤولية في القضايا الجزائية باعتبار أن تحديد المسؤولية من النظام العام[٣٧] الذي لا يجوز الاتفاق على مخالفته.

ورغم ذلك فإن هناك جملة من الجرائم التي يجوز التنازل عنها والتي تسمى بـ"جرائم الشكوى" وهي التي تأخذ صفة الادعاء الشخصي، حيث أوضح قانون الإجراءات الجزائية بأنه لا ترفع الدعوى العمومية إلا بناء على شكوى شفهية أو كتابية من المجنى عليه أو من وكيله الخاص في الجرائم التي يشترط فيها القانون تقديم شكوى[٣٨]، وهي جرائم محددة نص عليها القانون حصراً بأنها تحتاج إلى تقديم شكوى من المجنى عليها لأجل مباشرة التحقيق فيها من جهات الإختصاص.

ففي حالة ارتكاب الحدث الجانح لأحد جرائم الشكوى فإنه لمن قدم الشكوى أو الطلب أن يتنازل عن شكواه أو طلبه في أي وقت قبل الفصل في الدعوى نهائياً[٣٩]، ويصدر على إثرها القاضي حكماً بإنقضاء

[٣٧] – طلبة، **موسوعة المرفعات المدنية والتجارية**، ج2، ص113.

[٣٨] – **قانون الإجراءات الجزائية**، المادة (5).

[٣٩] – **المرجع نفسه**، المادة (10).

الدعوى العمومية بتنازل الشاكي [٤٠]، وهذا التنازل يأخذ غالباً صورة تسوية تتم بين الحدث أو وليه أو وصية أو المؤتمن عليه وبين المجنى عليه وتكون أمام القاضي في مرحلة المحاكمة.

وفي حالة تعدد المجنى عليهم، فإن التنازل لا ينتج أثراً إلا إذا صدر من جميع ممن قدموا الشكوى، وأما في حالة تعدد المتهمين فإن التنازل عن الشكوى بالنسبة إلى أحدهم يعتبر تنازلاً إلى البقية، وإذا تُوفي الشاكي انتقل الحق في التنازل إلى ورثته جملة إلا في دعوى الزنا فلكل واحد من أولاد الزوج الشاكي من الزوج المشكو منه أن يتنازل عن الشكوى[٤١].

وجرائم الشكوى التي نص قانون الجزاء على أن ترفع بناء على شكوى مقدمة من المجنى عليه محددة حصراً في القانون وهي على النحو التالي:

١. جريمة ارتكاب أفعال الإهانة الواقعة علناً أو بالنشر ضد رؤساء الدول الأجنبية أو ممثليها المعتمدين لدى السلطنة أو ضد أعلامها – المادة (153).
٢. جريمة استيفاء الحق بالذات – المادة (190).
٣. جريمتي اللواط والسحاق إذا لم يؤدي الأمر إلى الفضيحة – المادة (223).
٤. جريمة الزنا – المادة (227).
٥. جريمة الإيذاء البسيط – المادة (247).
٦. جريمة الإيذاء عن إهمال أو قلة احتراز أو عدم مراعاة الأنظمة شريطة أن لا ينجم عن الأذى مرض أو تعطيل عن العمل لمدة تزيد على عشرة أيام – المادة (255).
٧. جريمة انتهاك حرمة مسكن في غير حالات تشديد العقوبة – المادة (262).

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[٤٠] – **المرجع نفسه**، المادة (15).

[٤١] – **المرجع نفسه**، المادة (10).

٨. جريمة التهديد بالسلاح – المادة (264).

٩. جريمة وعيد آخر بجنحة – المادة (267).

١٠. جريمة التهديد بإنزال ضرر غير مُحِق – المادة (268).

١١. جريمة إهانة الكرامة – المادة (269).

١٢. جريمة السرقة للاستعمال وسرقة الأموال ذات القيمة التافهة – المادة (281).

١٣. جريمة اغتصاب التوقيع أو أية كتابة تتضمن تعهداً أو إبراء بواسطة التهديد – المادة (287).

١٤. جريمة إساءة الأمانة – المادة (296).

١٥. جريمة حبس اللُّقطة أو أي شيء منقول دَخَلَ في حيازته خطأ أو بصورة طارئة أو بقوة ظاهرة – المادة (297).

ويلاحظ في هذه الجرائم أن الحق الشخصي للمجنى عليه أظهر من حق المجتمع، ولذلك غُلِّبت فيها مصلحته على المصلحة العامة، وجميعها واردة في قانون الجزاء، وتنطبق ذات القاعدة على النصوص القانونية الواردة في القوانين الأخرى، فعلى سبيل المثال: جريمة التهرب الجمركي الواردة في قانون الجمارك يلزم فيها لتحريك الدعوى العمومية وجود طلب من مدير عام الجمارك [٤٢]، فإذا رفعت الدعوى العمومية قبل صدور هذا الطلب وقع ذلك الإجراء باطلاً بطلاناً متعلقاً بالنظام العام لاتصاله بشرط أساسي لازم لتحريك الدعوى العمومية وبصحة اتصال المحكمة بالواقعة[٤٣].

[٤٢] – **قانون الجمارك الموحد لدول مجلس التعاون لدول الخليج العربي** ، الصادر بالمرسوم السلطاني رقم (2003/67م) بتاريخ 2003/9/28م، منشور في الجريدة الرسمية العدد (752) الصادرة في 2003/10/1م، المادة (150).

[٤٣] – **مجموعة الأحكام الصادرة عن الدائرة الجزائية والمبادئ المستخلصة منها** ، 2006م، مبدأ رقم (51) في الطعن رقم (2006/174م). جلسة 2006/5/23م. ص402.

ويلاحظ أيضاً أن القاعدة العامة أنه لا يشترط وجود شكوى أو طلب لتحريك الدعوى العمومية، والاستثناء هو وجود نص صريح باشتراط تحريك الدعوى بناء على شكوى أو طلب أو إذن.

هذا في حالة حصول التسوية والتنازل قبل صدور حكم نهائي في الدعوى، ولكن التساؤل ينهض هنا ما لو حصل تنازل الشاكي عن دعواه في الجرائم التي يصح فيها ذلك بعد صدور الحكم النهائي في الدعوى العمومية؟

في هذه الحالة أوجد القانون معالجة أسماها "صفح الفريق المتضرر" ويقصد به: "العفو الذي يصدر من المتضرر الذي أصابته الجريمة بضررها سواءً المادي أو المعنوي"[٤٤]، ويعتبر صفح الفريق المتضرر أحد أسباب انقضاء العقوبة المحكوم بها ضد الحدث الجانح في جرائم الشكوى، فإذا حصلت التسوية بين المجنى عليه والحدث أو من يقوم مقامه بعد صدور حكم نهائي ضده فإنه يوقف تنفيذ العقوبة المحكوم بها [٤٥]، فإذا صدر الصفح من المضرور فإنه لا يُنْقَضُ ولا يصح التراجع عنه، وكذلك فإن الصفح لا يصح أن يُعلَّق على شرط إذ يجب أن يكون ناجزاً، وإذا تناول الصفح أحد المحكوم عليهم فإنه يشمل الآخرين، ولا يعتبر الصفح إذا تعدد المدعون بالحقوق الشخصية ما لم يصدر عنهم جميعاً[٤٦].

ولم يحدد القانون آلية معينة لهذه التسوية، كما لم يوضح الحاضن لها في ظل انتهاء المحاكمة وصدور الحكم، ونظراً إلى أن لجان التوفيق والمصالحة لا تختص بالتسوية في الدعاوى الجزائية، كما أن الصلح القضائي قاصر على الدعاوى المدنية والتجارية والشرعية دون الجزائية، وعليه فلا يوجد حاضن قانوني لهذا النوع من التسوية وتبقى الأعراف الاجتماعية ومؤسسات المجتمع المدني هي الحاضن لهذا النوع من

[٤٤] – عطية، طارق إبراهيم الدسوقي، **الأحكام العامة في قانون الجزاء العماني** ، (الإسكندرية: دار الجامعة الجديدة، ط 1، 2012م)، ص999.

[٤٥] – **قانون الجزاء العماني**، الصادر بالمرسوم السلطاني رقم (74/7) بتاريخ 1974/2/16م نشر في ملحق الجريدة الرسمية رقم (52) الصادرة بتاريخ 1974/4/1م، المادة (67).

[٤٦] – **المرجع نفسه**، المادة (68).

التسوية، ويقترح الباحث أن يوسع المجال للجان التوفيق والمصالحة – باعتبار أنها الأقرب إلى النسيج المجتمعي – في أن تختص بهذا النوع من حل المنازعات كما تختص كذلك بتسوية المنازعات الجزائية في جرائم الشكوى أثناء المحاكمة وبعد صدور الحكم.

ويتفهم الباحث غاية المشرع من عدم إتاحة مجال الصلح في الدعاوى الجزائية وذلك خشية منه أن تُتَخذ تجارة أو وسيلة للإثراء بلا سبب شرعي، غير أن قيد التصالح على جرائم الشكوى يَحُدُّ من ذلك، كما يمكن تقييدها أيضاً بقصر الصلح في الجرائم التي يرتكبها الأحداث دون البالغين حتى تكون التسوية وسيلة لتجنيب الحدث الجانح مساؤي المحاكمات والعقوبات المترتبة عليها.

وعليه يقترح الباحث إضافة مادة خاصة في قانون التوفيق المصالحة تحمل رقم (4 مكرراً) يكون نصها: (تختص اللجان بتسوية المنازعات الجزائية التي تأخذ صفة الادعاء الشخصي في الجرائم التي يرتكبها الأحداث الجانحون، وينتج الصلح أثر التنازل القانوني قبل صدور الحكم ويكون سبباً لانقضاء العقوبة بعد صدور الحكم).

– حلُّ المنازعات في الدعاوى المدنية:

يترتب غالباً على الجريمة حصول ضرر مادي أو معنوى لدى المجنى عليه الأمر الذي ينشأ عنه قيام دعوى مدنية متعلقة بالدعوى الجزائية للمطالبة بالتعويض لجبر الضرر الذي خَلَّفته الجريمة، وهذا أمر يحدث في القضايا التي يرتكبها الأحداث الجانحون أو البالغين على السواء.

وقد وضع قانون الجزاء العماني قاعدة عامة في ذلك نصها "كل جريمة تُلْحِقُ بالغير ضرراً مادياً أو معنوياً يحكم على فاعلها بالتعويض عند طلب المتضرر" [٤٧]، كما أن القواعد العامة في القانون المدني توجب رفع

[٤٧] – **قانون الجزاء العماني**، المادة (58).

الضرر عن المضرور بصرف النظر عن عُمْر الفاعل، فقد نص قانون المعاملات المدنية على أن "كل إضرار بالغير يلزم فاعله ولو كان غير مميز بالتعويض"[٤٨]، وهذا يتفق مع قواعد الفقه الإسلامي التي تقضي أنه "لا ضرر ولا ضرار"[٤٩] و"الضرر يزال"[٥٠] و"الضرر يدفع بقدر الإمكان"[٥١].

والأصل العام أن لكل من أصابه ضرر شخصي مباشر بسبب الجريمة أن يرفع دعوى بحقه المدني أمام المحكمة التي تنظر الدعوى العمومية في أية حالة كانت عليها إلى أن يقفل باب المرافعة بوصفه مدعياً منضماً في الدعوى العمومية، ويجوز للمدعي أن يطالب بحقه أثناء التحقيق الإبتدائي بطلب يقدمه إلى عضو الادعاء العام [٥٢]، غير أن هذا الأصل مستثنى في قضايا الأحداث، حيث مَنَعَ قانون مساءلة الأحداث قبول الدعوى المدنية المتعلقة بالدعوى الجزائية أمام محكمة الأحداث[٥٣].

وقد تغيَّا المشرع من ذلك عدة أهداف، منها أن قبول الدعاوى المدنية أمام محكمة الأحداث يؤدي إلى حضور أشخاص لا صلة لهم بمصلحة الحدث بل هم خصومه مما يتنافى مع مبدأ سرية جلسات محكمة

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[٤٨] – **قانون المعاملات المدنية** ، الصادر بالمرسوم السلطاني رقم (2013/29) بتاريخ 2013/5/6م، منشور في الجريدة الرسمية العدد (1012) بتاريخ 2013/5/12م، المادة (1/176).

[٤٩] – وهي قاعدة نصية واردة في حديث عن الرسول ﷺ قال: (لا ضرر ولا ضرار)، رواه ابن ماجة، **سنن ابن ماجة**، كتاب الأحكام، باب: من بنى في حقه ما يضر جاره، رقم (2340)، ج2، ص784، والأصبحي، مالك بن أنس، **موطأ مالك**، (مصر: دار إحياء التراث العربي، د.ت)، كتاب الأقضية، باب: القضاء في المرافق، رقم (1429)، ج2، ص745، والبيهقي، أحمد بن الحسين، **سنن البيهقي الكبرى**، (مكة المكرمة:مكتبة دار الباز، 1414هـ/1994م)، كتاب الحجر، باب: لا ضرر ولا ضرار، رقم (11166)، ج6، ص96، والدار قطني، علي بن عمر، **سنن الدار قطني**، (بيروت: دار المعرفة، 1386هـ/1966م)، كتاب البيوع، رقم (288)، ج3، ص77، وهو مروي عن عدد من الصحابة كعبادة بن الصامت وابن عباس وأبي سعيد الخدري وأبي هريرة وعائشة ﷺ.

[٥٠] – السيوطي، جلال الدين عبد الرحمن، **الأشباه والنظائر في قواعد وفروع فقه الشافعية** ، (بيروت: دار الكتب العلمية، ط 1، 1403هـ/1983م)، ص83، و باز، سليم رستم، **شرح المجلة**، (بيروت: دار إحياء التراث العربي، ط 3، 1406هـ / 1986م)، مادة (20)، ص29، وحيدر، علي، **درر الحكام شرح مجلة الأحكام** ، (بيروت: دار الجيل، ط 1، 1411هـ /1991م)، مادة (20)، ج1، ص37، والزرقا، أحمد بن حمد، **شرح القواعد الفقهية**، تحقيق: مصطفى أحمد الزرقا، (دمشق: دار القلم، ط4، 1417هـ/1996م)، مادة (20)، ص179.

[٥١] – باز، **شرح المجلة**، مادة (31)، ص32، وحيدر، **درر الحكام**، مادة (31)، ج1، ص42، والزرقا، **شرح القواعد الفقهية**، مادة (31)، ص207.

[٥٢] – **قانون الإجراءات الجزائية**، المادة (20).

[٥٣] – **قانون مساءلة الأحداث**، المادة (36).

الأحداث[٥٤]، وكذلك فإن هذا الفصل يُمكِّن محكمة الأحداث من التفرغ لبحث الجريمة وحالة مرتكبها وتقدير التدبير المناسب له دون أن يشغلها عن ذلك بحث الدعوى المدنية[٥٥]، كما أن ربط الدعوى المدنية بالدعوى الجزائية يؤدي عادة إلى إطالة أمد التقاضي، وهو الأمر الذي يتنافى مع مبدأ سرعة الفصل في دعاوى الأحداث، إذ أن من شأن نزع هذا الاختصاص عن محكمة الأحداث تقصير أمد التقاضي الذي هو من أهم ضمانات المحاكمة العادلة، ولذا فإن التشريعات التي أخذت بهذا الاتجاه هدفت إلى أن فصل الدعوى المدنية عن الدعوى الجزائية هو أحد وسائل الحماية الجنائية الإجرائية للحدث الجانح.

وبناء على ما تقدم، فإنه ليس للمضرور أو الحدث الجانح في هذه الحالة إلا اللجوء إلى أحد خيارين:

الخيار الأول: توجه المضرور إلى لجنة التوفيق والمصالحة للمطالبة بحقه وتقديم طلب أمامها ضد الحدث الجانح ووليه أو وصيه أو القائم عليه، أو أن يتقدم الحدث الجانح أو أحد القائمين على شأنه بطلب أمام اللجنة لطلب المصالحة على مبلغ التعويض، وهنا تتدخل اللجنة بما لها من صلاحيات في تسوية النزاع وتقدير مبلغ التعويض الذي يستحقه المضرور نتيجة فعل الحدث الجانح، وهذا يُبْعِدُ الحدث عن رهبة المحاكمات وتعقيدها وطول الإجراءات فيها، وهو أهون الخيارين مضرة على الحدث الجانح.

ولتحقيق هذا الخيار يقترح الباحث تعديل المادة (4) من قانون التوفيق والمصالحة ليكون نصها: (تختص اللجان بتسوية أي نزاع – قبل إقامة دعوى بشأنه إلى القضاء – بطريق الصلح بين أطرافه سواء كان موضوع النزاع مدنياً أو تجارياً أو متعلقاً بمسألة من مسائل الأحوال الشخصية، كما تختص بالصلح في

[٥٤]- عبدالعزيز، **المسؤولية الجنائية للطفل**، ص208.

[٥٥] - عوين، زينب أحمد، **قضاء الأحداث دراسة مقارنة**، (عمان: دار الثقافة للنشر والتوزيع، ط1، 2009م)، ص176، وطالب، السنية مُحَّد، **إجراءات محاكمة الأحداث في التشريع الجزائري** ، (بحث مقدم لنيل درجة الماجستير في جامعة مُحَّد خيضر بالجزائر، كلية الحقوق والعلوم السياسية، العام الجامعي2014/2013م)، ص92.

الحقوق المالية التي تنشأ عن الدعاوى الجزائية التي تأخذ صفة الادعاء الشخصي في أية حالة تكون عليها الدعوى).

الخيار الثاني: توجه المضرور إلى المحكمة المدنية للمطالبة بالتعويض بالتقدم بدعوى أمامها ضد الحدث الجانح ووليه أو وصيه أو القائم عليه، وهنا تأخذ الدعوى إجراءاتها المعتادة أمام القضاء، غير أنه يمكن تدخل القاضي بعرض الصلح على الأطراف وفقاً للمادة (99) من قانون الإجراءات المدنية والتجارية والتي سبق تفصيلها، وهو ما يعرف بالصلح القضائي، أو عرض الحدث الجانح أو أحد القائمين على شأنه الصلح مع المضرور وتسوية المطالبة ودياً، وفي حالة تمام الصلح فإن ذلك يُجنِّب الحدث طول الإجراءات بمرور الدعوى في درجات التقاضي المختلفة ويجنبه عناء المحاكمات.

ويقترح الباحث تعديل المادة (99) من قانون الإجراءات المدنية والتجارية ليكون نصها: (تبدأ المحكمة الجلسة الأولى بعرض الصلح على الخصوم، ويكون ذلك وجوبياً يرتب على مخالفته البطلان في الدعاوى التي يكون فيها المدعى عليه حدثاً...).

وفي الحالتين، تُطبق قواعد عقد الصلح الواردة في قانون المعاملات المدنية والتي أجازت للصبي المميز المأذون له في إبرام عقد الصلح إن كان نافعاً له، وكذلك الحكم في صلح الأولياء والأوصياء والقوام الذين ينوبون عن الحدث الجانح[٥٦].

ونخلص من هذا، أن القانون العماني أتاح للحدث الجانح أو وليه أو وصيه أو المؤتمن عليه بأن يتجنب إجراءات المحاكمة المدنية الناشئة عن الدعوى الجزائية بالتقدم إلى لجنة التوفيق والمصالحة لتسوية المنازعة أو الحضور أمامها في حالة تقديم الطلب من المضرور، وكذلك عرض الصلح أمام القاضي في حالة قيام

[٥٦] – **قانون المعاملات المدنية**، المادة (506).

المضرور برفع دعوى مدنية ضد الحدث، ورغم أن الطريقين كفيلين بتسوية المنازعات التي يقع فيها الحدث الجانح وتجنيبه طول المحاكمات وإجراءاتها المعقدة، غير أن عدم النص عليها يعتبر قصوراً تشريعياً يجب تداركه على النحو الذي اقترحه الباحث. كما يتمنى الباحث على المشرع العماني أن يجعل طريق المصالحة في القضايا التي يرتكبها الأحداث وجوبياً بدل أن يكون جوازياً، وذلك بإصدار تشريع يُلزم المضرور والحدث الجانح أو القائمين على شأنه بالمرور إجباراً على طريق المصالحة سواء في لجنة التوفيق والمصالحة أو في المحكمة وذلك قبل الدخول في إجراءات المحاكمة، وهو ما يقترحه الباحث على المشرع العماني.

الخاتمة

بعد هذا التطواف بين خمائل العلم وبساتين المعرفة، نرجع وأيدياً ملأى بثمار يانعة من المعارف المتعلقة بحل المنازعات في القضايا التي يرتكبها الأحداث الجانحون في القانون العماني، ويمكن تلخيص ذلك في عنصرين، النتائج والتوصيات.

– النتائج:

- الحدث في الفقه الإسلامي هو من لم يصل لسن البلوغ، وأما في القانون العماني فالحدث الجانح هو من بلغ التاسعة ولم يتم الثامنة عشر وارتكب فعلاً يعاقب عليه القانون.
- محكمة الأحداث صيغة متطورة لوظيفة القضاء الجزائي في المجتمع، تقوم فكرتها على إبعاد الحدث من الشكليات والإجراءات التي تحيط بالمحاكم العادية حماية للحدث.
- الصلح القضائي يعرضه القاضي على الأطراف أو يطلبه أطراف الخصومة بأنفسهم أثناء محاكمة قائمة، ويعطى في حال إقراره قوة السند التنفيذي ويتم تنفيذه مثل الأحكام القضائية.
- لجان التوفيق والمصالحة نظام فريد تميز به التشريع العماني وحرره من القيود الإجرائية التي يأخذ بها في المحاكمات القضائية، وجعل يدخل في تشكيلة أعضائه نسيج المجتمع من أهل الرأي والحكمة ليكون أدعى لقبول الصلح، ويكون المحضر الصادر عنها سنداً تنفيذياً شأنه شأن الأحكام القضائية.
- يمكن التنازل عن الدعوى الجزائية من المجنى عليه في جرائم الشكوى، كما يكون صفح الفريق المتضرر سبباً لانقضاء العقوبة المحكوم بها ضد الحدث الجانح.
- كل جريمة تُلحق ضرراً بالغير مادياً أو معنوياً يحكم على فاعلها بالتعويض المدني عند طلب المضرور.

- أتاح القانون العماني للحدث أو وليه أو وصيه أو المؤتمن عليه أن يتجنب إجراءات المحاكمة المدنية الناشئة عن الدعوى الجزائية بالتقدم إلى لجنة التوفيق والمصالحة لتسوية المنازعة أو عرض الصلح أمام القاضي في حال قيام المضرور برفع الدعوى مدنية ضد الحدث.

– التوصيات:

- يوصي الباحث أن يكون عرض القاضي للصلح القضائي على الأطراف وجوبياً يرتب على مخالفته بطلان الإجراءات وخاصة متى كان أحد طرفي الدعوى حدثاً، ويقترح تعديل المادة (99) من قانون الإجراءات المدنية والتجارية ليكون نصها: (تبدأ المحكمة الجلسة الأولى بعرض الصلح على الخصوم، ويكون ذلك وجوبياً يرتب على مخالفته البطلان في الدعاوى التي يكون فيها المدعى عليه حدثاً...).
- يوصي الباحث بفصل مباني محاكم الأحداث عن مباني القضاء العادي للبالغين نظراً للصفة الخاصة لقضاء الأحداث.
- يوصي الباحث بإنشاء جهاز مستقل أو هيئة أو لجنة خاصة تتبع محكمة الأحداث أو أية جهة أخرى تكون مهمتها تسوية المنازعات الجزائية والمدنية في القضايا التي يرتكبها الأحداث الجانحون.
- يوصي الباحث توسيع دائرة عمل لجان التوفيق والمصالحة لتشمل القضايا الجزائية التي يصح التصالح عليها في قضايا الأحداث، وذلك بإ ضافة مادة خاصة في قانون التوفيق المصالحة تحمل رقم (4 مكرراً) يكون نصها: (تختص اللجان بتسوية المنازعات الجزائية التي تأخذ صفة الادعاء الشخصي في الجرائم التي يرتكبها الأحداث الجانحون، وينتج الصلح أثر التنازل القانوني قبل صدور الحكم ويكون سبباً لانقضاء العقوبة بعد صدور الحكم).
- يوصي الباحث النص على اختصاص لجان التوفيق والمصالحة في الدعاوى المدنية الناشئة عن الدعوى الجزائية في قضايا الأحداث وذلك بتعديل نص المادة (4) من قانون التوفيق والمصالحة لتكون

كالتالي: (تختص اللجان بتسوية أي نزاع – قبل إقامة دعوى بشأنه إلى القضاء – بطريق الصلح بين أطرافه سواء كان موضوع النزاع مدنياً أو تجارياً أو متعلقاً بمسألة من مسائل الأحوال الشخصية، كما تختص بالصلح في الحقوق المالية التي تنشأ عن الدعاوى الجزائية التي تأخذ صفة الادعاء الشخصي في أية حالة تكون عليها الدعوى).

- يوصي الباحث أن يكون طريق المصالحة في القضايا التي يرتكبها الأحداث الجانحون وجوبياً بإصدار تشريع يلزم المضرور والمجنى عليه بالمرور إجباراً على طريق المصالحة قبل إجراءات المحاكمة سواء كانت هذه المصالحة أمام لجنة التوفيق والمصالحة أو في المحكمة.

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الاتجاهات الدولية في الآلية الفعالة لتسوية المنازعات في حضانة الاطفال بعد الطلاق

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المقدمة

يعرف العالم اليوم ظاهرة مجتمعية تتمثل في الوسائل البديلة لتسوية المنازعات، تطورت إلى جانب الآليات الرسمية لفضها، ويقصد بها مجموعة من الآليات التي يمكن اعتمادها لحل النزاعات بمشاركة وموافقة أطرافها، وهي ليست بديلة بشكل كامل عن القضاء، فقط هي بديلة عن بعض الإجراءات القضائية، وبالنهاية تجري تحت إشرافه.

إن الوسائل البديلة لتسوية المنازعات ليست آلية جديدة، وإنما هي قديمة جدا منذ قدم الإنسان، وكانت موجودة وفعالة آنذاك. لكن الجديد هو ضرورتها في وقت يحتاج إليها الجميع على مختلف المستويات والمجالات. هذه الضرورة أفرزتها المعضلة التي يواجهها القضاء منذ أمد بعيد في مختلف الأنظمة القضائية عبر العالم، تتجلى في تراكم أعداد هائلة من القضايا، بسبب التأخير في إصدار الأحكام، البطء في الحسم في النزاعات، تعدد أوجه الطعن عبر مختلف درجات التقاضي، زيادة على اتسام إجراءات التبليغ بالتعقيد، وانعدام الفعالية. كما أن معضلة تضخم وتراكم القضايا ليست حكراً على الدول النامية، بل تعاني منه أيضا وبدرجات متفاوتة الدول المتقدمة بدورها مع فارق في نوعية وموضوع القضايا.

إن اللجوء إلى الوسائل البديلة يزداد أهمية متى تعلق الأمر بالمنازعات الأسرية، نظراً لطبيعة العلاقة التي تربط بين مكونات الأسرة. خاصة بعد الطلاق، ويزداد أهميةً إذا كان الأمر يتعلق بالحضانة، وقد يتجاوزه الأمر إلى بعض الجرائم التي قد تنشب بين الأصول والفروع والأقارب. كل هذا يدفعنا للبحث والحديث عن الوسائل البديلة لتسوية المنازعات ما بعد الطلاق وفي حضانة الطفل خصيصاً.

المبحث الأول : ماهية الوسائل البديلة لفض النزاعات في الحضانة .

وفيه مطلبان :

المطلب الأول : تعريف الوسائل البديلة.

عرف بعض العلماء هذه الوسائل بأنها : (مجموعة من الإجراءات التي تشكل بديلاً عن المحاكم في حسم النزاعات ، وغالباً ما تستوجب تدخل شخص ثالث نزيه وحيادي)[١] .

وعرفها الأستاذ جوروسون (Garrosson) بأنها (مجموعة غير محددة من الإجراءات لحل النزاعات بحيث تتم في أغلب الأحيان بواسطة تدخل شخص ثالث بهدف حل غير قضائي لهذه النزاعات) [٢] .

وعرف الأستاذان ماريوت وبرواون (Marriott and Brown) الوسائل البديلة : بأنها: (مجموعة من الإجراءات تهدف إلى حل النزاع بطرق غير قضائي أو غير تحكيمي ، ولكن ليس بالضرورة تقتضي تدخل أو مساعدة من شخص ثالث محايد يسعى إلى مساعدة الأطراف بغية تسهيل الوصول إلى حل النزاع)[٣].

وعرف المركز التجاري الوسائل البديلة لحل المنازعات بأنها : (العمليات التي تهدف إلى تشجيع المتنازعين بغرض الوصول إلى حل خلافاتهم بأنفسهم، وذلك بواسطة شخص ثالث حيادي لتسهيل عملهم) [٤].

فالتعريفات متقاربة، إلا أنها أصحابها اختلفوا في مسألة ضرورة التدخل من قبل طرف ثالث، حيث يرى الأستاذ جوروسون (Garrosson) التدخل من قبل طرق ثالث في أغلب الأحيان، وبينما يرى والأستاذان ماريوت وبرواون (Marriott and Brown) عكس ذلك.

إن كلمة البديل (Alternative) استعملت في معنى حرية اختيار الوسائل غير القضائية، وهذه الوسائل هي إضافية ودية، وذلك لإعطاء مجال أوسع للمتنازعين على الاتفاق باللجوء إليها في أي مرحلة من مراحل النزاع[٥] .

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(1) Lo, A Mistelis: *A.D.R in England and wales,* clive Mschmitth off senior lecturer in international commercial law, school of international Arbitration center for commercial law studies. Queen Mary, University of London. P.3

(2) See, *Ibid.*

(3) <ADR> «May he defined as arrange of procedures which serves as (s) alternatives to the adjudication. Procedures of litigation and Arbitration for the Resolution of disputers generally But Not necessarily involving the intercession and assist of a neutral third party who helps to facilitate such Resolution.

(4) J.mackie – Karl. *A hand book of Dispute Resolution ADR in Action Alternative Dispute Resolution in Australia*. Davied Newton Sweet & Maxwell – London And New York first published 1991 p. 231.

«Alternative Dispute Resolution (ADR) means dispute Resolution by processes (a) which en courage resultants to reach their own solution and (b) in which the primary role of the third party natural is to facilitate the disputants to do so.

المطلب الثاني: الوسائل البدلية لفض المنازعات في الشريعة الإسلامية

وترى الباحثة ضرورة الطرق إلى الجانب الشرعي الإسلامي لتلك الوسائل البديلة ولو بشكل موجز غير مخل، ويأتي ذلك كون البحث يركز على فض منازعات قضايا الحضانة في المملكة العربية السعودية، حيث تُستمد الحكم في المملكة العربية السعودية من الشريعة الإسلامية ومصادرها الأصلية والفرعية. وهي كذلك من أبرز الوسائل التي أقرّتها الشريعة الإسلامية لتسوية المنازعات التي تنشأ بين أوساط المجتمع الإسلامي. تتمثل تلك الوسائل البديلة لفض المنازعات عبر الطرق التالية:

١ -التحيكم

٢ -والتوفيق

٣ -الصلح والمصالحة

٤ -الوساطة

١ -التحكيم

فالتحكيم هو أن الخصمين إذا حكما بينهما رجلاً وارتضياه، وأن يحكم بينهما [٦]. السبب في التحكيم هو أن في بعض الأحيان لا يلجأ الخصمان إلى هيئة القضاء للفصل بينهما، وإنما يلجآن إلى شخص لا يتولى منصب القضاء أو الإمام، فيحكمانه بينهما، إما لبعدهما عن مكان القاضي، أو اختصارا لإجراءات التقاضي، أو لأي غرض آخر، وهذا هو الحَكَم أو المحكم.

وقد كان التحكيم معروفاً في الجاهلية قبل مجيء الإسلام، وقد تكون ورتبة الحكم أو المحكم أقل من رتبة القاضي لعدة أمور:

- أن حكم المحكم يقتصر على من يرضى بحكمه عند فريق من العلماء.
- أن القاضي يقضي في أمور ليس من حق المحكم أن يحكم فيها، كالقصاص والحدود عند فريق من العلماء أيضًا، فحكم المحكم ليس مطلقا في كل قضية كالقاضي عند بعض العلماء.
- عموم ولاية القاضي، فيتعدى الحكم الصادر عنه، إلى غير المتخاصمين، كما في القتل الخطأ وما ماثل هذا، بخلاف المحكم.

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(٥) إناس حجازي، الوسائل البديلة لحل النزاعات دراسة مقارنة ، **مجلة البحوث القانونية والاقتصادية** – كلية الحقوق جامعة المنوفية مصر، 2011م ، ص 382.

(٦) إبراهيم بن علي بن مُحَمَّد، ابن فرحون، برهان الدين اليعمري ، **تبصرة الحكام في أصول الأقضية ومناهج الأحكام**. (القاهرة: مكتبة الكليات الأزهرية، ط1، 1406هـ - 1986م). ج1ص62.

وقد تكون رتبة المحكِم سواء مع رتبة القاضي الرسمي [٧].

فالتحكيم مشروع في الكتاب والسنة والإجماع والمعقول، وكذلك عند فقهاء المسلمين. ودليل مشروعية التحكيم في القرآن الكريم، هو قوله تعالى: ﴿ بى بي تر تز تم تن تى تي ثر ثز ثم ثن ثى ثي فى في قى كا كل كم كى كي لم﴾(النساء: ٣٥) ، وقال السرمقندي: (وفي هذه الآية دليل على إثبات التحكيم) [٨] . وقال القرطبي: وإذا جاز إرسال الواحد فلو حكم الزوجان واحدا لأجزأ، وهو بالجواز أولى إذا رضيا بذلك، وإنما خاطب الله بالإرسال الحكام دون الزوجين. فإن أرسل الزوجان حكمين وحكما نفذ حكمهما، لأن التحكيم عندنا جائز [٩]. وقال البيضاوي: واستدل به على جواز التحكيم[١٠].وقال ابن عاشور: وهذه الآية أصل في جواز التحكيم في سائر الحقوق، ومسألة التحكيم مذكورة في الفقه [١١]. أي أن جميع مسائل التحكيم مذكورة في الفقه الإسلامي، فقد تناولها الفقهاء ومذاهبهم بسكل مفصل ومبسط.

وفي السنة: عن هانئ أنه لما وفد إلى رسول الله ﷺ مع قومه سمعهم يكنونه بأبي الحكم، فدعاه رسول الله ﷺ، فقال: «إن الله هو الحكم، وإليه الحكم، فلم تكنى أبا الحكم؟» فقال: إن قومي إذا اختلفوا في شيء أتوني، فحكمت بينهم فرضي كلا الفريقين ... إلى آخر الحديث) [١٢] ولو لم يكن التحكيم المشروعا لما استحسنه رسول الله ﷺ، فرسول الله لا يستحسن شيئًا لا يجوز [١٣]. والحديث في باب جواز التحكيم كثيرة جدا.

وأما الإجماع، فقد ثبت أن التحكيم وقع لجمع من الصحابة، ولم ينكر ذلك أحد.

وأما المعقول؛ فلأنه ما دام الشخصان اللذان يرضيان بالتحكيم لهما ولاية على نفسيهما فيكون التحكيم صحيحا[١٤]. وقد نقل أبو حيان الاجماع عن جواز التحكيم حيث قال: وأجمع أهل الحل والعقد: على أن الحكمين يجوز تحكيمهما[١٥].

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(٧) مُحَمَّد رأفت عثمان، **النظام القضائي في الفقه الإسلامي**. (القاهرة: دار البيان، ط2، 1415هـ1994م). ج1ص51

(٨) نصر بن مُحَمَّد بن أحمد بن إبراهيم السمرقندي، **بحر العلوم**. (د.ن، د.ط، د.ت). ج1ص301.

(٩) مُحَمَّد بن أحمد بن أبي بكر بن فرح الأنصاري الخزرجي شمس الدين القرطبي ، **الجامع لأحكام القرآن – تفسير القرطبي**. (القاهرة: دار الكتب المصرية، ط2، 1384هـ - 1964 م). ج5ص178.

(١٠) ناصر الدين أبو سعيد عبد الله بن عمر بن مُحَمَّد الشيرازي البيضاوي ، **أنوار التنزيل وأسرار التأويل**. (بيروت: دار إحياء التراث العربي، ط1، 1418 هـ). ج2ص73.

(١١) مُحَمَّد الطاهر بن مُحَمَّد بن مُحَمَّد الطاهر بن عاشور التونسي، **التحرير والتنوير «تحرير المعنى السديد وتنوير العقل الجديد من تفسير الكتاب المجيد»**.(تونس: الدار التونسية للنشر، د.ط، 1984 هـ). ج5ص47.

(١٢) أبو داود سليمان بن الأشعث السجستاني، **السنن مع أحكام الألباني**.(صيدا – بيروت: المكتبة العصرية، د.ط، د.ت) الحديث رقم (4955) وصححه الألباني.

(١٣) ابن فرحون. **تبصرة الحكام في أصول الأقضية ومناهج الأحكام**. ص53.

(١٤) المرجع نفسه.

وأما عند فقهاء المسلمين في الفقه الإسلامي يرى الحنفية [١٦] والمالكية[١٧] والحنابلة[١٨] جواز التحكيم. وأما الشافعية فقد اختلفت الآراء في فقههم، وأقوى الآراء عندهم جواز التحكيم، وهذا كما يفهم من كتبهم[١٩].

فالتحكيم جائز ويصح في الأمور المالية سواء الإسلامية أو التقليدية. ولا يقيم المحكِم حداً، ولا يُلاعن بين الزوجين، ولا يحكِم في قصاص أو قذف أو طلاق أو عتاق أو نسب أو ولاء. أي أن التحكيم لا يدخل في تلك المسائل. وقد استثنيت هذه المسائل من قاعدة التحكيم في أن هذه المسائل تتطلب الإثبات أو النفي من قبل الطرفين، لا للمحكِم دخلا في إثباتها أو نفيها. فاللعان يتعلق بحق الولد في نفي نسبه من ابيه، فقد ينفيه المحكِم، وهذا ليس في التحكيم في شيء بأن يقوم المحكِم بالنفي أو الإثبات، وليس للمحكِم ولاية على الحكم في الولد. وكذلك النسب والولاء تجري على يد غير المحكِمين. وكذلك الطلاق والعتق فيهما حق الله تبارك وتعالى، وليس للمحكِم سلطة في الإثبات أو النفي فيها [٢٠]. ولذلك لا يجوز التحكيم في حقوق الله ، كحد الزنا وحد السرقة فغير جائز . كذلك لا يجوز التحكيم على القول الصحيح في القصاص. وكذلك لا يجوز التحكيم في حد القذف على القول المختار[٢١] .

٢ التوفيق:

فالتوفيق أحد وسائل المشروعة لفض المنازعات في الشريعة الإسلامية، فالتوفيق يصاحب الصلح دائما، لذلك أُجيز كما الصلح جائز، لقوله تعالى: ﴿ بى بي تر تز تم تن تى تي ثر ثز ثم ثن ثى ثي فى في قى كا كل كم كى كي لم ﴾ (النساء: ٣٥) ، فالتوفيق هو عبارة عن

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(١٥) أبو حيان مُحَّد بن يوسف بن علي بن يوسف بن حيان أثير الدين الأندلسي ، **البحر المحيط في التفسير**. (بيروت: دار الفكر، د.ط، 1420 هـ)ج3ص630.

(١٦) علاء الدين، أبو بكر بن مسعود بن أحمد الكاساني الحنفي، **بدائع الصنائع في ترتيب الشرائع**. (بيروت: دار الكتب العلمية، ط2، 1406هـ - 1986م). ج7ص3.

(١٧) القرطبي. **الجامع لأحكام القرآن – تفسير القرطبي**.ج5ص178.

(١٨) موفق الدين عبد الله بن أحمد بن مُحَّد بن قدامة الجماعيلي المقدسي الحنبلي، **الكافي في فقه الإمام أحمد** . (بيروت: دار الكتب العلمية، ط1، 1414 هـ - 1994 م). ج4ص224.

(١٩) شمس الدين مُحَّد بن أبي العباس أحمد بن حمزة شهاب الدين الرملي، **نهاية المحتاج إلى شرح المنهاج**. (بيروت: دار الفكر، د.ط، 1404هـ-1984م). ج6ص224.

(٢٠) ابن فرحون، **تبصرة الحكام في أصول الأقضية ومناهج الأحكام**. ج1ص62.

(٢١) علي حيدر خواجه أمين أفندي، **درر الحكام في شرح مجلة الأحكام**. (بيروت: دار الجيل، ط 1، 1411هـ - 1991م). ج4ص695.

تقريب وجهات النظر محالة في الوصول إلي حل أو اتفاق بين المتنازعين بصورة ودية، وللموفق طرح الحلول بما يرتضيه الطرفان، ويتم اختيار الموفق أو الموفقين بإرادة الطرفين.

٣ الصلح والمصالحة:

وفي الجملة أن الصلح جائز، فقد ثبت في القرآن والسنة والإجماع والمعقول، وهو مصاحب للتحكيم، ثبت مشروعية الصلح بما ثبت به التحكيم، وقد ورد القرآن به في آية الشقاق لقوله تعالى: لقوله تعالى: ﴿ بى بي تر تز تم تن تى تي ثر ثز ثم ثن ثى ثي فى في قى كا كل كم كى كي لم ﴾ (النساء: ٣٥) وقوله تعالى: ﴿ مم نر نز نم نن نى ني ىٰ ير يز يم ين يى يي ئج ئح ئخ ئم ئه بج بح بخ بم به تج تح تخ تم ته ثم جح جم حج حم خج خم سج سح سخ سم صح صخ صم ضج ضح ضخ ﴾ (الحجرات: ٩ – ١٠)، وفي السنة: وقد صالح النبي –صلى الله عليه وسلم– سهيل بن عمرو[٢٢]. وفي رسالة عمر إلى أبي موسى: والصلح جائز بين المسلمين إلا صلحاً حرم حلالاً أو أحل حراماً[٢٣].

أما الإجماع: وقد انعقد إجماع الأمة على جواز الصلح[٢٤].

أما المعقول، في ترك الصلح نزاع، لأنه إذا طلب صاحب الحق جميع حقه فأنكره المدعى عليه وأقام المدعي البينة، يكون ذلك باعثا للنزاع ولا سيما إذا حصل ذلك في وقت الإعسار، ويوجب ذلك لحصول سبب لتهيج الفتن بين المدعي والمدعى عليه، وتزيد العداوة بينهما، وهذا مما يستلزم الفساد العظيم. ويفهم من ذلك أن في الصلح خيرا ومنفعة [٢٥]. ولأن الصلح سبب لدفع الخصومة وقطع المنازعة والمشاجرة، والمنازعة متى امتدت أدت إلى الفساد فكان الصلح دفعا لسبب الفساد، وإطفاء لثائرة الفتن والعناد، وشقيقا لسبب الإصلاح والسداد، وهو الألفة والموافقة فكان حسنا مندوبا إليه شرعا، وركنه الإيجاب والقبول؛ لأنه معارضة[٢٦].

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(٢٢) أبو عبد الله أحمد بن مُحَمَّد بن حنبل بن هلال بن أسد الشيباني، **المسند**. (بيروت: مؤسسة الرسالة، ط 1، 1421 هـ - 2001 م) الحديث رقم (656) والبخاري مُحَمَّد بن إسماعيل الجعفي، **صحيح البخاري**. (بيروت: دار طوق النجاة، ط 1، 1422هـ) الحديث رقم (2711). ومسلم، مسلم بن الحجاج أبو الحسن القشيري النيسابوري، **صحيح مسلم**، (بيروت: دار إحياء التراث العربي، د.ن، د.ط، د.ت) الحديث رقم (28).

(٢٣) علي بن مُحَمَّد بن أحمد، أبو القاسم الرحبيّ المعروف بابن السِّمناني، **روضة القضاة وطريق النجاة**. (بيروت: مؤسسة الرسالة، وعمان: دار الفرقان، ط2، 1404 هـ - 1984 م) ج2ص760.

(٢٤) علي حيدر أفندي، **درر الحكام في شرح مجلة الأحكام**. ج4ص5.

(٢٥) المرجع نفسه.

(٢٦) أبو الحسن، علاء الدين، علي بن خليل الطرابلسي الحنفي، **معين الحكام فيما يتردد بين الخصمين من الأحكام**. (بيروت: : دار الفكر، د.ط، د.ت). ص122.

ويجوز الصلح عن كل مال وعن كل حق أخذ العوض عليه من سائر الحقوق وإتلاف الأموال والجنايات والقرض والمداينات(٢٧).

٤ الوساطة:

وتعتبر الوساطة إحدي الطرق الفعالة في الشريعة الإسلامية لفض المنازعات بين أطراف النزاع، وتقوم على محاولة تقريب وجهات النظر بين الخصمين، بغية الوصول إلى تسوية لفض النزاعات، لكونها مرضية لجميع الأطراف حيث يساهم كل من فرقاء النزاع بالوصول إلى هذه التسوية.

وهي عبارة عن عملية التمهيد للجوء إلى الحلول البديلة لفض النزاعات التي تنشأ بين أفراد المجتمع، وأصبحت أمراً ملحا لتلبية مقتضيات الحياة وتشعبها داخل هذا المجتمع . وتساهم الوساطة في تسوية بعض المنازعات بصورة ودية، وتعتمد على التوافق والتراضي بعيداً عن الحزم والإجبار دون أن يكون هناك غالب أو مغلوب، ولا مخطئ أو مصيب، ودون أن يترك أثراً في نفوس المتنازعين بشكل تراعى فيه السرعة المطلوبة والمصالح المتبادلة للمتنازعين.

إذن، إن الوساطة هي عبارة عن عملية مفاوضات غير ملزمه يقوم بها طرف ثالث محايد يهدف إلى مساعدة أطراف النزاع للتوصل إلى حل النزاع القائم(٢٨).

الأصل في الوساطة في الشريعة الإسلامية هي الجواز أو الإستحباب، وإذا كانت لإحقاق باطل أو إبطال حق كانت حراماً . الأصل في الوساطة الجواز، بل هي من الأمور الخيرية التي أمر الشارع بها ورغب فيها،(٢٩) حيث قال ﷺ: (اشْفَعُوا تُؤْجَرُوا، وَيَقْضِي اللَّهُ عَلَى لِسَانِ نَبِيِّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ مَا شَاءَ) وقال: مصطفى البغا في تعليقه على أحاديث صحيح البخاري (اشفعوا) توسلوا في قضاء حاجة من طلب أو سأل. (تؤجروا) يكن لكم مثل أجر قضاء حاجته(٣٠). وقال ﷺ: (مَنْ كَانَ فِي حَاجَةِ أَخِيهِ كَانَ اللهُ فِي حَاجَتِهِ) وقال مصطفى البغا: (كان في حاجة أخيه) "سعى في قضائها". وقال مُحَمَّد فؤاد عبد الباقي في تعليقه على أحاديث صحيح مسلم: "أي أعانه عليها ولطف به فيها" (٣١) وكل تلك النصوص الشرعية تدل على جواز الوساطة بين المسلمين لحلحلة مشاكلهم ونزاعاتهم. والوساطة في الجملة هي تفضي إلى

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(٢٧) المرجع نفسه، ج2ص761.

(٢٨) ستار الجيريا، **مذكرة الطرق البديلة لفض النزاعات الصلح والوساطة القضائية والتحكيم،** <http://www.staralgeria.net> تاريخ الاسترجاع 17 – 7 -2017.

(٢٩) مكز الفتوى، **خلاصة الفتوى**. < .http://fatwa.islamweb.net/fatwa/index> تاريخ الاسترجاع 18 – 7 – 2017.

(٣٠) البخاري، **صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري**. الحديث رقم (1432) ومسلم، صحيح مسلم، الحديث رقم (145).

(٣١) البخاري، **صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري**. الحديث رقم (2442). ومسلم، **صحيح مسلم، مع شرح وتعليق مُحَمَّد فؤاد عبد الباق على أحاديث صحيح مسلم**، الحديث رقم (58).

صلح الخصمين[٣٢]. فالوساطة تُجرى عليها نفس أحكام وإجراءات الصلح والتوفيق، وهي صدرت من سراج واحد، ولا تختلف كثيراً عن الصلح والتوفيق، وبالأخص التشابه الموجودة بين التوفيق والوساطة، لذلك تُطبق أغلب أحكام وإجراءات التوفيق عملية الوساطة.

المطلب الثالث : تعريف الحضانة ومشروعيتها .

تعددت التعاريف عند العلماء والفقهاء في الحضانة .

فجاء تعريف الحنفية للحضانة بأنها : (تربية الولد لمن له حق الحضانة)[٣٣] .

وعرفه المالكية بأنها : (حفظ الولد في مبيته و مؤنة طعامه ولباسه ومضجعه وتنظيف جسمه)[٣٤] .

وجاء التعريف عند الشافعية بأنها : (القيام بحفظ من لا يميز ولا يستقل بأمره وتربيته بما يصلحه، ووقايته عما يؤذيه)[٣٥] .

وأما الحنابلة فعرفوا الحضانة بأنه : (حفظ صغير ومجنون ومعتوه وهو المختل العقل بما يضرهم وتربيتهم بعمل مصالحهم :كغسل رأس الطفل وغسل يديه وغسل ثيابه وكدهنه و تكحيله وربطه في المهد وتحريكه لينام ونحوه)[٣٦] .

وبالنظر إلى هذه التعريفات نجد أنها تدور حول الحفظ والصيانة وتربية المحضون بما يصلحه.

ومما أفصح عنه العمل **القضاء السعودي** في مفهوم الحضانة :

١ -تسمع دعوى الحضانة في حق الصبي والمعتوه .

٢ -تقام دعوى الحضانة على من بيده المحضون، ولو كان غير الأبوين .

٣ -لا تسمع الدعوى من أحد الوالدين على الآخر في ضم الولد البالغ العاقل، لكن تقام الدعوى على الولد مباشرة[٣٧] .

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(٣٢) وزارة الأوقاف والشئون الإسلامية، **الموسوعة الفقهية الكويتية**. (الكويت: وزارة الأوقاف والشئون الإسلامية، د.ط، 1404 - 1427 هـ). ج38 ص142.

(٣٣) ابن عابدين، الدر **المختار وحاشية ابن عابدين (رد المحتار على الدر المختار)** ، (بيروت: دار الفكر، ط1، 1412هـ - 1992م) ج3 ص555.

(٣٤) الخرشي، **شرح مختصر خليل للخرشي**، (بيروت: دار الفكر، د.ط، د.ت) ج3ص207.

(٣٥) النووي، محيي الدين، **روضة الطالبين وعمدة المفتين**، (بيروت، دمشق، عمان: المكتبة الإسلامي، ط 2، 1412هـ -1991م) ج9ص98. و الشربيني، شمس الدين، **مغني المحتاج إلى معرفة معاني ألفاظ المنهاج**، (بيروت: دار الكتب العلمية، ط 1، 1415هـ - 1994م) ج5ص191.

(٣٦) البهوتى ، منصور بن يونس ، كشاف القناع عن متن الإقناع، (بيروت: دار الكتب العلمية، د.ط، د.ت) ج 5ص495. العاصمي، عبد الرحمن بن مُحَمَّد، حاشية الروض المربع، (د.ن، د.ط، 1397 هـ)، ج7ص148.

(٣٧) انظر: الإجراءات القضائية في المشكلات الزوجية. بحث **منشور في مجلة العدل .العدد ٤٥ محرم**. ص14.

علماً أن الحضانة مشروعة وهي واجبة لذا قال ابن قدامة : (كفالة الطفل وحضانته واجبة، لأنه يهلك بتركه، فيجب حفظه عن الهلاك كما يجب الإنفاق عليه وإنجاؤه من المهالك) [٣٨] .

المبحث الثاني : أنواع ومميزات الوسائل لفض النزاعات في الحضانة .

المطلب الأول : أنواع الوسائل البديلة لفض النزاعات في الحضانة .

إن الأنواع والوسائل البديلة لفض المنازعات في الحضانة من أهم متطلبات العصر نظراً لحاجة المجتمع إليها بسبب ما يمكن أن تحققه من مزايا في حال تطبيقها وتتفرع إلى عدة وسائل نختصرها بالتالي :

١ -الوساطة في الحضانة :

إن الوساطة في الحضانة هي وسيلة اختيارية لتسوية المنازعات بحل ودي بمساعدة ثالث -الوسيط- تعتمد على الحوار والمشاورات المتبادلة لإقناع الزوجين بحلول مقترحة، والتوصل إلى حل نابع منهما للنزاع القائم في أيهما أحق بحضانة الطفل بعد فحص طلباتهم وادعاءاتهم[٣٩] .

2 – الصلح في الحضانة :

ويمكن بيان الصلح في الحضانة بأنه: عقد يحسم به الطرفان على وجه التراضي نزاعاً قائماً أو يتوقيان به نزاعا محتملا [٤٠] . أو هو: عقد يتوصل به إلى التوفيق بين متنازعين في حق .

تنظيم الوساطة والصلح في باب حضانة الأطفال بعد الطلاق :

كانت النواة الأولى لمكاتب المصالحة في المملكة العربية السعودية على -سبيل المثال- عند ما تم إنشاء مكتب التوجيه والإصلاح بمحكمة الضمان والأنكحة بالرياض شهر محرم 1420هـ، وعندما تبين نجاح محاولات الصلح من واقع التجربة التي تمت بواسطة الاجتهادات الشخصية من بعض المحتسبين من الموظفين وبتكليف من رئيس المحكمة. وهذه النتائج المشجعة جعلت وزارة العدل بالمملكة العربية السعودية تسعى لتوسيع العمل بمبدأ المصالحة والوساطة وتنظيمه بما يحقق الأهداف المرجوة منها ، ولذلك تمت المصادقة على تنظيم مركز المصالحة وإقراره بموجب قرار مجلس الوزراء رقم 103 وتاريخ 1434/4/8هـ ، والأمل يحدونا لصياغة مشروع نظام الوساطة والتوفيق الذي يتضمن مكاتب حكومية بإجراءات نظامية أملاً أن تتطور إلى محاكم صلح، وتكون إلزامية بحيث لا تنظر محكمة الأحوال الشخصية أي قضية مشمولة بنظام الوساطة إلا بعد إحالة من قاضي الصلح، أو

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(٣٨) ابن قدامة، **المغني**، (القاهرة: مكتبة القاهرة، د.ط، 1388هـ - 1968م) ج9ص298.

(٣٩) مركز القاهرة الإقليمي للتحكيم التجاري الدولي ، **كيفية حسم منازعات التجارة الدولية – التحكيم والوسائل البديلة لحسم المنازعات**، (د.ن، د.ط، د.ت) ص 45.

(٤٠) أحمد البراك، **الصلح في الخصومات**، (د.ن، د.ط، 1426هـ) ص 17.

وسيط الصلح، وتزداد أهمية إذا كانت الوساطة والصلح في مسائل الحضانة مع العلم أن الحضانة هي حق من حقوق الطفل لذا لابد أن يغلب جانبه (٤١).

أولا: يقترح أن يكون هناك تنظيماً ومركزاً للمصالحة في حضانة الأطفال بعد الطلاق :

وفيما يلي نسرد أبرز معالم هذا التنظيم كما نص عليه موادهـ النظامية:

المادة الأولى: تعريف المصالحة (الوساطة) والمصلح (الوسيط) .

المصالحة: وسيلة رضائية لتسوية المنازعات –تتولاها مكاتب المصالحة – صلحاً كلياً أو جزئيا.

المصلح: من يتولى أعمال المصالحة بين الزوجين وفقاً لأحكام هذا التنظيم.

المادة الثانية: إنشاء مركز المصالحة بوزارة العدل .

ينشأ في وزارة العدل مركز يسمى (مركز المصالحة) ويكون عمله وفقا لأحكام هذا التنظيم.

المادة الثالثة: المهمة الأساسية للمركز.

الإصلاح وحل النزاع بين الطرفين مع النظر لمصلحة الطفل وتسوية المنازعات حيال ذلك .

المادة الرابعة: إنشاء مكاتب المصالحة وشروط المصلحين.

تنشأ مكاتب المصالحة في مقرات المحاكم أو كتابات العدل ويتكون كل مكتب من مصلح أو أكثر يختارون من منسوبي الوزارة أو من موظفي الدولة –بعد أخذ موافقة جهات عملهم –أو من غيرهم ممن تتوافر فيهم الشروط التي يحددها الوزير بقرار منه.

المادة السابعة: حفظ سرية إجراءات المصالحة.

لا يجوز لمن يعمل في مكاتب المصالحة –ولو بعد انتهاء عمله –إفشاء سر أؤتمن عليه أو عرفه عن طريق عمله في تلك المكاتب، ما لم يكن هناك مقتضى شرعي أو نظامي يوجب ذلك.

المادة الثامنة: حق إنهاء الخلاف مكفول لأطراف النزاع خارج مكاتب المصالحة.

لا تخل أحكام هذا التنظيم بحق الأطراف في إنهاء منازعاتهم صلحاً خارج إطار مكاتب المصالحة.

المادة التاسعة: قواعد العمل في مكاتب المصالحة وإجراءاته.

يصدر وزير العدل قواعد العمل في مكاتب المصالحة وإجراءاته والقرارات اللازمة لتنفيذ هذا التنظيم.

ثانيا: قواعد العمل في مكاتب المصالحة وإجراءاته ا إعمالاً للمادة التاسعة من تنظيم مركز المصالحة، والتي تخول لوزير العدل إصدار قواعد العمل في مكاتب المصالحة وإجراءاته والقرارات اللازمة لتنفيذ هذا التنظيم، فقد صدرت هذه القواعد وتم نشرها(٤٢) .

(٤١) مسفر بن حسن القحطاني، **الوساطة المنتهية بالصلح ودورها في تسوية المنازعات في المملكة العربية السعودية** ، (د.ن، د.ط، د.ت)، ص207

الإجراءات النظامية للوساطة المنتهية بالصلح في حضانة الأطفال بعد الطلاق :

أولاً: أحكام عامة للمصالحة

١ -تجري مكاتب المصالحة والصلح في حضانة الطفل وفق أحكام الشريعة الإسلامية، وما يصدره ولي الأمر من أنظمة لا تتعارض مع الكتاب والسنة.

٢ -يحدد الوزير بقرار منه التدرج الموضوعي للقضايا المتعلقة بالوساطة المنتهية بالصلح في حضانة الأطفال بعد الطلاق.

٣ -تسري أحكام هذه القواعد على طلبات المصالحة التي لم تحل إلى المحكمة، والتي يتقدم طرفاها بطلب المصالحة من المحكمة، ولو كانت منظورة لدى المحكمة المختصة.

٤ -يشترط في المصلح ما يلي:

١ -أن يكون سعودي الجنسية.

٢ -أن يكون من المشهود لهم بالنزاهة والخبرة، وأن يكون حسن السيرة والسلوك

٣ -أن يجتاز المقابلة الشخصية.

٤ -لا يجوز للمصلحين أن يباشروا عملا- يدخل في حدود وظائفهم- في طلبات المصالحة الخاصة بهم، أو بأزواجهم، أو بأقاربهم، أو أصهارهم، حتى الدرجة الرابعة، وإلا كان هذا الإجراء باطلا.

٥ -يحظر على من يقوم بالمصالحة:

- أن يكشف لأحد الأطراف ما أطلعه عليه الطرف الآخر إلا بموافقته.
- أن يفشي سرا اؤتمن عليه أو عرفه من خلال إجراءات المصالحة، ما لم يَذن صاحب الشأن، أو وافق الأطراف على خلاف ذلك.
- أن يعمل كمحكم أو وكيل أو محام بعد العمل كمصلح في أي نزاع قام بإجراء المصالحة فيه، أو أي نزاع مرتبط به أو ناشئ عنه.
- يقصد بمحل الإقامة في تطبيق أحكام هذه القواعد ما أشير إليه في نظام المرافعات الشرعية ولوائحه التنفيذية الصادر عام 1435هـ.

٦ -يسلم المحضر صورة التبليغ حسب النموذج المعد إلى من وجهت إليه في محل إقامته أو عمله إن وجد، وإلا فيسلمها إلى من يوجد في محل إقامته من الساكنين معه من أهله، وأقاربه،

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(٤٢) انظر: القرار الوزاري رقم 53792 تاريخ 1435/7/27هـ ، ونشر القرار في **جريدة الرياض عدد** (**16667**) وتاريخ 1435/4/10هـ ص 6.

وأصهاره، أو من يوجد ممن يعمل في خدمته، وإذا تعدد من وجه إليهم تعين تعدد التبليغ بعددهم.

وللمكتب طلب السجين أو الموقوف لجلسات المصالحة في مكتب المصالحة المختص في بلد السجين.

ولمدير مكتب المصالحة إبلاغ الأطراف المعنيين بالنزاع بأي من طرق التبليغ التي يراها مناسبة لحضور جلسة المصالحة.

٧ -في جميع الحالات المنصوص عليها في المادة السابقة، إذا امتنع المراد تبليغه، أو من ينوب عنه من التسلم، أو من التوقيع بالتسلم، فعلى المحضر أن يثبت ذلك كتابيا، وعلى مكتب المصالحة إحالة المعاملة إلى المحكمة المختصة، ما لم يطلب الطرف الآخر موعدا آخر على ألا يتكرر الموعد أكثر من ثلاث مرات.

ثانيا :الجهة المعنية بالمصالحة واختصاصها

١ -تختص مكاتب المصالحة بنظر الطلبات التي ترفع على السعودي وغير السعودي الذي له محل إقامة عام أو مختار في المملكة، فيما يخص حضانة الطفل بعد الطلاق.

٢ -يحال طلب المصالحة للمحكمة المختصة في الحالات التالية:

-إذا تعذرت المصالحة بين طرفي الدعوى.

-إذا امتنع المطلوب حضوره من الحضور أو تعذر تبليغه أو اعتذر عن قبول المصالحة أو لم ترد ورقة التبليغ ما لم يطلب الطرف الآخر موعدا آخر على أن لا يتكرر الموعد أكثر من ثلاث مرات.

-إذا كان المدعي لا يعرف عنوان المطلوب حضوره.

٣ -إذا كان محل التبليغ داخل المملكة خارج نطاق اختصاص مكتب المصالحة، فتحال القضية إلى مكتب المصالحة المختص، فإن لم يوجد مكتب مصالحة في بلد المطلوب حضوره فيحال طلب المصالحة للمحكمة المختصة بنظر الموضوع.

٤ -يجب على المدعي أن يتقدم بطلب المصالحة للمكتب الذي يقع في نطاق اختصاصه محل إقامة المطلوب حضوره.

٥ -لا يحق لمكاتب المصالحة اتخاذ الإجراءات التحفظية، كما لا يحق لها المنع من السفر، مع أحقية طالب المصالحة بالرفع للمحكمة المختصة بطلب اتخاذ الإجراءات التحفظية والمنع من السفر والطلبات المستعجلة.

ثالثا :طلب المصالحة وقيدها

١ -يقدم طلب المصالحة في حضانة الأطفال من طالب المصالحة بصحيفة تودع لدى المكتب، ويجب أن تكون محررة ويعد القيد في مكتب المصالحة قيداً لها في المحكمة المختصة بنظر الموضوع.

٢ -يجوز للمصلح عقد عدة جلسات للمصالحة في الحضانة ، على ألا يزيد عدد الجلسات عن ثلاث، فإن تجاوزها وجب إحالة المعاملة للمحكمة المختصة، ما لم يطلب طرفا المصالحة إبقاءها واستمرار عقد الجلسات.

رابعا :حضور أطراف المصالحة

١ -في اليوم المعين لنظر جلسة المصالحة يحضر طرفا الصلح بأنفسهم أو من ينوب عنهم، فإذا كان النائب وكيلاً، تعين كونه ممن له حق الصلح وما يلزم لذلك من حق الإقرار والتنازل.

٢ -كل ما يقرره الوكيل في حضور الموكل يكون بمثابة ما يقرره الموكل نفسه، إلا إذا نفاه أثناء جلسة المصالحة نفسها، وإذا لم يحضر الموكل فلا يصح من الوكيل الصلح ما لم يكن مفوضا تفويضا خاصا في الوكالة.

٣ -إذا غاب طالب المصالحة عن جلسة من جلسات المصالحة فيحفظ طلب المصالحة، وله بعد ذلك المطالبة بنظره من جديد، وإذا غاب المطلوب حضوره فيعامل وفقا للفقرة الثانية من المادة الحادية عشرة من هذه القواعد، ما لم تكن المعاملة قد أحيلت من المحكمة فتحال إليها.

خامسا :إجراءات الجلسات

١ -يقوم المصلح بتدوين وقائع المصالحة في الضبط، ويذكر تاريخ وساعة افتتاح كل جلسة، ورقم القيد وتاريخه، واسم المصلح، وأسماء طالبي الصلح، أو وكلائهم، ثم يوقع عليه المصلح ومن ذكرت أسماؤهم فيه، وإذا لم يكن المصلح من منسوبي الوزارة فيذكر قرار التكليف وتاريخه الصادر من صاحب الصلاحية.

٢ -يجب أن تكون الوقائع المراد الصلح عليها أثناء المصالحة متعلقة بحضانة الطفل، جائزا قبولها شرعا ونظاما.

٣ -للمصلح في جلسة المصالحة أن يتناقش مع الأطراف مجتمعين أو منفردين، مع مراعاة الأحكام الشرعية المتعلقة بالخلوة بالمرأة الأجنبية أو نحوها، وله أن يتشاور معهم في موضوع النزاع أو أن يطلب من أي منهم تقديم معلومات إضافية، وأن يتخذ ما يراه مناسبا لتقريب وجهات النظر بما يساعد على إتمام المصالحة في حضانة الطفل.

٤ -جلسات المصالحة سرية، إلا إذا رغب الطرفان أن تكون علنية، ويعاملا على قدم المساواة، وتَيأ لكل منهما الفرصة الكاملة والمتكافئة لعرض رأيه في الموضوع محل المصالحة وهي حضانة الطفل.

سادسا : إعلام المصالحة وتفسيره

١ -يصدر مكتب المصالحة إعلاماً حاويا لخلاصة طلب المصالحة والجواب وما تم عليه الصلح في حضانة الطفل، ويوقع من المصلح ويختم عليه بختم مكتب المصالحة، ويحال للمحكمة المختصة أو القاضي المكلف للتصديق عليه.

٢ -على القاضي المختص بالتصديق رد الصلح المتعلق بحضانة الطفل إذا كان مخالفا لأحكام الشريعة الإسلامية أو للأنظمة، مبينا سبب الرد في الضبط وتحال المعاملة للمحكمة المختصة.

٣ -إعلام المصالحة الذي يكون التنفيذ بموجبه يجب أن يذيل بالصيغة التنفيذية ولا يسلم إلا للطرف الذي له المصلحة في تنفيذه، ويجوز إعطاء نسخ من الإعلام لكل ذي مصلحة في حضانة الطفل.

٤ -إذا وقع في إعلام المصالحة غموض أو لبس جاز لطرفي الصلح أن يطلبوا من مكتب المصالحة الذي صدر منه الإعلام تفسيره، ويجب على القاضي الذي صادق على الصلح تفسير الغموض المتعلق بحضانة الطفل .

٥ -يلحق الإعلام الصادر بالتفسير بنسخة الإعلام الأصلية، ويوقعها من صادق على الإعلام، ويعد التفسير متمماً للصلح الأصلي ويسري عليه ما يسري على إعلام المصالحة في حضانة الطفل.

سابعا :الاعتراض

جميع الإعلامات الصادرة من مكاتب المصالحة والمتعلقة بحضانة الطفل مكتسبة القطعية بعد المصادقة عليها من المحكمة، أو القاضي المكلف بالتصديق، وغير خاضعة للاستئناف، ويطبق في الاعتراض عليها ما ورد في طرق الاعتراض على سندات التنفيذ.

ثامنا :أحكام ختامية للمصالحة

١ -تطبق أحكام أنظمة المرافعات الشرعية، والإجراءات الجزائية والتنفيذ فيما لم يرد له حكم في هذه القواعد، وبما يتلاءم مع طبيعة المصالحة في حضانة الطفل وإجراءاتها .

٢ -جميع الخصومات الناشئة عن إعلام المصالحة في حضانة الطفل من اختصاص محكمة الأحوال الشخصية .

٣ -يحدد الوزير في قرار إنشاء مكاتب المصالحة المتعلقة في حضانة الطفل الجهة الإدارية التي تتبع لها المكاتب.

٤ -تسري أحكام هذه القواعد اعتبارا من صدوره(٤٣) .

المطلب الثاني : طبيعة ومميزات الوسائل البديلة لفض النزاعات في الحضانة.

تحقق الوساطة كوسيلة بديلة ودية لتسوية المنازعات في حضانة الأطفال ما بعد الطلاق مع تحقيق العدالة في ما فيه مصلحة الطفل كعنصر أساسي وهي أداة سريعة بتكلفة أقل، وإجراءات مبسطة وبمشاركة فعالة للزوجين مع الوسيط للوصول إلى تسوية ودية للنزاع بعد إزالة أسباب النزاع، وإعادة روح

(٤٣) نشرت على الموقع الإلكتروني لوزارة العدل ، علماً بأن هذه القواعد معمول بها في النظام السعودي في مكاتب القضاء والصلح. <moj.gov.sa> تاريخ الاسترجاع 17 يوليو 2017.

التعاون والعلاقات المتصلة بين الزوجين، وإصلاح الضرر بحل ودي نابع من إرادة الزوجين بمساعدة الوسيط في صورة توصية غير ملزمة للزوجين ، ولا تتمتع بحجية الأمر المقضي به.

وتعتبر الوساطة وسيلة لإيجاد التفاهم المشترك بين الزوجين في جو بعيد عن البغض والكراهية، ونشر روح التسامح والتراحم والود بين الزوجين ، الأمر الذي يؤدي إلى إعادة التآلف الاجتماعي والتعايش فهي وسيلة رضائية فعالة وسريعة لحل المنازعات خاصة في مسألة حضانة الأطفال والتي تسهم في علاج مشكلة بطء إجراءات التقاضي.

وللوساطة في حضانة الأطفال ما بعد الطلاق كوسيلة بديلة لتسوية المنازعات مجموعة من الفوائد والمزايا منها:

أولا :السرعة:

حيث يكون الوسيط غالبا خبيراً في موضوع النزاع بين الزوجين وصاحب الأحقية بذلك ، ولديه الوقت الكافي لدراسة موضوع النزاع مما يساعده على تسوية النزاع في أقل وقت ممكن وبإجراءات بسيطة، وفي أوقات مناسبة لطرفي النزاع ودون التقيد بمواعيد الدوام الرسمي لعقد جلسات عملية الوساطة، كما أن الوسيط يعمل جاهدا لتسوية النزاع خلال مدة الوساطة.

وسرعة حسم المنازعات بالوساطة أمر مشجع في جميع المنازعات وخاصة منازعات حضانة الأطفال ما بعد الطلاق التي تتأثر بعدم استقرار الأطفال، فالثقة في الوسيط والبحث عن حل للنزاع بالوساطة خير من ضياع الوقت أمام القضاء للوصول إلى الحق بكامله(٤٤) .

ثانيا :قلة التكاليف:

تعتبر مصاريف الوساطة قليلة مقارنة بالتحكيم والخصومة القضائية، وأتعاب المحامين، والخبراء، والشهود، وهذه الميزة تجعل الوسيط يقنع أحد الأطراف في النزاع كأحد الزوجين مثلاً وما يراه الوسيط في ما فيه مصلحة للطفل بتقديم تنازلات متبادلة وتعديل مراكزهم القانونية للوصول إلى حل النزاع في أسرع وقت ممكن للحيلولة على التأثيرات النفسية لدى الأطفال، ولطرفي النزاع أيضا(٤٥).

ثالثا :استغلال الوقت والحصول على حلول سريعة:

تعتمد الوساطة على مهارات الوسيط والأساليب المستخدمة لحل النزاع، وقدرته العلمية والعملية في تقييم الواقع الأسري لدى الزوجين، وثقة طرفي النزاع فيه، وقدرته على إيجاد سبل ناجحة في التفاوض في جو ودي، وذلك أن الوسيط غالباً يكون خبيراً في موضوع النزاع، والوساطة تكون على درجة واحدة كما

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(٤٤) مركز القاهرة الإقليمي للتحكيم التجاري الدولي، **التحكيم والوسائل البديلة لحسم المنازعات** ، ص47 .

(٤٥) خالفي عبد اللطيف، **الوسائل السلمية لحل منازعات العمل الجماعية**، (بحث مقدم لنيل درجة الدكتوراه في القانون – جامعة القاهرة 1987) ، ص 150.

أن الوساطة توفر الوقت والجهد والنفقات نظراً لملائمة مواعيد جلسات الوساطة ومكانها للزوجين، وقصر الوقت اللازم لعملية الوساطة(٤٦) .

رابعا :السرية:

تعتبر المحافظة على أسرار طرفي النزاع والجو العائلي لدى الزوجين في عملية الوساطة في حضانة الأطفال ما بعد الطلاق ضمانة مهمة خاصة في مجال العلاقات والمنازعات الأسرية، وإلا لما أقدم طرفا النزاع للجوء إلى الوساطة.

فسرية الوساطة تؤدي إلى التعايش السلمي ما بعد الطلاق على مستوى الزوجين عامة ، ولدى الأطفال خاصة في المستقبل، وبقاء العلاقات متصلة، والمحافظة على الأسرار الأسرية لدرجة أن بعض الأزواج يفضل التنازل عن حقه على كشف أسرارهم الزوجية، والتي يحرص على إبقاء المشاكل والنزاع سراً مكتوماً(٤٧) .

وسرية الوساطة تتطلب سرية الإجراءات، فلا يحضر جلساتها إلا طرفي النزاع الزوجين مثلاً، والشهود والخبراء ومن يؤذن لهم بالحضور في جلسات سرية لا يحضرها الجمهور، ولا وسائل الإعلام، وتشجع السرية طرفي النزاع على حرية الحوار والإدلاء بما لديهم من أقوال ومستندات وتقديم التنازلات في مرحلة المفاوضات بحرية تامة دون أن يكون لذلك حجة أمام القضاء أو أي جهة أخرى كالتحكيم فيما لو فشلت مساعي الوساطة، ومن شأن السرية أيضاً مساعدة الوسيط على تقريب وجهات نظر الزوجين بغية التوصل إلى تسوية مرضية.

فجميع إجراءات الوساطة ومدلولاتها سرية لا يجوز الكشف عنها أو الاحتجاج بها، ولا يجوز للوسيط نظر الدعاوى كقابض، أو العمل فيها كمحام أو خبير أو شاهد(٤٨) .

ونصت المادة(الخامسة والعشرون)من قواعد العمل في مكاتب المصالحة وإجراءاتها (٤٩) بالمملكة العربية السعودية على أن" جلسات المصالحة سرية، إلا إذا طلب طرفاها أن تكون علنية، ويعامل طرفا المصالحة على قدم المساواة وتهيأ لكل منهما الفرصة الكاملة والمتكافئة لعرض دعواه أو دفاعه" .

خامسا :وسيلة ودية بديلة وتخفيف العبء عن القضاء:

(٤٦) المرجع نفسه، ص 151.

(٤٧) عبدالحميد الشواربي، التحكيم **والصلح في ضوء الفقه والقضاء**، (د.ن، د.ط، د.ت) ص 21.

(٤٨) المرجع نفسه ، ص 22.

(٤٩) انظر: المادة التاسعة من تنظيم مركز المصالحة واستناداً لقرار وزير العدل في المملكة العربية السعودية رقم 53792 تاريخ 1435/7/27هـ

الوساطة والصلح نظام إرادي أساسه رضا طرفي النزاع كالزوجين مثلاً وراحة واطمئنان الطفل في ما فيه استقرار عند حاضنه على أن يكون هناك اتفاق في تحديد الوسيط (٥٠)، ويتم اختياره لتسوية النزاع في أيهما أحق في حضانة الطفل وأن تحدد الحلول بوضوح وتكون موافقة للزوجين معاً على وجه العموم وللطفل على وجه الخصوص ، وأن تكون هذه المصالحة وسيلة للتعايش السلمي والعلاقات المتصلة بين طرفي النزاع بديلة عن القضاء الذي يوصف بقضاء العلاقات المنقطعة (٥١).

فالوساطة وسيلة بديلة لتسوية المنازعات بطرق ودية واقتصاد في الوقت والنفقات والرسوم والأتعاب، فهي عدالة مريحة لطرفي النزاع بإصلاح ذات البين بالتراضي، فلا يكون فيها غالب أو مغلوب، فكلاهما خصمان رابحان.

وترى الباحثةأن في الوساطة والصلح مكاسب مشتركة لطرفي النزاع على وجه العموم والطفل على وجه الخصوص ، وذلك أن التسوية النهائية في الوساطة تكون قائمة على حل مرض لهم جميعاً تم التوصل إليه بإرادتهما الحرة ويكون قائماً على تحقيق مكاسبهما ومصالحهما المشتركة وعلاقتهم الاجتماعية مع المحافظة على العلاقة الودية بينهما . وتحقق كذلك هدفا مهما وهو تخفيف العبء على المحاكم والقضاء بشكل عام.

سادسا :وسيلة اختيارية غير ملزمة:

الوساطة وسيلة بديلة لتسوية المنازعات غير ملزمة لطرفي النزاع، حيث يحتفظ طرفا النزاع بكافة حقوقهما القانونية إذا فشلت عملية الوساطة، ولم يتفقا على حل يمكن التوصل إليه، أو رفض أي منهما توصية الوسيط، فتبقى لكل من طرفي النزاع الحرية الكاملة في اللجوء إلى القضاء كمرفق عام للعدالة في الدولة، فالوساطة تتم دون المساس بحق التقاضي (٥٢) .

كما أنه لا يجوز إجبار طرفي النزاع على اللجوء إلى الوساطة كوسيلة بديلة لتسوية المنازعات، فاتفاق الوساطة بإرادة طرفي النزاع هو قوام عملية الوساطة.

وترى الباحثة أن الطابع الاختياري التي هي أساسية في عملية الوساطة والتي تنتهي بتوصية تتضمن حلولا اختيارية غير ملزمة لطرفيها، فلا يمكن القيام بها دون موافقة أطراف النزاع معاً، كما يمكنهم في أي وقت الانسحاب من الوساطة واللجوء إلى أي وسيلة أخرى لفض النزاع كالتحكيم أو القضاء.

سابعاً :وسيلة مشاركة في إيجاد حلول للنزاع:

(٥٠) كالقانون الأردني والجزائري والمصري والمغربي.

(٥١) خيري عبد الفتاح السيد ، **الوساطة كوسيلة بديلة لفض المنازعات المدنية والتجارية**، (د.ن، د.ط، د.ت) ، ص 28.

(٥٢) مُحَّد نصر الدين جودة، **إدارة الدعوى المدنية** ، (د.ن، د.ط، د.ت) ، ص 22.

تتم عملية الوساطة بمشاركة طرفي النزاع والوسيط لحل النزاع، حيث يقوم الوسيط بمهمة تسهيل الحوار بين طرفي النزاع، ومساعدتهما بتقريب وجهات النظر بينهما وتسهيل التواصل بينهما، ثم اقتراح الحلول الممكنة التي تخدم مصالح طرفي النزاع والتقريب بين وجهات النظر، وتوفير ملتقى للحوار قد يساهم في الوصول إلى حل مرض لطرفي النزاع بعد تهيئة جو من الثقة والاطمئنان في حوار من أجل المصلحة دون ترك آثار سيئة في نفوس طرفي النزاع، فنجاح الوساطة مرهون بمشاركة حقيقية لطرفي النزاع في البحث مع الوسيط عن حلول عادلة ومقبولة من الطرفين معا ليكونا خصمين رابحين (٥٣) .

بمعنى أن الوسيط يقوم بطرح مقترحات لتسوية النزاع على أطرافه لاختيار من بينها ما يرونه الأقرب إلى تحقيق تسوية مرضية لهما بعيدا عن فكرة الخصومة، وهو ما يمكن الطرفان والزوجان من الاحتفاظ بعلاقات طيبة، ويكون لكلٍ منهما الحرية في قبول أو رفض كل أو بعض اقتراحات توصية الوسيط.

وقناعة طرفي النزاع بحيادية الوسيط يدعوهما في الغالب إلى أخذ مقترحاته بعين الاعتبار عند اختيار الحل الذي يراه الأكثر قبولاً مما يزيد من مصداقية عمل الوسيط، لأن التوصية المتمخضة عن الوساطة غير ملزمة لطرفي النزاع إلا برضاهما، الأمر الذي يكفل تنفيذها دون صعوبات.

كما تتيح الوساطة لطرفي النزاع فرصة التعبير عن مصالحهما وتقديم مالديهما من الأحق في حضانة الطفل الذي يكون فيه استقراره النفسي والمالي . وأن حل النزاع تكمن في المحافظة على مصالحهما المشتركة، وبقاء علاقتهما ودية في المستقبل؛ لأنها من صنع طرفي النزاع وبمساعدة الوسيط بما يؤدي إلى سرعة التنفيذ الاختياري(٥٤) .

المبحث الثالث : نماذج من الوسائل البديلة لفض المنازعات كنظام بديل عن إجراءات المحاكم في تسوية منازعة الحضانة بعد الطلاق في المملكة العربية السعودية ، مع بعض الأحكام الصادرة من القضاء السعودي في هذا الخصوص .

(محضر صلح)

الحمد لله والصلاة والسلام على من لا نبي بعده وبعد...

بناءً على المعاملة الواردة لنا من فضيلة رئيس محاكم منطقة القصيم برقم ..... وتاريخ ..... بشأن دعوى ..... مع زوجته .....

بشأن حضانة الابنة عليه نفيدكم حفظكم الله أنه بعد دراسة المعاملة من قبل لجنة الصلح تم تحديد موعد للطرفين وجرى الجلوس معهما عدة جلسات مجتمعين ومنفردين وبعد سماع مالديهما من أقوال قمنا

(٥٣) أحد شرف الدين، **تسوية منازعات عقود الإنشاءات الدولية في الدول العربية** ، (د.ن، د.ط، د.ت) ، ص 63.

(٥٤) محمد نصر الدين جودة، **إدارة الدعوى المدنية** ، ص 22.

بمناصحتمها ومحاولة الإصلاح بينهما وتذليل العقبات التي تواجه الزوجين من أجل استمرار حياتهم الزوجية محاولين تقريب وجهات النظر وترغيبهم في الصلح والابتعاد عن الخلاف ومسبباته ومحاولين إقناع الزوجة بالرجوع لبيت زوجها بشرط تحفظ لكل منهما حقوقه الشرعية لا سيما أن بينهما ابنة تحتاج للرعاية والعناية من الزوجين ولكن دون جدوى .

ومن ثم اتفقا صلحاً بينهما على أن يخالع الزوج زوجته على عوض وقدره خمسون ألف ريال لا غير وأن تتنازل الزوجة عن النفقة السابقة التي تدعيها الزوجة على زوجها وحيث أن بينهما ابنة فقد اتفقا صلحاً أيضاً على أن تبقى الابنة في حضانة والدتها ما لم تتزوج فإن تزوجت تنتقل الحضانة إلى والدة الزوجة وعلى الزوج أن يقوم بدفع مبلغ ثلاثمائة ريال شهرية كنفقة شهرية للابنة تودع في حساب والد الزوجة ومن ثم أكد الطرفان قناعتهما بهذا الصلح واعتباره منهياً للقضية وعلى ذلك جرى التوقيع هذا والله الموفق والصلاة والسلام على نبينا مُحَمَّد .

الزوجة	**الزوج**
.....	.....

الشهود

.....

.....

رئيس مركز الصلح في محكمة بريدة

مُحَمَّد بن صالح السعوي

خلاصة البحث

الوسائل البديلة لفض المنازعات هي عباة عن تفاوض وحوار مع تقديم التنازل من قبل الطرفين للوصول إلى حل ملائم ومرضي لطرفي النزعات، ويأتي الاهتمام بالوسائل البديلة على الصعيد المحلي والدولي بعد تزايد المشاكل والنزعات بين المجتمع، وبجانبه التراكم والتكدس الملفات القضايا في الهيئات القضائية في المملكة العربية السعودية وفي أنحاء العالم، وخاصة في المسائل الحضانة التي تكدست المحاكم الأحوال الشخصية بسببها في المملكة العربية السعودية. ولا شك أن هذه الوسائل ستلعب دورا كبيرا في إيجاد الحلول السريعة للبت في المنزاعات الحضانة التي هي من أهم تركيبات المجتمع، وأن هذه الوسائل هي بمثابة أهدافا مشتركة بين طرفي النزاع، ومكاسب كبيرة للطفل لسلامة حياته وصلاح تربيته.

ومن خلال هذا البحث البحث استطاعت الباحثة الوصول على تنائج والتوصيات التالية:

أولاً: النتائج

١ وجود طابعي اختياري محض من قبل طرفي النزاع في استخدام الوسائل البديلة لفض المنازعات سواء في الحضانة أو في غيرها.

٢ لا يكون قرار الصادر في عملية فض منازعات الحضانة ملزما إلا بعد مصادقته من المحكمة المختص.

٣ لا توجد إجراءات الاستئناف ضد قرار عملية فض منازعات الحضانة، إلا الطعن الذي يتمثل في وجود خطأ في تفسير النصوص، أو العيوب المقبولة، الإخلال بمبادئ العدل والانصاف في الحكم والقرار.

٤ إمكانية استخدام هذه الوسائل البديلة لفض المنازعات الحضانة بدون التدخل من قبل طرف ثالث.

ثانياً التوصيات:

١ توصي الباحثة في إعطاء الاهتمام الزائد في استخدام الوسائل البديلة لفض منازعات الحضانة في المملكة العربية السعودية، كأن يكون هناك نظام خاص ينظم هذه العملية، وكذلك وجود هيئات ومراكز ومكاتب بشكل كثيف لأعملية فض منازعات الحضانة.

٢ توصي الباحث المجتكع السعودي الحرص في اللجوء إلى الوسائل البديلة لفض منازعات الحضانة، والحصر على نجاح العملية للوصول إلى الحلول، كتقديم التنازلات وقبول الحكم والقرار، وذلك لاكتساب المصالح للأطفال.

٣ توسيع اللجوء إلى الوسائل البديل في فض منازعات الحضانة يخفف العبء عن القضاء وعن المحاكم الأحوال الشخصية في المملكة العربية السعودية.

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التحكيم كوسيلة لحل النزاعات فى القانون الليبي والموريتاني: دراسة مقارنة

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ملخص البحث:

يعتبر التحكيم من أهم الوسائل التي يلجأ إليها لحل النزاعات الواقعة أو المحتمل وقوعها فى المستقبل. والتحكيم نظام قديم قد عرفته البشرية منذ أمد بعيد، وفى العصر الحديث ازدادت أهمية التحكيم وكثر اللجوء إليه وأصبحت له مؤسسات ومراكز متخصصة تمارسه على المستويين الدولي والوطني وتوجد اتفاقيات دولية حول التحكيم وأيضا قوانين وطنية تنظم التحكيم فى كثير من الدول ومن هذه الدول ليبيا وموريتانيا اللتان انضمتا إلى الركب فقننتا التحكيم ونظمتاه حيث أصبح جزءا من المنظومة القانونية فى هاتين الدولتين. ففي ليبيا مثلا خصص قانون المرافعات المدنية والتجارية الليبي لسنة 1953 بابه الرابع للتحكيم مبينا الأحكام المتعلقة به فى فصلين؛ فصل عام وفصل خاص بالخلافات الزوجية. أما فى موريتانيا فيوجد قانون خاص بالتحكيم هو القانون رقم 2000-06 المتضمن مدونة الحكيم. تحاول هذه الورقة قراءة قانون التحكيم الموريتاني حسب ما ورد فى مدونة التحكيم المذكورة آنفا وقانون التحكيم الليبي انطلاقا من الباب الرابع من قانون المرافعات الليبي ثم تقارن بين القانونين مبرزة مظاهر الاتفاق والاختلاف -إن وجدت- بينهما مستخدمة المنهج التحليلي حيث تقوم بتحليل نصوص القانونين ومناقشتها ومقارنة بعضها ببعض والتعليق عليها. ودراسة كهذه يعتقد أنها مفيدة على المستويين النظري والعملي.

الكلمات المفتاحية: التحكيم، حل النزاعات، القانون الليبي والموريتاني.

مقدمة:

التحكيم من أهم الوسائل التي يلجأ إليها لحل النزاعات الواقعة أو المحتمل وقوعها فى المستقبل. والتحكيم نظام قديم عرفته البشرية منذ أمد بعيد، وفى العصر الحديث ازدادت أهميته وكثر اللجوء إليه وأصبحت له مؤسسات ومراكز متخصصة تمارسه على المستويين الدولي والوطني وتوجد اتفاقيات دولية حول التحكيم وأيضا قوانين وطنية تنظمه فى كثير من الدول. وليبيا وموريتانيا قد انضمتا إلى الركب فقننتا التحكيم ونظمتاه حيث أصبح جزءا من المنظومة القانونية فى هاتين الدولتين. ففي ليبيا مثلا خصص قانون المرافعات المدنية والتجارية الليبي بابا كاملا للتحكيم وهو الباب الرابع منه (من المادة 739 –777). وقد صدر هذا القانون في 28 –11–1953 ونشر في الجريدة الرسمية (عدد خاص) بتاريخ 20–2–1954م[1] إلا أنه اقتصر على التحكيم الداخلي. وقد قسم الباب الرابع إلي فصلين الفصل الأول ذكرت فيه أحكام عامة عن التحكيم (771–739) أما الفصل الثاني فقد تناول التحكيم بين الزوجين في حالة وجود خلاف (777–772[2]). وحتي تاريخ إعداد هذه الورقة لم يتم التصديق على مسودة قانون تحكيم شامل تم إعدادها سنة 2010 وبناء على ذلك بقت ليبيا معتمدة علي قانون المرافعات المدنية والتجارية لسنة 1953. وهناك محاولة جديدة في الوقت الحالي لسن قانون جديد للتحكيم وقد أعتمد المشرع الليبي التحكيم كوسيلة لتسوية النزاع في عقود النفطولقد ورد في نص المادة 20 فقرة 1 من قانون النفط الليبي تجري تسوية النزاع بين اللجنة وطرف العقد الممنوح عن طريق التحكيم وفقا لأحكام هذا القانون [3].وكذلك أيضا في عقود الأستثمار فقد نص قانون تشجيع الاستثمار رقم9 لسنة 2010 في المادة 24علي عرض اي نزاع بين ليبيا والمستثمر الأجنبي علي المحاكم المختصة ويرد أستثناء علي هذا النص في حال وجود أتفاقيات ثنائية اومتعددة الأطراف بين الدولة المضيفة ودولة المستثمر فيها تتضمن نصوصاً متعلقة بالصلح أو التحكيم أو اتفاق خاص بين المستثمر والدولة ينص على شرط التحكيم[4].

[1] علي الصادق القناص وعبدالرحيم ابوالقاسم الحريزي :" أتفاق التحكيم بين الرضائية والشكليةفي ظل القانون الليبي" *مجلة العلوم القانونية والشرعية*، ع8. (يونيو 2016) ،ص6.

[2] قانون المرافعات المدنية والتجارية الليبي سنة 1953.

[3] الفقرة 1المادة20 منقانون النفط الليبي رقم 25 لسنة 1954.

[4] المادة 24قانون تشجيع الاستثمار رقم 9 لسنة 2010.

أما فى موريتانيا فيوجد قانون خاص بالتحكيم وهو القانون رقم 2000-06 المتضمن مدونة التحكيم. وتشتمل مدونة التحكيم الموريتانية على ثلاثة فصول فى أربع وستين مادة. الفصل الاول "أحكام عامة" يتضمن أحكاما عامة مثل تعريف التحكيم وموضوعه والأطراف المشاركة فيه. أما الفصل الثانى والثالث فقد خصصا للتحكيم الداخلي والدولي على التوالى. لكن الحديث عن التحكيم فى موريتانيا يتطلب الرجوع إلى قوانين موريتانية أخرى أحالت لها مدونة التحكيم إيماء أو تصريحا ومن أهمها قانون الالتزامات والعقود الموريتاني -(الأمر القانوني رقم 89-126 الصادر بتاريخ 14سبتمبر 1989 المتعلقة با المتضمن قانون الالتزامات والعقود المعدل بالقانون رقم 2001-31 الصادر بتاريخ 7 فبراير 2001)- الذى تسرى أحكامه على الالتزامات والعقود فى موريتانيا بصفة عامة. ومن هذه القوانين أيضا قانون المرافعات المدنية والتجارية الإدارية الموريتاني (قانون رقم 99-035)الذي يرجع إليه في المسائل الإ جراءات.

تحاول هذه الورقة قراءة قانون التحكيم الموريتاني حسب ما ورد فى مدونة التحكيم المذكورة آنفا وقانون التحكيم الليبي انطلاقا من الباب الرابع من قانون المرافعات الليبي ثم تقارن بين القانونين مبرزة مظاهر الاتفاق والاختلاف -إن وجدت- بينهما مستخدمة المنهج التحليلي حيث تقوم بتحليل نصوص القانونين ومناقشتها ومقارنة بعضها ببعض والتعليق عليها. ودراسة كهذه يعتقد أنها مفيدة على المستويين النظري والعملي. وهذا يتطلب تقسيم الموضوع إلى مقدمة وأربعة مباحث وخاتمة على النحو التالى: المقدمة؛ المبحث الأول: مدخل عام إلى التحكيم؛ المبحث الثانى: أهلية أطراف التحكيم؛ المبحث الثالث: إجراءات الحكيم ونظمه؛ المبحث الرابع: إصدار حكم التحكيم وتنفيذه؛ والخاتمة تتناول النتائج التى توصلت إليها الدراسة.

المبحث الأول: مدخل عام إلى التحكيم

هذا المدخل العام تعريف التحكيم لغة واصطلاحا وتمييزه عن النظم المشابهة له، وتعريف عقد التحكيم وطرق إثباته والأشياء التى يجوز فيها التحكيم والتى لا يجوز فيها. .

الفرع الأول: تعريف التحكيم وتمييزه عن النظم المشابهة له

التحكيم لغة قال فيه صاحب القاموس "وحَكَّمَهُ في الأمْرِ تَحْكيماً: أمَرَهُ أن يَحْكُمَ " و"الحاكِمُ: مُنَفِّذُ الحُكْمِ، كالحَكَمِ محرَّكَةً ج: حُكَّامٌ[٥]. وفيما يتعلق بتعريف التحكيم فى اصطلاح القانونييننفيلاحظ أن بعض القوانين عرف اتفاق التحكيم ومن تلك القوانين مدونة التحكيم الموريتانية بينما لم تعرفه بعض آخر منها ومن ذلك البعض القانون الليبي لسنة1953 الذى ربما أخد بالاتجاه القائل أن التعريفات هي من عمل الفقه لا من عمل من يسن القوانين [٦].وقد عرفت مجلة الاحكام العدلية التحكيم بأنه "عبارة عن اتخاذ الخصمين لشخص آخر حاكما برضاهما لفصل خصومتهما ودعواهماويقال له حكم بفتحتين ومحكم بضم الميم وفتح الحاء وتشديد الكاف المفتوحة." [٧]ويتبين من هذا التعريف أن التحكيم تلاقى إرادتي الخصمين بالتراضي والايجاب والقبول باختيار التحكيم مسلكا لهما لحل النزاع الدائر بينهما بعيدا عن القضاء.

وتعريف مدونة التحكيم الموريتانية الذى جاء فى المادة الأولى منها هو قولها: "التحكيم هو طريقة خاصة لفض بعض أصناف النزاعات من قبل هيئة تحكيم يسند إليها الأطراف مهمة البت فيها بموجب اتفاق التحكيم." حسب هذا التعريف التحكيم هو طريق خاص يسلكه أطراف رابطة قانونية لفض نزاع حالي أو مستقبلي عن طريق أشخاص يعينونهم لذلك، ويتم إبرام التحكيم عن طريق اتفاق بين الأطراف. فاتفاق التحكيم إذن هو التزام ناشئ عن إرادة

[٥] مجد الدين أبو طاهر مُحَمَّد بن يعقوب الفيروزآبادى،القاموس المحيط، (بيروت :مؤسسة الرسالة للطباعة والنشر والتوزيع ،. ط 8، 1426 هـ - 2005 م. (نسخة المكتبة الشاملة).

2عبدالباسط مُحَمَّد عبدالواسع الضراسي ، النظام القانوني لاتفاق التحكيم ،(القاهرة: ط 2 دار الفتح، 2008)، ص63.

[4]نفس المرجع السابق،3.

الأطراف يشترط لصحته والأعتداد به –حسب قانون الألتزامات والعقود الموريتانى– أن تتوفر فى أطرافه كل الأركان اللازمة لصحة الالتزامات الناشئة عن الإرادة وهى: (1) أهلية الالتزام ؛ (2) تعبير صحيح عن الإرادة يشتمل على العناصر الأساسية للالتزام؛ (3) شيء محقق يصلح لأن يكون محلا للالتزام؛ (4) سبب مشروع للالتزام [٨]. وهيئة التحكيم التى يسند إليها الأطراف مهمة البت فى النزاع قد تكون فردا واحدا أو مجموعة من الأفراد [٩]. وينقسم المحكم من ناحية السلطة المخولة له إلى محكم عادي ومحكم مفوض للصلح وهو "الذى يبيح له اتفاق التحكيم أن يبت فى فى موضوع النزاع بروح العدل والإنصصاف لا بحسب القواعد القانونية" [١٠].

ولتمييز نظام التحكيم بصفة أكثر وضوحا نذكر –باختصار– بعض النظم التى تشترك معه فى محاولةحل النزاعاتمثل نظام الصلح والتوفيق والخبرة ة والقضاء [١١]. فهذه النظم وإن اتفقت مع التحكيم فى محاولة حل النزاع إلا أنها تختلف معه فى السلطة المخولة لكل واحد منهم. فسلطة الموفق فى نظام التوفيق –الذى هو "اتفاق الأطراف على محاولة إجراء تسوية ودية عن طريق الموافق أو الموفقين"– لا تخوله إخضاع أطراف النزاع لأحكامه لأنه لا يصدر قرارات بل يقدم مقترحات قد تقبل وقد ترفض [١٢]. ومن النظم أو العقود التى تشبه التحكيم عقد الصلح وقد عرفته المادة (1030) من قانون الالتزامات والعقود الموريتاني بأنه "عقد بمقتضاه يحسم الطرفان نزاعا قائما أو يتوقعان قيامه، وذلك بتنازل كل منهما للآخر عن جزء مما يدعيه لنفسه أو بإعطائه مالا معينا أو حقا." يتفق الصلح مع التحكيم من حيث أن كلما منهما ينهى النزاع ولا يجوز الرجوع عنه مثلا ولكنهما يختلفان فى أمور أخرى. فمثلا قرار الصلح ينشأ عن انفاق مباشر

[٨] المادة 23 من الأمر قانوني رقم 89–126 الصادر بتاريخ 14سبتمبر 1989 المتضمن قانون الالتزامات والعقود المعدل بالقانون رقم 2001–31 الصادر بتاريخ 7 فبراير 2001.

[٩] المادة 2 (ج) من القانون رقم 2000–06 المتضمن مدونة التحكيم الموريتانية.

[١٠] المادة 2 (د) من المرجع السابق.

[١١] انظر مثلا عبد الباسط محمد عبد الواسع الضراس، النظام القانوني للتفاق التحكيم : دراسة تحليلية مقارنة. المكتب الجامعي الحديث: الطبعة 2 – 2008، ص29، و د. محمد سامى الشوا، "التحكيم التجارى الدولي: أهم الحلول البديلة لحل النزاعات الاقتصادية" – المؤتمر السنوي السادس عشر (التحكيم التجاري الدولي)– جامعة الإمارات العربية المتحدة– كلية القانون. ص31–34

[١٢] د. محمد سامى الشوا مرجع سابق، ص 32.

بين أطراف النزاع أما التحكيم فيأتى قراره من هيئة التحكيم التى عينت بموجب اتفاق التحكيم. وهذه النقطة تقود للكلام على اتفاق التحكيم والطرق التى يثبت بها وذلك ما يتعرض له الفرع الثانى من هذا المبحث.

الفرع الثانى: اتفاق التحكيم وطرق إثباته:

اتفاق التحكيم عرفته المادة الثالثة منمدونة التحكيم بقولها "اتفاق التحكيم هو التزام أطراف على أن يفصلوا بواسطة التحكيم كل أو بعض النزاعات القائمة أو التى قد تقوم بينهم بشأن علاقة قانونية معينة تعاقدية كانت أو غير تعاقدية. ويكتسى الاتفاق صيغة شرط التحكيم أو صيغة عقد التحكيم."اشتمل تعريف اتفاق التحكيم على أركانه الأساسية وهي التزام متبادل بين طرفين أو أكثر، علاقة قانونية معينة، نزاع حالي أو مستقبلي. وبما أن اتفاق التحكيم هو التزام ومن شروط الااتزام أن يقع على" شيء محقق يصلح لأن يكون محلا الالتزام [١٣]" نصت المادة 17 من مدونة التحكيم على أنه: "يجب أن يحدد عقد التحكيم موضوع النزاع مع بيان أسماء المحكمين صراحة أو بوضوح كاف لا يبقى معه ريب فى أشخاصهم وإلا كان العقد باطلا". والفرق بين صيغة شرط التحكيم وصيغة عقد التحكيم –حسب المادة 4و5 من المدونة– هو أن " **شرط التحكيم** هو التزام أطراف عقد بإخضاع النزاعات التى قد تتولد عن ذلك العقد للتحكيم." فشرط التحكيم إذن ينصب على ما قد ينشأ من النزاعات فى المستقبل. وأما عقد التحكيم –و"هو التزاميتولى بمقتضاه أطراف نزاع قائم عرض هذا النزاع على هيئة تحكيم"– فيتعلق بنزاع معين موجود فى الوقت الحاضر. وبما أن التحكيم اتفاق خاص تتولد عنه أمور مهمة نص قانون المرافعات المدنية والتجارية الليبي على إثبات مشارطة التحكيم لا تثبت المشارطة إلا بالكاتبة [١٤]. وكذلك أيضا مدونة التحكيم على ضرورة إثباته بالكتابة فقط حيث جاء فى المادة 23 منها "لا يثبت اتفاق التحكيم إلا بمكتوب سواء كان رسميا أو عرفيا أو محضر جلسة أو محضرا محررا لدى هيئة التحكيم التى وقع اختيارها". والكتابة هى إحدى وسائل الإثبات الخمس التى يقررها القانون الموريتانى وهى:

١٣ الفقرة (3) من المادة 23 من قانون الالتزامات والعقود الموريتاني.

١٤المادة 742 من قانون المرافعات المدنية والتجارية الليبي.

إقرار الخصم؛ الحجة الكتابية؛ شهادة الشهود؛ القرينة؛ اليمين والنكول عنها[١٥].وانطلاقا مما قررته المادة 399 من قانون الالتزامات والعقود التى تصرح بأنه " لا يطلب أي شكل خاص لإثبات الالتزامات إلا في الحالة التي فيها يقرر القانونشكلا معينا" وأنه "إذا قرر القانون شكلا معينا، لم يسغ إجراء إثبات الالتزام أو التصرف بشكل آخر يخالفه، إلا في الأحوال التي يستثنيها القانون" لا يمكن إثبات اتفاق التحكيم إلا بالكتابة فقط لأن مدونة التحكيم نصت على ضرورة إثباته بالكتابة. لكن إثبات اتفاق التحكيم عن طريق الكتابة ليس أمرا صعبا حيث تشمل الكتابة أنواعا مختلفة فى الشكل والقوة مثل الورقة الرسمية والعرفية أو وثيقة "موقعة من الأطراف أو تبادل رسائل أو تلكسات أو برقيات أو غيرها من وسائل الاتصال التى تثبت وجود الاتفاق."[١٦]

بعد معرفة اتفاق التحكيم وطرق إثباته حان الوقت للكلام على الأشياء التى يجوز أن يتم اللجوء إلىاتفاق التحكيم فيها والتى لا يصح فيها ذلك. ذلك ما سيبحث فى الفرع التالى.

الفرع الثالث: موضوع التحكيم:

معرفة موضوع التحكيم أو بعبارة أخرى الأشياء التي يجوز فيها والتى لا يجوز مسألة مهمة من الناحية النظرية والقانونية لأن أنواع المعاملات والعقود التى قد يقع فيها نزاع كثيرة ومتعددة فمنها مثلا التجاري والمدني ومنها ما قد يكون موضوعه الأحوال الشخصية أوالمسائل المتعلقة بالنظام العام. فوفقا لنص المادة (740) من القانون الليبي لا يجوز التحكيم فى: (1) الامور المتعلقة بالنظام العام؛ (2) المنازعات بين العمال وأرباب العمل بشأن تطبيق الاحكام الخاصة بالتامين الاجتماعي وأصابات العمل وأمراض المهنة؛ (3) المنازعات المتعلقة بالجنسية أو بالحالة الشخصية بما في ذلك التفريق البدني. ويجوز التحكيم بين الزوجين فيما تجيزه أحكام الشريعة الاسلامية؛ [١٧] (4) لايصح التحكيم في

١٥المادة 402قانون الالتزامات والعقود الموريتاني.

[١٦]انظر المادة 8 من مدونة التحكيم والمادة 414 وما بعدها من قانون الالتزامات والعقود المويتاني.

١٧المادة 740 منقانون المرافعات المدنية والتجارية الليبي.

المسائل التي لايجوز فيها الصلح؛ (5) ولا يصح التحكيم إلا ممن له أهلية التصرف في حقوقه [18]أجاز المشرع الليبي ووفقا لنص المادة 769 فقرة رقم 3 رفع دعوي بطلان ضد الحكم التحكيمي الصادر اذا كان موضوع النزاع خاصا باالأحوال التي لا يجوز فيها التحكيم . [19] ،أيضا نصت مدونة التحكيم الموريتاني علي أشياء مشابهة في الجملة؛ لكن المتأمل لنص المدونة يلاحظ أنها أعطت للاطراف حرية اللجوء إلى التحكيم فى "كل أو بعض النزاعات القائمة أو التى قد تقوم بينهم بشأن علاقة قانونية معينة تعاقدية كانت أو غير تعاقدية" ثم استثنت فى المادة 8 منها أشياء لا يجوز التحكيم فيها وعنونتها ب"مجال الحظر" وهى: (1) المسائل المتعلقة بالنظام العام؛ (2) المسائل المتعلقة بالجنسية؛ (3) النزاعات المتعلقة بالأحوال الشخصية التى لا تخضع للتحكيم الوارد فى هذه المدونة باستثناء الخلافات المالية الناشئة عنها؛ (4) المسائل التى لا يجوز فيها الصلح؛ (5) النزاعات المتعلقة بالدولة والمؤسسات العمومية والجماعات المحلية إلا إذا كانت هذه النزاعات ناتجة عن علاقات دولية ذات طابع اقتصادي أو تجاري أو مالى المنظمة بالفصل الثالث من هذه المدونة.

فمن المسائل التى لا يجوز فيها التحكيم –حسب القانونين– المسائل المتعلقة بالنظام العام الذى قد عرف بأنه "مجموعة النظم والقواعد التى قصد بها المحافظة على حسن سير المصالح العامة فى الدولة، وضمان الأمن والأخلاق فى المعاملات بين الأفراد، بحيث لا يجوز للأفراد أن يستبعدوها فى اتفاقاتهم" [20]. ومنها كذلك المسائل التى لا يجوز فيها الصلح وتشمل حسب قانون الالتزامات المسائل المتعلقة بالحالة الشخصية أو بالنظام العام أو بالحقوق الشخصيةالأخرى الخارجة عن دائرة التعامل وما لا يجوز التعاقد عليه شرعا وحق النفقة.[21]

المبحث الثانى: أهلية أطراف التحكيم:

[18] المادة 740 منقانون المرافعات المدنية والتجارية الليبي .

[19] أنظر المادة 769 من قانون المرافعات المدنية والتجارية الليبي

[20] عبد الباسط مُحَمَّد، مرجع سابق ص 133.

[21] لمزيد من التفاصيل تنظر المادة 1030 والمادتين بعدها من قانون الألتزامات والعقود.

ككل التصرفات القانونية اتفاق التحكيم يتطلب أن يكون أطرافه يتمتعون بالأهلية الكاملة ومتمتعين بحقو قهم المدنية وإلا كان التحكيم غير معتد به. هذا المبحث يتكلم على الشروط الواجب توفرها فى كل من المحكمين بكسر الكاف أي من يعين هيئة التحكيم والمحكمين بفتحه أي هيئة التحكيم.

الفرع الأول: الشروط المشترطة فى من يبرم اتفاق التحكيم:

نصقانون التحكيم الليبي على أنه في الفقرة 2 من المادة 740 بانه "لايصح التحكيم إلا ممن لهأهلية التصرف فيحقوقه..."[٢٢] ولايتطلب هنا أهلية التقاضي لـلمح تكمين في أبرام أتفاق التحكيم وانما يتطلب أهلية التصرف والتي قد حددهابعض من فقهاء القانون" بأهلية أجازة التصرف فيما يملكه الشخص نفسه" [٢٣] فلا يملك القاصر او المحجور عليه ولايملك الولي أو الوصي أو الوكيل قبوله بالانابة عنهم في التحكيم لانه لايملك التصرف ولكنه يملك الحق في تمثيل القاصر امام القضاء [٢٤] ولكن لكل قاعدة أستثناء والاستثناء هنا جاء في نص المادة 732 من قانون المرافعات المدنية والتجارية الليبي

ألايصحبغيرتفويضخاصالإقراربالحقالمدعيبهولاالتنازلعنهولاالصلحولاالتحكيمفيه..."[٢٥] وهو تفويض خاص ومن دونه لايصح عقد التحكيم أما في حال مخالفة ذلك من أحد أطراف النزاع وأبرم أتفاق التحكيم فقد نصت المادة 769 من قانون المرافعات المدنية والتجارية الليبي من "الاحوال التي يجوز طلب بطلان أحكام المحكمين إذا صدر من قاصر أو محجوز عليه أو محروم من حقوقة المدنية **أو كان الخصوم او احدهم ممن لا يجوز له التصرف**..."[٢٦]. ونصت المادة 7 من مدونة التحكيم الموريتانية على أنه "لا يمكن أن يبرم اتفاق التحكيم إلا شخص طبيعي أو معنوي يتمتع بأهلية التصرف فى حقوقه." من هذه النصوص يتبين أن أطراف اتفاق التحكيم يشترط فيهم أن يكونوا متمتعين بأهلية

[٢٢] الفقرة 2من المادة 740 من قانون المرافعات المدنية والتجارية الليبي.
[٢٣] مسعد عواد حمدان البرقاني الجهني،التحكيم في الشريعة الأسلامية والقانونالنظم الوضعية(بيروت :دار البشائر الأسلامية : ط 1 1994)،ص155.
[٢٤] أحمد أبوالوفا، التحكيم الا ختيارى والاجباري (إسكندرية : دار المطبوعات الجامعية 2007)،ص.50.51.
[٢٥] المادة 732 من قانون المرافعات المدنية والتجارية الليبي .
[٢٦] المادة 769، من قانون المرافعات المدنية والتجارية الليبي.

التصرف فى حقوقهم حتى يتمكنوا من تعيين هيئة التحكيم. ما هى إذن أهلية التصرف فى الحقوق وما هى مسقطاتها؟ يقسم الفقهاء الأهلية إلى قسمين. القسم الأول أهلية الوجوب وهى "صلاحية الإنسان لوجوب الحقوق المشروعة له وعليه"[٢٧] وقد أشارت لها المادة 12 من قانون الا لتزامات الموريتاني بقولها: "تبدأ شخصية الإنسان بتمام ولادته حيا وتنتهى بموته، ويتمتع الجنين بحقوقه المدنية بشرط أن يولد حيا". ومن الواضح أن هذه ليست هى الأهلية المرادة فى التحكيم وإنما المراد فى التحكيم القسم الثانى أيأهلية الأداء التى "هى صلاحية الشخص لاستعمال الحق [٢٨]" وأشارت لها المادة 15 من قانون الالتزامات الموريتاني بقولها: "كل شخص بلغ سن الرشد متمتعا بقواه العقلية ولم يحجر عليه يكون كامل الأهلية لمباشرةحقوقه المدنية. وسن الرشد هي ثماني عشرة 18سنة". وهذه المادة تتكلم على الشخص الطبيعي وأما الشخص المعنوي –الذى له هو الآخر الحق فى إبرام اتفاق التحكيم– فذكرت أهليته المادة 19 من نفس القانون بقولها: "يتمتع الشخص الاعتباري بجميع الحقوق إلا ما كان منها ملازما لصفة الإنسان وذلك في الحدود التى يقررها القانون.مما سبق يتبيت أن الشخص المعنوي أو الطبيعي المتمتع بأهلية التصرف فى حقوقه يمكن أن يبرم اتفاق تحكيم معتد به وملزم له من الناحية القانونية. لكن الشخص الفاقد للأهلية بسبب صغر سن أو فقد عقل أو بسبب الحجر عليه لا يمكنه أن يعين محكما لحل نزاع بينه وبين خصمه.

الفرع الثانى: الشروط المشترطة فى من يكون حكما:

من يعين محكما فى قضية يلزم أن يكون متمتعا بأهلية كاملة وقادرا على القيام بالمهمة على أحسن وجه لأن المحكم يقوم مقام القاضى فى الفصل فى النزاع وإعطاء كل ذى حق حقه. ولذا نصت المادة 10 من مدونة التحكيم الموريتانية تحت عنوان تعيين المحكمين وأهليتهم أنه "يجبب أن يكون المحكم شحصا طبيعيا راشدا كفئا ومتمتعا بكامل حقوقه المدنية وبالاستقلالية والحياد إزاء الأطراف". وفى ما يتعلق بالجانب الليبي لم يتناول قانون المرافعات المدنيه والتجارية

[٢٧] عبد الرزاق أحمد السنهوري ، الوسيط فى شرح القانون المدني الجديد. ج 1 دار إحياء التراث العربي بيروت لبنان. ص 266.
[٢٨] المرجع السابق ص 268.

مسألة الكفاءة أو الخصائص التي علي ضوهايتم اختيار المحكم[٢٩] بل ترك الباب مفتوحا للاطراف ولم يلزمهم بحكم أو عدة محكمين ولكن عند التعداد يجب أن يكون العد وترا ولكن هناك أستثناء علي هده القاعدة وهو عند التحكيم بين الزوجين كما نصت عليها الشريعة الاسلامية والمادة (744) من قانون التحكيم الليبي لسنة 1953 [٣٠]وفقا لنص المادة 741 من قانون المرافعات المدنية والتجارية الليبي حددت شروط معينة في المحكم كباقي التشريعات الاخري فلايصح التحكيم أن يتولي التحكيم قاصرا أو

محجوزعليهأومحروماًمنحقوقهالمدنيةبسببعقوبةجنائيةأومفلساًلميردإليهاعتباره[٣١]تلك الشروط ضروية فيمن يعين محكما لأنها تمكن المتصف بها من النظر فى النزاع المعروض أمامه بعين من يريد تحقيق العدالة لا بعين من يريد الحكم لزبونه. وينظر إلى "استقلالية المحكم بأنها عصب مهمته القضائية، لان المحكم بمجرد بمجرد تعيينه يدخل فى نظام القضاة الخالي من أي ارتباط لاسيما مع أطراف النزاع" [٣٢]. ولذا نصت المادة 22 من المدونة أن على الشخص الذى يعرض عليه احتمال تعيينه محكما أن يصرح بكل الأسباب التى من شأنها أن تثير شكوكا حول حياده سواء القديم منها أو الجديد، ويجوز للاطراف رد المحكمين المعينين من طرفهم إذا تبينت أسباب الرد بعد التعيين. ويجوز كذلك رد المحكم بمثل ما يرد به القاضوهى أمور مذكورة فى قانون الإجراءات المدنية والتجارية والإدارية الموريتانى [٣٣]وتشمل على سبيل المثال لا الحصر القرابة والصداقة أو العداوة المشهوةالتبعية الدّين الخ.ويجب أن يكون الحكم راشدا ومتمتعا بكامل حقوقه المدنية. وحسب قانون الالتزامات والعقود الموريتاني فإنكل شخص بلغ سن الرشد (وهى ثماني عشرة سنة) متمتعا بقواه العقلية ولم يحجر عليه يكون كامل الأهلية لمباشرة لمباشرة حقوقه المدنية.

[٢٩]الكوني أعبودة أضواء علي قواعد التحكيم في قانون المرافعات الليبي ، المجلة العربية للفقه والقضاء، الأمانة العامة لجامعة الدول العربية، عدد 25، ابريل 2001، ص 13.

[٣٠]الكوني أعبودة ،مرجع سابق ذكره،ص13.

[٣١]المادة 741 من قانون المرافعات المدنية والتجارية الليبي لسنة 1953.

[٣٢]. عبد الحميد الأحدب، موسوعة التحكيم: التحكيم الدولي (الكتاب الثانى)منشورات الحلبى الحقوقية–بيروت لبنان، ط الثامنة2008 ص 326

[٣٣]تنظر تفاصيلها فى المادة 262 (الفقرات 1 إلى 11) من القانون رقم99-035.

يتحصل مما سبق أن كل شخص توفرت فيه الشروط المذكورة آنفا وانتفت عنه الموانع يمكن أن يعين حكما. ويجوز أن يكون الحكم شخصا معنويا أو طبيعيا متعددا أو منفرا. لكن إذا تعدد المحكمون وجب أن يكون عددهم وترا حسب المادة 18 من المدونة الموريتانية. وإذا عين أطراف التحكيم شخصا معنويا كمحكم فإن مهمته تنحصر فى تعيين هيئة التحكيم. وبعد تعيين المحكم المستوفى الشروط وقبوله مهمته لا يجوز له التخلى عنها دون مبرر مقبول وأيضا لا تقبل طلبات عزله أو رده عندما تقدم بعد ختم المرافعة[٣٤].

بعد أن عرفنا الشروط المتعلقة بالمحكم والمحكم ومن يجوز له ممارسة مهمة التحكيم بقي أن نتكلم على إجراءات التحكيم ونظمه وهو ما يحاول البحث لآتى الكلام عليه.

المبحث الثالث: إجراءات التحكيم ونظمه:

إجراءات إذا تم تعيين هيئة التحكيم على الصفة التى تم بيانها فإنها تباشر مهمتها وفق نظم محددة فما هى إجراءات التحكيم التى تتبعها هيئة التحكيم وما هى النظم التى تسلكها؟ الإجابة على هذين السؤالين ستتم فى فرعين الفرع الأول يتكلم على إجراءات التحكيم والثانى سيخصص لنظم التحكيم.

الفرع الأول: إجراءات التحكيم:

نصت المادة 754 من التحكيم الليبي –تحت عنوان إجراءات التحكيم– على أن "للخصوم أن يضمنوا عقد التحكيم أو أي مشارطة أخرى للتحكيم أو أي اتفاق لاحق يحررونه قبل أن يبتدئ المحكمون فى نظر القضية قواعد معينة وإجراءات يسير عليها المحكمون. وفى حالة عدم قيامهم بذلك فللمحكمين أن يضعوا القواعد التى يرونها صالحة وإلا وجب مراعاة الأصول والمواعيد المتبعة أمام المحاكم" [٣٥].وأيضا نصت المادة 9 من مدونة التحكيم الموريتانية على أن

[٣٤] المادة 11 و12 من مدونة التحكيم الموريتانية.

[٣٥] المادة 754 ، قانون المرافعات المدنية والتجارية الليبي.

إجراءات التحكيم فى نزاع معين تبدأ فى اليوم الذى يتسلم فيه المدعى عليه طلبا بإحالة ذلك النزاع إلى التحكيم، ما لم يتفق الأطراف على خلاف ذلك. ومعرفة وقت بداية إجراءات التحكيم له أهمية عملية لأن التحكيم له أجل محدد وهذا الأجل إما أن يحدده اتفاق التحكيم أو يكون ثلاثة أشهر تبدأ من تاريخ قبول آخر المحكمين لمهمته حسب المادة 24 من المدونة الموريتانية. ونصت هذه المادة على أن أجل التحكيم الشرعى أو الاتفاقى يجوز تمديده باتفاق الأطراف أو بطلب من أحدهم أو بقرار من هيئة التحكيم.

الفرع الثانى: نظم التحكيم:

يمكن تقسيم التحكيم إلى أقسام نظرا للزاوية التى ينظر إليه منها. فمنه مثلا تحكيم داخلي وتحكيم دولي وتحكيم فردي وآخر مؤسسي[٣٦]. وقد أشارت المدونة الموريتانية إلى التحكيم الحر والمؤسسي بقولها "يمكن أن يكون التحكيم خاصا أو مؤسسيا"[٣٧]. وتختلف سلطة المحكم تبعا لنوع التحكيم، ففى حالة التحكيم المؤسسى تتولى تلك المؤسسة تنظيمه طبقا لنظامها. أما فى حالة التحكيم الخاص فإن هيئة التحكيم تتولى تنظيمه بتحديد الإجراءات الواجب اتباعها ما لم يتفق أطراف النزاع على خلاف ذلك أو يفضلوا سلوك نظام تحكيم معين [٣٨]. وبالنظر إلى السلطة الممنوحة إلى المحكم إلى محكم عادي ملزم بتطبيق القانون وإلى محكم مفوض للصلح وهو غير ملزم بتطبيق القواعد القانونية وإنما يبت فى النزاع حسب قواعد العدل والإنصاف [٣٩].وفى الجانب الليبي نظم قانون المرافعات الليبي [٤٠]نظم التحكيم من شرط التحكيم ثم إجراءاته وتنفيذه وطرق الطعن فيه وتسري هذه القواعد علي كل تحكيم لاتنظمة قواعد خاصة أو قواعد

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[٣٦] انظر عماد الدين المحمد، "طبيعة وأنماط التحكيم مع التركيز على التحكيم عبر الأنترنت". المؤتمر السنوي السادس عشر (التحكيم التجاري الدولي)، جامعة الإمارات العربية المتحدة–كلية القانون، ص1028

[٣٧] المادة 13مدونة التحكيم الموريتاني.

[٣٨]المادة 14مدونة التحكيم الموريتاني.

[٣٩]المادة 14مدونة التحكيم الموريتاني.

[٤٠]قانون المرافعات المدنية والتجارية الليبي لسنة1953م

اتفاقية يضعها أصحاب النزاع أو قواعد يحددها نظام مؤسسة تحكيمية [٤١]. ومن الواضح من خلال درستنا للقواعد التنظيمية لقانون التحكيم الليبي أنها تنحصر في التحكيم الحر بشكل عام ولم تتناول التحكيم المؤسساتي في مواده والمادة 754 من قانون المرافعات أكدت هذا بشكل قاطع وقد جاء في نص هذه المادة أنه "للخصوم أن يضمنو عقد التحكيم أو أي مشارطة أخري للتحكيم أو أي اتفاق لاحق يحرورنه قبل أن يبدئ المحكمون في نظر القضية قواعد معينة وإجراءات يسير عليه المحكمون. وفي حالة عدم قيامهم بذلك فللمحكمين أن يضعوا القواعد التي يرونها صالحة وإلا وجب مراعاة الاصول والمواعيد المتبعة أمام المحاكم" [٤٢] ومن هنا يبدو لنا وعلى ضوء ماسبق أن المشرع الليبي أخد بالنظام الحر للتحكيم.

المبحث الرابع: إصدار حكم التحكيم وتنفيذه

المحكمون مهمتهم تنحصر فى الوصول إلى حل عادل للنزاع يرضى الأطراف ويحسم النزاع بينهم وذلك من خلال إصدار حكم التحكيم وتنفيذه وطي ملف القضية طيا نهائيا. كيفية إصدار حكم التحكيم وكيفية تنفيذه ستتم مناقشتهما فى هذا المبحث فى فرعين الفرع الأول يبحث إصدار حكم التحكيم والفرع الثانى يلقى الضوء على كيفية تنفيذه.

الفرع الأول: إصدار حكم التحكيم

وفقا لنص المادة 760 من قانون المرافعات التجارية والمدنية الليبي بعد مداولة المحكمين مجتمعين يصدر حكم التحكيم بأغلبية الاراء [٤٣] أما فيما يتعلق بالمحكم الفرد أو بمعني أصح الوتر هنا يصدر الحكم بعد الاستماع إلي أطراف النزاع

[٤١] عبدالحميد الأحداب مرجع سابق ذكره ص1994م

[٤٢] الكونى أعبودة ،مرجع سابق ذكره ص 4 .

[٤٣] المادة760 من قانون المرافعات المدنية والتجارية الليبي.

ودراسة ما قد قدموه من وثائق وبراهين [٤٤]وليس من المستغرب هنا اشتراط القانون الليبي لشكلية الكتابة عند صدور حكم التحكيم أسوة بالحكم القضائي، فلا وجود لحكم شفوي والكتابة تعتلى أعلى المراتب في سلم القوة الثبوتيه [٤٥].

وفى ما يتعلق بالجانب الموريتاني؛نصت المادة 28 من المدونة على أنه عندما تتهيأ القضية للحكم تعلم هيئة التحكيم أطراف النزاع بتاريخ ختم الإجراءات. وتكون مداولات هيئة التحكيم سرية وتصدر قراراتها بأغلبية الأصوات ما لم يتفق الأطراف على خلاف ذلك، ويتم حسم المسائل الإجرائية من الرئيس إذا أذن له فى ذلك ويوقع جميع أعضاء هيئة التحكيم على القرار أو أكثرهم إذا رفضت أقلية منهم التوقيع عليه وينص على ذلك ويكون لقرار التحكيم، بمجرد صدوره، سلطة الشيء المقضى به بالنسبة لموضوع النزاع الذى بت فيه [٤٦].ومن خلال دراستنا لنص المادة 28من مدونة التحكيم الموريتاني فقد ورد بالنص "تكون مدولات هيئة التحكيم سرية " [٤٧]ومن الملاحظ هنا أخد المشرع الموريتاني بمدأ سرية المدولات وعلي خلاف من ذلك في القانون الليبي لايوجد أي نص حرفي واضح متعلق بالسرية في المدولات وهي تعتبر من أهم الأمور التي تميز التحكيم عن قضاء المحاكم.[٤٨]

بما أن قرار هيئة التحكيم –ككل الأعمال البشرية– قد يكون صدر مشتملا على خطإ يتطلب التحصيح أو طعن فيه فى الحالات التي يجوز فيها ذلك، فقد فتحت مدونة التحكيم الموريتانية باب التصحيح للخطأ والطعن فى قرار هيئة التحكيم قبل التنفيذ.فتصحيح قرار التحكيم المعيب ذكرت المدونة أنه يجوز لهيئة التحكيم أو لرئيس المحكمة التى صدر بدائرتها قرار التحكيم عند تعذر اجتماع الهيئة أن يصلح الغلط فى الكتابة أو فى الحساب أو أي غلط مادي آخر

[٤٤]الكوني أعبودة مرجع سابق ذكره ص19.

[٤٥]حمد فال الحسن ولد الأمين التحكيم الألكتروني والقانون الليبي المؤتمر المغاربي الاول ،حول المعلوماتية والقانون ،طرابلس أكاديمية الدراسات العليا ص16، 2009.

[٤٦] المادة 29 و30 من مدونة التحكيم.

[٤٧]المادة 28 من مدونة التحكيم الموريتاني

[٤٨]جمال عمران إغنية الورفلي ،تنفيذ أحكام التحكيم التجاري الأجنبية،(القاهرة:دار النهضة العربية ط1 2009)،ص41.

تسرب إلى القرار وحددت لذلك آجالا وطرقا يتم الاصلاح من خلالها.[49] وأما الطعن فقد ذكرت المدونة الحالات التى يجوز فيها وذكرت أيضا أنه يقدم طبق أحكام قانون الإجراءات المدنية والتجارية والإدارية إلى محكمة الاستئناف التى صدر بدائرتها قرار التحكيم.[50]وكذلك أيضا بالنسية للقانون الليبي ومن خلال نص المادة 763 أجاز التشريع الليبي الاستئناف في أحكام التحكيم ولكن بعد صدور الحكم والتصديق علية من قاضي الأمور الوقتية وبعد تأكده من حكم التحكيم وشرط التحكيم والتثبت من عدم وجود مايمنع تنفيذ حكم التحكيم وطبقا للقواعد المقرره قانونا لأستئناف الصادرة من المحاكم ومن الملاحظ هنا أن المشرع أعطي حكم التحكيم نفس القواعد المقرره لأستئناف أحكام المحاكم ولكنه أشترط لكي يتم قبول الاستئناف الأ يكون قد تم تفويض المحكمين بالصلح أوكانوا محكمين في أستئناف او قد تنازلوا صرحا عن حق الاستئناف أو أن تكون قيمة الدعوي لاتتجاوز النصاب النهائي للمحكمة المختصة اصلا لنظرها ويرفع الأستئناف الي المحكمة المختصة بنظره فيما لو كان النزاع قد صدر فيه حكم ابتدائي من المحكمة المختصةو كذلك أيضا أجاز التماس إعادة النظر يجوز الطعن في أحكام المحكمين بالتماس إعادة النظر فيما عدا الحالة الخامسة المنصوص عليها في المادة 328 وطبقاً للقواعد المقررة ذلك فيما يتعلق بأحكام المحاكم [51] ويرفع الالتماس إلى المحكمة التي كان من اختصاصها أصلاً نظر الدعوى [52].أما فيما يتعلق بالبطلان فقد نصت المادة 769 من قانون المرافعات المدنية والتجارية الليبي أحوال البطلان وأجاز رفع دعوي البطلان ضد أحكام المحكمين النهائية ولو أشترط الخصوم علي خلاف ذلك وعددت المادة769 تلك الاحوال .[53]

الفرع الثانى: تنفيذ قرار التحكيم

[49] انظر المواد من 32–36 من المدونة.
[50] انظر المواد من 37-39 من المدونة.
[51] المادة 768 من قانون المرفعات المدنية واالتجارية الليبي
[52] المادة 768 من قانون المرفعات المدنية واالتجارية الليبي
[53] أنظر المادة 769 من قانون المرفعات المدنية واالتجارية الليبي

إذا صدر قرار التحكيم بشكل صحيح أو معيب وتم تصحيصه أو الطعن فيه فى الحالات التى تستوجب ذلك فإنه – طبقا لمدونة التحكيم الموريتانية– يصبح قابلا للتنفيذ طوعا من قبل الأطراف أو بصفة إجبارية بإذن من رئيس محكمة الولاية التى صدر بدائرتها القرار وإذا كان قرار التحكيم صدر فى قضية منشورة أمام محكمة استئاف فإن رئيس تلك المحكمة هيالجهة الوحيدة التي لها الحق فى إصدار الإذن بالتنفيذ. [٥٤]وفيما يتعلق بالجانب الليبي فقد قيد القانون الليبي أحكام تنفيذ حكم التحكيم بضوابط معينةحيث نص على أنه "لايصير حُكم المحكمين واجب التنفيذ إلا بأمر يصدره قاضي الأمور الوقتية بالمحكمة التي أودع أصل الحكم قلم كتابها بناءً على طلب ذوي الشأن بعد الاطلاع علي الحكم ومشارطة التحكيم والتثبت من عدم وجود مايمنع من تنفيذه،ويوضع أمر التنفيذ بذيل أصل الحكم" [٥٥].باستقراء النص نلاحظ أن المشرع الليبي قد قيد حكم التحكيم الداخلي أو الوطني عن تنفيده إلا بامر صادر من قاضي الامور الوقيتية بعد أودع أصل الحكم عند قلم كتابها وهنا اشترط المشرع الليبي الحكم الاصلي وطلب مقدم من أحد الطرفين واجب علي قاضي الأمور الوقتية التأكد من حكم التحكيم وشرط التحكيم والتثبت من عدم وجود مايمنع تنفيذ حكم التحكيم ويمهر بأمر التنفيذ بذيل أصل الحكم. ويقوم قلم الكتاب للمحكمة بالإيداع واعلام طرفي النزاع وبتصديق المحكمة بالطرق المقررة قانونا لإعلان الأحكام، وفي حال أراد أحد الخصوم رفع تظلم ضد رفض التصديق على حكم المحكمين يرفع الي المحكمة. الابتدائية إذا صدر الرفض من القاضي الجزئي أما في حال جاء رفض التصديق من المحكمة الإبتدائية يرفع التظلم الي محكمة الأستناف ومرحلة تنفيذ حكم التحكيم تعتبر من أهم مراحل التحكيم لتحقيق النتائج المرجوه من التحكيم وأعطاء كل ذي حقٍ حقه من خلال تنفيذ حكم التحكيم أما في حال تنفيد حكم التحكيم الأجنبي فقد نصت المادة 408 من قانون المرافعات المدنية والتجارية الليبي علي تنفيد أحكام المحكمين

[٥٤] المادة 31 من المدونة.

[٥٥]المادة 763 من قانون المرافعات المدنية والتجارية الليبي.

الأجنبية اذا كانت نهائية وقابلة للتنفيذ في البلد الدي صدرت فيه مع التقيد بالقواعد الواردة في المواد المواد السابقة [٥٦] والتي نصت علي الا يكون الحكم التحكيمي مخالفا لقواعد النظام العام والاداب وأن يكون الخصوم قد مثلوا تمتيلا صحيحا والا يكون قد يتعارض مع حكم او أمر صدر من المحاكم الليبية حكم سابق وان يكون حائز علي قوة الشئ المقضي [٥٧] وقد نصت المادة 405 من نفس القانون علي أن "الأحكاموالأوامرالصادرةفيبلدأجنبييجوزالأمربتنفيذهابنفسالشروطالمقررةفيقانونذلكالبلدلتنفيذالأحكاموالأوامرالليبية فيه [٥٨]"يظهر من هذا النص أن المشرع الليبي قد سلك مبدأ المعاملة بالمثل..في تنفيذ الاحكام الأجنبية .

وفيما يتعلقبتصحيح الإخطاء الواردة في الحكم فقدنصت المادة 764 من قانون المرافعات التجارية والمدنية الليبي على أن الجهة المخوله في اختصاص تصحيح الإخطاء المادية الوارادة في حكم التحكيم للمحكمة التي قد اودع الحكم قلم كتابها بناء علي طلب احد ذوي الشأن بالطرق المقررة لتصحيح الأحكام [٥٩].ومن الملاحظ هنا من خلال النص أن المشرع الليبي قد خول المحكمة التي أودع الحكم قلم كتابها صفة تصويب الحكم التحكيمي وبناءً على طلب أحد الخصوم وفقا لطرق المقررة قانونا لتصويب الأحكام وعلى النقيض بالنسبة للمذونة التحكيم الموريتاني ووفقا لنص المادة 32 فقد خول المشرع الموريتاني الهيئة التحكيميةمن تصويب الأحكام من اي خطأ في الكاتبة والحساب ومن اي غلط مادي قد يكون تسرب الى القرار، وتقوم الهيئة التحكيمية من تلقاء نفسها من ذلك في غضون عشرون يوما من صدور الحكم التحكيمي [٦٠] والمادة 33 من المذونة الموريتانية فقدأجازت ذلك أيضا الي الاطراف وبناءا علي طلب مقدم منهم خلال نفس المدة الزمانيه التي أعطيت للهيئة وهي عشرون يوما ويجب تبليغ الطرف الاخر ويمكنه من

[٥٦] المادة 408 من قانون المرافعات المدنية والتجارية الليبي.
[٥٧] المادة 407 من قانون المرافعات المدنية والتجارية الليبي.
[٥٨] المادة 405 من قانون المرافعات المدنية والتجارية الليبي.
[٥٩] المادة 764 من قانون المرافعات التجارية والمدنية الليبي.
[٦٠] مادة 32 من مدونة التحكيم الموريتاني.

تقديم ملاحظاتة عند الاقتضاء خلال 15 يوما من تاريخ ابلاغة[٦١]أصلاح الغلط وتأويل القرار التحكيمي إصدار قرار تكميلي في جزء معين وقع سهوا عند صدور الحكم من طلب الأصلي ويعتبر الحكم التأويلي الصادر جزءا من من الحكم الاصلي الصادر، ويصدر الحكم في غضون ثلاثون يوما بالنسبة إلى الاصلاح والتأويل أما في القرار التكميلي هنا تكون المدة ستون يوما ويجوز قانونا للهيئة التحكيمية التمديد سوا في حال القرار التأويلي أوالتكميلي وعند الحاجة يسمح بتمديد الأجال لأصدار القرار [٦٢].أما في حال تعذر القيام بذلك من قبل الهيئة التحكيميةفهنا المشرع الموريتاني أعطى رئيس المحكمة التي وقع التحكيم في دائرة أختصاصها من أصدار قرار التصحيح والتأويل أو التكميل وفي غضون ثلاثين يوما [٦٣].ومن الواضح من خلال دراستنا لهذا النص أنه المشرع الليبي قد حصر مهمة تصحيح الأخطاء الواردة في متن الحكم التحكيمي للقضاء أي المحكمة التي أودع الحكم في قلم كتابها الحكم بينما المشرع الموريتاني فقد سمح للهيئه التحكيمية بتصحيح القرار التحكيمي محدد من تلقاء نفسها أوبطلب من أطراف النزاع وفي كلا الحالتين محدد بزمن معين وعند تعذر الهيئة التحكيميةعن تصحيح الخطأ ففي هذة الحالة تتولاه المحكمة التي صدر الحكم في حدود ولايتها ولايجوز التصحيح اذا تم تنقيذ الحكم طوعيا من قبل الأطراف وتبين لنا من خلال النصوص أن القانون الموريتاني هو أكثر مرونة حيث أنه قد أعطى صلاحيات كبيرة للهيئة التحكيمية في تصويب الأخطاءبينما المشرع الليبي أوكل هذة المهمة حصريا إلى للقضاء.

٦١مادة 33 من مدونة التحكيم الموريتاني.

٦٢مادة 33 من مدونة التحكيم الموريتاني.

٦٣مادة 34 من مدونة التحكيم الموريتاني.

الخاتمة:

بعد دراستنا الأحكام التحكيم في القانون الليبي والقانون الموريتاني نخلص الى النتائج الآتية:

-تناولت هذه الدراسة بالبحث موضوع التحكيم كدراسة مقارنة بين التشريع الليبي والموريتاني.

- موضوع التحكيم بشكل عام يكتسب أهمية متزايدة في كلا النظامين الليبي وكذلك الموريتاني.

- عرفت مدونة التحكيم الموريتاني التحكيم وفي المقابل لم يوجد تعريف في قانون المرافعات المدنية والتجارية الليبي لسنة 1953.

- القانون الموريتاني أعطى أفقا أكثر للتحكيم بشقيه الوطني والدولي بينما اقتصر الجانب الليبي على التحكيم الوطني فقط.

- قسمت مدونة التحكيم الموريتانية التحكيم إلى مؤسسي وحر بينما اقتصر الجانب الليبي على التحكيم الحر فقط.

-بالنسبة للكتابة في عقد أو مشارطة التحكيم؛ فالقانون الليبي نص على أنه لاتثبت مشارطة التحكيم إلا بالكتابة ونصت المدونة الموريتانية للتحكيم على أنه لايمكن إثبات اتفاق التحكيم إلا بالكتابة أيضا.

- يوجد اتفاق تام فى الأشياء التي لا يجوز فيها التحكيم بين القانونين.

- مدونة التحكيم الموريتانية تعتبر حديثة نسبيا عند المقارنة بالقانون الليبي للتحكيم الوارد فى الباب الرابع من قانون المرافعات المدنية والتجارية والفرق حوالى نصف قرن من الزمن.

- قانون التحكيم الليبي خصص فصلا كاملا للتحكيم بين الزوجين بينما خصصت المدونة الموريتانية فصلا كاملا للتحكيم الدولي والاعتراف به.

-تصحيح الأخطاء في الحكم التحكيمي فالجانب الليبي حصريا للقضاء فقط بينما في الجانب الموريتاني فالأمر متروك للهيئة التحكيمية الا في حال فشلها في ذلك تحال إلى القضاء الذي صدر الحكم في ولايته .

- أخد المشرع الموريتاني بمدأ سرية المدولات وعلي خلاف من ذلك في القانون الليبي لايوجد أي نص حرفي واضح متعلق بالسرية في المدولات وهي تعتبر من أهم الأمور التي تميز التحكيم عن قضاء المحاكم - طبقا لمدونة التحكيم الموريتانية- يصبح قابلا للتنفيذ طوعا من قبل الأطراف أو بصفة إجبارية بإذن من رئيس محكمة الولاية التى صدر بدائرتها القرارأما بالنسبة للقانون الليبي فقد أشترط القانون الليبي ضوابط معينة عند تنفيد أحكام التحكيم "لايصير حُكم المحكمين واجب التنفيذ إلا بأمر يصدره قاضي الأمور الوقتية بالمحكمة التي أودع أصل الحكم قلم كتابها بناءً على طلب ذوي الشأن بعد الاطلاع علي الحكم ومشارطة التحكيم والتثبت من عدم وجود مايمنع من تنفيذه،ويوضع أمر التنفيذ بذيل أصل الحكم.

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ملخص البحث:

تعتبر الدعوى الجزائية هي الوسيلة القانونية العادية للفصل في المنازعات الجنائية، غير أن الاقتصار عليها بشكل كبير في فلسطين أدى إلى وقوع أزمات طالت العدالة الجنائية؛ نتيجة الكم المتراكم من الدعاوى الجنائية المنظورة أمام القضاء الفلسطيني، بالإضافة إلى إشكاليات عديدة في تطبيق العقوبات على المجرمين، أبرزها عدم وجود مراكز إصلاح وتأهيل "سجون" ملائمة لإصلاح المجرمين؛ ولذا كان لا بد من العمل على تطبيق وسائل بديلة لحل المنازعات الجنائية، والتي تعرف ببدائل الدعوى الجنائية، ومن أهمها الصلح الجنائي. ويناقش هذا البحث ماهية الصلح الجنائي وطبيعته ونطاقه وآثاره وموقف المشرع والقضاء الفلسطيني منه، وذلك باتباع المنهجين: الاستقرائي والتحليلي. ويخلص هذا البحث إلى أن القانون الفلسطيني اكتفي بالنص على نظام الصلح الجنائي في جرائم الشيك، وأن القضاء الفلسطيني يأخذ بالمصالحة بين طرفي النزاع كسبب من أسباب تخفيف العقوبة وكمسوغ لقبول طلبات الإفراج بكفالة. وتأتي فائدة هذا البحث في اقتراح بعض التوصيات لتطوير القوانين الفلسطينية من أجل تطبيق نظام الصلح الجنائي الذي سيسهم بشكل كبير في تحقيق العدالة في فلسطين.

الكلمات المفتاحية:

الصلح الجنائي، الدعوى الجزائية، القانون الفلسطيني.

مقدمة:

تعتبر الدعوى الجنائية هي الوسيلة القانونية للفصل في المنازعات الجزائية، حيث تختص النيابة العامة كأصل عام بإقامتها ومباشرتها، ولا تملك وقفها أو التنازل عنها أو تركها أو تعطيل سيرها أو التصالح عليها، إلا في إطار ما نص عليه القانون . وبعد قيامها بالتحقيق فيها تحيلها للمحكمة التي تتولى الفصل فيها إذا تبين أن الفعل المرتكب فيها يشكل جريمة.

وإن ارتفاع نسبة ارتكاب الجرائم انعكس على تزايد القضايا المنظورة أمام المحاكم الجزائية، ناهيك عن تعقيد إجراءات الدعوى الجزائية وطول أمدها، مِمّا حدا بالكثير من التشريعات للبحث عن بدائل للدعوى الجزائية بحيث تخفف على أجهزة العدالة وتوفر النفقات على الدولة من جهة، ومن جهة أخرى تحفظ حقوق المجني عليه وتكفل إصلاح الجاني وتحمي أمن المجتمع من جهة أخرى.

وقد كان أحد أهم هذه البدائل نظام الصلح الجنائي الذي يتم بين المجني عليه أو من يقوم مقامه قانوناً وبين الجاني أو من يقوم مقامه قانوناً في أي مرحلة من مراحل الدعوى الجزائية.

وإن قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م نص على جواز التصالح بين جهات التحقيق (النيابة العامة ومأموري الضبط القضائي) في جرائم محددة ووفقاً لإجراءات معينة، ولكنه لم يتضمن الحديث عن الصلح الجنائي الذي يتم بين الجاني والمجني عليه كبديل للدعوى الجزائية، واكتفي قانون التجارة الفلسطيني المطبق في قطاع غزة بالنص على الصلح في جرائم الشيك.

ونظراً لتراكم الكثير من القضايا أمام القضاء الفلسطيني وعدم وجود سجون مناسبة ومؤهلة لإصلاح وتأهيل الجناة في فلسطين بالإضافة إلى اعتبارات أخرى، كان لا بد من العمل على تطبيق نظام الصلح الجنائي في فلسطين. ويأتي هذا البحث لتوضيح مفهوم الصلح الجنائي وطبيعته ونطاقه وآثاره وموقف المشرع والقضاء الفلسطيني منه، ويقدم مقترحاً لتطبيق نظام الصلح الجنائي في فلسطين مع مسوغات ذلك. وعليه سيتم تقسيم هذا البحث إلى أربعة محاور، وذلك على النحو التالي:

المحور الأول: ماهية الصلح الجنائي.

المحور الثاني: نطاق الصلح الجنائي وآثاره.

المحور الثالث: موقف المشرع والقضاء الفلسطيني من نظام الصلح الجنائي.

المحور الرابع: مشروع قانون بشأن تطبيق نظام الصلح الجنائي في فلسطين.

المحور الأول

ماهية الصلح الجنائي

يقتضي الحديث عن ماهية الصلح الجنائي بيان مفهومه لغة وشرعاً والفرق بينه وبين التصالح الجنائي، وكذلك توضيح طبيعته القانونية، وهذا ما سيتم تناوله على النحو التالي:

أولاً: مفهوم الصلح الجنائي:

أ -**الصلح لغة:** الصَلَحَ لغة من الفعل صَلَح يَصْلَحُ ويَصْلُح صَلاحاً وصُلُوحاً ومصالحة، والصلاح ضد الفساد، و الصُّلْحُ: تَصالُحُ الْقَوْمِ بَيْنَهُمْ ، والصُّلْحُ: السِّلْم ، وأَصْلَح مَا بَيْنَهُمْ وصالَحهم مُصالَحَة وصِلاحاً[1].

والصلح بمعنى إزالة الفساد وإنهاء الخصومة وتسوية الخلاف، فيقال أصلح الشيء: أي أَزَال فَسَاده، ويقال أصلح ذَات بَينهمَا: أي أَزَال مَا بَينهمَا من عَدَاوَة وشقاق وأنهى خصومتهما وسوَّى الخلاف بينهما[2]، ومنه قوله تعالى: ﴿**وَإِن طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا**﴾[3].

ب -**الصلح الجنائي اصطلاحاً:** لم يُعرِّف المشرع الفلسطيني والقضاء الفلسطيني الصلح الجنائي، ولا يعد هذا عيباً؛ لأن وضع التعريفات ليس من عمل المشرع ولا القاضي، ولكن من اختصاص الفقهاء.

ويُعرِّف بعض الفقه القانوني الصلح الجنائي بأنه: " تنازل من الهيئة الاجتماعية عن حقها في الدعوى الجنائية مقابل دفع المتهم للمبلغ الذي حدده القانون، أو لتصالحه مع المجني عليه في الأحوال

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[1] مُحَمَّد بن مكرم بن منظور، **لسان العرب** (بيروت: دار صادر، ج 2، ط3، 1414هـ)، ص516،517 ؛ وأحمد بن مُحَمَّد الفيومي، **المصباح المنير في غريب الشرح الكبير** (بيروت: المكتبة العلمية، ج1، د.ت)، ص345.

[2] إبراهيم مصطفى، وأحمد الزيات، وحامد عبد القادر ومُحَمَّد النجار، **المعجم الوسيط** (استانبول: المكتبة الإسلامية للطباعة والنشر والتوزيع، ج1، ط2، 1972م)، ص520 ؛ ومجمع اللغة العربية، **المعجم الوجيز** (القاهرة: دار التحرير للطبع والنشر، 1989م)، ص368.

[3] سورة الحجرات: من الآية (9)

التي سمح المشرع فيها بذلك " [٤]. ويُلاحظ على هذا التعريف أنه اعتبر أثر الصلح يتمثل في تنازل الدولة عن الدعوى الجنائية، والصحيح أن الأثر الأساسي للصلح تنازل الدولة عن حقها في العقاب وليس عن حقها في الدعوى الجنائية[٥]. ويرى الباحثان أن هذا التعريف لا يصلح تعريفاً للصلح؛ كونه جمع بين تعريف التصالح والصلح وخلط بينهما مع العلم أن لكل منهما نطاق وطبيعة وأثر.

ويُعرِّفه آخرون بأنه: " تلاقي إرادة المتهم والمجني عليه " [٦]. ويؤخذ على هذا التعريف أنه قاصراً، فلم يشتمل إلا على أطراف الخصومة، ولم يوضح مدى جواز حدوثه بين وكلاء أطراف الخصومة، كما أنه لم يبين نطاق وآثار الصلح الجنائي.

ويُعرِّفه غيرهم بأنه: "عقد يتم بين كلٍ من المجني والجاني، يعبر كل منهما بإرادته عن رغبته في إنهاء النزاع، ويجب عرضه على المحكمة الجنائية، وذلك في جرائم محددة " [٧]. ويُلاحظ على هذا التعريف تمسكه بالطبيعة التعاقدية للصلح، ويُحمَد له أنه أشار إلى نطاق الصلح؛ حيث ذكر أنه يكون في جرائم محددة، ويُؤخذ عليه أن لم يبيّن أن الصلح قد يقع من قبل وكلاء طرفي الخصومة الجنائية، كما أنه أوجب عرض الصلح على المحكمة الجنائية، على الرغم من أنه قد يتم أمام مأموري الضبط القضائي أو النيابة العامة، وبالتالي لا يجب عرضه على المحكمة الجنائية في جميع الأحوال.

ويُعرِّف أيضاً بأنه: " اتفاق بين صاحب السلطة الإجرائية في ملاحقة الجاني وبين هذا الأخير، يترتب عليه إنهاء سير الدعوى الجنائية شريطة قيامه بتدابير معينة " [٨]. ويُؤخذ على هذا التعريف أنه أعطى للمجني عليه وصفاً غير دقيق؛ حيث اعتبره صاحب السلطة الإجرائية في ملاحقة الجاني،

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[٤] حسن ربيع، **الإجراءات الجنائية في التشريع المصري** (القاهرة: دار النهضة العربية، ط1، 2000-2001م)، ص236.

[٥] طه عبد العليم، **الصلح في الدعوى الجنائية** (القاهرة: دار النهضة العربية، ط2، 2009م)، ص12.

[٦] عوض مُحَمَّد عوض، **المبادئ العامة في قانون الإجراءات الجنائية** (الإسكندرية: دار المطبوعات الجامعية، 1999م)، ص131.

[٧] أمين مصطفى مُحَمَّد، **انقضاء الدعوى الجنائية بالصلح** (القاهرة: دار النهضة العربية، 2002م)، ص20.

[٨] أسامة عبيد، **الصلح في قانون الإجراءات الجنائية ماهيته والنظم المرتبطة به** (القاهرة: دار النهضة العربية، ط1، 2005م)، ص15.

وهذا الوصف يصدُق في جرائم الشكوى فقط، وعلى أية حال النيابة العامة هي صاحبة السلطة الإجرائية في ملاحقة الجاني باعتبارها ممثلة المجتمع[٩].

ويُعرِّف الباحثان الصلح الجنائي بأنه: اتفاق قانوني إجرائي بين الجاني أو من يقوم مقامه قانوناً والمجني عليه أو من يقوم مقامه قانوناً في جرائم محددة قانوناً، لإنهاء الخصومة الجزائية في أي مرحلة من مراحل الدعوى، ويترتب عليه انقضاء الدعوى الجزائية دون التأثير على الدعوى المدنية.

ثانياً: الفرق بين الصلح الجنائي والتصالح الجنائي: قرر المشرع الفلسطيني أنه يجوز التصالح في مواد المخالفات والجنح المعاقب عليها بالغرامة فقط، وعلى مأمور الضبط القضائي المختص عند تحرير المحضر أن يعرض التصالح على المتهم أو وكيله في المخالفات ويثبت ذلك في محضره، ويكون عرض التصالح في الجنح من النيابة العامة ، ويتوجب على المتهم الذي يقبل التصالح أن يدفع خلال خمسة عشر يوماً من اليوم التالي لقبول التصالح مبلغاً يعادل ربع الحد الأقصى للغرامة المقررة للجريمة أو قيمة الحد الأدنى المقرر لها –إن وجد– أيهما أقل ، ويترتب على التصالح انقضاء الدعوى الجزائية بدفع مبلغ التصالح ولا يكون لذلك تأثير على الدعوى المدنية[١٠].

باستقراء نصوص قانون الإجراءات الجزائية الفلسطيني يمكن تعريف التصالح الجنائي بأنه: سبب من أسباب انقضاء الدعوى الجزائية تختص النيابة العامة ومأموري الضبط القضائي بعرضه على المتهم أو وكيله في جرائم الجنح والمخالفات وفقاً للقانون، حيث يدفع المتهم مبلغاً معيناً في موعد محدد قانوناً، مما يترتب عليه انقضاء الدعوى الجزائية دون أن يؤثر ذلك على الدعوى المدنية.

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[٩] ليلى قايد، **الصلح في جرائم الاعتداء على الأفراد** (الإسكندرية: دار الجامعة الجديدة، 2011م)، ص29.

[١٠] راجع: المواد (16–18) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م وتعديلاته.

ويتضح مما سبق أوجه اتفاق الصلح الجنائي والتصالح الجنائي في انقضاء الدعوى الجزائية دون التأثير على سير الدعوى المدنية.

أما أوجه الاختلاف بينهما، فهي على النحو التالي:

١. أطراف الصلح الجنائي هما: المجني عليه أو من يقوم مقامه قانوناً والجاني أو من يقوم مقامه قانوناً، بينما أطراف التصالح الجنائي هما: النيابة العامة أو مأموري الضبط القضائي والمتهم أو وكيله[١١].

٢. الصلح الجنائي صادر عن إرادتين متقابلتين هما: إرادة المجني عليه أو من يقوم مقامه قانوناً وإرادة الجاني أو من يقوم مقامه قانوناً، في حين أن التصالح الجنائي صادر عن إرادة المتهم وحده[١٢].

٣. الصلح الجنائي يجوز في أي مرحلة من مراحل الدعوى الجزائية، بينما يكون التصالح خلال مدة محددة قانوناً[١٣].

٤. لا يُشترط لصحة الصلح الجنائي أن يكون بمقابل مادي، بينما لا يُرتِّب التصالح الجنائي آثاره إلا بعد دفع مبلغ معين[١٤]. وحدده المشرع الفلسطيني بأنه ربع الحد الأقصى للغرامة المقررة للجريمة أو قيمة الحد الأدنى المقرر لها -إن وجد- أيهما أقل[١٥].

ثالثاً: الطبيعة القانونية للصلح الجنائي: ثار الخلاف بين فقهاء القانون حول الطبيعة القانونية للصلح الجنائي، فرأى فريق منهم أن الصلح الجنائي يعد بمثابة عقد، ورأى فريق آخر أن الصلح يعتبر عقوبة، وبيان ذلك على النحو التالي:

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[١١] أنيس حسيب المحلاوي، **الصلح وأثره في العقوبة والخصومة الجنائية** (الإسكندرية: دار الفكر الجامعي، ط1، 2011م)، ص57.

[١٢] عوض، **المبادئ العامة في قانون الإجراءات الجنائية**، ص134.

[١٣] إيمان الجابري، **الصلح كسبب لانقضاء الدعوى الجنائية** (الإسكندرية: دار الجامعة الجديدة، 2011م)، ص34.

[١٤] المحلاوي، ، **الصلح وأثره في العقوبة والخصومة الجنائية**، ص57.

[١٥] راجع: المادة (17) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م وتعديلاته.

أ -**الطبيعة التعاقدية للصلح الجنائي:** يرى جانب من الفقه أن الصلح الجنائي يتم بتلاقي إرادتي الجاني أو من يقوم مقامه قانوناً والمجني عليه أو من يقوم مقامه قانوناً على إنهاء الخصومة الجنائية، وبالتالي فهو بمثابة عقد لا ينتج آثاره إلا باتفاق الطرفين، وحال رفض أحدهما يكون هذا الاتفاق والعدم سواء[١٦]. وعليه فإن الصلح الجنائي يشبه إلى حد كبير الصلح المدني في طبيعته القانونية، ولا بد أن تحقق فيه أركان العقد: الرضا والمحل والسبب[١٧].

ب -**الطبيعة العقابية للصلح الجنائي:** يرى جانب آخر من الفقه أن الصلح الجنائي يعتبر عقوبة جنائية مالية؛ حيث يتوجب على الجاني إزالة آثار الجريمة وإصلاح فعلته التي اقترفها، وهذا يتطلب دفع تعويض للمجني عليه مقابل الضرر الذي تسبب له فيه، وهذا التعويض يحمل معنى العقوبة المالية [١٨]. ويدعم هذا القول أن المشرع الفلسطيني في قانون العقوبات اعتبر التعويض أحد أنواع العقوبات[١٩].

ويُعارض الباحثان هذا الاستدلال؛ ذلك أن طبيعة التعويض تتعارض مع فكرة العقوبة الجنائية، كما أن المحاكم الجنائية لا تقضي بالتعويض في الدعوى الجنائية ما لم يكن هناك دعوى مدنية بالتبعية، أضف إلى ذلك أن التعويض في الصلح قد يكون في مرحلة سابقة على مرحلة المحاكمة، فقد يتم في مرحلة التحقيق أمام مأموري الضبط القضائي أو النيابة العامة، والتعويض كعقوبة لا يكون إلا بحكم قضائي.

ولا تتفق الدراسة مع القول بالطبيعة العقابية للصلح الجنائي؛ لأنه لا يُشترط أن يتم هذا الصلح بدفع الجاني مقابلاً مالياً، بل قد يعفو المجني عليه أو من يقوم مقامه قانوناً ولا يُطالِب بأي حقوق أو

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[١٦] علي المبيضين، **الصلح الجنائي وأثره في الدعوى العامة** (عمان: دار الثقافة للنشر والتوزيع، ط1، 2010م)، ص43،44.

[١٧] الجابري، **الصلح كسبب لانقضاء الدعوى الجنائية**، ص26.

[١٨] قايد، **الصلح في جرائم الاعتداء على الأفراد**، ص113 وما بعدها ؛ والمبيضين، **الصلح الجنائي**، ص44،45.

[١٩] راجع: المادتين (37،43) من قانون العقوبات الانتدابي رقم (74) لسنة 1936م وتعديلاته المطبق في قطاع غزة.

تعويضات مالية، وبالتالي لا يمكن القول بأن الصلح الجنائي عقوبة مالية. وبناءً عليه يُرجِّح الباحثان الطبيعة التعاقدية للصلح الجنائي، غير أن هذه الصفة العقدية هي جنائية وليست مدنية، وبالتالي فإن الصلح هو عقد جنائي يحكمه القانون وينظم أحكامه وإجراءاته.

المحور الثاني

نطاق الصلح الجنائي وآثاره

وسيتناول هذا المبحث الحديث عن نطاق الصلح الجنائي وآثاره القانونية، وذلك على نحو ما هو تالٍ:

أولاً: نطاق الصلح الجنائي: إن من الأهمية بمكان بيان نطاق الصلح الجنائي من حيث الجرائم التي يجوز فيها الصلح، وبمراجعة نصوص التشريعات الفلسطينية؛ يتضح أن المشرع الفلسطيني لم يُشر إلى الصلح الجنائي الذي يتم بين الخصوم إلا في جرائم الشيك بموجب قانون التجارة الفلسطيني المطبق في قطاع غزة، حيث ينص هذا القانون على أنه: " وللمجني عليه ولوكيله الخاص في الجرائم المنصوص عليها في هذه المادة –أي جرائم الشيك– أن يطلب من النيابة العامة أو المحكمة بحسب الأحوال، وفي أية حالة كانت عليها الدعوى إثبات صلحه مع المتهم. ويترتب على الصلح انقضاء الدعوى الجنائية ولو كانت مرفوعة بطريق الادعاء المباشر، وتأمر النيابة العامة بوقف تنفيذ العقوبة إذا تم الصلح أثناء تنفيذها ولو بعد صدور الحكم "[٢٠].

[٢٠] راجع: المادة (4/566) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة.
ومن الجدير بالذكر أن هذا القانون صدر عن المجلس التشريعي بغزة إبان فترة الانقسام السياسي الفلسطيني، مما انعكس على تطبيقه فهو مطبق في قطاع غزة دون الضفة الغربية، أما قانون التجارة الذي لا يزال مطبقاً في الضفة الغربية، فهو قانون التجارة الأردني رقم (12) لسنة 1966م وتعديلاته.

غير أنه بالنظر إلى طبيعة الصلح الجنائي، يُمكن القول بأن نطاق الصلح الجنائي يكون في الجرائم المتعلقة بالحقوق الشخصية وليس الجرائم المتعلقة بالنظام العام والحق العام للدولة، فمن غير المعقول أن يكون هناك صلح في الجرائم الماسة بأمن المجتمع وكيانه وسلامته.

وبالاطلاع على نصوص التشريعات المجاورة خصوصاً القانون المصري، يتضح أن نطاق الصلح الجنائي يكون في مجموعة من الجرائم المتعلقة بحقوق شخصية بين الأفراد، أهمها[٢١]:

١. جرائم الاعتداء على الأشخاص: مثل بعض صور جرائم القتل الخطأ، وجرائم الإيذاء.

٢. جرائم الاعتداء على الشرف والاعتبار: مثل جرائم السب والقذف والتشهير.

٣. جرائم الاعتداء على الأموال: مثل جرائم السرقة والنصب وخيانة الأمانة والإتلاف.

٤. بعض جرائم المخالفات التي تلحق ضرراً بشخص المجني عليه أو ماله، مثل: الإيذاء الخفيف، وإتلاف منقول الغير بإهمال، والسب غير العلني.

٥. جرائم الشيك[٢٢].

ثانياً: الآثار القانونية للصلح الجنائي: لكي يحقق الصلح آثاره لابد أن يكون في جريمة أجاز فيها القانون الصلح، وأن يتم باتفاق بين طرفيه ووفقاً للإجراءات المحددة قانوناً بحيث يتم إثباته أمام النيابة العامة أو المحكمة، وأن لا يكون مقترناً أو معلقاً على شرط واقف أو فاسخ[٢٣].

أما بخصوص آثار الصلح على الدعوى الجزائية والمدنية، فسيتم بيانها على النحو التالي:

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[٢١] راجع: المادة (18 مكرر –أ–) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.

[٢٢] راجع: المادة (534) من قانون التجارة المصري رقم (17) لسنة 1999م وتعديلاته.

[٢٣] أحمد خلف، **الصلح وأثره في انقضاء الدعوى الجنائية وأحوال بطلانه** (الإسكندرية: دار الجامعة الجديدة، 2008م)، ص98–104.

أ -**آثار الصلح الجنائي على الدعوى الجزائية:** يختلف أثر الصلح الجنائي على الدعوى الجزائية بحسب الحالة التي عليها هذه الأخيرة؛ لأن الصلح الجنائي يجوز أن يتم في أي مرحلة من مراحل الدعوى الجزائية.

فإذا تم الصلح الجنائي قبل تحريك الدعوى الجزائية، ففي هذه الحالة تقوم الجهات المختصة بحفظ الأوراق. وإذا تم الصلح والدعوى لا تزال في مرحلة التحقيق من قبل النيابة العامة، فتصدر النيابة العامة قراراها بحفظ الدعوى. وإذا ما أحالت النيابة العامة الدعوى للمحكمة على الرغم من تحقق الصلح الجنائي فيها، فإن المحكمة تقضي بعدم قبول الدعوى[٢٤].

أما إذا تم الصلح في مرحلة المحاكمة فتنقضي الدعوى الجزائية، وإذا تم الصلح بعد صدور الحكم يتم وقف تنفيذ العقوبة[٢٥].

ومن الضرورة بمكان مراعاة قاعدة نسبية آثار الصلح الجنائي، فالصلح في جريمة معينة يعد سبباً خاصاً بها، ولا يتعدى أثره إلى جرائم أخرى، كما أن آثار الصلح لا تتعدى أطرافه إلى الغير، فينحصر في المتهم وحده الذي كان طرفاً فيه، وكذلك آثار الصلح لا يمكن أن تلحق ضرراً بالغير، فيحق لمن تضرر من جراء الجريمة أن يتقدم بشكوى للجهات المختصة حتى لو كانت الدعوى الجنائية انقضت نتيجة لصلحٍ تم بين أطرافها[٢٦].

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[٢٤] تامر القاضي، "دور الصلح في الدعوى الجزائية في التشريع الفلسطيني"، (بحث متطلب مقدم لنيل درجة الماجستير في القانون العام، كلية الحقوق، جامعة الأزهر، غزة، 2012م)، ص161-166.

[٢٥] راجع: المادة (4/566) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة، والمادة (18 مكرر –أ–) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.

[٢٦] المبيضين، **الصلح الجنائي**، ص130-134.

ب- آثار الصلح الجنائي على الدعوى المدنية: لم يبين المشرع الفلسطيني أثر الصلح الجنائي على الدعوى المدنية لا في قانون الإجراءات الجزائية، ولا حتى في قانون التجارة الذي أجاز فيه الصلح في جرائم الشيك.

ولكن المشرع المصري نص صراحة على أن الصلح الجنائي لا يؤثر على الدعوى المدنية، حيث قرر في قانون الإجراءات الجنائية أنه: " ... لا أثر للصلح على حقوق المضرور من الجريمة "[٢٧].

وقد يتم الصلح قبل إحالة الدعوى الجزائية للمحكمة، ففي هذه الحالة تنقضي الدعوى الجزائية قبل إحالتها، وبالتالي لا يجوز للمتضرر من الجريمة رفع دعواه المدنية أمام القضاء الجزائي، ويكون الاختصاص للقضاء المدني[٢٨].

وإذا تم الصلح بعد إحالة الدعوى الجزائية للمحكمة، فتنقضي الدعوى الجزائية دون أن يؤثر ذلك على سير الدعوى المدنية المرفوعة معها[٢٩].

ويستخلص الباحثان أنه حال تم الصلح بعد أن أصدرت المحكمة الجزائية حكماً باتاً فيها، يكون للمضرور أن يرفع دعواه أمام القضاء المدني؛ لعدم وجود دعوى جزائية منظورة أمام القضاء الجزائي، تتيح له رفع الدعوى المدنية بالتبعية أمام ذات القضاء.

المحور الثالث

موقف المشرع والقضاء الفلسطيني من نظام الصلح الجنائي

ويبين هذا المبحث موقف المشرع والقضاء الفلسطيني من نظام الصلح الجنائي، وذلك على النحو التالي:

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[٢٧] راجع: المادة (18 مكرر –أ–) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.

[٢٨] القاضي، "دور الصلح في الدعوى الجزائية في التشريع الفلسطيني"، ص180، 181.

[٢٩] راجع: المادة (259) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.

أولاً: موقف المشرع الفلسطيني من نظام الصلح الجنائي: اقتصر المشرع الفلسطيني في قانون الإجراءات الجزائية على الحديث عن التصالح الذي يتم بين مأموري الضبط القضائي أو النيابة مع المتهم أو وكيله في جرائم محددة ونص على إجراءات خاصة بذلك [٣٠]، أما الصلح الذي يتم بين المجني عليه أو من يقوم مقامه قانوناً –الذي فصل فيه المشرع المصري في المادة (18 مكرر –أ–) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته والمواد الأخرى المشار إليها في هذه المادة–، لم يتناوله المشرع الفلسطيني في قانون الإجراءات الجزائية.

غير أن المشرع الفلسطيني ذكر الصلح الجنائي فقط في جرائم الشيك بموجب قانون التجارة المطبق في قطاع غزة دون الضفة الغربية [٣١]؛ وهذا يعد قصوراً تشريعاً؛ إذ يتوجب على المشرع الفلسطيني أن يتناول موضوع الصلح الجنائي ويجعله أحد أسباب انقضاء الدعوى الجزائية؛ لما له أثر إيجابي على طرفي الخصومة والمجتمع وأجهزة التقاضي كما سيتم بيانه في المبحث الأخير.

ثانياً: موقف القضاء الفلسطيني من نظام الصلح الجنائي: على الرغم من أن المشرع الفلسطيني لم ينص على الصلح الجنائي إلا في جرائم الشيك، إلا أن ذلك لم يمنع القضاء الفلسطيني من أن يأخذ بالصلح الجنائي الذي يتم بين الجاني والمجني عليه أو عائلتيهما كسبب من أسباب تخفيف العقوبة[٣٢].

ويعد نظام التراضي بين طرفي الخصومة الجزائية من خلال ما يعرف بـ(ورقة المصالحة أو سند المصالحة) والذي غالباً ما يتم بشكل عُرفي من خلال لجان إصلاح وتوفيق بين الخصوم أو بشكل قِبَلي

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[٣٠] راجع: المواد (16–18) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م وتعديلاته.

[٣١] راجع: المادة (4/566) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة.

[٣٢] نصت مجموعة من أحكام محاكم الاستئناف العليا الفلسطينية منها: الحكم رقم (1950/49)، والحكم (1951/133م)، والحكم (1953/130)، والحكم رقم (1960/50)، على الأخذ بالصلح كسبب من أسباب تخفيف العقوبة. راجع: وليد الحايك، **مجموعة مختارة من أحكام محكمة الاستئناف العليا القسم الجزائي** (غزة: مطابع شركة البحر، ج15، 17، 1997–1998م).

وتجدر الإشارة أنَّ المشرع الفلسطيني في قطاع غزة اعتبر عفو ولي الدم أو دفع الدية في جرائم القتل سبباً مخففاً للعقوبة، راجع: المادة (1) من قانون رقم (3) لسنة 2009م المعدل لقانون العقوبات الانتدابي رقم (74) لسنة 1936م المطبق في قطاع غزة.

وعشائري معمولاً به في فلسطين، وإن إبراز ورقة أو سند المصالحة أمام المحكمة يؤدي إلى تخفيف العقوبة، ولكن لا يؤدي إلى انقضاء الدعوى الجزائية[٣٣].

كما يعد الصلح الجنائي سبب من أسباب الإفراج بكفالة عن المتهم تمهيداً للحكم عليه بعد ذلك بحكم مخففٍ، وقد حصلت واقعة مع الباحث إبان تدريبه في المحاماة عام 2011م، حيث ترافع في قضية اعتداء، وحين إبراز سند المصالحة أمام قاضي محكمة الصلح، أصدر القاضي قراراه بقبول طلب الإفراج بكفالة عن المتهم.

المحور الرابع

مشروع قانون بشأن تطبيق نظام الصلح الجنائي في فلسطين

إن تقديم مقترح مشروع قانون يتيح تطبيق نظام الصلح الجنائي كحد بديل للدعوى الجزائية في فلسطين، يستدعي ابتداءً بيان مسوغات تطبيق هذا النظام وأهميته وفوائده بالنسبة لأطراف الخصومة والمجتمع وأجهزة العدالة، وهذا ما سيتم بيانه على النحو التالي:

أولاً: مسوغات تطبيق نظام الصلح الجنائي في فلسطين: يحقق نظام الصلح الجنائي الكثير من الفوائد، ويحمي العديد من المصالح؛ ولذا لا بد من العمل على تطبيقه في فلسطين كأحد أهم الوسائل البديلة لحل النزاعات، وتتمثل المصالح التي يحققها نظام الصلح الجنائي فيما يلي:

أ -**مصلحة الجاني:** يجنب نظام الصلح الجاني المحاكمة الجنائية، ومصاريف المحاماة والرسوم وغير ذلك من مصاريف التقاضي، ويجنبه المعاناة النفسية التي سيتعرض لها سواء خلال مرحلة المحاكمة أو بعد صدور حكم عليه، ناهيك احتمالية فقد وظيفته وتضرر سمعته وسمعة عائلته، وأن يفقد صفة حسن السيرة

[٣٣] أحمد صلاح عطا الله، محامي نظامي وشرعي في المحاكم الفلسطينية بغزة، **مقابلة عبر الانترنت**، السبت 2017/7/8م.

والسلوك بحيث توضع نقطة سوداء في صحيفة سوابقه، هذا بالإضافة إلى الضرر المالي والاجتماعي الذي يصيب عائلة المجني عليه حال تم تنفيذ العقوبة بحقه، فيكون نظام الصلح أفضل بكثير من الآثار السلبية للتقاضي التي تصيب الجاني وذويه كذلك[٣٤].

ومن جهة أخرى فإن الصلح يؤدي إلى إصلاح الجاني؛ حيث يكشف خلال حوارات الصلح عن أسباب ودوافع ارتكابه لفعلته؛ وبالتالي فإن ذلك يساعد الجاني في معرفة الخلل الذي لديه. كما أنه حال مواجهة الجاني بجريمته ومطالبته بإصلاح الضرر الناتج عنها يضعه تحت وطأة المسؤولية. وإن طلب الجاني العفو من المجني عليه يُشعره بالندم والخجل من فعلته؛ وكل ذلك يحقق إصلاح الجاني ويشكل رداعاً يمنعه من العودة لارتكاب الجريمة[٣٥].

ب -**مصلحة المجني عليه:** إن تطبيق نظام الصلح الجنائي يُشعر المجني عليه بالرضا؛ حيث يسهم بفاعلية في العدالة الجنائية، ويجد نفسه صاحب حق وله النسبة الأكبر من قرار تطبيق الصلح الجنائي، هذا من جانب. ومن جانب ثانٍ فإن الصلح يشفي غيظ المجني عليه، فتتلاشى الأحقاد بينه وبين الجاني، ويتخلص من الآثار السلبية التي لحقت به جراء الجريمة المرتكبة ضده. ومن جانب ثالثٍ يضمن الصلح تعويضاً مناسباً للمجني عليه بدون إجراءات التقاضي الطويلة[٣٦].

ج- مصلحة أجهزة العدالة: إن تطبيق نظام الصلح يخفف العبء عن كاهل المحاكم وأجهزة العدالة؛ وهذا أمر نحن بحاجة بالغة إليه في فلسطين؛ نظراً لتراكم القضايا المنظورة أمام القضاء، وأكثرها جرائم تقبل تطبيق الصلح الجنائي حال النص عليه في القانون الفلسطيني. وإن تراكم القضايا أمام القضاء يؤدي إلى إرهاق القضاة ومعاونيهم والنيابة العامة ومأموري الضبط القضائي، مما ينعكس على بطء

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[٣٤] الجابري، **الصلح كسبب لانقضاء الدعوى الجنائية**، ص22.

[٣٥] قايد، **الصلح في جرائم الاعتداء على الأفراد**، ص183-185.

[٣٦] عبيد، **الصلح في قانون الإجراءات الجنائية**، ص189 ؛ والمحلاوي، **الصلح وأثره في العقوبة والخصومة الجنائية**، ص539،540.

الفصل في القضايا، فتفقد العقوبات قيمتها بعد صدور الحكم فيها بعد وقت طويل، قد يكون سنوات في بعض الأحيان[٣٧].

د. مصلحة المجتمع والدولة: يساهم تطبيق نظام الصلح الجنائي في نشر الأمن والسلم الاجتماعيين؛ فهو يجسر هوة الخلاف بين المجني عليه والجاني ويعيد المودة بينهما، مما ينعكس على أمن المجتمع بأسره. كما يراعي الصلح صلات القرابة التي قد يؤدي تفككها نتيجة وقوع جريمة بين الأقارب إلى إحداث قلاقل في المجتمع[٣٨].

كما أن الصلح يُجنب الدولة نفقات مالية باهظة لإدارة الدعاوى الجزائية في كافة مراحلها، وكذلك يجنبها نفقات إنشاء مراكز الإصلاح والتأهيل (السجون) ونفقات حراستها والقيام عليها ونفقات رعاية نزلاء السجون اجتماعياً وصحياً وغير ذلك؛ مما يجعلها تصب تركيزها على إصلاح المجرمين الخطيرين وتأهيلهم[٣٩].

ثانياً: النصوص المقترحة لتطبيق نظام الصلح الجنائي في فلسطين: بناءً على ما سبق، يقترح الباحثان على المشرع الفلسطيني تعديل قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م، بإضافة ثلاثة نصوص بعد المادة (18)، وذلك وفق التالي:

المادة (18 مكرر أ) للمجني عليه أو من يقوم مقامه قانوناً الصلح مع المتهم أو من يقوم مقامه قانوناً، وذلك في جرائم المخالفات والجنح المعاقب بالغرامة أو الحبس مدة لا تزيد عن سنتين، وفي الأحوال الأخرى المنصوص عليها قانوناً.

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[٣٧] محمد حكيم الحكيم، **النظرية العامة للصلح وتطبيقاتها في المواد الجنائية** (القاهرة: دار النهضة العربية، 2002م)، ص177، 178 ؛ محمد الدمياطي، "بدائل الدعوى الجزائية ودورها في تحقيق العدالة في فلسطين"، (بحث متطلب مقدم لنيل درجة الماجستير في القانون العام، كلية الشريعة والقانون، الجامعة الإسلامية، غزة، 2013م)، ص144.

[٣٨] قايد، **الصلح في جرائم الاعتداء على الأفراد**، ص195، 196.

[٣٩] المحلاوي، **الصلح وأثره في العقوبة والخصومة الجنائية**، ص538، 539.

المادة (18 مكرر ب)

١. يجوز الصلح في أي مرحلة من مراحل الدعوى الجزائية، حتى بعد صدور الحكم البات فيها.

٢. إذا تم الصلح خلال مرحلة التحقيق، يُثبت المتهم أو من يقوم مقامه قانوناً الصلح أمام مأموري الضبط القضائي في المخالفات، وأمام النيابة العامة في الجنح، ويترتب على الصلح حفظ الدعوى الجزائية.

٣. يستثنى من الفقرة السابقة جريمة القتل الخطأ، حيث يتوجب التصديق على الصلح فيها من المحكمة المختصة.

٤. إذا تم الصلح خلال مرحلة المحاكمة، يُثبت المتهم أو من يقوم مقامه قانوناً الصلح أمام المحكمة، ويترتب عليه الحكم بانقضاء الدعوى الجزائية، حتى لو رفعت الدعوى بطريق الادعاء المباشر.

٥. إذا تم الصلح بعد صدور الحكم البات في الدعوى، تأمر النيابة العامة بوقف تنفيذ العقوبة.

المادة (18 مكرر ت) لا أثر للصلح الجنائي على الدعوى المدنية.

الخاتمة

بعد دراسة موضوع الصلح كبديل للدعوى الجزائية في القانون الفلسطيني، توصل الباحثان إلى أن الصلح الجنائي من أبرز الوسائل البديلة لحل المنازعات الجنائية بشكل يحفظ حقوق طرفي الخصومة الجنائية، ويحمي كيان المجتمع وأمنه، ويوفر على الدولة الكثير من النفقات، وييسر عمل أجهزة التقاضي خصوصاً في فلسطين.

وخلص هذا البحث أيضاً إلى أن المشرع الفلسطيني نص على نظام الصلح الجنائي فقط في قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة دون الضفة الغربية، وعابه عدم النص عليه في قانون الإجراءات الجزائية كأحد بدائل الدعوى الجزائية.

وتبين من خلال هذا البحث أن القضاء الفلسطيني يأخذ بالمصالحة بين المتهم والمجني عليه كسبب مخفف للعقوبة وكمسوغ لقبول طلبات الإفراج عن المتهم بكفالة؛ بحكم السلطة التقديرية للقضاء، على الرغم من عدم النص على نظام الصلح في قانون الإجراءات الجزائية الفلسطيني.

ويوصي الباحثان بضرورة العمل على توحيد التشريعات المعمول بها في قطاع غزة والضفة الغربية، والعمل على تطويرها بما يتناسب مع الواقع المعاصر. كما ويوصي بضرورة تطبيق نظام الصلح الجنائي بالنص عليه في قانون الإجراءات الجزائية (كما تم اقتراحه في المبحث الرابع) وتفعيله من قبل جهات الاختصاص.

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الوساطة القضائية في تسوية المنازعات في القانون الأردني

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العالمية ماليزيا

1

المستخلص

تعد الوساطة القضائية إحدى الوسائل البديلة الفاعلة في تسوية المنازعات، إذ أنها تمثل إحدى مقدمات إجراءات الصلح قبل رفع النزاع الى القضاء وإنهاء الخصومة بين المتخاصمين، كما أنها تمتاز بالسرعة في حسم النزاع وتوفير الوقت والجهد و المال على المتخاصمين. ولقد تناول القانون الأردني المسمى ب " قانون الوساطة لتسوية النزاعات المدنية رقم (12) لسنة 2006" الوساطة القضائية و ذلك عن طريق استحداث إدارة قضائية تسمى إدارة الوساطة والتي تتشكل من عدد من قضاة البداية و الصلح ويسمون قضاة التسوية. إلا ان تلبُس نصوص هذا القانون بالعديد من الثغرات قلّصت من فاعليته في تسوية النزاعات. من هنا جاءت هذه الورقة البحثية لمناقشة هذه الثغرات والتي على رأسها اختصاص قانون الوساطة بالنزاعات المدنية دون غيرها من النزاعات وقصر مهمة إحالة النزاع الى إدارة الوساطة على قاضي إدارة الدعوى و قاضي الصلح دون قاضي الموضوع الذي لم يعط هذا الحق، إضافة الى فرض غرامات في حال فشل التسوية . و ذلك من خلال استقراء و تحليل نصوص قانون الوساطة لتسوية النزاعات

المدنية رقم 12 لسنة 2006و النصوص القانونية الأخرى ذات العلاقة بهدف تقديم مقترحات لتعديل القانون أو إضافة مواد من شأنها علاج القصور الذي بدا واضحا في نصوص القانون.

3

الوساطة القضائية في تسوية المنازعات في القانون الأردني

دراسة تحليلية نقدية

مقدمة

الحمد الله القائل في محكم التنزيل " فاتقوا الله و أصلحوا ذات بينكم و أطيعوا الله و رسوله إن كنتم مؤمنين " والصلاة والسلام على أشرف الخلق والمرسلين سيدنا ونبينا مُحَمَّد ﷺ وعلى اله وصحبه أجمعين.

تعد الوسائل البديلة لتسوية المنازعات من المو ضوعات التي شاع تداولها في الحقبة الراهنة واكتسبت أهمية بالغة خاصة في ظل تسارع وتيرة التطورات في مجالات الحياة المختلفة وتحديدا في مجال التجارة والمعاملات المالية. فقد ظهر ت عدة حلول بديلة لفض المنازعات مثل التحكيم والوساطة وغيرها من الوسائل التي تمتاز بتوفير الوقت والجهد والمال على المتخاصمين.

وقد اعتنت هذه الورقة البحثية بوسيلة الوساطة القضائية كحل بديل لفض المنازعات في القانون الأردني، وذلك بعد أن استحدث المشرّع الأردني

قانونا للوساطة لتسوية المنازعات المدنية رقم 12 لسنة 2006 إضافة إلى بعض النصوص القانونية الأخرى المتعلقة بالوساطة القضائية.

لكن القراءة التحليلية لنصوص هذا القانون والنصوص ذات العلاقة تكشف عن قصور تشريعي وثغرات قانونية أفقدت الوساطة القضائية فاعليتها في تسوية النزاعات.

من هنا تبرز إشكالية هذا البحث في بيان مدى قدرة قانون الوساطة القضائية في صورته الحالية على فض النزاعات ، وما التعديلات الممكن إدخالها في هذا القانون للخروج بنصوص قانونية متكاملة تضمن جذب المتخاصمين لفض نزاعاتهم عن طريق الوساطة القضائية.

ويتمثل الهدف من هذه ا لورقة في التعرّف على أهم المعوقات والثغرات في قانون الوساطة القضائية الأردني وتقديم مقترحات لتعديل مواده أو إضافة مواد أخرى لعلاج هذا القصور، وذلك من خلال الإعتماد على المنهج الاستقرائي لتتبع المواد القانونية المتعلقة بالوساطة القضائية في القانون الأردني، والمنهج التحليلي لمحاولة فهم مضمون نصوص هذه المواد وتحديد طبيعة علاقتها ببعضها البعض و اكتشاف نقاط القصور فيها وما ترتب عليها من ثغرات وفراغ تشريعي.

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وسيتم تقسيم هذه الورقة إ لى قسمين ، يتناول القسم الأول مفهوم الوساطة القضائية و أنواعها ومشروعيتها ، أما القسم الثاني فسيتناول أهم الثغرات والمعوقات التي تضمّنها القانون الأردني والإقتراحات والتعديلات التي من شأنها تفعيل الوساطة القضائية في هذا القانون.

المبحث الأول

مفهوم الوساطة القضائية ومشروعيتها

المطلب الأول : مفهوم الوساطة القضائية

لم يُضمِّن المشرّع الأردني تعريف للوساطة القضائية في قانون الوساطة لتسوية النزاعات المدنية رقم 12 لسنة 2006 حيث اكتفى ببيان من هم الأشخاص المكلّفون بعملية الوساطة دون تحديد مفهوم الوساطة القضائية، ولعله ترك هذه المهمة للفقه القانوني والقضاء. وعليه سيتم في مايلي تعريف مفهوم الوساطة بشكل عام ثم تعريف الوساطة القضائية بشكل خاص.

فالوساطة كما استقر تعريفها في الفقه القانوني هي:

" عملية تقوم فيها جهة ثالثة محايدة بتسهيل حل النزاع من خلال تشجيع الوصول إلى اتفاقية طوعية من قبل أطراف النزاع "[1]

كما عُرِّفت بأنها: " هي عملية مرنة غير ملزمة ومكتومة يتولى أدائها وسيط محايد لمساعدة في مفاوضات التسوية" [2]

إلا أن هذه التعريفات للوساطة لم تكن جامعة لكافة عناصر الوساطة من حيث كيفية اختيار الوسطاء وأنواع النزاعات التي تصلح محلا للوساطة .

من هنا جاء تعريف بسام الجبور على أنها " عملية إجرائية تتضمن تدخل طرف بين أطراف النزاع بطلبهما أو بموافقتهما للتوصل إلى حل الخصومة صلحا في محلٍ قابلا له " [3]

والوساطة ثلاثة أنواع، وهي:

الوساطة الخاصة: وهي التي تُعهد إلى أصحاب المهن مثل المحامين و الأطباء والمهندسين وغيرهم من أصحاب الاختصاص والخبرة وبالرجوع إلى

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[1] . الصليبي ، بشير ، مرجع سابق/ ص62.

[2] القطاونه ، مُحَمَّد ، الوساطة في تسوية النزاعات المدنية ، مطبوعات دائرة المكتبة الوطنية ، ط1 2008،عمان،ص8.

[3] الجبور ، بسام ، الوساطة القضائية في الشريعة الإسلامية القانون دراسة مقارنه ، دار الثقافة للنشر والتوزيع ، عمان ، ط1، 2015، عمان، ص29.

نص المادة الثانية بفقرتها الثالثة من قانون الوساطة يتبين لنا من هم الأشخاص المعنيين (وسطاء خصوصيين).[1]

١. الوساطة الاتفاقية : وهي التي تتم بموافقة طرفي النزاع على إحالة النزاع إلى وسيط من أجل حل النزاع بينهما ، و ذلك وفقا لأحكام الفقرة الثانية من المادة الثالثة من قانون الوساطة الأردني [2].

٢. الوساطة القضائية: وهي التي تتم تحت إشراف القضاء وبمعرفة أحد القضاة العاملين في إدارة الوساطة ويتم اختيارهم من قبل رئيس المحكمة من قضاة البداية و الصلح بصفتهم الوظيفية، بحيث يكون دور القاضي دور مسهّل لحل النزاع[1] .

فالوساطة القضائية تعتبر وسيلة من الوسائل البديلة لتسوية النزاعات وذلك عن طريق إحالة النزاع الى القاضي الوسيط الذي يكون طرفا محايدا لحسم النزاع ومساعدة المتخاصمين في الوصول إلى تسوية .

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[1] المادة 2/ج/ من قانون الوساطة الأردني" الرئيس المجلس القضائي بتنسيب من وزير العدل تسمية (وسطاء خصوصيين) يختارهم من بين القضاة المتقاعدين و المحامين و المهنيين و غيرهم من ذوي الخبرة المشهود لهم بالحيدة و النزاهة "

[2] المادة الثالثة / ب / من قانون الوساطة الأردني" لأطراف الدعوى بموافقة قاضي إدارة الدعوى أو قاضي الصلح الاتفاق على حل النزاع بالوساطة و ذلك بإحالتها الى أي شخص يرونه مناسبا ....."

مما سبق يمكن تعريف الوساطة القضائية بأنها: هيئة قضائية مشكّلة من وسيط واحد أو أكثر للفصل في النزاع المحال إلى الوساطة وفقا لأحكا م القانون .

ومن خلال التعريفات السابقة يمكننا القول بأن الغاية من الوساطة هو الوصول إلى نتيجة ترضي جميع الأطراف لحل النزاعات فيما بينهم، فالوسيط يسعى إلى تقريب وجهات النظر بين المتخاصمين من حيث الاتفاق و الاختلاف في مسألة النزاع .

وعليه، ففكرة الوساطة تعتبر أفضل وسيلة لحل النزاع كون أن عدالة الفرقاء المبنية على الاتفاق بخلاف العدالة التي يطبقها القاضي بالاستناد إلى نصوص قانونية بحتة. [٢]

المطلب الثاني : مشروعية الوساطة القضائية

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١ نص المادة 1 / أ من قانون الوساطة الأردني.

[٢] القطاونه، محمد ، مرجع سابق ، 10.

تعتبر الوساطة القضائية وسيلة من الوسائل الحديثة لتسوية النزاعات بين المتخاصمين، وقد أ خذ المشرّع الأردني بالوساطة في عدة مواضع في القانون الأردني، نُجملها في الآتي:

أولاً : حالة الشقاق و النزاع بين الزوجين :

حيث نص المشرع الأردني في المادة 126 من قانون الأحوال الشخصية الأردني على أن " لأي من الزوجين أن يطلب التفريق للشقاق والنزاع إذا ادعى ضررا لحق به من الطرف الآخر يتعذر معه استمرار الحياة الزوجية سواء كان الضرر حسيا كالإيذاء بالفعل أو بالقول أو معنويا، ويعتبر ضررا معنويا أي تصرف أو سلوك مشين أو مخل بالأخلاق الحميدة يلحق بالطرف الآخر إساءة أدبية ، وكذلك إصرار الطرف الآخر على الإخلال بالواجبات والحقوق الزوجية المشار إليها في الفصل الثالث من الباب الثالث من هذا القانون بحيث:

أ. إذا كان طلب التفريق من الزوجة وتحقق القاضي من ادعائها بذلت المحكمة جهدها في الإصلاح بينهما فإذا لم يمكن الإصلاح أنذر القاضي الزوج بأن يصلح حاله معها وأجّل الدعوى مدة لا تقل عن

شهر، فإذا لم يتم الصلح بينهما وأصرت الزوجة على دعواها أحال القاضي الأمر إلى حكمين .

ب. إذا كان المدعي هو الزوج و أثبت وجود الشقاق والنزاع بذلت المحكمة جهدها في الإصلاح بينهما فإذا لم يمكن الإصلاح أجّل القاضي الدعوى مدة لا تقل عن شهر أملا بالمصالحة وبعد انتهاء الأجل إذا لم يتم الصلح وأصر الزوج على دعواه أحال القاضي الأمر إلى حكمين.

ج. يشترط في الحكمين أن يكونا عدلين قادرين على الإصلاح وأن يكون أحدهما من أهل الزوجة والآخر من أهل الزوج إن أمكن وإن لم يتيسر ذلك حكّم القاضي اثنين من ذوي الخبرة والعدالة والقدرة على الإصلاح .

د. يبحث الحكمان أسباب الخلاف والنزاع بين الزوجين معهما أو مع أي شخص يرى الحكمان فائدة قي بحثها معه وعليهما أن يدونا تحقيقاتهما بمحضر يوقع عليه ، فإذا رأيا إمكان التوفيق والإصلاح على طريقة مرضية أقراها ودوّنا ذلك في محضر يقدم إلى المحكمة .

هـ. إذا عجز الحكمان عن الإصلاح وظهر لهما أن الإساءة جميعها من الزوجة قررا التفريق بينهما على العوض الذي يريانه على أن لا يزيد على المهر وتوابعه وإذا كانت الإساءة كلها من الزوج قررا التفريق بينهما بطلقة بائنة على أن للزوجة أن تطالبه بغير المقبوض من مهرها وتوابعه ونفقة عدتها.

و. إذا ظهر للحكمين أن الإساءة من الزوجين قررا التفريق بينهما على قسم من المهر بنسبة إساءة كل منهما للآخر وإن جهل الحال ولم يتمكنا من تقدير نسبة الإساءة قررا التفريق بينهما على العوض الذي يريانه من أيهما بشرط أن لا يزيد على مقدار المهر وتوابعه .

ز. إذا حكم على الزوجة بأي عوض وكانت طالبة التفريق فعليها أن تؤمن دفعه قبل قرار الحكمين بالتفريق ما لم يرض الزوج بتأجيله وفي حال موافقة الزوج على التأجيل يقرر الحكمان التفريق على البدل ويحكم القاضي بذلك أما إن كان الزوج هو طالب التفريق وقرر الحكمان أن تدفع الزوجة عوضا فيحكم القاضي بالتفريق والعوض وفق قرار الحكمين.

ح. إذا اختلف الحكمان حكّم القاضي غيرهما أو ضم إليهما ثالثا مرجحا وفي الحالة الأخيرة يؤخذ بقرار الأكثرية .

ط. على الحكمين رفع التقرير إلى القاضي بالنتيجة التي توصلا إليها وعلى القاضي أن يحكم بمقتضاه إذا كان موافقا لأحكام هذه المادة."[١]

ثانيا : حالات النزاعات العمالية الجماعية :

حيث نص المشرع الأردني في المادتين 120 و121 من قانون العمل الأردني على الوساطة، حيث أجازت المادة 120 للوزير أن يعين وسيطا من موظفي الوزارة للقيام بالتسوية في النزاعات العمالية الجماعية ، كما أجازت المادة 121 في فقرتها الأولى للوسيط في حالة وقوع نزاع عمالي جماعي أن يبدأ بإجراءات الوساطة بين الطرفين لتسوية النزاعات فإذا تمّ الاتفاق بين الأطراف يقوم الوسيط بالاحتفاظ بنسخة من الاتفاق مصادق عليه من الطرفين .[٢]

[١] المادة 126 / قانون الأحوال الشخصية الأردني رقم 36 لسنة 2010

[٢] المادتين 120، 121 / من قانون العمل الأردني رقم 8 لسنة 1996 .

أما في فقرتها الثانية فقد نصّت على أنه في حال عدم الوصول إلى تسوية النزاع بين الأطراف يقوم الوسيط بإعداد تقرير يبين الأسباب التي حالت دون إتمام الوساطة، أما في فقرتها الثالثة فقد أشارت إلى أنه في حالة أن الوزير لم يتمكّن من التوصل إلى تسوية بين أطراف النزاع فله أن يحيل التسوية إلى مجلس توفيق يشكل من قبله.

ثالثا: مرحلة الدعوى الصلحية:

حيث نص المشرع الأردني في المادة السابعة في فقرتها الثانية من قانون محاكم الصلح رقم 30 لسنة 2008 وتعديلاته والتي أجازت للقاضي ابتداءً أن يحيل النزاع إلى إدارة الوساطة إذا تبين له أن النزاع يمكن تسويته بالوساطة وبموافقة الخصوم أو أن يبذل الجهد في إتمام مساعي المصالحة بين الأطراف فإذا تم تسوية النزاع بموافقة الخصوم يقوم بتثبت ما اتفق عليه الخصوم في محضر الجلسة ويوقع عليه الخصوم أو وكلائهم ، أما في حالة إذا تم الاتفاق بين الأطراف خارج محضر الجلسة يصادق القاضي على الاتفاق ويلحق

الاتفاق المكتوب بمحضر الجلسة ويثبت بما جاء فيه ويكون بمثابة حكما قطعيا صادرا عن المحكمة و لا يقبل أي طريق من طرق الطعن[1].

رابعا: مرحلة الدعوى البدائية :

حيث نصّ المشرع الأردني في المادة 59 مكرر بفقرتها الثانية /هـ وفقرتها الرابعة من قانون أصول المحاكمات المدنية الأردني ، والتي أجاز المشرع للقاضي بحصر نقاط الاتفاق و الاختلاف بين الخصوم وحثهم على تسوية النزاع القائم بينهم وديا وله في حالة الاتفاق على التسوية بتثبت الصلح بين الخصوم وإصدار القرار وفق ما تقتضيه أحكام المادة 78 من ذات القانون و التي تنص على أنه " للخصوم أن يطلبوا إلى المحكمة في أية حالة تكون عليها الدعوى إثبات ما اتفقوا عليه من صلح أو أي اتفاق آخر في محضر الجلسة ويوقع عليه منهم أو من وكلائهم . فإذا كانوا قد كتبوا ما اتفقوا عليه، الحق الاتفاق المكتوب بمحضر الجلسة واثبت محتواه فيه ويكون للمحضر في هذه الحالة قوة الحكم الصادر عن المحكمة وتعطي صورته وفقا للقواعد المقررة وفقا للأحكام [2] ".

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[1] المادة السابعة الفقرة الثانية من قانون محاكم الصلح رقم 30 لسنة 2008 وتعديلاته.

[2] المادة 78 من قانون أصول المحاكمات المدنية الأردني .

وبالرجوع إلى نص المادة الثالثة في فقرتها الأولى من قانون الوساطة لتسوية النزاعات المدنية رقم 12 لسنة 2006 نجد أن القانون منح لقاضي إدارة الدعوى وقاضي الصلح الحق في إحالة النزاع إلى إدارة الوساطة بعد الاجتماع بالخصوم أو وكلائهم القانونين لحصر نقاط الاتفاق والاختلاف فيما بينهم وذلك لتسوية النزاع فيما بينهم .

المبحث الثاني

الثغرات التي تواجه الوساطة القضائية وسبل علاجها

في عام 2003 أصدر المشرع الأردني القانون المسمى بقانون الوساطة لتسوية النزاعات المدنية المؤقت رقم (37) لسنة (2003) و كان الهدف من هذا القانون تنظيم الوساطة كوسيلة من الوسائل البديلة لحل النزاعات ليتماشى مع التعديلات التي أُحدثت على قانون أصول المحاكمات المدنية الأردني المعدل رقم (26) لسنة (2002) ، بحيث أضاف المشرع الأردني نص المادة (59) مكرر والتي تنص على أن:

" 1. أ . تنشأ في مقر محكمة البداية إدارة قضائية تسمى (إدارة الدعوى المدنية) على أن يحدد وزير العدل المحاكم التي يتم فيها إحداث هذه الإدارة.

ب. يسمي رئيس المحكمة قاض أو أكثر للعمل في إدارة الدعوى المدنية وللمدة التي يحددها ويختار من بين موظفي المحكمة العدد اللازم لهذه الإدارة.

2. يتولى قاضي إدارة الدعوى المهام والصلاحيات التالية :

أ . الإشراف على ملف الدعوى عند وروده مباشرة إلى المحكمة وتسجيله في سجلاتها ، مراعيا بذلك أحكام المواد (56) و(57) و(58) و(59) و(109) من هذا القانون .

ب. اتخاذ الاجراءات اللازمة لتبليغ أطراف الدعوى بالسرعة الممكنة .

ج. تعيين جلسة لأطراف الدعوى وتبليغهم بموعدها وفق الأصول المقررة خلال مدة لا تتجاوز سبعة أيام بعد انتهاء المدد المحددة في المادة (59) من هذا القانون .

د. الاجتماع بالخصوم أو وكلاؤهم القانونيين في جلسة أولية يعقدها للتداول معهم في موضوع النزاع دون إبداء رأيه فيه ، والتحقق من استكمال الوثائق المتعلقة بصحة الخصومة وطلب أي مستند يكون لدى الغير ورد ذكره في قائمة بينات الخصوم ، و إذا تعذّر إحضار المستند ضمن المدة المحددة وفقا لأحكام هذه المادة تحال الدعوى إلى قاضي الموضوع .

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هـ. حصر نقاط الاتفاق والاختلاف بين الفرقاء وحثهم على تسوية النزاع القائم بينهم وديا .

3. يمارس قاضي إدارة الدعوى الصلاحيات المقررة لقاضي الموضوع في تثبيت الصلح أو أي اتفاق آخر ، وإصدار القرار وفق ما تقتضيه أحكام المادة (78) من هذا القانون وفرض الغرامات المنصوص عليها في المادة (14) وفي المادة (72) منه .

4. اذا تخلف أحد الأطراف عن حضور الجلسة التي حددها قاضي إدارة الدعوى أو رفض حضورها أو انتهت المدة المنصوص عليها في هذه المادة يحيل الدعوى إلى قاضي الموضوع مرفقا بها المحضر المشار إليه في الفقرة (5) من هذه المادة .

5. ينظم قاضي إدارة الدعوى محضرا بما قام به من اجراءات متضمنا الوقائع المتفق والمتنازع عليها بين الاطراف ويحيل الدعوىإالى قاضي الموضوع خلال ثلاثين يوما من تاريخ أول جلسة يعقدها .

6. لا يجوز لقاضي إدارة الدعوى تحت طائلة البطلان النظر في موضوع الدعوى التي سبق له واتخذ قرارا باحالتها الى قاضي الموضوع ". التي مفادها استحداث إدارة قضائية تحت مسمى إدارة الدعوى المدنية و الغاية من هذه

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الإدارة إعداد ملف الدعوى لتصبح مُعده للفصل من خلال الإشراف على ملف الدعوى بجميع مراحله ، و الغاية منها أيضا عرض الصلح بين الخصوم من خلال تقريب وجهات النظر و حصر نقاط الاتفاق و الاختلاف لتسوية النزاع عن طريق الوساطة[١] .

ولقد وجهت انتقادات إلى قانون الوساطة المؤقت وتحديدا إلى نص المادة (59) مكرر من الأصول المدنية. ومن هذه الانتقادات حصر تسمية الوسطاء الخصوصيين لوزير العدل فقط ، وقيد إحالة النزاع إلىإادارة الوساطة لقاضي إدارة الدعوى و قاضي الصلح من تلقاء نفسه دون اتفاق الأطراف وأيضا حصر صلاحية الاحالة إلى إدارة الوساطة لقاضي إدارة الدعوى و قاضي الصلح فقط. وبناء على هذه الانتقادات قام المشرع الأردني بإصدار قانون الوساطة لتسوية النزاعات المدنية رقم (12) لسنة (2006) إلا أن هذا القانون كذلك لم يسلم من بعض الإشكاليات و الثغرات التي قلّصت من فاعليته في تسوية النزاعات .

و في مايلي عرض للإشكاليات و الثغرات بشكل تفصيلي مع تقديم مقترحات للخروج بقانون وساطة فاعل ومتكامل.

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[١] القطاونة ،مُحَمَّد ، مرجع سابق ، ص 71

المطلب الأول : الثغرات الموضوعية التي تواجه الوساطة و علاجها:

أولاً : حصر المشرّع الأردني الوساطة في النزاعات المدنية دون غيرها

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في مادته الأولى على أن النزاعات القابلة للتسوية عن طريق الوساطة هي النزاعات المدنية دون سواها من النزاعات الأخرى التي يرغب الخصوم بعرضها على إدارة الوساطة ، و بالتالي فقد حرم الخصوم من اللجوء الى إدارة الوساطة. ومن أمثلة النزاعات التي أخرجها المشرع من قانون الوساطة :

أ – النزاعات الإدارية، وهي النزاعات المتعلقة بشؤون الموظفين و طلبات التعويض عن القرارات الإدارية المتصلة بالموظفين[1]، فقد أخرج المشرع الأردني النزاعات الإدارية من دائرة النزاعات التي تعرض على إدارة الوساطة و جعلها من اختصاص المحاكم الإدارية حسب أحكام المادتين الخامسة و السادسة من قانون القضاء الإداري الأردني رقم (27) لسنة 2014 .

ب –ما اصطلح عليه في الفقه القانوني ب (الوساطة الجنائية) "وهي الإجراء الذي بموجبه يحاول شخص من الغير ، بناء على اتفاق الأطراف ، وضع

حد و نهاية لحالة الاضطراب التي أحدثتها الجريمة عن طريق حصول المجني عليه على تعويض كاف عن الضرر الذي حدث له ، فضلا عن إعادة تأهيل الجاني " [٢] ، فالوساطة الجنائية تقوم على رضا أطراف النزاع بتدخل شخص محايد لتسوية النزاع و ذلك قبل تدخل النيابة العامة بالدعوى أو الحكم فيها [٣].

و بالتالي فقد أخرج المشرّع الأردني الوساطة الجنائية من دائرة النزاعات التي تُعرض على إدارة الوساطة ، بالرغم من وجود النصوص القانونية في القوانين الجنائية التي تعترف بالوساطة الجنائية، و من هذه النصوص القانونية نص الفقرة ب / 1 و2 و الفقرة ج / 2 المادة التاسعة من قانون الجرائم الاقتصادية الأردني رقم 11 لسنة 1993 و التي تنص على:

" ب. 1. يحق للنائب العام التوقف عن ملاحقة من يرتكب جريمة معاقبا عليها بمقتضى أحكام هذا القانون وإجراء الصلح معه إذا أعاد كليا الأموال التي حصل عليها نتيجة ارتكاب الجريمة او اجرى تسوية عليها ، ولا

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[١] كنعان ، نواف ، القضاء الإداري في الأردن ،1999، ط1 ، ص 96 و ما بعدها .

[٢] عبدالحميد ، اشرف ، الوساطة الجنائية و دورها في إنهاء الدعوى العمومية ، دراسة مقارنة ، دار النهضة العربية ، ط1 ،2004 ، ص19 .

[٣] القطاونة ، محمد ، مرجع سابق ، ص91 .

يعتبر قرار النائب العام في أي مرحلة من مراحل التحقيق او المحاكمة نافذا الا بعد الموافقة عليه من قبل لجنة قضائية برئاسة رئيس النيابات العامة وعضوية كل من : قاضي تمييز يختاره رئيس المجلس القضائي والمحامي العام المدني وذلك بعد سماع راي النائب العام .

2 . لا تسري أاحكام البند (1) من هذه الفقرة على الموظفين العموميين العاملين في السلك الاداري أو القضائي أو البلدي ، وضباط الأجهزة الأمنية أو العسكرية أو أي من أفرادها ، وكل عامل أو مستخدم في الدولة أو في إدارة عامة .

ج. 2. يحق للنائب العام اجراء المصالحة مع حائز المال في حال رد المال محل الجريمة والمنافع المرتبطة به ، كليا او اجرى تسوية عليها ، ولا يعتبر هذا القرار نافذا الا بعد موافقة اللجنة القضائية المنصوص عليها في الفقرة (ب) من هذه المادة " .

ونص الفقرة الأولى من المادة 212 من قانون الجمارك الاردني رقم 20 لسنة 1998 و التي تنص على أنه " للوزير أو من يفوضه عقد التسوية الصلحية في جرائم التهريب أو ما في حكمه سواء قبل إقامة الدعوى أو خلال النظر فيها وقبل صدور الحكم البدائي وذلك مع جميع المسؤولين عن التهريب أو

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مع بعضهم عن كامل الجرم وضمن الشروط الواردة في عقد المصالحة " و نص المادة 214 و التي تنص على أنه " تسقط الدعوى عند إجراء المصالحة عليها" من قانون الجمارك الأردني رقم 20 لسنة 1998.

و نص الفقرة الأولى من المادة 45 من قانون ضريبة الدخل رقم 34 لسنة 2014 و التي تنص على أنه " يجوز لمحكمة البداية الضريبية بعد قبول الدعوى شكلا تأجيلها باتفاق الطرفين لمرة واحدة أو أكثر لإتاحة الفرصة لحلها مصالحة على أن لا يزيد مجموع مدد التأجيل في جميع الحالات على ستين يوماً " . و بالرجوع إلى هذه المواد نجد أن المشرع الأردني أخذ بمبدأ الوساطة الجنائية و لم يضمّنه لقانون الوساطة الحالي . و كان على المشرّع الأردني إلغاء عبارة النزاعات المدنية و تسميته "قانون الوساطة لتسوية النزاعات" و بهذه التسمية يتيح القانون للخصوم في جميع النزاعات القابلة للوساطة أن يعرضوا نزاعهم على إدارة الوساطة لتسويته.

ثانيا : فرض غرامات في حال فشل التسوية.

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في فقرته الرابعة من مادته السابعة و التي تنص على أنه " إذا فشلت التسوية بسبب تخلف أحد أطراف النزاع أو وكيله عن حضور جلسات التسوية ،

فيجوز لقاضي إدارة الدعوى أو لقاضي الصلح فرض غرامة على ذلك الطرف أو وكيله لا تقل عن مائة دينار ولا تزيد على خمسمائة دينار في الدعاوى الصلحية ولا تقل عن مائتين وخمسين دينارا ولا تزيد على ألف دينار في الدعاوى البدائية ." و من خلال استقراء نص المادة نجد أن المشرع الأردني قد رتب جزاء في حالة فشل التسوية متمثلا بترتيب غرامة مالية لا تقل عن مائة دينار و لا تزيد عن خمسمائة دينار إذا كانت الدعوى صلحية أما إذا كانت الدعوى بدائية فإن الغرامة لا تقل عن مائتين دينار و لا تزيد عن ألف دينار و ذلك بسبب تخلّف أحد أطراف النزاع أو وكيله عن حضور جلسات التسوية .

كان على المشرع الأردني عدم فرض غرامات و التي تعتبر بمثابة عقوبة على أطراف النزاع ، وذلك حتى يتشجع الخصوم على اللجوء الى الوساطة.

فالغاية من الوساطة التي تعتبر وسيلة من الوسائل البديلة لتسوية النزاعات هو تلافي الإشكاليات و التعقيدات التي تواجه النظام القضائي ، و بالتالي فان فرض الغرامة غير مبرر. وحتى بعد فرض الغرامة لم يبين المشرع الأردني طريقة التظلم من الغرامة .

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المطلب الثاني : الثغرات الإجرائية التي تواجه الوساطة وسبل علاجها:

أولا :عدم تعميم إدارة الوساطة على كافة محاكم الأردن

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في فقرته الأولى من مادته الثانية على إنشاء إدارة قضائية مقرها محكمة البداية تعنى بالوساطة و تشكل من عدد من قضاة البداية و الصلح و يسمون قضاة الوساطة و يختارهم رئيس محكمة البداية للمدة التي يحددها لهم ، و يحدد وزير العدل المحاكم البدائية التي تنشأ فيها هذه الإدارة.إلا أن فكرة الوساطة لم تعمّم على جميع محاكم الأردن فهي مقتصرة على محكمة بداية عمان و محكمة بداية إربد بالرغم من وجود أكثر من خمس عشرة محكمة بداية في الأردن ، وبالتالي في حالة إذا ما أراد المتخاصمون إحالة النزاع لتسويته على إدارة الوساطة فإن عرض النزاعات على إدارة الوساطة في تلك المحاكم يشكل عائقاً أمام المتخاصمين لعدم وجود إدارة الوساطة .

ثانيا : خلو القانون من الشروط الواجب توافرها في الوسيط الخاص أو الاتفاقي.

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في فقرته الثالثة من مادته الثانية على أنه "لرئيس المجلس القضائي و بتنسيب من وزير العدل تسمية (وسطاء خصوصيين) يختارهم من بين القضاة المتقاعدين و المحامين و غيرهم من ذوي الخبرة المشهود لهم بالحيدة و النزاهة" يتضح من خلال هذا النص أن المشرع أوجد نوعا ثانيا من الوسطاء بعد الوساطة القضائية وهو وسيط خاص ، و بالتالي فإن قاضي الوساطة يخضع لقانون استقلال القضاء و لمدونة السلوك القضائي أما بالنسبة للوسطاء الخصوصيين فإنهم لا يخضعون لأي قانون أو مدونة لضبط سلوكهم أو حتى مساءلتهم قانونيا في حالة التقصير و الإهمال و غيرها من السلوكيات التي من شأنها أن تؤدي إلى عزوف الخصوم عن اللجوء إلى الوساطة. و لذلك كان على المشرع الأردني ضبط عملية الوساطة من خلال إيجاد جهة رقابية و مشرفة على أعمال الوساطة بكافة أنواعها و يكون لها الصلاحية في تحديد الشروط الواجب توافرها في الوسيط و إعداد مدونة لسلوكيات الوسيط .

ثالثا : حصر الصلاحية في الإحالة إلى قاضي إدارة الدعوى و قاض الصلح.

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في فقرته الأولى من مادته الثالثة و التي تنص على أنه " لقاضي إدارة الدعوى أو قاضي الصلح و بعد الاجتماع بالخصوم أو وكلائهم القانونيين إحالة النزاع بناء على طلب أطراف الدعوى أو بعد موافقتهم الى قاضي الوساطة أو الى وسيط خاص لتسوية النزاع وديا وفي جميع الأحوال يراعي القاضي عند تسمية الوسيط اتفاق الطرفين ما أمكن." فمن خلال هذا النص يتضح أن المشرع الأردني حصر حق إحالة النزاع إلى إدارة الوساطة فقط من خلال قاضي إدارة الدعوى و قاضي الصلح، و في حالة وجود دعوى مرفوعة أمام قاضي الموضوع و تقدّم الخصوم بطلب لإحالة النزاع إلى إدارة الوساطة فبحسب هذا النص لا يملك قاضي الموضوع الحق في إحالة النزاع الى إدارة الوساطة الأمر الذي يؤدي الى عزوف أطراف النزاع عن اللجوء إلى الوساطة. و أيضاهناك إشكالية أخرى بخصوص إدارة الدعوى المدنية (قاضي إدارة الدعوى المدنية) فإن هذه الإدارة ليست مطبقة في جميع محاكم البداية المنتشرة في الأردن، والسؤال الذي يُطرح في حالة إذا رغب الخصوم في إحالة النزاع إلى إدارة الوساطة كيف يمكن حل هذه الإشكالية في المحاكم التي تخلو من إدارة الدعوى المدنية؟ و بالتالي كان على المشرع

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الأردني عدم حصر حق الإحالة لقاضي إدارة الدعوى و قاضي الصلح و إنما الواجب أن يمنح قاضي الموضوع أيضا حق الصلاحية في إحالة النزاع عندما تتولد عند الخصوم الرغبة في حل النزاع وديا عن طريق إدارة الوساطة، وبهذا التعديل يمكن تلافي أية إشكالية يمكن أن تحدث . على الرغم من أن من الناحية العملية هناك قضاة موضوع في محاكم البداية يقومون بإحالة النزاع الى إدارة الوساطة و في هذا مخالفة صريحة لنص القانون .

رابعا :خلو القانون من آلية كيفية استرداد الرسوم القضائية

لقد عالج المشرع الأردني موضوع الرسوم في الفقرة الثانية من المادة الثالثة من قانون الوساطة و التي تنص على أنه " لأطراف الدعوى بموافقة قاضي إدارة الدعوى أو قاضي الصلح الاتفاق على حل النزاع بالوساطة و ذلك بإحالته إلى أي شخص يرونه مناسبا ، و في هذه الحالة يحدد الوسيط أتعابه بالاتفاق مع أطراف النزاع ، و في حالة تسوية النزاع وديا يسترد المدعي الرسوم القضائية التي دفعها " و كذلك الفقرة الأولى من المادة التاسعة من ذات القانون و التي تنص على أنه : " أ . إذا تمت تسوية النزاع كليا بطريق الوساطة القضائية فللمدعي استرداد نصف الرسوم القضائية التي دفعها "

و الهدف من إعادة الرسوم التي دفعها المدعي إذا تمت تسوية النزاع وديّا أو عن طريق الوساطة القضائية هو تحفيز أطراف النزاع إلى اللجوء الى الوساطة. و لكن من الناحية العملية كما ذكرنا سابقا ، تكون الإحالة عن طريق قاضي الموضوع و الجاري العمل فيه – مخالفة صريحة لنص المادة 3/ أ – انه في حالة إحالة النزاع عن طريق قاضي الموضوع و تمت التسوية بين الخصوم عن طريق الوساطة فانه لا يتم استرداد الرسوم و السبب في ذلك أن صلاحية إعادة الرسوم من صلاحيات قاضي إدارة الدعوى أو قاضي الصلح [1].

خامسا : خلو القانون من كيفية تحديد أجور الوسيط بما يتلاءم مع متطلباته.

حيث أشار المشرع الأردني إلى أتعاب الوسيط في الفقرة الثانية من المادة الثالثة و التي تنص على أنه " لأطراف الدعوى بموافقة قاضي إدارة الدعوى أو قاضي الصلح الاتفاق على حل النزاع بالوساطة و ذلك بإحالته إلى أي شخص يرونه مناسبا ، و في هذه الحالة يحدد الوسيط أتعابه بالاتفاق مع أطراف النزاع ، و في حالة تسوية النزاع وديا يسترد المدعي الرسوم القضائية

[1] القطاونة ، محمد ، مرجع سابق ، ص 93 و ما بعدها .

التي دفعها " و كذلك نص الفقرة الثانية من المادة التاسعة و التي تنص على أنه "1 . إذا توصل الوسيط الخاص الى تسوية النزاع كليا فللمدعي استرداد نصف الرسوم القضائية التي دفعها ويصرف النصف الآخر كأتعاب لهذا الوسيط على أن لا يقل في حده الأدنى عن ثلاثمائة دينار وإذا قل عن هذا الحد يلتزم أطراف النزاع بان يدفعوا للوسيط وبالتساوي بينهم الفرق بين ذلك المبلغ والحد الأدنى المقرر . 2. إذا لم يتوصل الوسيط الخاص لتسوية النزاع فيحدد قاضي إدارة الدعوى أتعابه بما لا يتجاوز مبلغ مائتي دينار ، يلتزم المدعي بدفعها له ، ويعتبر هذا المبلغ من ضمن مصاريف الدعوى . "

و باستقراء نصوص المواد نجد أن المشرع عالج أتعاب الوسيط الخاص في حالة إذا توصل إلى تسوية النزاع كليا أو إذا لم يتوصل الى تسوية النزاع ، فمن الناحية العملية إن الأتعاب التي يتقاضاها المحامين تتجاوز الرسوم القضائية فهل من المعقول أن يطلب المحامي إحالة النزاع الى إدارة الوساطة و يتقاضى أتعابه المتمثلة بنصف الرسوم القضائية ؟ حتما الإجابة ستكون بالنفي لان نصف الرسوم القضائية حسب أحكام نظام رسوم المحاكم لا تتجاوز سبعمائة دينار تقريبا بالحد الأعلى إذا كانت الدعوى بدائية . و بالتالي كان على المشرع الأردني أن يعيد النظر في أتعاب الوسطاء و أسس

توزيعها و ذلك عن طريق إصدار نظام يحدد أتعاب الوسطاء بموجب قانون الوساطة الأردني بما يتلاءم مع متطلبات الشخصية للوسطاء .

معى العلم أن قاضي الوساطة لا يتقاضى أية أتعاب من الخصوم لقاء عمله بالوساطة.

الخاتمة

لقد توصلت هذه الورقة إلى مجموعة من النتائج و التوصيات نوردها على النحو التالي :-

نتائج البحث

- يعد قانون الوساطة لتسوية النزاعات المدنية رقم (12) لسنة 2006 نقلة نوعية في محاولة التقليل من النزاعات المعروضة على القضاء.
- أن القانون يتميز بالصبغة القضائية حيث أنه يتم من خلال إنشاء إدارة قضائية وبإشراف قضاة مقرها محاكم البداية تعنى بالوساطة، وتشكل من عدد من قضاة البداية و الصلح و يسمون قضاة الوساطة ، ويهدف هذا القانون إلى إنهاء الخصومة بين المتخاصمين بطريق التسوية القضائية.

- أن القانون شابه بعض الإشكاليات والثغرات التي قلّلت من دوره الفاعل في توسيع دائرة الوساطة القضائية.

التوصيات

1. تعديل قانون الوساطة الأردني بحيث يسمح للخصوم في الدعاوى الإدارية و الجنائية اللجوء الى الوساطة لما لها من اثر في تخفيف العبء على المحاكم و القضاة و تقليل أعداد القضايا.
2. تعديل قانون الوساطة الأردني بإضافة نص يبين الشروط الواجب توافرها في الوسيط و سلوكياته أو بموجب نظام خاص يعد لهذه الغاية ، كما يمكن إضافة الأحكام الخاصة برد الوسيط و تنحيته و عدم صلاحيته.
3. تعديل نص الفقرة الأولى من المادة الثالثة من قانون الوساطة الأردني بحيث يسمح لقضاة الموضوع الصلاحية بإحالة النزاع على إدارة الوساطة و عدم حصر هذه الصلاحية لقاضي إدارة الدعوى و قاضي الصلح .
4. تعديل نص الفقرة الثانية من المادة الثالثة من قانون الوساطة الأردني على ضوء تعديل الفقرة الأولى بحيث يسمح لقضاة الموضوع بإعادة الرسوم القضائية في حالة نجاح التسوية.

5. تعديل نص الفقرة الثانية من المادة الثالثة من قانون الوساطة الأردني وكذلك تعديل نص الفقرة الثانية من المادة التاسعة من قانون الوساطة الأردني و المتعلقة بأتعاب الوسيط أو إعداد ملحق لأتعاب الوسيط و أسس توزيعها بما يتلاءم مع متطلبات الوسيط.

6. شطب نص الفقرة الرابعة من المادة السابعة من قانون الوساطة الأردني و المتعلقة بفرض غرامات في حالة فشل التسوية و يعتبر فرض الغرامة غير مبرر كما ذكرنا سابقا.

7. تعديل الفقرة الاولى من المادة الثانية وذلك باستحداث إدارة الوساطة في مقر محاكم البداية والمقاطعات التابعة لها وذلك ليتم توسيع الاختصاص المكاني لإدارة الوساطة القضائية أو منح رئيس محكمة البداية سلطة انشاء ادرة الوساطة القضائية في المقاطعات التابعة لمحكمة البداية.

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التحكيم الإلكتروني والقانون الواجب التطبيق

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المستخلص:

يعدّ التحكيم أحد الوسائل البديلة التي اشتهرت في السنوات الأخيرة لتسوية مختلف النزاعات. وتزامناً مع التطور التكنولوجي الذي شمل مختلف مجالات الحياة ظهر ما يسمى بمحاكم أو هيئات التحكيم الإلكترونية. ومع تحوّل التحكيم إلى الشكل الإلكتروني، برزت إشكالية القانون الواجب التطبيق في عملية التحكيم في مجال المعاملات الدولية وكيفية إعمال القواعد التقليدية لتنازع القوانين والتي تعتمد غالباً على التوطين المكاني أو الجغرافي، وهو ما يتعارض مع الفضاء الذي يمارس التحكيم الإلكتروني أعماله. من هنا جاءت هذه الورقة لمحاولة دراسة القانون الواجب التطبيق على كل مرحلة من مراحل عملية التحكيم الإلكتروني في المعاملات الدولية الإلكترونية؛ بما في ذلك اتفاق التحكيم الإلكتروني وإجراءاته وموضوعه وتنفيذ أحكامه وطرق الطعن فيها، وذلك من خلال تحليل ومقارنة التشريعات المختلفة التي تنظم التحكيم بصفة عامة وإجراءاته ومدى قابليتها للتطبيق على التحكيم الإلكتروني، وكذا دراسة القواعد واللوائح الخاصة بهيئات التحكيم الإلكتروني، وبيان مدى استيعابها أو قصورها بشأن تنظيم التحكيم الإلكتروني، أضف إلى ذلك مناقشة بعض القضايا التي استعملت فيها آلية التحكيم الإلكتروني، وما نتج عنها من أحكام، وما يمكن استنباطه من مبادئ تتعلق بهذا النوع من التحكيم. ولقد خلصت هذه الورقة إلى عدم قدرة قواعد تنازع القوانين التقليدية وحدها على تحديد القانون الواجب التطبيق على التحكيم الإلكتروني، وضرورة إدخال بعض التعديلات على التشريعات المنظمة للتحكيم التقليدي لتشمل التحكيم الإلكتروني وتسهم في حل إشكالاته، لاسيما ما يتعلق منها بالنواحي الإجرائية والشكلية، وكذا أهمية اعتماد معايير جديدة في مجال القانون الواجب التطبيق بخلاف المعايير الجغرافية والمكانية وذلك بهدف مواكبة التطور التكنولوجي في مجال التحكيم الإلكتروني في المعاملات الإلكترونية.

كلمات مفتاحية: التحكيم الإلكتروني، المعاملات الإلكترونية، القانون الواجب التطبيق، اتفاق التحكيم، حكم التحكيم

مقدمة:

تأخذ المعاملات الإلكترونية دوراً متنامياً ومتزايداً في مجالات الحياة وخاصة في المجال التجاري، وإزاء ذلك ومع انتشارها أصبح واقعاً وجود منازعات ناتجة عن هذه الممارسات بين أطرافها، وهو ما يتطلب وجود آليات تتصدى لحل هذه المشكلات والمنازعات.

وتعتبر الآلية الرسمية لحل المنازعات هي القضاء، إلا أنه وأمام إشكاليات القضاء وجد ما يعرف بالوسائل البديلة لحل النزاعات (كالتحكيم والوساطة والتفاوض والصلح ....إلخ)، والتي تنتشر انتشاراً متزايداً في الآونة الأخيرة وتلقى اهتماما من المتعاملين والباحثين على حد سواء.

ومع انتشار التكنولوجيا المتزايد في شتى المجالات كان لمجال حل النزاعات البديلة نصيب من ذلك، حتى ظهر التحكيم الإلكتروني، والوساطة الإلكترونية والمفاوضات الإلكترونية.... إلخ، وقد كانت تنظم هذه الوسائل البديلة قوانين وتشريعات تتناسب مع الاستخدام التقليدي لا الإلكتروني في ظل إطار عالم مادي يعتمد على الجغرافيا والحدود الإقليمية لا الفضاء الإلكتروني، وهو ما برزت معه إشكاليات قانونية تحتاج إلى دراستها.

ومن هذه الإشكاليات التي يتناولها البحث إشكالية القانون الواجب التطبيق على التحكيم الإلكتروني في مجال المعاملات الإلكترونية.

وتقوم منهجية البحث على تحليل ومقارنة التشريعات المختلفة التي تنظم التحكيم بصفة عامة وإجراءاته ومدى قابليتها للتطبيق على التحكيم الإلكتروني، وكذا دراسة القواعد واللوائح الخاصة بهيئات التحكيم الإلكتروني ، وبيان مدى استيعابها أو قصورها بشأن ذلك.

وتتضمن خطة البحث مبحثاً تمهيدياً وأربع مباحث أخرى؛ يشتمل المبحث التمهيدي على تعريف التحكيم الإلكتروني وخصائصه وإشكالياته، والمبحث الأول يتضمن اتفاق التحكيم الإلكتروني والقانون الواجب التطبيق عليه، وخصص

المبحث الثاني لإجراءات التحكيم الإلكتروني والقانون الواجب التطبيق عليه، أما المبحث الثالث فيتناول موضوع التحكيم الإلكتروني والقانون الواجب التطبيق عليه، والمبحث الرابع والأخير يتناول حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه.

مبحث تمهيدي: التحكيم الإلكتروني: تعريفه وخصائصه وإشكالياته

المطلب الأول: تعريف التحكيم الإلكتروني

يتطلب تعريف التحكيم الإلكتروني أن نبحث أولاً عن تعريف معنى التحكيم كمصطلح حيث يقصد بالتحكيم اتفاق أطراف النزاع على طرح نزاعهم خارج الإطار التنظيمي للقضاء الرسمي للدول وعرضه على أشخاص أو هيئات خاصة بغية الفصل في النزاع بحكم ملزم للأطراف، فبجانب تحقيق العدل يرغب الأطراف الحفاظ على السلام بينهم رغبة في المصالحة وتفادياً للثأر الخاص.[1]

وأما وصف التحكيم بالإلكتروني فيعني تدخل الوسائل الإلكترونية في التحكيم، وقد عرفت بعض التشريعات مصطلح "إلكتروني" من خلال التقنية المتبعة في الوسائل سواء كانت تقنيات كهربائية أو مغناطيسية أو كهرومغناطيسية أو رقمية أو لاسلكية أو ضوئية أو غيرها من الوسائل المشابهة والتي تقوم بذات دورها.[2]

فالتحكيم الإلكتروني هو الذي يتم من خلال وسائط إلكترونية وشبكات الاتصال كالانترنت دون الحاجة للتواجد في مكان مادي واحد.[3]

ويبدر التساؤل هل يشترط قيام جميع مراحل التحكيم إلكترونياً حتى نعتبره كذلك أم يكفي أن تتم بعض مراحله إلكترونياً وبعضها تقليدياً؟ثمة رأي يذهب إلى أنه يستوي في أن يكون التحكيم إلكترونياً إتمام جميع مراحله إلكترونياً أو بعضها

[1] رضوان، 1995، ص 19.

[2] من هذه التشريعات قانون المعاملات الأمريكية الموحد لعام 1999 المادة (5/2)، وكذلك قانون المعاملات الإلكترونية الأردني رقم 85 لسنة 2001 في المادة الثانية منه.

[3] إبراهيم خ.، 2008، ص 133، النعيمي، 2009،ص207 ، حسين، 2012، ص260

إلكترونياً وبعضها تقليدياً.[٤]

وثمة رأي آخر يذهب إلى ضرورة قيام جميع مراحله إلكترونياً حتى يعتبر كذلك، مستنداً إلى أن القول بغير ذلك يجعل جميع عمليات التحكيم تحكيماً إلكترونياً حيث لا يخلو تحكيم من استخدام وسائل الاتصال الحديثة في تسيير أعماله.[٥]

والحقيقة أن وصف التحكيم بكونه إلكترونياً أم تقليدياً ليس غاية حتى تشترط الإلكترونية في جميع مراحله، إنما الهدف وضع حلول تتناسب مع استخدام التكنولوجيا والاستفادة منها في أدوات العدالة أياً كان شكلها تقليدياً أم إلكترونياً، وليست كل القواعد القانونية للتحكيم التقليدي تتنافى مع التحكيم الإلكتروني، وهذا ما أكدته ملاحظات الأونيسترال التقنية بشأن تسوية المنازعات بالاتصال الحاسوبي المباشر في الملاحظة (50) منها.[٦]

المطلب الثاني: خصائص التحكيم الإلكتروني وإشكالياته

مميزات التحكيم الإلكتروني:

١ - **ميزة السرعة والإنجاز:** يتميز التحكيم عموماً بالسرعة، وتزداد هذه الميزة في التحكيم الإلكتروني، [٧] إذ أن الإبلاغ بالخصومة والمراسلات وتسليم المستندات التي تتم بالوسائل التقليدية وتستغرق أياماً فإنها تنجز في لحظات من خلال الوسائل الإلكترونية، ويؤكد ذلك أن التحكيم التقليدي قد يصل إلى 18 شهراً كما في قانون التحكيم المصري [٨] بينما يستغرق التحكيم الإلكتروني حوالي 3 أشهر كما في منصة الاتحاد الأوروبي لحل النزاعات عبر الإنترنت.[٩]

٢ - **قلة التكلفة:** يعتبر التحكيم الإلكتروني أقل تكلفة من التحكيم التقليدي، إذ أن إجراء الجلسات من خلال الإنترنت يوفر تكلفة الانتقال والسفر من وإلى مقر انعقاد جلسات التحكيم.[١٠]

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[٤] إبراهيم خ.، 2008، ص133.

[٥] النعيمي، 2009، ص210.

[6] http://www.uncitral.org/uncitral/uncitral_texts/odr/2016Technical_notes.html . Accessed Jul11, 2017

[٧] علي، 2009، ص118.

[٨] المادة (45) من قانون التحكيم المصري رقم 27لسنة 1994.

[9] https://ec.europa.eu/consumers/odr/main/?event=main.complaints.timeLine. Accessed Jun30, 2017.

[١٠] النعيمي، 2009، ص212.

٣ - **عرض النزاع على متخصصين:** من يستخدمون الوسائل الإلكترونية في معاملاتهم يرغبون الاستفادة من ذات الوسيلة الإلكترونية في حل النزاعات التي تنشأ عن هذه المعاملات، كما لا يشترط تخصص معين في التحكيم حيث يمكن أن يكون من ضمن أعضاء هيئة التحكيم من هو متخصص بالنواحي الفنية في مجال المنازعة.[١١]

٤ - **النأي بالنزاع عن تشريعات قد لا تتوافق مع المعاملات الإلكترونية:** القاضي الوطني محكوم عند نظره النزاع بالقانون الواجب التطبيق الذي يقره قانونه الوطني، وهو ما قد يؤدي إلى تطبيق قانون لا يتوافق مع هذه المعاملات الإلكترونية أو ينظمها، في حين أن المحكم يمتلك مرونة في تطبيق القانون الواجب التطبيق لأنه لا توجد قواعد تنازع أو إسناد توجهه كالقاضي، فيستطيع البحث عن القانون الأنسب لحل النزاع من بين القوانين المتنازعة،[١٢] كما يمكنه إعمال القواعد الموضوعية الدولية.

٥ - **السرية:** يمتاز التحكيم الإلكتروني عن غيره من أنواع التحكيم التقليدي والقضاء بالسرية خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والفنية حيث أن المستندات والجلسات تكون من خلال الوسائط ووسائل الاتصال الإلكترونية المشفرة.[١٣]

بينما ثمة رأي يذهب عكس ذلك حيث يرى أن موضوع السرية هو أحد عيوب أو مخاطر التحكيم الإلكتروني[١٤] لأن المعاملات الإلكترونية قد تكون عرضة للاختراق، ومردود على ذلك بأن التحكيم الإلكتروني يتم بطرق آمنة ومشرفة لا يطلع عليها إلا المعنيين فقط بالقضية، وذلك بعكس التحكيم التقليدي التي قد تتسع دائرة الاطلاع على القضية فيه وعلى فرض حدوث اختراق إلكتروني فهو أشبه بسرقة أو اختلاس الأوراق في التحكيم التقليدي أو القضاء العادي والتي ليست بمأمن عن ذلك.

مخاطر وإشكاليات التحكيم الإلكتروني:

[١١] شرف الدين، 2003، ص39.
[١٢] رضوان، 1995، ص154.
[١٣] زمزمي، 2009، ص350.
[١٤] النعيمي، 2009، ص214.

١ - **عدم ملاءمة التشريعات الوطنية للتحكيم الإلكتروني:** قد لا تتوائم بعض التشريعات الوطنية مع آلية التحكيم الإلكتروني وخاصة فيما يتعلق بالأهلية والنواحي الشكلية كالكتابة وغيرها، وإن كان القانون النموذجي للتحكيم الصادر عن الأمم المتحدة في 1985 قد تناول لاحقا هذه الإشكالية في تعديل هذا القانون عام 2006، [١٥] إلا أن هذه الإشكالية لا زالت تمثل إحدى الإشكاليات القانونية وخاصة في العديد من القوانين الوطنية.

٢ - **إشكالية مكان التحكيم الإلكتروني:** من الأشياء المهمة والضرورية في التحكيم التقليدي تحديد مكان التحكيم لما يترتب عليه من آثار قانونية هامة من حيث القانون الواجب التطبيق، والمحكمة المختصة ببطلان التحكيم، وغيره من إشكاليات قانونية أخرى، في حين أن تحديد المكان في التحكيم الإلكتروني قد تعترضه صعوبة في تحديده.

٣ - **إشكالية عدم تنفيذ حكم التحكيم الإلكتروني:** تشترط بعض التشريعات الوطنية شروطاً شكلية معينة في حكم التحكيم كالكتابة وغيرها قد لا تتوافر في التحكيم الإلكتروني وهو ما قد يؤدي إلى رفض تنفيذ الحكم.

وسنتناول ما سبق من إشكاليات تفصيلاً في موضعها من البحث.

المبحث الأول: اتفاق التحكيم الإلكتروني والقانون الواجب التطبيق عليه

المطلب الأول: اتفاق التحكيم الإلكتروني وصوره

اتفاق التحكيم هو ذلك الاتفاق الذي يتم بين الأطراف لإخضاع ما قد ينشأ بينهم من منازعات ليتم الفصل فيها عن طريق التحكيم، [١٦] سواء أكان هذا الاتفاق سابقاً للنزاع أم لاحقاً له، وسواء أكان هذا النزاع استنادا لعلاقة قانونية عقدية أو غير عقدية. [١٧]

صور اتفاق التحكيم الإلكتروني:

١ - **شرط التحكيم الإلكتروني:** ويقصد به الشرط الذي ينص عليه في العقد الأساسي بين الطرفين، ومن ثم فإن

[15] https://www.uncitral.org/pdf/arabic/texts/arbitration/ml-arb/07-86996_Ebook.pdf . Accessed Jul09, 2017.

[١٦] وفا، 2001، ص250

[١٧] المادة (1/10) من قانون التحكيم المصري رقم 27 لسنة 1994.

شرط التحكيم يكون قبل حصول النزاع، [١٨] وقد يكون عن طريق البريد الإلكتروني أو من خلال مواقع التسوق الإلكتروني التي تضع هذا الشرط ضمن شروط التعاقد.

٢ - **مشارطة التحكيم الإلكتروني:** هي اتفاق مستقل يحصل عند حصول نزاع وعدم وجود شرط تحكيم في العقد الأصلي، حيث يتم الاتفاق إلكترونيا على اللجوء للتحكيم الإلكتروني لحل هذا النزاع، ويجب أن يتضمن الاتفاق الأمور التي يشملها التحكيم وإلا أصبحت مشارطة التحكيم باطلة. [١٩]

ثمة رأي يذهب إلى أن الفرق بين شرط التحكيم ومشارطة التحكيم هو أن الأول لا يكون إلا قبل إثارة النزاع، أما مشارطة التحكيم فيمكن إبرامها قبل حصول النزاع أو بعده، [٢٠] بينما يذهب رأي آخر إلى أن مشارطة التحكيم لا تكون إلا بعد حدوث النزاع. [٢١]

٣ - **التحكيم الإلكتروني بالإحالة:** ويقصد بالتحكيم بالإحالة وجود إشارة بالعقد الأصلي إلى وثيقة أخرى يرد بها بند التحكيم، ويشترط لصحة ذلك أن تكون هذه الإحالة مشار إليها صراحة بأنها أحد بنود العقد، وهو ما أشار إليه قانون الأونيسترال النموذجي للتحكيم 1985 المعدل في 2006. [٢٢]

ويجب أن يؤخذ التحكيم بالإحالة في المعاملات الإلكترونية بنوع من الحذر إذ أن المتعاقدين عبر الإنترنت غالباً لا يطلعون على بنود التعاقد الواردة في صفحات أخرى، وهو ما أثبتته إحدى الدراسات من حيث عدم قراءة الغالبية العظمى من المتعاملين عبر الإنترنت للشروط، [٢٣] كما قد تكون بلغة أخرى لا يفهمها المستهلك، أو أن تتعدد الإحالات من صفحة إلى صفحة أو من رابط إلى رابط، وهو ما قد يكون متعمداً لإخفاء شرط التحكيم.

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[١٨] إبراهيم إ.، 1997، ص85.

[١٩] عباس، 2011، ص493.

[٢٠] إبراهيم إ.، 1997، ص86.

[٢١] حسين، 2012، ص266.

[٢٢] حيث نص قانون الأونيسترال النموذجي للتحكيم في المادة (6/7) الخيار الأول المعدلة في 2006 على "تشكل الإشارة في العقد لأي مستند يتضمن بندا تحكيميا اتفاق تحكيم مكتوب، شريطة أن تكون الإشارة على نحو يجعل ذلك البند جزءا من العقد".

[23] http://www.sahafah24.net/show1033678.html . Accessed Jul20, 2017

وثمة رأي يذهب إلى أنه لكي يعتد باتفاق التحكيم الإلكتروني بالإحالة يجب أن يتضمن العقد الأصلي شرط التحكيم المشار إليه في الرابط أو الملف صراحة، وأن يكون متاحاً وممكنا الاطلاع عليه في أي وقت وأن يمكن تحميله على جهاز الكمبيوتر الخاص بالمتعاقد، وألا يكون مخفياً وسط الشروط العامة بل يجب إبرازه بوضوح وأن يكون زر القبول لاحقاً لمرحلة ما بعد الاطلاع على الشروط العامة التي يوجد بها اتفاق التحكيم.[٢٤]

وثمة رأي آخر يذهب إلى أنه لا يشترط قيام المتعاقد بقراءة الشرط أو الاطلاع عليه فعلاً طالما أنه وافق على إبرام العقد وكان متاحاً له الاطلاع عليه إلا أنه لم يفعل، ومن ثم فليس له الاحتجاج بتقصيره.[٢٥]

والحقيقة أنه قد يكون ذلك مقبولاً إذا كان الطرف الآخر تاجراً يهمه الوقوف على جميع شروط الصفقة، إلا أنه يجب التحوط في ذلك وخاصة إذا كان الطرف الآخر مستهلكاً غايته الحصول على السلعة ومعرفة الثمن فقط، إذ قد لا يهتم بأي شروط أخرى يصعب الوصول إليها من خلال الإحالة إلى صفحات أخرى ليفاجئ بها عند حدوث النزاع، فيجب التأكد من الاطلاع الفعلي عليه، لما قد يترتب عليه من إضرار بالمستهلك.

شرط الكتابة واتفاق التحكيم الإلكتروني :

لقي شرط كتابة اتفاق التحكيم جدلاً فقهياً حول مكافئة الكتابة الإلكترونية للتقليدية،[٢٦] وهو ما نبينه فيما يلي:

- **مرحلة ما قبل الاعتراف التشريعي بالوسائل الإلكترونية في اتفاق التحكيم:** ذهب الاتجاه الغالب في تشريعات التحكيم الوطنية إلى اشتراط كتابة اتفاق التحكيم وإلا كان باطلاً، [٢٧] وكذلك دولياً حيث نصت المادة (2) من اتفاقية (نيويورك 1958) من اشتراط كتابة اتفاق التحكيم، وقانون التحكيم النموذجي الصادر في 1985 في المادة (2/7) اشترط أن يكون اتفاق التحكيم مكتوباً، وهو ما كان يمثل إشكالية لاتفاق التحكيم الإلكتروني، وذهبت التفسيرات إلى مكافئة الكتابة الإلكترونية للتقليدية وفقاً للقانون النموذجي للمعاملات الإلكترونية، واتفاقية الخطابات الإلكترونية.

[24]CACHARD,2003, p18.

[٢٥] النعيمي، 2009، ص 220.

[26]CACHARD,2003, p19.

[٢٧] قانون التحكيم المصري (م 12)، قانون التحكيم السعودي (م 2/9)، قانون التحكيم الأردني (م 10/أ).

- **مرحلة الاعتراف التشريعي بالوسائل الإلكترونية في اتفاق التحكيم:** سعت لجنة الأونسيترال بالأمم المتحدة في دورتها الـ(39) عام 2006 لإدخال تعديلات على الوثائق التحكيم للاعتراف بالكتابة الإلكترونية في مجال التحكيم.

أولاً: توصية تفسير اتفاقية نيويورك (1958): قامت لجنة الأونيسترال بالأمم المتحدة (عام 2006) بإصدار توصيتها الخاصة بتفسير نص المادة (2/2) من اتفاقية نيويورك 1958 بعدم اعتبار الحالات الواردة فيها حصرية، لتتماشى هذه الاتفاقية مع اتفاق التحكيم الذي يبرم بالوسائل الإلكترونية، وليس بموجب الكتابة التقليدية فقط.[٢٨]

ثانياً: تعديل القانون النموذجي للتحكيم (1985): وكذلك قامت لجنة الأمم المتحدة بتعديل قانون الأونيسترال النموذجي للتحكيم (1985) في دورتها الـ(39) عام (2006) حيث قامت بتعديل المادة (7) المتعلقة باتفاق التحكيم ووضعت خيارين لها لتأخذ الدول بما يتناسب معها من حلول.[٢٩]

- **الخيار الأول: اتفاق التحكيم في الشكل الإلكتروني:** اعتبرت المادة 7 –الخيار الأول– كما جاء في الفقرة 4 منها ورود اتفاق التحكيم في شكل خطاب إلكتروني أو رسالة بيانات مستوفياً لشرط الكتابة ما دام أنه يمكن الرجوع لاحقاً إلى ما به من معلومات مبينة نماذج على سبيل المثال لا الحصر كتبادل البيانات الإلكتروني والبريد الإلكتروني.

- **تحول الكتابة من شرط انعقاد إلى دليل إثبات:** وقد ذهبت الفقرة 3 من المادة 7 إلى أوسع من ذلك حين اعتبرت أن الاتفاق يعتبر مكتوباً ما دام أن محتواه مدون في أي شكل حتى ولو تم الاتفاق على التحكيم أو العقد الذي أشار إليه شفويا أو بأي وسيلة أخرى، ويعتبر ذلك تحولاً كبيراً في شرط الكتابة في اتفاق التحكيم من اعتبارها شرطاً شكلياً لإبرام الاتفاق إلى اعتبارها أداة إثبات.

- **الإقرار الضمني بوجود اتفاق التحكيم:** وزادت الفقرة (5) من المادة (7) إلى الإشارة من أحد الطرفين بوجود اتفاق تحكيم في إحدى وسائل الادعاء أو الدفاع المتبادلة بينهما في أي شكل كانت تقليدياً أو الكترونياً مالم ينكرها الطرف الآخر بمثابة اتفاق تحكيم موجود حتى ولو لم يصرح الطرف الآخر بذلك وهو ما يعتبر إقراراً ضمنياً بوجود اتفاق

[28] http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/2006recommendation.html . Accessed Jul20, 2017.
[29] http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/1985Model_arbitration.html . Accessed Jul20, 2017.

التحكيم.

- **الخيار الثاني للمادة (7) من تعديل قانون التحكيم النموذجي:** جاء الخيار الثاني المعدل للمادة (7) في 2006 بصيغة عامة مسقطاً شرط الكتابة بالمرة ليفتح المجال أمام اتفاق التحكيم ليكون بأي طريقة كانت، حيث نصت على "اتفاق التحكيم هو اتفاق بين الطرفين على أن يحيلا إلى التحكيم جميع أو بعض ما نشأ أو ما قد ينشأ بينهما من نزاعات بشأن علاقة قانونية محددة، سواء أكانت تعاقدية أم غير تعاقدية".

وقد أخذت بعض القوانين الوطنية بتعديلات القانون النموذجي للتحكيم بعد تعديله في 2006 لتعترف باتفاق التحكيم الذي يتم بوسائل إلكترونية، ومنها قانون التحكيم القطري [٣٠] حيث اشترط في المادة (3/7) منه أن يكون اتفاق التحكيم مكتوباً وإلا كان باطلاً، وأقر باتفاق التحكيم الذي يرد في شكل رسائل إلكترونية.

المطلب الثاني: القانون الواجب التطبيق على اتفاق التحكيم الإلكتروني

استقر الرأي على مبدأ استقلالية اتفاق التحكيم عن العقد الأصلي –الذي ترتبت عليه المنازعة– حتى ولو كان شرطاً فيه، فلا يتأثر اتفاق التحكيم بما يعتري العقد الأصلي من بطلان إذ يبقى شرط التحكيم صحيحاً ما لم يصبه بطلان متعلق به، [٣١] وهو ما يعني أصالته واستقلاله بذاته، [٣٢] ويترتب على ذلك إمكانية أن يحكم كلاً من العقد الأصلي واتفاق التحكيم قانون مختلف. [٣٣]

ويعتمد اتفاق التحكيم بالأساس على رضا طرفيه وما يرتبط بذلك من ضرورة وجود الرضا وصحته، وتوافر الأهلية المتطلبة لإبرام هذا الاتفاق، ومدى قابلية محل اتفاق التحكيم موضوع النزاع للطرح أمام التحكيم. [٣٤]

القانون الواجب التطبيق على الرضا في اتفاق التحكيم:

[٣٠] القانون رقم (2) لسنة 2017 الصادر في 2017/2/16 والمنشور بالجريدة الرسمية بتاريخ 2017/3/13منشور على الموقع التالي: http://www.legal.gov.qa/LawArticles.aspx?LawTreeSectionID=17542&lawId=7156&language=ar. Accessed Jul20, 2017

[٣١] المادة (1/16) من قانون الأونيسترال النموذجي للتحكيم 1985، المادة (23) من قانون التحكيم المصري.

[٣٢] رضوان، 1995، ص37.

[٣٣] حسين، 2012، ص271.

[٣٤] النعيمي، 2009، ص222.

أول ما يتوجب على المحكم عمله التحقق من وجود اتفاق التحكيم وصحته وفقاً للقانون الواجب التطبيق، فاتفاق التحكيم الباطل لا يعطيه الحق في مباشرة التحكيم، كما أن القاضي الذي يطلب منه تنفيذ حكم تحكيم قام على اتفاق تحكيم باطل يمتنع عليه إصدار قرار بتنفيذه.[٣٥]

أولاً: قانون الإرادة: الأصل خضوع اتفاق التحكيم إلى القانون المختار من قبل الأطراف إعمالاً لمبدأ سلطان الإرادة باعتباره أحد المبادئ المستقرة دولياً، فعند البحث عن وجود الرضا الخاص باتفاق التحكيم أو صحته أو ما قد يعتريه من عيوب، يتم الرجوع إلى القانون المختار من قبل الأطراف صراحة أو ضمناً.[٣٦]

ثانياً: قانون مكان التحكيم: يعتبر القانون البديل لعدم اختيار الأطراف للقانون الواجب التطبيق على اتفاق التحكيم هو قانون مكان التحكيم وفق ما أقرت اتفاقية نيويورك،[٣٧] ووفق ما نص عليه القانون النموذجي للتحكيم.[٣٨]

ويعتبر قانون مكان التحكيم إحدى الإشكاليات في التحكيم الإلكتروني وهو ما سنتناوله عند تناول مكان التحكيم.

القانون الواجب التطبيق على الأهلية في اتفاق التحكيم:

يعتبر القانون الواجب التطبيق على الأهلية هو القانون الشخصي وفقاً للاتجاهات السائدة في القانون الدولي الخاص سواء أكان هذا القانون قانون الجنسية أو الموطن،[٣٩] وتذهب أغلب التشريعات والاتفاقيات الدولية إلى تطبيق القانون الشخصي للمتعاقد على الأهلية في اتفاق التحكيم، وترتب على عدم اكتمال أهليته بطلان حكم التحكيم.[٤٠]

وتمثل معرفة أهلية المتعاقدين في اتفاق التحكيم الإلكتروني صعوبة لأن المعاملات تتم عن بعد، وهو ما قد يؤدي إلى بطلان اتفاق التحكيم بل وبطلان العملية التحكيمية برمتها إذا تبين عدم أهلية المتعاقدين، إلا أنه يمكن التغلب على هذه

[٣٥] إبراهيم إ.، 1997، ص63.

[٣٦] سلامة أ.، 2008، ص175.

[٣٧] المادة (5-1-أ) من اتفاقية الاعتراف بقرارات التحكيم الأجنبيةوتنفيذها نيويورك1958.

[٣٨] المادة (34-2-أ-1) من قانون الأونيسترال النموذجي للتحكيم1985.

[٣٩] عشوش، 1989، ص13.

[٤٠] المادة (53-1-ب) من قانون التحكيم المصري، المادة (33-2-أ) من قانون التحكيم القطري، مادة (5-1-أ) من اتفاقية نيويورك1958.

الإشكالية من خلال مقدمي خدمات التصديق للتأكد من شخصية المتعاقد وهويته.[٤١]

وفي سعي لجنة الأمم المتحدة للقانون التجاري الدولي لوضع حد لهذه الإشكالية تناولت في "مشروع القواعد الإجرائية" الصادر في فبراير 2015 الخاص باستخدام منصات تسوية المنازعات في مشروع المادة (4) منه على ضرورة تقديم المدعي والمدعى عليه ما يفيد تحديد الهوية والتوثق منها والذي يؤدي بدوره إلى التأكد من أهلية الأطراف، [٤٢] وهو ما أقرته أيضاً "ملاحظات الأونيسترال التقنية بشأن التسوية الحاسوبية 2016" في الملاحظتين (33،35) منها.[٤٣]

القانون الواجب التطبيق على المحل في اتفاق التحكيم الإلكتروني:

يقصد بمحل اتفاق التحكيم موضوع النزاع المطلوب حله،والذي يشترط إمكانية حله عن طريق التحكيم وهو ما يسمى بقابلية موضوع النزاع للتحكيم، حيث تستثني بعض التشريعات بعض الموضوعات من خضوعها للتحكيم، [٤٤] ومن الأهمية بمكان أن يراعى بالنسبة لمحل التحكيم قابلية خضوعه للتحكيم لدى الدولة التي يراد تنفيذ حكم التحكيم لديها، وكذلك بالنسبة لدولة مكان التحكيم، ومن ذلك منع المستهلك أو وضع قيود على إبرامه اتفاق تحكيم عند إبرام المعاملات الإلكترونية –حماية له– من ممارسات التاجر.[٤٥]

ومن ثم فإن القانون الواجب التطبيق على محل اتفاق التحكيم هو القانون الواجب التطبيق على اتفاق التحكيم بصفة عامة سواء أكان قانون الإرادة أو قانون محل التحكيم، إلا أنه مراعاة لأن يكون التحكيم منتجاً لأثره وقابلاً للتنفيذ فإن ذلك مشروط بمراعاة قانون البلد الذي سيتم التنفيذ فيه بأن يكون موضوع التحكيم قابلاً للتسوية بموجب التحكيم وفقاً لقانون

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[٤١] النعيمي، 2009، ص225.

[٤٢] الوثيقة رقم A/CN.9/WG.III/WP.133 المنشورة على الرابط التالي:
https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/080/63/PDF/V1408063.pdf?OpenElement. استخراج في 20يوليو2017

[٤٣] منشورة على الرابط التالي: http://www.uncitral.org/pdf/arabic/texts/odr/V1700380_Arabic_Technical_Notes_on_ODR.pdf استخراج في 21يوليو 2017.

[٤٤] مادة (2) من قانون التحكيم السعودي. حيث استثنت مسائل الأحوال الشخصية والأمور التي لا يجوز فيها الصلح.

[٤٥] النعيمي، 2009، ص226.

بلد التنفيذ، وألا يتعارض مع النظام العام أو السياسة العامة لهذه الدولة، وهو ما أكده قانون التحكيم النموذجي، [٤٦] واتفاقية نيويورك.[٤٧]

المبحث الثاني: القانون الواجب التطبيق على إجراءات التحكيم الإلكتروني

المطلب الأول: ماهية إجراءات التحكيم الإلكتروني

التفرقة بين ما هو إجرائي وما هو موضوعي من الأمور الدقيقة، التي قد تختلف من قانون لآخر ويصعب وضع معيار محدد للتفرقة بينهما، فمن القواعد القانونية ما قد يمس الإجراءات والموضوع في آن واحد، وللتفرقة بينهما يرجع في ذلك إلى عملية التكييف في قانون القاضي الذي يعرض عليه النزاع، [٤٨] والنواحي الإجرائية لا ترتبط بمرحلة معينة، فقد تسبق النزاع وقد تكون أثناء نظره أو حتى بعد صدور الحكم وعند تنفيذه.

ويدخل في الإجراءات كيفية بدء الخصومة، وتبادل الخطابات الإلكترونية بين الأطراف، وتحديد مكان التحكيم، واللغة المستخدمة، وكيفية اختيار المحكمين والضوابط الخاصة بهم، وكيفية انعقاد الجلسات، وتقديم مذكرات الدفاع، وأدلة الإثبات وضوابطها، وما يتعلق بالشهود والخبراء، والمدد والمواعيد المقررة بصفة عامة، وما يتعلق بالإجراءات التحفظية والوقتية، وكيفية إصدار الأحكام وطلب تصحيحها أو تفسيرها أو الاعتراض عليها.....إلخ.

وتبدو أهمية تحديد الأطراف للقانون الواجب التطبيق على الإجراءات الخاصة بالتحكيم لما يحققه من تحديد كيفية سير المنازعة وضمان حقوق كل الأطراف، وتحديد الوسائل الفنية التي تضمن احترام المبادئ الأساسية للتقاضي وحل النزاعات كاحترام حق الدفاع ومبدأ المواجهة، وما يتعلق بالنواحي الإلكترونية الخاصة بالمنازعة وضوابطها.[٤٩]

الإجراءات بين التحكيم الحر وتحكيم المؤسسات:

قد تختلف الإجراءات المتبعة في التحكيم بحسب نوعه، ففي التحكيم الحر والذي يلجأ فيه الأطراف لاختيار محكمين

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[٤٦] مادة (34-2-ب) من قانون الأونيسترال النموذجي للتحكيم 1985.

[٤٧] مادة (5-2) اتفاقية الاعتراف بقرارات التحكيم الأجنبيةوتنفيذها نيويورك1958.

[٤٨] التلاحمة، 2013، ص11.

[٤٩] فضل، 2011، ص332.

مستقلين لا يتبعون أحد مراكز التحكيم، قد يختار الأطراف قانوناً معيناً لحكم إجراءات التحكيم، وقد يضعون قواعد خاصة بهم لا تنتمي لقانون محدد.

أما مؤسسات التحكيم غالباً ما تضع قواعد إجرائية خاصة بها تطبق حال عدم اختيار الأطراف للقانون الواجب التطبيق على الإجراءات، ومن أمثلة ذلك قواعد تحكيم غرفة التجارة الدولية (ICC) والصادرة عام 2012 المعدلة 2107،[٥٠] وكذلك قواعد محكمة لندن للتحكيم (LCIA) الصادرة في عام 1998 والمعدلة في 2014،[٥١] وقواعد جمعية التحكيم الأمريكية (AAA) المعدلة في 2014،[٥٢] كما أصدرت لجنة القانون التجاري بالأمم المتحدة قواعد خاصة بإجراءات التحكيم والتي صدرت في نسختها الأولى عام 1976 ثم نقحت في عام 2010 وفي عام 2013.[٥٣]

ومع تغيير المؤسسات لقواعدها الإجرائية، يثور التساؤل أيهما يسري في حال كان اتفاق التحكيم قد تم في ظل إحداها وثارت المنازعة في ظل قواعد أخرى، تذهب بعض مؤسسات التحكيم إلى تطبيق القواعد السارية عند بدء التحكيم ما لم يتفق الأطراف على خلاف ذلك.[٥٤]

تحديد مكان التحكيم وأهميته:

يؤثر مكان التحكيم على التحكيم بصفة عامة وعلى الإجراءات بصفة خاصة، وفقاً للاتجاه الذي يرى أن لقانون مكان التحكيم دوراً احتياطياً عند غياب الإرادة الصريحة بالنسبة لتحديد القانون الواجب التطبيق على إجراءات التحكيم.[٥٥]

ويسهل تحديد مكان التحكيم في التحكيم التقليدي، إلا أن الأمر يختلف في التحكيم الإلكتروني الذي تتلاشى فيه الحدود الجغرافية، ويصعب معه تحديد مقر التحكيم واقعياً، ومن ثم فلن يكون تحديد المكان افتراضياً، ولا يرتبط مادياً بالضرورة بالأماكن التي تتم فيها إجراءات التحكيم.[٥٦]

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[50] https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ . Accessed Jun30, 2017.
[51] http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx . Accessed Jun30, 2017.
[52] www.icdr.org. Accessed Jun30, 2017.
[53] http://www.uncitral.org/uncitral/ar/uncitral_texts/arbitration/2010Arbitration_rules.html .Accessed Jun30, 2017.
[٥٤] مادة (6-1) قواعد غرفة التجارة الدولية 2017، مادة (1-1) قواعد جمعية التحكيم الأمريكية2014.
[٥٥] رضوان، 1995، ص94؛التلاحمة، 2013، ص13.
[٥٦] شرف الدين، 2003، ص57

ويذهب رأي إلى أن مفهوم مقر التحكيم مفهوم قانوني بحت [٥٧] يختاره الأطراف أو هيئة التحكيم، وليس مكان مادي محدد مثل مكان المرافعات أو مكان توقيع الحكم، بل لهيئة التحكيم الاجتماع في غير المكان المحدد كمقر للتحكيم. [٥٨]

الإجراءات التحفظية والوقتية في التحكيم الإلكتروني:

تعتبر الإجراءات التحفظية والوقتية من الأمور الهامة عند نظر النزاعات فقد يتطلب الأمر اتخاذ بعض الإجراءات السريعة المؤقتة للحفاظ على الحق لحين صدور حكم نهائي، فلو لم يتم اتخاذ هذه التدابير لأصبح الاستمرار في التحكيم لا طائل منه لضياع هذا الحق المتنازع عليه.

ويحق لمحكمة التحكيم نظر مثل هذه الإجراءات التحفظية وإصدار قرارات أو أوامر بشأنها، إلا أنه قد يصعب أحياناً على هيئة التحكيم القيام بذلك، فيتم اللجوء إلى المحكمة المختصة من قبل أحد الأطراف، [٥٩] أو بناء على طلب هيئة التحكيم ذاتها؛ [٦٠] لإصدار قرار وقتي، ومن ثم فإنه من المستقر عليه أنه لا يمنع اختصاص التحكيم بنظر منازعة ما من اللجوء إلى القضاء بشأن نظر إجراء تحفظي أو وقتي متعلق بموضوع التحكيم، ولا يعني ذلك تخلياً عن التحكيم. [٦١]

سماع الشهود والخبراء في التحكيم الإلكتروني:

تنعقد جلسات التحكيم الإلكتروني غالباً بوسائل إلكترونية بطرق مشفرة وآمنة، ويمكن سماع الشهود والخبراء ومناقشتهم من خلال هذه الوسائل الإلكترونية دون حاجة لحضورهم الشخصي، إلا أنه لا يوجد ما يمنع من الحضور الشخصي إذا ارتأت هيئة التحكيم ذلك لأن شهادة الشهود والخبراء تخضع لتقييم القاضي، من خلال المناظرة الشخصية ومتابعة الانفعالات، والتي تظهر بوضوح في المقابلات الحية أكثر منها في اللقاءات الإلكترونية، وهو ما يمثل دوراً في تشكيل قناعة هيئة التحكيم بهذه الشهادة ويكون أوقع في الاطمئنان إلى تحقيق العدالة. [٦٢]

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[٥٧] نقض فرنسي 1997/10/28 مشار إليه لدى؛ شرف الدين، 2003، ص111.

[٥٨] مادة (28) قانون التحكيم المصري.

[٥٩] مادة (14) قانون التحكيم المصري.

[٦٠] مادة (22) قانون التحكيم السعودي.

[٦١] مادة (26-9) من قواعد الأونيسترال للتحكيم 2013.

[٦٢] شرف الدين، 2003، ص56.

المطلب الثاني: القانون الواجب التطبيق على إجراءات التحكيم الإلكتروني

اختيار الأطراف للقانون الواجب التطبيق على الإجراءات:

يعتبر اختيار الأطراف الصريح لإجراءات التحكيم هو الأصل في تحديد القانون الواجب التطبيق على الإجراءات، ويذهب رأي في تفسير ذلك إلى أن إعطاء الحق للأطراف في اختيار القواعد التي تحكم الإجراءات يعود للطبيعة التعاقدية للتحكيم –مع الأخذ في الاعتبار الطبيعة القضائية له– ومن ثم فاتفاق الأطراف صراحة على تطبيق قانون بلد معين بدون تحديد مكان التحكيم يتعين تفسيره على أن إرادتهم المشتركة قد اتجهت إلى اختيار مكان التحكيم في البلد الذي تم اختيار قانونه ليحكم الإجراءات، وكذلك الأمر إذا لم يتفق الأطراف على القانون الواجب التطبيق على الإجراءات لكنهم قاموا بتحديد مكان التحكيم فإن قانون إجراءات هذا المكان هو الذي تجري بموجبه الإجراءات باعتبار ذلك اختياراَ ضمنياً للأطراف، [٦٣] إلا أن هذه القرينة ليست قاطعة ولا تعني عدم إمكانية إثبات عكسها أو استبعادها بقرائن أخرى. [٦٤]

وتستقر أغلب التشريعات على إخضاع إجراءات التحكيم –بحسب الأصل– لاختيار الأطراف، [٦٥] الذي يمكن أن يكون اختيارهم اختياراً حراً للقواعد الإجرائية لا يرتبط بقانون محدد، أو اختياراً لقانون وطني معين أو قواعد دولية أو لقواعد إحدى مراكز التحكيم، وقد تشترط بعض التشريعات عدم مخالفة هذه الإجراءات لبعض المبادئ أو الأحكام كالشريعة الإسلامية مثلاً. [٦٦]

وتسير الاتفاقات الدولية والقوانين النموذجية [٦٧] على ذات النهج في ترك إجراءات التحكيم لاختيار الأطراف بحسب الأصل، ثم قانون مكان التحكيم في حال عدم الاختيار وفق ما قررت اتفاقية نيويورك. [٦٨]

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[٦٣] رضوان، 1995، ص94.

[٦٤] التلاحمة، 2013، ص34.

[٦٥] مادة (25) من قانون التحكيم المصري، مادة (19) من قانون التحكيم القطري، مادة (1043) من قانون الإجراءات المدنية والإدارية الجزائري الذي ينظم التحكيم.

[٦٦] مادة (25) من قانون التحكيم السعودي.

[٦٧] مادة (19–1) قانون التحكيم النموذجي 1985، مادة (35–1) قواعد الأونيسترال للتحكيم 2013.

[٦٨] مادة (5–1–د) اتفاقية نيويورك 1958.

اختيار هيئة التحكيم لإجراءات التحكيم وضوابطه:

اتجه القانون النموذجي للتحكيم إلى إعطاء هيئة التحكيم مكنة واسعة في اختيار القانون الواجب التطبيق حال عدم اختيار الأطراف للقانون الواجب التطبيق على الإجراءات صراحة أو ضمناً، [٦٩] وهو ذات النهج التي سارت عليه أغلب تشريعات التحكيم، فهل سلطة هيئة التحكيم في اختيار القواعد أو القانون الواجب التطبيق على إجراءات التحكيم سلطة مطلقة من كل قيد، ودون ضوابط.

تتراوح اتجاهات التشريعات في ذلك حيث يذهب اتجاه إلى إطلاق يد المحكمين كقانون التحكيم المصري الذي يعطي هيئة التحكيم اختيار الإجراءات التي ترى أنها مناسبة إلا من قيد مراعاة أحكام القانون، [٧٠] وهو ما ذهب له القانون القطري للتحكيم.[٧١]

وبعض التشريعات تقيد اختيار المحكمين وفق نهجها العام في تشريعاتها كنظام (قانون) التحكيم السعودي الذي يعطي الحرية المطلقة للمحكمين في تنظيم إجراءات التحكيم حال عدم اختيار الأطراف شريطة مراعاة أحكام الشريعة الإسلامية،[٧٢] وقد تكون هذه القواعد من اجتهاد المحكمين لا ترتبط بقانون معين أو أنها تستند إلى قانون معين أو نظام تحكيم محدد.[٧٣]

ويرى البعض أن إطلاق الحرية للمحكم في تحديد الإجراءات لا تعني قدرته على اتباع أو اتخاذ أي إجراء أثناء التحكيم، بل المقصود إطلاق سلطته في تحديد هذه الإجراءات قبل البدء فيها، [٧٤] كما تخضع هذه الحرية للمراقبة من السلطات المختصة في دولة مقر التحكيم حيث يتعين على المحكم الالتزام بالنصوص الإجرائية الآمرة في قانون دولة مقر التحكيم، واحترام

[٦٩] مادة (19–2) قانون التحكيم النموذجي 1985.
[٧٠] مادة (25) من قانون التحكيم المصري.
[٧١] مادة (19–2) قانون التحكيم القطري.
[٧٢] مادة (25–2) من نظام التحكيم السعودي.
[٧٣] مادة (1043) من قانون الإجراءات المدنية والإدارية الجزائري.
[٧٤] إبراهيم إ.، 1997، ص133.

حدود السلطة المخولة له في اتفاق التحكيم ذاته بالنسبة لمسألة تنظيم الإجراءات.[٧٥]

فضلاً عن ضرورة الالتزام بالمبادئ الأساسية للتقاضي [٧٦] كالمساواة[٧٧] والمواجهة بين الخصوم وكفالة حق الدفاع،ومخالفة ذلك يرتب البطلان، فضلاً عن رفض التنفيذ،[٧٨] ويجب تجنب إطالة أمد النزاع والنفقات غير الضرورية.[٧٩]

والحقيقة أن إعطاء هيئة التحكيم الحرية في اختيار القواعد واجبة التطبيق على الإجراءات وتكملة النقص في القواعد الإجرائية عند عدم اختيار الأطراف لها أمر محمود خاصة في التحكيم الإلكتروني إذ قد تخلو بعض التشريعات الخاصة بالتحكيم من القواعد التي تستطيع التعامل مع نواحي التكنولوجيا، وهو ما يعطي للمحكمين فرصة لاختيار القوانين أو القواعد التي تتناسب مع ذلك.

المبحث الثالث: القانون الواجب التطبيق على الموضوع في التحكيم الإلكتروني

المطلب الأول: النواحي الموضوعية في منازعة التحكيم الإلكتروني

نتناول في هذا المطلب بيان ما هي النواحي الموضوعية في منازعة التحكيم الإلكتروني، حيث يعتبر من النواحي الموضوعية في التحكيم كل نزاع يتعلق بالمسائل الموضوعية في العقد الإلكتروني موضوع النزاع، كالمنازعات التي تنشأ عن تكوين العقد الإلكتروني ووجوده من حيث مدى توافر الإرادة وصحتها وعيوبها، والتعبير عنها، واقتران الإيجاب بالقبول، وأحكام مجلس العقد.[٨٠]

ومن المسائل الموضوعية في التحكيم النزاعات المتعلقة بمحل العقد وما يرتبط بشروطه من حيث وجوده أو إمكانية وجوده، وما إذا كان معيناً او قابلاً للتعيين، ومدى قابليته للتعامل فيه.

وكذلك النزاعات المتعلقة بسبب العقد الإلكتروني ومدى مشروعيته، والنزاعات المتعلقة بالالتزامات المتبادلة ومدى تنفيذ كل

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[٧٥] التلاحمة، 2013، ص34.

[٧٦] زمزمي، 2009، ص382.

[٧٧] مادة (26) قانون التحكيم المصري.

[٧٨] مادة (5-1-ب،د) اتفاقية نيويورك 1958.

[٧٩] مادة (14-4) من قواعد محكمة لندن للتحكيم 2014.

[٨٠] راجع: قاسم، 2005، مجاهد، 2007، بهجت، 2009.

طرف لالتزاماته سواء أكان التنفيذ إلكترونياً أو مادياً، ، وانقضاء العقد الإلكتروني وصوره.

ومن ضمن النواحي الموضوعية الإخلال بالالتزامات المترتبة على العقد وما يترتب عليها من مسئولية عقدية وتوافر عناصرها وآثارها في المنازعة، وكذلك الفعل غير المشروع الذي ينتج عن طريق الخطأ الإلكتروني غير المشروع وما يسببه من أضرار وما يترتب عليه من مسئولية والتزام.[٨١]

المطلب الثاني: القانون الواجب التطبيق على موضوع التحكيم الإلكتروني

تمثل إرادة الأطراف الأساس في أغلب المراحل، ومنها اختيار الأطراف للقانون الواجب التطبيق على موضوع التحكيم، إعمالاً لقانون الإرادة، وقد تأتي إرادة الأطراف صريحة في الاختيار، وقد تكون ضمنية تستفاد من ملابسات العقد ويستظهرها المحكم، أو مفترضة يفترضها المحكم عند غياب الإرادة الصريحة أو الضمنية من خلال تحديد القانون الأكثر صلة بالنزاع أو الأنسب لحكم العلاقة.[٨٢]

اختيار الأطراف للقانون الواجب التطبيق على موضوع النزاع:

استقر الرأي على أن لأطراف النزاع حرية اختيار القانون الواجب التطبيق على موضوع النزاع، فهل حرية الأطراف في ذلك مطلقة..أي هل لهم أن يختاروا أي قانون حتى ولو لم يكن ذو صلة بالنزاع، وهل أصلاً عند قيامهم بالاختيار يلزم أن يكون اختيارهم من بين القوانين الوطنية، وهل اختيارهم لأحد القوانين الوطنية يعني اختيار قواعد التنازع الموجودة به أم القواعد الموضوعية، وهل يمكن لاختيارهم أن يتخطى القوانين الوطنية أم يمكن أن ينصب اختيارهم على قانون دولي أو عقود نموذجية أو أعراف دولية لا ترتبط بقانون وطني.

ولقد ذهبت إحدى الآراء إلى أن للأطراف الحرية المطلقة في اختيار القانون الواجب التطبيق على موضوع النزاع دون اشتراط صلة بين القانون المختار والعقد موضوع النزاع ما دام أن هذا الاختيار قد تم بحسن نية، [٨٣] ولا يتضمن غشاً نحو

[٨١] في المسئولية عن الأخطاء الإلكترونية راجع: منصور، 2007.

[٨٢] في تفصيل قانون الإرادة ونظرياته راجع:سلامة أ.، 2008، ص157 وما بعدها، صادق، 2001،ص 128 وما بعدها، ياقوت، 2000، ص24 وما بعدها.

[٨٣] رضوان، 1995، ص130.

القانون الذي كان من المفترض أن يحكم النزاع أو مخالفة للنظام العام والقواعد الآمرة للدولة ذات الشأن. [٨٤]

فحرمان الأطراف من حريتهم في اختيار قانون ليس له صلة بالعقد يخالف حقهم في الاختيار ابتداءً، ويفرغه من مضمونه، وينفي عنه وصفه قانون الإرادة. [٨٥]

وهذا الرأي يتناسب مع المعاملات الإلكترونية، فقد يؤدي اشتراط وجود صلة بين القانون المختار وموضوع النزاع إلى تطبيق قانون يفتقر إلى تنظيم المعاملات الإلكترونية أو التحكيم الإلكتروني، فضلاً عن صعوبة إمكانية وجود هذه الصلة في المعاملات الإلكترونية التي يصعب في الغالب تحديد صلاتها الجغرافية.

ويحق لأطراف النزاع الاختيار من بين قواعد مستقاة من قوانين وطنية أو دولية أو أي قوانين نموذجية، إلا أنه يعتبر اختيار الأطراف لأحد القوانين الوطنية لحكم موضوع النزاع هو بمثابة اختيار للقواعد الموضوعية بهذا القانون لا قواعد التنازع به إذ القول بغير ذلك قد يؤدي إلى تطبيق حلول وقوانين لم يكن يقصدها الطرفان عند اختيارهم للقانون الواجب التطبيق.

وذهب قانون التحكيم النموذجي إلى إعطاء الحرية للأطراف في اختيار القواعد والقوانين التي تحكم موضوع النزاع، وأن اختيار الأطراف لأحد القوانين الوطنية يعني اختيار القواعد الموضوعية فيه لا قواعد التنازع الموجودة به ما لم يتم الاتفاق على خلاف ذلك صراحة، [٨٦] وسارت على ذات النهج أغلب القوانين والتشريعات الوطنية، [٨٧] كما تسير على ذلك قواعد مراكز التحكيم ومنها قواعد تحكيم غرفة التجارة الدولية، [٨٨] وقواعد جمعية التحكيم الأمريكية. [٨٩]

اختيار القانون الواجب التطبيق على موضوع النزاع بواسطة المحكمين وضوابطه:

١ – **إطلاق يد المحكمين في اختيار القانون الواجب التطبيق:** يذهب اتجاه إلى إطلاق يد المحكمين في اختيار القانون

[٨٤] سلامة أ.، 2008، ص191

[٨٥] صادق، 2001، ص439.

[٨٦] مادة (28–1) قانون الأونيسترال للتحكيم النموذجي.

[٨٧] مادة (39) قانون التحكيم المصري،مادة (28–1) قانون التحكيم القطري، مادة (38–1–أ) قانون التحكيم السعودي، مادة (1050) من القانون الجزائري.

[٨٨] مادة (21–1) من قواعد محكمة التحكيم الدولية التابعة لغرفة التجارة الدولية (ICC) الصادرة في 2017.

[٨٩] مادة (31–1) من إجراءات تسوية المنازعات الدولية الصادرة عن المركز الدولي لحل المنازعات (ICDR) التابع لجمعية التحكيم الأمريكية (AAA) الصادرة في 2014.

الواجب التطبيق على موضوع النزاع حال عدم اتفاق الأطراف على اختياره، حيث يعطي للمحكم تطبيق القواعد القانونية أو القوانين التي يرى أنها مناسبة للنزاع من وجهة نظره، وليس شرطاً أن يكون اختيار المحكم لقوانين وطنية فقط فقد تكون قواعد دولية أو شروطاً وعقود نموذجية، وقد أخذت بهذا الاتجاه الذي يطلق يد المحكم في اختيار القانون واجب التطبيق أغلب مراكز ومؤسسات التحكيم.[٩٠]

٢ – **تقييد المحكمين باتباع قواعد تنازع القوانين:** ويذهب اتجاه إلى عدم إطلاق يد المحكم في اختيار القانون إنما تقييده باتباع قواعد التنازع من حيث تطبيق القانون التي تدل عليه قواعد تنازع القوانين التي ترى أنها واجبة التطبيق، فهذا الاتجاه لم يعطي المحكم حرية اختيار القواعد القانونية مباشرة إنما أوجب عليه أن يعمل قواعد تنازع القوانين أولاً حتى تدله على القانون الواجب التطبيق، وقد أخذ بهذا النهج قانون الأونيسترال النموذجي للتحكيم، [٩١] إلا أنه من الملاحظ أن قواعد الأونيسترال للتحكيم –بعكس القانون النموذجي– أخذت بالاتجاه السابق الذي يطلق الحرية للمحكم في اختيار القانون الواجب التطبيق،[٩٢] ومن التشريعات الوطنية التي أخذت بهذا الاتجاه القانون القطري.[٩٣]

والحقيقة أنه على الرغم من أن هذا الاتجاه المقيد يحد المحكم الذي يجنح في اختياره بتطبيق قواعد قد تخالف توقعات الأطراف، ويجعله مقيداً بالقانون الذي توصله إليها قواعد التنازع، إلا أن هذا الاتجاه قد يجد صعوبة في التحكيم الإلكتروني وفي المعاملات الإلكترونية التي يصعب توطينها مكانياً ومن ثم يصعب معه إعمال قواعد تنازع القوانين لصعوبة التوطين المكاني الذي يقوم عليه تنازع القوانين، إلا أنه يحقق ما يسمى بالأمان القانوني.

٣ – **تطبيق القواعد الموضوعية بالقانون الأكثر اتصالا بالنزاع:** ويذهب هذا الاتجاه والذي أخذ به التشريع المصري [٩٤]

[٩٠] مادة (31–1) من قواعد جمعية التحكيم الأمريكية، مادة (3/22) من قواعد محكمة تحكيم لندن، مادة (1/21) قواعد تحكيم غرفة التجارة الدولية.

[٩١] مادة (28–2) من قانون الأونيسترال النموذجي للتحكيم.

[٩٢] مادة (35–1) من قواعد الأونيسترال الخاصة بالتحكيم.

[٩٣] مادة (28–2) من قانون التحكيم القطري.

[٩٤] مادة (39–2) من قانون التحكيم المصري.

والسعودي[٩٥] مسلكاً وسطاً حيث لم يطلق يد المحكم لاختيار أي قوانين سواء وطنية أو غير وطنية، وفي ذات الوقت لم يقيده باتباع طرق تنازع القوانين، إنما غل يد المحكم عن البحث في غير القواعد الوطنية وجعل حريته محصورة في الاختيار من بين القوانين الوطنية الأكثر اتصالاً بالنزاع، وفي ذات الوقت وجهه لإعمال القواعد الموضوعية في هذه القوانين الوطنية، وليست قواعد التنازع كما في الاتجاه المقيد.

وتكاد تجمع جميع الاتجاهات التشريعية السابقة على أمرين وهما: ضرورة مراعاة المحكم لشروط العقد والأعراف التجارية التي ترتبط بنوع المعاملة، وفي ذات الوقت حظر المحكم في اختياره عن الخروج عن تطبيق القوانين سواء الوطنية أو الدولية تحت مسمى قواعد العدل والإنصاف إلا إذا اتفق الأطراف صراحة على ذلك، [٩٦] فمراعاة الأعراف التجارية أمر قد تقتضيه طبيعة المعاملات الدولية، والمعاملات الحديثة حيث يعطي ذلك مكنة للمحكم حال مواجهته لأمور مستحدثة لم تنظم قانونياً أن يراعي الأعراف التجارية المرتبطة بذلك.

المبحث الرابع: حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه

يمثل حكم التحكيم ثمرة العملية التحكيمية، وبصدوره من المفترض انتهاء النزاع، باعتبار أن حكم التحكيم نهائي، لا يجوز الطعن عليه، إلا بموجب إقامة دعوى بطلان حكم التحكيم،[٩٧] إذا ما شابه مخالفة تستوجب إلغاءه.[٩٨]

المطلب الأول: شكل حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه

شرط كتابة حكم التحكيم وتوقيعه: نص قانون التحكيم النموذجي، [٩٩] وقواعد الأونيسترال للتحكيم، [١٠٠] على وجوب كتابة حكم التحكيم، وأن يكون ممهوراً بتوقيع أغلبية المحكمين، مع بيان سبب عدم توقيع باقي هيئة التحكيم.

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[٩٥] مادة (38-1-ب) من نظام التحكيم السعودي.

[٩٦] مادة (28-3،4) من قانون الأونيسترال للتحكيم النموذجي، مادة (35-2،3) من قواعد الأونيسترال للتحكيم النموذجي، مادة (21-2،3) من قواعد تحكيم غرفة التجارة الدولية، مادة (31-2،3) من قواعد تحكيم جمعية التحكيم الأمريكية، مادة (39-3،4) من قانون التحكيم المصري، مادة (28-3،4) من قانون التحكيم القطري، مادة (38-1،2) من قانون التحكيم السعودي.

[٩٧] مادة (52) من قانون التحكيم المصري.

[٩٨] الهواري، 2012، ص415.

[٩٩] مادة (31-1) من قانون التحكيم النموذجي.

[١٠٠] مادة (34) من قواعد الأونيسترال للتحكيم.

وقد اشترطت اتفاقية نيويورك أن يتم تقديم قرار التحكيم الأصلي مصدقاً عليه حسب الأصول المعتمدة أو نسخة منه معتمدة حسب الأصول.[١٠١]

ويثور التساؤل هل يغني الشكل الإلكتروني للحكم الإلكتروني عن الشكل الكتابي التقليدي، وهل معنى تقديم الأصل ممهوراً بالتوقيع يعني أصل الحكم في شكله التقليدي وعليه توقيعات حية للمحكمين، خاصة وأن التقنية الإلكترونية حالياً تمكن الأفراد من التوقيع الحي إلكترونياً على المستندات الإلكترونية من خلال القلم الإلكتروني، فهل يغني ذلك عن الشكل التقليدي أم أن مقصد القانون النموذجي واتفاقية نيويورك هو صدور الحكم وتوقيعه بالشكل التقليدي.

يمكن القول بأن القانون النموذجي للتجارة الإلكترونية، [١٠٢] والقانون النموذجي بشأن التوقيعات الإلكترونية، [١٠٣] واتفاقية الخطابات الإلكترونية، [١٠٤] يمكن أن يكون لهم دور في حل هذه الإشكالية على أساس ارتباط التحكيم الإلكتروني بالمعاملات التجارية الدولية ومن ثم يمكن اعتبار النص على شرط الكتابة في حكم التحكيم الإلكتروني يمتد ليشمل الكتابة الإلكترونية، إلا أنه إذا كان يصلح ذلك مع العقود إلا أنه لا يصلح مع الأحكام من الناحية الواقعية.

ومن الجدير بالملاحظة أن القانون النموذجي للتحكيم الصادر 1985 قد تم تعديل المادة (7) منه في 2006 لتنص صراحة على توافر شرط الكتابة في اتفاق التحكيم إذا ما تم في شكل إلكتروني، إلا أنه لم يتم تعديل نص المادة (31) من ذات القانون النموذجي والتي تتطلب شرط الكتابة في حكم التحكيم لينص على توافر شرط الكتابة في صور الكتابة الإلكترونية بالنسبة لحكم التحكيم.[١٠٥]

كما صدرت توصية من الأمم المتحدة في عام 2006 خاصة باتفاقية نيويورك1958 بشأن تفسير نص المادة (2) منها والخاصة بشرط الكتابة في اتفاق التحكيم ليتوسع في تفسيره وعدم الاقتصار على شكل الكتابة التقليدية، إلا أنه وفي ذات الوقت لم يتم الإشارة إلى المادة (4) من الاتفاقية الخاصة بحكم التحكيم وشكله والتوصية بالتوسع في تفسيرها.

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[١٠١] مادة (4-1-أ) من اتفاقية نيويورك1958 للاعتراف بأحكام التحكيم وتنفيذها .

[١٠٢] مادة (5) من قانون الأونيسترال النموذجي بشأن التجارة الإلكترونية1996.

[١٠٣] مادة (3) من قانون الأونيسترال النموذجي بشأن التوقيعات الإلكترونية2001.

[١٠٤] مادة (8) من اتفاقية الأمم المتحدة المتعلقة باستخدام الخطابات الإلكترونية2006.

[١٠٥] علي، 2009، ص147.

والحقيقة أنه يمكن فهم ذلك في إطار أن الأحكام لها خصوصية عن الاتفاقات والعقود، في إطار الكتابة التقليدية، إذ بالاطلاع على ما ينظم الأحكام وشكلها وكيفية التعامل معها نجد هناك تفرقة بين عدة مصطلحات أو أشكال بشأن نسخ الحكم وهي:

– **"مسودة الحكم"**: ويقصد بها النسخة التي يحررها القاضي بنفسه عند المداولة والمتضمنة أسباب الحكم والتوقيع الحي للقضاة الذين اشتركوا في المداولة، وهذه النسخة تحفظ في ملف القضية إلى حين إتمام نسخة الحكم الأصلية.[١٠٦]

–**"نسخة الحكم الأصلية"**: ويقصد بها نسخة الحكم بعد إتمام نسخه والتي توقع توقيعاً حياً من القاضي وتودع أيضا ملف الدعوى خلال مدة معينة من تاريخ صدور الحكم.[١٠٧]

–**"نسخة الحكم التنفيذية"**: ويقصد بها صورة الحكم التي توضع عليها الصيغة التنفيذية المقررة لتنفيذ الأحكام، ولا تعطى إلا نسخة واحدة منها لصاحب الشأن، وفي حال فقدها لا يجوز استخراج نسخة غيرها إلا بعد رفع دعوى جديدة بطلب نسخة تنفيذية من الحكم.[١٠٨]

–**"نسخة حكم رسمية "** : أو ما يطلق عليها نسخة بسيطة من الحكم، ويقصد بها صورة من نسخة الحكم الأصلية عليها خاتم الدولة بما يفيد رسميتها وصحتها وتعطى لمن يطلبها ولو لم يكن من ذوي الشأن ويجوز أن تصدر منها أكثر من نسخة، ويمكن استخدامها في الإثبات لكن لا يجوز استخدامها في التنفيذ.[١٠٩]

وبمتابعة الاشتراطات الخاصة بالأحكام القضائية والقياس عليها بشأن أحكام التحكيم الإلكترونية تثور عدة تساؤلات:

- هل يمكن أن تكون هناك نسخة أصلية وحيدة لحكم التحكيم الإلكتروني في شكل إلكتروني ويمكن حفظها؛

لاشك أن المستندات التي تصدر في شكل إلكتروني يمكن عمل أكثر من نسخة إلكترونية منها ويصعب التفرقة بينها وبين الأصل، لكن هل يمكن الاحتفاظ بنسخة إلكترونية منها في ملف دعوى التحكيم الإلكترونية للرجوع إليها متى دعت

[١٠٦] مادة (175، 177) من قانون المرافعات المصري.

[١٠٧] مادة (179) من قانون المرافعات المصري.

[١٠٨] مادة (181، 183) من قانون المرافعات المصري.

[١٠٩] مادة (180) من قانون المرافعات المصري.

الحاجة والتأكد من صحة النسخ الإلكترونية المأخوذة عنها؛ الإجابة على ذلك بنعم إذا توافرت وسائل الأمان الإلكترونية التي تمنع التلاعب فيها والرجوع إليها كلما دعت الحاجة.

- وهل يمكن الحصول على نسخة وحيدة للتنفيذ في شكل إلكتروني لا يمكن تكرارها –حسب المتبع في الأحكام القضائية– حتى لا يتم إساءة استغلالها بمحاولة التنفيذ في أكثر من مكان أو أكثر من مرة وإرهاق المنفذ ضده أو الإضرار به، فضلاً عن التأكد من صحة هذه النسخة التنفيذية في شكلها الإلكتروني، أظن أنه يصعب ذلك إلا إذا وجدت إمكانية مثلاً بأن تتاح لإدارات التنفيذ بالدول الدخول على مواقع مؤسسات التحكيم بطريقة آمنة ومشفرة تحفظ سرية المعلومات للتأكد من صحة الحكم من خلال الموقع ومطابقة النسخة الإلكترونية المقدمة للتنفيذ مع نسخة الحكم الإلكترونية المودعة بملف الدعوى الإلكتروني على موقع مؤسسة أو منصة التحكيم الإلكتروني، إلا أن الأمر قد يختلف بالنسبة للأحكام الصادرة من خلال التحكيم الحر حيث يصعب ذلك.

ويبدو أنه لا مانع من إصدار حكم التحكيم إلكترونياً من ناحية تقنية، لكن الاعتراف به وتنفيذه بموجب شكله الإلكتروني من ناحية قانونية تعترضه بعض الصعوبات نفرق فيها بين حالتين:

الحالة الأولى: حالة إمكانية تنفيذ الحكم إلكترونياً دون الحاجة لتدخل مادي في التنفيذ، وحالته الواضحة المنازعات المتعلقة بعناوين المواقع الإلكترونية والتي تتم تسويتها من خلال منظمة الأيكان المسؤولة عن عناوين المواقع الإلكترونية، [١١٠] حيث تتم التسوية من خلال مقدمي خدمة تسوية المنازعات المرخص لهم من الأيكان والتي قد تجرى إلكترونياً، ويتم تنفيذها إلكترونياً من قبل مؤسسة الأيكان. وفي هذا الفرض لا يجد حكم التحكيم الإلكتروني عقبة في الاعتراف به أو تنفيذه.

الحالة الثانية: الحاجة إلى التنفيذ المادي لحكم التحكيم الإلكتروني وتدخل الدول؛ وهو ما قد ينتج عنه صعوبات واقعية في الوقت الحالي من حيث المتطلبات الشكلية للحكم، والتأكد من صحته خاصة في حالات التحكيم الحر، لكن قد توضع آليات تقنية مستقبلاً أو اعتماد خدمات التصديق الإلكتروني والتي تؤدي إلى إمكانية التأكد من صحة حكم التحكيم في

[١١٠] فضل، 2011، ص350.

شكله الإلكتروني وإمكانية تنفيذه.

ومن ثم فإنه على الرغم من إمكانية استخدام الوسائل الإلكترونية في تحرير الحكم وتوقيعه إلا أنه وتفادياً لمشاكل التنفيذ التي قد تنتج في دول لا تعترف أنظمتها القانونية بالحكم الإلكتروني أو تتطلب شكليات معينة في الحكم فإن الحكمة تقتضي توفير نسخة من حكم التحكيم في شكل الكتابة التقليدية وبها متطلبات التأكد من صحة الحكم التحكيمي.[١١١]

البيانات الأساسية في حكم التحكيم الإلكتروني:

يجب أن يشتمل حكم التحكيم الإلكتروني على بيانات أساسية منها:

– **تاريخ إصدار الحكم ومكانه:** فالتاريخ يترتب عليه معرفة المواعيد والإجراءات القانونية،[١١٢] ومكان التحكيم يترتب عليه معرفة مدى التزام الحكم بالقواعد الإجرائية وقواعد إصدار الأحكام وفقا لقانون مكان التحكيم.[١١٣]

– **بيانات المحكمين والأطراف:** ومن البيانات الجوهرية أسماء المحكمين وبياناتهم وعلى الرغم من عدم نص القانون النموذجي للتحكيم عليها إلا أنه يستفاد من اشتراط توقيع المحكمين، فضلاً عما يرتبط بذلك من آثار قانونية، كحالات وجود مصلحة أو ارتباط للمحكم بموضوع النزاع قد يترتب عليه بطلان حكم التحكيم،[١١٤] وكذلك أسماء الأطراف وبياناتهم كالجنسية والعناوين، لما يترتب عليه من معرفة مكان التنفيذ الذي يتوجه إليه لتنفيذ الحكم جبراً على المحكوم ضده حال عدم تنفيذه طواعية، ومراعاة الاشتراطات القانونية التي يتطلبها مكان التنفيذ.[١١٥]

– **تسبيب الحكم وإعلانه:** تقوم الأحكام القضائية على التسبيب[١١٦] والعلانية[١١٧] وفقدانها لذلك يبطلها، إلا أن الأمر يختلف بالنسبة لأحكام التحكيم، فقد يرتبط النزاع بأسرار تجارية أو فنية متعلقة بنشاطهم أو بسمعتهم التجارية ولا يرغب

[١١١] شرف الدين، 2003، ص112.
[١١٢] مادة (31–1) قانون التحكيم النموذجي.
[١١٣] مادة (31–3) قانون التحكيم النموذجي، مادة (34–4) قواعد الأونيسترال للتحكيم.
[١١٤] مادة (31–1) قانون التحكيم النموذجي.
[١١٥] مادة (43–2) قانون التحكيم المصري.
[١١٦] مادة (176) قانون المرافعات المصري.
[١١٧] مادة (174) قانون المرافعات المصري.

الأطراف في أن تكون معلنة فيعمدون إلى إخفاء هذا النزاع، إلا أن الأصل في أحكام التحكيم أن يتم تسبيبها إلا أنه يجوز للأطراف الاتفاق على عدم بيان الأسباب، [١١٨] ويتم إعلام الأطراف بالحكم بتسليم كل طرف نسخة منه موقعة، ولا تشترط العلانية في حكم التحكيم إلا إذا اتفق الأطراف على ذلك، أو كان أحد الأطراف ملزم بذلك لحماية حقوقه أو المطالبة بها.[١١٩]

القانون الواجب التطبيق على شكل حكم التحكيم:

الأصل في حكم التحكيم أنه يصدر وفقاً للقواعد الإجرائية والشكلية الواجبة التطبيق على نزاع التحكيم سواء المختارة من قبل الأطراف أو وفقاً لقانون مقر التحكيم في حال عدم اختيار الأطراف للقانون الواجب التطبيق، [١٢٠] شريطة ألا يكون مخالفاً للنظام العام في دولة مقر التحكيم.

المطلب الثاني: تنفيذ حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه

ضوابط تنفيذ حكم التحكيم الإلكتروني:

أولاً: رفض التنفيذ بناء على طلب المحتج ضده: وهي محكومة باشتراطات وردت على سبيل الحصر[١٢١] تتمثل في:

أ) فقدان طرفي اتفاق التحكيم للأهلية بمقتضى القانون التي تخضع له أهلية كل منهما، ويشترط النص –وفق صياغته– أن يكون الطرفان فاقدي الأهلية، في حين أن المفترض أن فقد أهلية أحد المتعاقدين يرتب البطلان ولا يشترط اجتماع ذلك في الطرفين، وهو ما يمكن أن يكون –من وجهة نظرنا– خطأ في الصياغة، وليس المقصود من قبل واضعي الاتفاقية.

ب) عدم الإخطار الصحيح بتعيين المحكم أو إجراءات التحكيم، أو لأي سبب آخر ترتب عليه عدم إمكانيته عرض قضيته ودفاعه على الوجه الصحيح، ونرى ألا يكون هذا السبب راجعاً إلى رافض التنفيذ.

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[١١٨] مادة (31-2) قانون التحكيم النموذجي.

[١١٩] عباس، 2011، ص 517.

[١٢٠] مادة (36-أ-4) قانون التحكيم النموذجي.

[١٢١] مادة (5-1) اتفاقية نيويورك 1958.

ج) شمول الحكم أمور لم يتفق عليها الطرفان في اتفاق التحكيم، وفي هذه الحالة يقتصر رفض طلب التنفيذ على الأمور التي تجاوز فيها الحكم اتفاق الأطراف على التحكيم ما دام ذلك ممكنا، وليس له تأثير على باقي نواحي الحكم.

د) مخالفة تشكيل هيئة التحكيم أو الإجراءات المتبعة في التحكيم للقانون الواجب التطبيق سواء أكان القانون المختار من قبل الأطراف أم قانون مكان التحكيم.

هـ) ألا يكون قد اكتسب حكم التحكيم صفة النهائية أو أن يكون قد أبطل أو ألغي أو أوقف تنفيذه من قبل الجهات المختصة سواء في بلد قانون التحكيم، أو بلد التنفيذ.

ويذهب رأي إلى أن هذه الحالات الحصرية لم تشمل حالة ما إذا تم الحصول على حكم التحكيم بالتدليس أو الغش أو التحايل أو التزوير.[١٢٢]

ثانيا: رفض التنفيذ تلقائياً من الجهات المختصة بدولة التنفيذ:

وهذه الحالات نصت عليها الفقرة الثانية من المادة الخامسة من الاتفاقية وحصرتها في حالتين هما:

- أن يكون موضوع التحكيم غير قابل للخضوع للتحكيم وفق قانون بلد التنفيذ.
- أو أن يكون من شأن الاعتراف بحكم التحكيم أو تنفيذه التعارض مع السياسة العامة للبلد.

والحقيقة أن هذا الشرط الأخير يمكن أن يكون سنداً لرفض أحكام التحكيم الأجنبية التي تتضمن ما يخالف الشريعة الإسلامية إذا كانت السياسة التشريعية لبلد التنفيذ ترفض مخالفة أحكامها للشريعة الإسلامية.

كما أن الاتفاقية قد تجاهلت إمكانية طلب رفض التنفيذ من الغير الذي قد لا يكون طرفاً في التنفيذ وليس محتجاً ضده بالتنفيذ لكن قد يسبب له التنفيذ ضرراً مباشراً أوغير مباشر، وهو ما نرى معه ضرورة أن تكون أسباب طلب وقف التنفيذ مرنة أكثر من ذلك.

[١٢٢] إبراهيم إ.، 1997، ص231.

القانون الواجب التطبيق على تنفيذ حكم التحكيم:

يعتبر الحكم الواجب التطبيق على تنفيذ حكم التحكيم بطبيعة الحال هو قانون دولة التنفيذ فهي التي يناط بها التنفيذ والمعنية به، وهو ما نصت عليه اتفاقية نيويورك في المادة (3) منها بقولها "وأن تقوم بتنفيذها وفق القواعد الإجرائية المتبعة في الإقليم الذي يحتج فيه بالقرار.

الخاتمة:

في ختام هذا البحث نورد أهم النتائج والتوصيات التي توصل إليها البحث:

النتائج :

١ -أن الاهتمام بتفعيل وسائل التقنية الحديثة في مجال التسوية البديلة وخاصة التحكيم الذي يترتب عليه الفصل في النزاع لم يعد ترفاً يؤخذ على التراخي بل هو ضرورة من ضرورات المجتمع لتحقيق الأمان القانوني للمعاملات الإلكترونية.

٢ -أن قواعد التنازع الوطنية، والقواعد الموضوعية الدولية (القوانين النموذجية والاتفاقيات) لا غنى لأحدهما عن الآخر، لأن كلاهما يكمل بعضه بعضاً، فقواعد التنازع ستظل باقية ما بقيت الدول متمسكة بسيادتها التشريعية، والقواعد الموضوعية ستظل مطلوبة لمواجهة مستجدات الحياة ومستحدثاتها، وكلاهما يكمل نقص الآخر.

٣ -أن قواعد التحكيم التقليدي وإن كانت تصلح للتطبيق على العديد من خطوات التحكيم الإلكتروني، إلا أنه ما زال هناك نقص في القواعد القانونية التي تنظم بعض مراحل التحكيم الإلكتروني منها النواحي الإجرائية، ومنها الاعتراف بحكم التحكيم الإلكتروني وتنفيذه، التي تعد أهم المراحل في عملية التحكيم الإلكتروني.

٤ -أن منصات التحكيم الإلكتروني ما زالت بحاجة لتحقيق الأمان التقني والقانوني، وتوسيع الثقة فيها، وفرض الرقابة عليها ووضع الآلية التقنية والقانونية لمنع ما قد ينتج من تلاعب أو تزوير يؤدي إلى ضياع الحقوق وفقدان الثقة في هذه الوسائل.

٥ -أن ما أدخل من تعديلات على قانون التحكيم النموذجي وتفسير اتفاقية نيويورك في عام 2006 بالاعتراف باتفاق التحكيم الإلكتروني أمر جيد إلا أنه يتطلب متابعة ذلك بخطوات أخرى منها وضع ضوابط خاصة بالأحكام الإلكترونية تضمن الاعتراف بها وتنفيذها.

التوصيات:

١ -ضرورة إنشاء منصات إلكترونية لتسوية المنازعات الناتجة عن المعاملات الإلكترونية دولية وإقليمية ومحلية تتبع جهات رسمية أو جهات موثوق بها بحيث يقتصر دورها على الإدارة والرقابة، ويترك تقديم خدمات التسوية للقطاع الخاص أو الحر.

٢ -ضرورة الاهتمام على جميع المستويات بتأهيل كوادر قانونية تقنية تقوم بتقديم خدمات تسوية المنازعات إلكترونياً على الوجه الصحيح وبالكفاءة المطلوبة.

٣ -تعديل القانون النموذجي للتحكيم بحيث يسمح بالاعتراف بحكم التحكيم الإلكتروني وتنفيذه ووضع ضوابط لذلك، وملحق لاتفاقية نيويورك 1958 الخاصة بالاعتراف بأحكام التحكيم الأجنبية وتنفيذها لتشمل الاعتراف بأحكام التحكيم الإلكتروني ووضع الضوابط الخاصة بها.

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موقع غرفة التجارة الدولية (ICC)	https://iccwbo.org/dispute-resolution-services/arbitration

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المؤتمر العالمي عن تسوية المنازعات

9–10 أغسطس 2017

عنوان البحث:

تسوية نزاعات البناء

إعداد

الدكتورة / أسما أكلي **الباحث/ عبد الحنان العيسى**

محاضر في كلية أحمد إبراهيم للحقوقباحث دكتوراه في كلية أحمد إبراهيم للحقوق

مقدمة: نظراً للأهمية المتنامية في قطاع البناء والتشييد، ظهرت العديد من المبادرات الدولية لتوحيد القواعد المنظمة لعقود المقاولات، لتحقيق قدر من الاستقرار في هذا القطاع، وتوحيد القواعد المطبقة في دولة صاحب العمل وفي دولة المقاول، وقد كانت العقود النموذجية التي أصدرها الاتحاد الدولي للمهندسين الاستشاريين، والتي عرفت باسم عقود الفيديك، واحدة من أهم العقود النموذجية المتعارف عليها، والتي تنظم كافة الأعمال الهندسية المتعلقة بأعمال التشييد والبناء، حيث صدرت عدة أنواع من هذه العقود: وتم تسميتها بلون الغلاف الصادرة به، ويعتبر الفيديك من أوسع العقود انتشاراً في قطاع التشييد والبناء(المقاولات)، وأصبح عقداً دولياً تتعامل به معظم الشركات في المشاريع الكبرى، وبنوك التنمية والبنك الدولي، وتتميز عقود البناء والتشييد الدولية بطبيعتها المركبة والفنية، ولذلك فان العديد من المنازعات التي تظهر خلال تنفيذها، ترجع إلى أسباب ذات طبيعة فنية وقانونية، ويؤدي عدم حلها في الوقت المناسب، إلى تفاقمها والتأثير سلباً على العلاقة بين أطراف العقد، مما يؤثر على انجاز المشروع، ومن هنا ظهرت أهمية اللجوء إلى وسائل لتسوية المنازعات في صناعة البناء، حيث ستتناول هذه الدراسة التعريف بالاتحاد الدولي للمهندسين الاستشاريين (الفيديك)، واستعراض نماذج عقود الفيديك، وتطورها والتعديلات التي طرأت عليها، وألية تسوية المنازعات الناشئة عن عقود الفيديك، ودور المهندس الاستشاري ومجلس فض النزاعات، والتسوية الودية للنزاع (المفاوضات والوساطة)، وإجراءات التحكيم وفق غرفة التجارة الدولية في باريس.

المبحث الأول: الاتحاد الدولي للمهندسين الاستشاريين ونماذج عقود الفيديك

يتضمن هذا المبحث نشأة الاتحاد الدولي للمهندسين الاستشاريين، والطبيعة القانونية لعقود الفيديك، واستعراض العقود الصادرة عن الفيديك منذ نشأته، حيث تم تقسيم هذا المبحث لمطلبين، تضمن المطلب الأول الاتحاد الدولي للمهندسين الاستشاريين والطبيعة القانونية لعقود الفيديك، والمطلب الثاني: نماذج عقود الفيديك.

المطلب الأول: الاتحاد الدولي للمهندسين الاستشاريين والطبيعة القانونية لعقود الفيديك

الفرع الأول: نشأة الاتحاد الدولي للمهندسين الاستشاريين

(FIDIC) هو الاتحاد الدولي للمهندسين الاستشاريين، ومصطلح الفيديك هو الأحرف الأولى للتسمية الفرنسية (FEDERATION INTERNATIONAL DES INGENIEURS CONSEILS)، ويضم الاتحاد جمعيات المهندسين الاستشاريين في غالبية دول العالم، حيث نشأ هذا الاتحاد من خلال مساهمة ثلاث جمعيات أوروبية للمهندسين الاستشاريين، وهي:

1-الجمعية السويسرية للمهندسين الاستشاريين (ASIC).

2- والجمعية الفرنسية للمهندسين الاستشاريين (CICF).

3- جمعية المهندسين الاستشاريين البلجيكية (CICB).[1]

حيث عقد المؤتمر التأسيسي الأول عام 1913 في مدينة جنت (Ghent) في بلجيكا، وفي عام 1914، عقد المؤتمر الثاني في مدينة بيرن بسويسرا (Berne) وأعضائه هو جمعية في كل دولة تتولي تمثيل المهندسين الاستشاريين في تلك الدولة بالفيديك، وهو غير حكومي، حيث لا يسمح بعضوية أي دولة أو جهة حكومية في الاتحاد، حيث تقتصر عضويته على جمعيات مهنية، وقد حدد النظام الأساسي للاتحاد الذي تم تطوير نسخته الأخير في المؤتمر

[1] انظر: جمال الدين نصار ومحمد ماجد خلوصي، **عقود الاتحاد الدولي للمهندسين الاستشاريين (فيديك)** (القاهرة: دار الفكر، ط1، 2002)، ص22.

المنعقد في مدينة ريو دي جانيرو في البرازيل في الأول من جان ويري عام 2014: اسم الاتحاد، أهداف الاتحاد، العضوية في الاتحاد وشروط الانتساب، والانسحاب والاستبعاد من عضوية الاتحاد، الهيكلية التنظيمية للاتحاد، الجمعية العامة والمواد اللجنة التنفيذية ومهامها، والحد من صلاحياتها، الأمانة العامة للاتحاد، وتعيين مراجعو الحسابات وإيرادات الاتحاد، والميزانية السنوية، والمسؤولية عن ديون الاتحاد، تعديل النظام الأساسي للاتحاد، وحل الاتحاد واللغة، والقانون الحاكم حيث يقرأ ويفسر هذا النظام وفق القوانين السويسرية.[٢]

الفرع الثاني: الطبيعة القانونية لعقود الفيديك

الطبيعة القانونية لنماذج عقود الفيديك، تتجلى من خلال دولية هذه العقود، ولكونها عقود نموذجية، للأطراف حرية الأخذ بها كما هي أو تعديل بعض أحكام وقواعد هذه العقود لكي تتوافق مع احتياجات الأطراف وطبيعة المشروع، أي أنها عقود غير ملزمة، وهي لا تندرج ضمن عقود الإذعان، بل قواعد وأحكام هذه العقود تخضع لقاعدة العقد شريعة المتعاقدين، كما أنها ليس تشريعاً ولا تصبح ملزمة إلا عندما يعتمدها الأطراف، فتصبح من العقود الملزمة لجانبين.

المطلب الثاني: نماذج عقود الفيديك

عكف الاتحاد الدولي للمهندسين الاستشاريين منذ تأسيسه، على إصدار مجموعة من العقود النموذجية المتعلقة بالإنشاء والتشييد الهندسي منذ عام 1957م، وقام بتطوير هذه العقود وفق احتياجات المشروعات التي تنظم أحكامها وشروطها، وسوف يتم استعراض أنواع عقود الفيديك التي صدرت وفق تسلسل إصدارها:

[٢] STATUTES AND BY-LAWS, INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS, (English) September 2015

الفرع الأول: أنواع عقود الفيديك الصادرة قبل عام 1999

1- عقد مقاولات أعمال الهندسة المدنية ويسمى بالكتاب (الأحمر):

حيث صدرت الطبعة الأولى من نموذج "شروط عقد مقاولات أعمال الهندسية المدنية" في عام 1957، واختير له الغلاف الأحمر الذي تميَّز به، وهو يعتبر أشهر عقود الفيديك انتشاراً وتطبيقاً على المستوى الدولي، وفي عام 1987 أصدرت الطبعة الرابعة، وفي عام 1995 قام فيديك بإصدار ملحقاً للطبعة الرابعة حيث تضمن نظاماً جديداً لتسوية المنازعات .

2- عقد مقاولات الأعمال الميكانيكية والكهربائيةويسمى بالكتاب (الأصفر)

صدرت الطبعة الأولى من هذا العقد في عام 1963، شاملة أعمال التركيبات بالموقع، أو في المشاريع التي يوكل فيها إلى المقاول بإعداد التصاميم إضافة للتنفيذ، اختير لغلافه اللون الأصفر، وفي عام 1987 تم إصدار الطبعة الثالثة، وفي عام 1995 قام فيديك بإصدار ملحقاً يتضمن نظاماً جديداً لتسوية المنازعات.[٣]

3-عقد العميل (رب العمل) والاستشاري (المهندس الاستشاري): في عام 1991م، قام الفيديك بإصدار الطبعة الأولى من نموذج تعاقدي تحت اسم العميل / الاستشاري، نموذج اتفاقية خدمات، والطبعة الثالثة عام 1998م، واختير لغلافه اللون الأبيض، لذلك تم تسميته بالكتاب الأبيض.

4- عقد التصميم والتشييد وتسليم المفتاح ويمسى بالكتاب (البرتقالي):

[٣] انظر: جمال الدين نصار ومُحَمَّد ماجد خلوصي، عقود الاتحاد الدولي للمهندسين الاستشاريين (فيديك). ص28.

صدرت الطبعة الأولى من هذا العقد في عام 1995 شاملة لنموذج "شروط عقد التصميم والتشييد وتسليم المفتاح ليشمل الأعمال المتكاملة المدنية والميكانيكية والكهربائية" واختير لغلافه اللون البرتقالي.[٤]

وسوف نستعرض الشروط العامة لعقد أعمال الهنّدسة المدنيّة الفيديك نسخة 1987م (الكتاب الأحمر) لأنها تتضمن قواعد شاملة لكل أنواع العقود الصادرة عن فيديك، حيث تضمنت هذه الشروط: اثنان وسبعون بنداً ضمن خمسة وعشرين عنواناً لهذه البنود، وتشمل هذه البنود جميع التفاصيل التي يعد بها مشروع التشييد منذ بدء تنفيذه وحتى اكتماله، وتناول البند (1) التعاريف للأشخاص المشاركين في مشروع التشييد، والمستندات الخاصّة بعقد التشييد، والأعمال والمعدات التي يتم التعاقد عليها، وتناول البند (2) التزامات المهنّدس وصلاحياته، ووجوب تصرفه بحياد، أما البندين (3 و 4) فقد حظرا على المقاول أن يحيل العقد إلى مقاول آخر، أو أن يتعاقد من الباطن على كامل العقد دون موافقة رب العمل، وحدد البند (5) مستندات العقد ، وحدد البندان (6 و 7) الرسومات ووجوب احتفاظ المقاول بنسخة منها في موقع المشروع، وكذلك الاشتراطات الخاصّة بتقديم المقاول أية تصاميم خاصة بموجب العقد، أما البنود من (8 وحتى 33) فتضمنت الالتزامات العامّة لطرفي العقد: رب العمل والمقاول، وتشرح هذه البنود الحقوق والواجبات لطرفي العقد أثناء تنفيذ المشروع، والبنود من (34 وحتى 36) تضمنت الشروط الخاصّة باليد العاملة، ومواد ومعدات التشييد، والاختبارات الخاصّة بهذه المواد، أما البند (38) فتناول التفتيش على الأعمال، مع إتاحة الفرصة للمهنّدس لمعاينة الأعمال قبل ردمها أو تغطيتها، والبند (39) نص على ضرورة إصلاح المقاول للأعمال غير المطابقة للعقد، وكذلك كيفية معالجة إخلال المقاول وعدم إتباعه لتعليمات

[٤] انظر: أسامة مصطفى عطعوط، **النظام القانوني لعقود الفيديك FIDIC**، الاسترجاع بتاريخ 4-4-2017 من http://aleyarbitration.blogspot.my

المهنّدس، والبند (40) تناول إيقاف المقاول عن العمل، وتعليق الأعمال بناءً على تعليمات المهنّدس، وتحديد مستحقات المقاول نتيجة هذا الإيقاف، والبند (41) تضمن مواعيد بدء الأعمال، واشتراط عدم تأخر المقاول في المباشرة بالتنفيذ، والبند (42) على ضرورة تمكين المقاول من حيازة موقع العمل، وكذلك تمكّينه من الوصول إلى الموقع، وحددت البنود من (43 وحتى 46) وقت انتهاء العمل، وكيفيّة التعامل مع القيود الخاصّة بتحديد ساعات العمل، ومعدل تقدم الأعمال، وتناول البند (47) التعويض الاتفاقي (غرامات التأخير)، وضرورة تخفيض هذا التعويض في حالة استلام رب العمل لقسم من الأعمال المنفذة من المقاول، والبند (48) تناول شهادة التسلم والإجراءات اللازم إتباعها قبل تسلم المهنّدس للأعمال، وتناول البند (49) مسؤولية المقاول عن العيوب ومدّة هذه المسؤولية، وإصلاح العيوب في حال حدوثها، وكيفيّة معالجة إخلال المقاول للتعليمات الصادرة له من قبل المهنّدس، والبند (50) ألزم المقاول البحث عن مصدر العيوب، أما البندان (51 و 52) فقد منحا المهنّدس حق إجراء التعديلات والتغييرات، التي يراها ضرورية لتنفيذ العقد، وتحديد فئات الأسعار لهذه التعديلات، أما البند (53) فتناول الإجراءات الخاصّة بتقديم المقاول للمطالبات إلى المهنّدس التي يجب الالتزام بها، وتضمن البند (54) معدات المقاول، وإجراءات التخليص الجمركي لها وإجراءات إعادة التصدير، وتناولت البنود من (55 وحتى 57) كيفية قياس الأعمال المنّجزة، والبند (58) تناول طرق محاسبة المقاول، أما البند (59) فتناول المقاولة من الباطن، والبند (60) تناول كيفية إصدار كشوف الحساب بانتهاء المسؤوليّة من العيوب، ونص البندان (64-63) على حالات حق رب العمل إنهاء العقد بإرادته المنفردة، وتناول البند (65) المخاطر الخاصّة غير المتوقعة، والتي يتحملها رب العمل مثل الحرب والتمرد والإشعاعات الذريّة، وتناول البند (66) حالات الإعفاء من أداء الالتزامات، عند استحالة تنفيذ هذه الالتزامات لأيٍ من الطرفين، وتناول البند (67) طريقة تسوية النزاعات الناجمة عن تنفيذ العقد، وتشترط في البداية إحالة النزاع إلى المهنّدس، ليصدر قراره خلال (84) يوماً من طلب إحالة النزاع إليه، وفي حالة عدم صدور القرار خلال هذه المدّة أو في حالة صدور القرار وتم الاعتراض عليه من قبل أحد

الأطراف، يجب إرسال إشعار للطرف الأخر بالرغبة باللجوء إلى التحكيم، خلال (70) يوماً، ولا يبدأ التحكيم قبل انقضاء (56) يوماً على إرسال هذا الإشعار، علماً أنه يجب إجراء محاولات للتسوية الوديّة للنزاع، فإذا فشلت يبدأ التحكيم، وتضمن البند (68) طريقة توجيه المراسلات المتبادلة بين طرفي العقد، والاتفاق على العناوين المعتمدة بين الطرفين، وتضمن البند (69) حالات حق المقاول إنهاء العقد، وتناول البند (70) أثر التعديلات في الأسعار وفي التشريعات، التي تحدث بعد توقيع العقد، والتي تؤثر في قيمة العقد، وما ينبغي أن يحصل عليه المقاول عند حدوث هذه التعديلات، وتناول البندان (71 و 72) قيود العملة، وكيفية تحديد سعر الصرف في حالة الدفع بعملات مختلفة.[٥]

الفرع الثاني: أنواع عقود الفيديك الصادرة بعد عام 1999

قامت فيديك بتطوير النسخ السابقة من العقود، أصبح العقد شاملاً لشروط واحدة، وللأطراف إجراء التعديلات عليها، والتوزيع العادل للمخاطر في العقد، وتوحيد أرقام البنود المتناظرة في جميع العقود، بما في ذلك عددها ولغتها وأسلوب صياغتها، بالإضافة لذلك أصدرت نماذج جديدة من العقود وهي كالتالي:

1- الكتاب الأحمر الجديد : عقد مقاولات أعمال التشييد:

في عام 1999 أصدر الفيديك الكتاب الأحمر الجديد لنموذج " عقد مقاولات أعمال التشييد " والتي يقوم فيها رب العمل بإعداد التصميمات والمستندات بمعرفته أو بواسطة تابعيه، بغض النظر عن نوعية الأعمال التي يشملها العقد، فيمكن أن يشمل العقد أعمال كهربائية أو ميكانيكية أو غيرها من الأعمال، وتضمن هذا العقد 20بنداً رئيسياً و159 فرعياً و58 بنداً تفصيلياً ، وبلغ إجمالي البنود الفرعية والتفصيلية 217 بنداً .

[٥] انظر: جمال الدين أحمد نصّار ومهنّدس مُحَمَّد ماجد خلوصي، م. داود خلف، م. نبيل مُحَمَّد عباس، **عقود الاتحاد الدولي للمهنّدسين الاستشاريين (فيديك) فقه وتفسير**،(المركز العربي للتحكيم، الطبعة الأولى 2008م).

2–الكتاب الأصفر الجديد: عقد مقاولات الأعمال الصناعية:

في عام 1999 أصدر الفيديك الكتاب الأصفر الجديد لنموذج "عقد الأعمال الصناعية والتصميم/ البناء، وتمت صياغة الكتاب الأصفر الجديد ليصلح لعقود إنشاء المصانع، التي تحتوي عادةً على أعمال كهربائية وميكانيكية، وتصميم وتنفيذ بنية أساسية أو أعمال هندسية، ويصلح أيضاً استخدامه في العقود التي يقوم فيها رب العمل، بإعداد التصميمات والمستندات بمعرفته أو بواسطة تابعيه، بغض النظر عن نوعية الأعمال التي يشملها العقد، بحيث يقوم المقاول في هذا النوع من المشاريع، بأعمال التصميمات والتوريدات وفقاً لمتطلبات رب العمل، كما يقوم بتجهيز الآلات والمعدات اللازمة لإتمام العملية موضوع التعاقد،

3– الكتاب الفضي: عقد مقاولات الأعمال المتكاملة:

في عام 1999 أصدر الفيديك عقداً جديداً سمَّي بالكتاب الفضي "عقد مقاولات أعمال متكاملة، أو مشروعات، ووضعت قواعد هذا العقد ليكون مناسباً للمشروعات التي تنشأ على أساس تسليم المفتاح مثل مشروعات محطات معالجة المياه أو الصرف الصحي أو محطات الكهرباء أو المصانع ، بحيث يتحمل المقاول فيها المسؤولية الكاملة عن التصميم والتنفيذ للمشروع، مع مشاركة ضئيلة من قبل صاحب العمل أو أجهزته الفنية أو شركة المشروع في المشروعات بنظام البوت B.O.T.[٦]

4– الكتاب الأخضر: عقد الأعمال المختصر:

[٦] **عقد البوت:** هو عقد يتولى فيه الملتزم (شركة المشروع) فرداً كان أو شركة بمقتضاه وعلى مسئوليته، بتصميم وبناء وتملك وتشغيل وإدارة مرفق عام أو مشروع اقتصادي واستغلاله، مقابل رسوم يتقاضاها من المنتفعين خلال مدة الالتزام، تكون كافية لتسترد الشركة تكاليف المشروع واستغلاله تجارياً، مع خضوعه للقواعد الأساسية الضابطة لسير المرافق العامة.

كذلك من العقود الجديدة التي استحدثتها فيديكفي عام 1999 والتي تتناسب مع المشاريع صغيرة القيمة وقصيرة المدة، عقد المقاولة الموجز، ويمكن ملاحظة ذلك من خلال تقصير مدد الإشعارات والدفعات، وأطلق عليه: الكتاب الأخضر، وهو عقد نموذجي يسمى "عقد الأعمال المختصر" وتمت صياغة الكتاب الأخضر ، استجابةً للانتقادات التي وجهت للعقود السابقة، بأنها عقود طويلة الأجل، حيث نظام تسوية المنازعات فيها يستغرق مدة طويلة قبل بدء إجراءات التحكيم،

حيث تم إعداد أحكام وشروط هذا العقد النموذجي للعقود صغيرة القيمة؛ أي التي تبلغ قيمتها أقل من 2 مليون دولار، أو قصيرة المدة؛ أي التي تتراوح مدتها من 6 شهور إلى 12 شهر.

٥- الكتاب الذهبي:

في عام ٢٠٠٨ أصدر فيديك عقداً مطوراً سمَّي Golden book ويعد هذا الكتاب امتداد للكتاب الأصفر، ويهدف إلى توفير نماذج للعقود الدولية، بشأن تصميم وتنفيذ وتشغيل المشاريع الانشائية الدولية، ويركز المسؤولية على المقاول في جميع مراحل تنفيذ العقد، ويقوم المقاول في هذا النموذج من المشاريع بأعمال التخطيط والتصميم والتوريد والبناء، وفقاً لمتطلبات رب العمل أو للنماذج القياسية المتعارف عليها في هذا النوع من المشاريع، ويقوم كذلك المقاول بتجهيز الآلات والمعدات اللازمة لإتمام العملية موضوع التعاقد وكافة الأعمال الأخرى اللازمة لإتمام العملية.

6- الكتاب الأبيض:

في عام ٢٠٠٦ أصدر فيديك نسخة جديدة من الكتاب الأبيض، الذي يحدد علاقة رب العمل بالاستشاري، ويستخدم هذا النموذج لإنجاز الدراسات السابقة للتعاقد في مجال المشروعات الاستثمارية ودراسات الجدوى، والتصميمات وإدارة التنفيذ وإدارة المشروع.

7- عقد التشييد النسخة التوافقية لبنوك التنمية متعددة الأطراف ، بعد أن صدرت النسخة الأخيرة من عقود فيديك النموذجية في عام (1999)، توافقت غالبية بنوك التنمية على تطوير عقد الانشاءات الصادر عن الفيديك، وذلك من خلال إضافة شروط تمويلية ضمن أحكامه، وتم التوافق مع فيديك، لإصدار نسخة توافقية خاصة ببنوك التنمية، ساهم في مراجعتها فريق العقود العامل لدى فيديك، وقد تم إصدار هذه النسخة التوافقية خلال عام (2005)، وأجريت عليها بعض التعديلات في عام 2006، وأصبح لزاماً على الجهات المقترضة استخدام هذه العقود النموذجية كشرط لمنحها قروضاً.

يلاحظ أن النسخ الصادرة بعد عام 1987 تتميز بأنها أدخلت تعديلاً جوهرياً على نظام تسوية النزعات، حيث ألغت دور المهندس شبه التحكيمي quasi-arbiter واستبدلته بمجلس فض المنازعات، الذي يتم تشكيله بالتشاور بين رب العمل والمقاول، مما يضفي عليه طابع الحيادية، أكثر من الدور الذي كان يقوم فيه المهندس، لجهة تسوية النزاعات المتولدة عن تنفيذ العقد، حيث أن المهندس الاستشاري يتم تعيينه بإرادة منفردة من قبل رب العمل، ويتقاضى أجره منه، وبالتالي هو تابع له، مما يمس حياده أثناء قيامه بتسوية أي نزاع ينشأ بين رب العمل والمقاول.

وتتضمن الشروط العامة للفيديك لعام 1999م الكتاب الأحمر عشرون فصل كالآتي:

الفصل الأول: أحكام عامة تتضمن بالمادة الأولى: التعاريف والتفسيرات والاتصالات والقانون واللغة، وأولوية الوثائق، واتفاقية العقد، والتنازل عن العقد، والعناية بالوثائق والتزود بها والتأخر بإصدار المخططات أو التعليمات،

واستخدام صاحب العمل لوثائق المقاول، واستعمال المقاول لوثائق صاحب العمل، والتفاصيل السرية، والتقيد بالقوانين الواجبة التطبيق، والمسؤوليات.

الفصل الثاني: تناول الأحكام الخاصة بصاحب العمل، حيث تضمنت المادة الثانية حق دخول المقاول للموقع، وقيام صاحب العمل بتقديم المساعدة بالحصول على التصاريح أو التراخيص أو الموافقات، ومسؤولية صاحب العمل عن أفراده، ومستخدمي المقاول الذين يعملون معه في الموقع، ومطالبات صاحب العمل.

الفصل الثالث تضمن أحكام المهندس ، حيث تناولت المادة الثالثة واجبات المهندس في التفويض وصلاحياته، والتعليمات التي يصدرها المهندس للمقاول، واستبدال المهندس، والتقديرات.

الفصل الرابع تناول الأحكام الخاصة بالمقاول، حيث تضمنت المادة الرابعة الالتزامات العامة للمقاول، وضمان الأداء، وممثل المقاول، والمقاولون الفرعيون، والتنازل عن المقاولة الفرعية، وإجراءات السلامة، وتوكيد الجودة، وحق المرور والتسهيلات، وتجنب التدخل، والطرق الموصلة، ونقل اللوازم، ومعدات المقاول، وحماية البيئة، وتقارير تقدم العمل الشهرية، وحصر العمليات في الموقع، والأثريات التي يعثر عليها المقاول في الموقع.

الفصل الخامس والمتضمن المقاولون الفرعيون المسمون ، حيث تضمنت المادة الخامسة تعريف المقاول الفرعي المسمى، وحق المقاول بالاعتراض على التسمية، والدفعات للمقاولين الفرعيين المسميين، واثبات الدفعات.

الفصل السادس تناول أحكام المستخدمون والعمال، ففي المادة السادسة تم النص على كيفية تعيين المستخدمين والعمال، ومعدلات الأجور وشروط العمل، وقوانين العمل، وساعات العمل والمرافق للعمال والمستخدمين، وشروط الصحة والسلامة، وأحكام مستخدمو المقاول، وسجلات مفصلة عن الأعمال والمعدات التي يستخدمها المقاول، وضبط السلوك غير المنضبط من العمال.

الفصل السابع تناول التجهيزات الآلية والمواد المصنعة، تضمنت المادة السابعة، طريقة التنفيذ، والعينات والمعاينة والاختبارات، والرفض، وأعمال الإصلاحات، وملكية التجهيزات الآلية والمواد، ودفع عوائد حق الملكية.

الفصل الثامن تناول المباشرة والتأخر بالإنجاز وتعليق العمل، حيث تضمنت المادة الثامنة شروط مباشرة العمل، ومدة الإنجاز وبرنامج العمل، وتمديد مدة الإنجاز، وتأخر الإنجاز بسبب السلطات، ونسبة تقدم العمل، وغرامات التأخير، وتعليق العمل وتبعات تعليق العمل، والدفع مقابل التجهيزات الآلية والمواد في حالة تعليق العمل، والتعليق المطول، واستئنافه.

الفصل التاسع تناول موضوع الاختبارات عند الإنجاز، حيث تناولت المادة التاسعة التزامات المقاول بإجراء الاختبارات، وإعادة الاختبارات، والإخفاق في اجتياز الاختبارات عند الإنجاز.

الفصل العاشر تناول مسألة تسلَّم الأعمال من قبل صاحب العمل، حيث تضمنت المادة العاشرة، مسألة تسلم الأعمال وجزء من الأعمال.

الفصل الحادي عشر تناول المسؤولية عن العيوب، فنصت المادة الحادية عشر إنجاز الأعمال المتبقية وإصلاح العيوب، وكلفة إصلاح العيوب، وتمديد مدة الإشعار بإصلاح العيوب، ومسألة الإخفاق في إصلاح العيوب، وإزالة الأعمال المعيبة التي لا يمكن إصلاحها، الاختبارات اللاحقة، واجبات المقاول في البحث عن أسباب العيوب في الأعمال، وإصدار شهادة الآداء عند إكمال كامل الأعمال، وإخلاء الموقع من قبل المقاول.

الفصل الثاني عشر تناول كيل الأعمال وتقدير قيمتها، حيث أن المادة الثانية عشر تضمنت كيفية كيل الأعمال المنجزة، وتقدير القيمة، وإلغاء الأعمال.

الفصل الثالث عشر تناول التغييرات والتعديلات ، حيث أنَّ المادة الثالثة عشر تضمنت صلاحية المهندس بإحداث التغييرات في الأعمال، وإجراءات التغيير ونوع العملات الواجب الدفع بها، والمبالغ الاحتياطية، واستخدام نظام الأعمال بالمياومة للأعمال الصغيرة وذات الطبيعة الطارئة، وتعديلات قيمة العقد بسبب تغير التشريعات وبسبب التكاليف.

الفصل الرابع عشر تناول مسألة قيمة العقد والدفعات المقدمة، وتقديم طلبات شهادات الدفع المرحلية، وجدول الدفعات، وإصدار شهادات الدفع المرحلية، والدفع من صاحب العمل للمقاول، والدفعات المتأخرة، ورد المحتجزات بعد إصدار شهادة تسلم الأعمال وشهادة الصيانة، وطلب شهادة الدفعة الختامية، مع إقرار المخالصة النهائي، وإصدار شهادة الدفعة الختامية، وانتهاء مسؤولية صاحب العمل.

الفصل الخامس عشر وتناول مسألة إنهاء العقد من قبل صاحب العمل ، حيث تضمنت المادة الخامسة عشر الإشعار بالتصويب، وحالات حق صاحب العمل بإنهاء العقد، والتقييم والدفع بعد انتهاء العقد.

الفصل السادس عشر تناول مسألة تعليق العمل وإنهاء العقد من قبل المقاول، حيث تضمنت المادة السادسة عشر الحالات التي يحق فيها للمقاول تعليق العمل، وكذلك حالات إنهاء العقد من قبل المقاول، وإزالة معدات المقاول من الموقع، ودفع كافة مستحقات المقاول عند إنهاء العقد.

الفصل السابع عشر تناول المخاطر والمسؤولية، حيث نصت المادة السابعة عشر عن التعويضات الواجب على المقاول دفعها لرب العمل عن أي ضرر، وعن مسؤولية المقاول عن الاعتناء بالأعمال من تاريخ المباشرة وحتى صدور شهادة تسلُّم الأعمال، وعن مخاطر صاحب العمل وتبعات هذه المخاطر، وعن حقوق الملكية الفكرية والصناعية، وتحديد المسؤولية.

الفصل الثامن عشر، تناول موضوع التأمين، حيث نصت هذه المادة عن المتطلبات العامة للتأمينات، والتأمين على الأعمال ومعدات المقاول، والتأمين ضد إصابة الأشخاص والإضرار بالممتلكات، والتأمين على مستخدمي المقاول.

الفصل التاسع عشر، تناول القوة القاهرة، فعرف القوة القاهرة، وإرسال إشعار بتعذر أداء الالتزامات بسبب القوة القاهرة، والتبعات المترتبة على قيام القوة القاهرة، وواجب التقليل من المخاطر، والقوة القاهرة التي تؤثر على المقاول الفرعي، وإنهاء العقد اختيارياً، والدفع، والإخلاء من مسؤولية الأداء.

الفصل العشرون والأخير، تناول موضوع المطالبات والخلافات والتحكيم، حيث حددت المادة عشرون مطالبات المقاول التي يرسلها للمهندس، وتعيين مجلس فض الخلافات، وحالات الإخفاق في الاتفاق على تعيين المجلس، القرار الذي يتخذه مجلس فض النزاعات، ثم التسوية الودية، ثم التحكيم، وعدم الامتثال لقرار مجلس فض النزاعات، وانقضاء فترة تعيين المجلس.[٧]

يرى الباحث أنَّ عقود الفيديك تمتاز عن باقي عقود الإنشاءات، بأنها عقود متوازنة تحافظ على حقوق جميع أطراف العقد، تلافت الكثير من المشكلات والنزاعات، وتحديدها الإطار العام لتنفيذ المشروع، ومن مزاياها أيضاً توزيع عادل للمخاطر والمسؤوليات بين أطراف العقد، ويسمح بترجمة عقود الفيديك لأي لغة، كما يسمح بالتعديل والإضافة والحذف على الصيغ والنماذج المعتمدة من فيديك شريطة ألا يتعدى التعديل نسبة 5% من إجمالي العقد، ويسمح بإجراء تعديلات على العقد إلى نسبة 15% شريطة أن يضاف اسم اخر إلى عقد فيديك، وبتحقيقها لمبدأ الكفاية الذاتية للعقد، جعلها تحظى بالقبول والاعتماد من قبل جهات دولية وإقليمية يأتي في مقدمتها البنك

[٧] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1999م)**، الاسترجاع بتاريخ 2-3-2017 من www.fidic.org.

الدولي، علماً بأن أي تعديل لأي طبعة سابقة لعقود الفيديك، لا يعني إلغاء العقد السابق، حيث أن الطبعة الرابعة لعام 1987م ما تزال سارية ويتم العمل بها رغم تعديل عام 1999م.[٨]

المبحث الثاني: ألية تسوية المنازعات الناشئة عن عقود الفيديك

إن عققود الفيديك خاصة عقد أعمال الإنشاءات الهندسية (الكتاب الأحمر)، تأتي بمقدمة العقود النموذجية التي اعتنت بتنظيم ألية تسوية المنازعات، حيث نظمت قواعد عقود الفيديك لعام 1987م، ألية تسوية المنازعات في المادة (67)، أما قواعد عقود الفيديك لعام 1999م، فقد نظمت ألية فض المنازعات في المادة (20)، حيث تم استبدال دور المهندس، كشبه محكم، بمجلس فض المنازعات (DAB)، حيث أن المادة (20) فرقت بين مهمة المهندس، التي اقتصرت على النظر بالمطالبات، وإذا تحولت هذه المطالبات إلى نزعات فتكون من اختصاص مجلس فض المنازعات، واختارت عقود الفيديك الوسائل البديلة لفض الخلافات، لما تتمتع به هذه الوسائل من ميزات تتجلى بالسرعة بحسم النزاع من قبل أشخاص متخصصين يتم التوافق على اختيارهم.

من خلال هذا المبحث سوف نستعرض ألية ودور كل من هذه الوسائل لفض النزاعات التي تنشأ أثناء تنفيذ عقود الفيديك، حيث سوف يتم البحث في نسختي عقود الفيديك (الكتاب الأحمر) نسخة عام 1987م ونسخة عام 1999 كونه الأكثر تفصيلاً وشيوعاً، وذلك لأن كلا النسختين يتم التعامل بهما على النطاق الدولي حتى الآن، حيث تم تقسيم هذا المبحث لمطلبين، المطلب الأول المهندس ومجلس فض النزاعات، والمطلب الثاني: التسوية الودية للنزاع والتحكيم.

[٨] انظر: الحبشي، مصطفى عبد المحسن، **التوزان المالي في عقود الإنشاءات الدولية دراسة مقارنة**، (القاهرة: 2002م). ص 541.

المطلب الأول: المهندس –مجلس فض النزاعات

الفرع الأول: دور المهندس الاستشاري في تسوية النزاعات

إن الشخص الذي يتصدى لفض النزاعات يجب أن يتحلى بجملة من الصفات أهمها الحياد والاستقلال عن أطراف النزاع، وهذا ما كان يؤخذ على المهندس وفق قواعد عقود الفيديك لعام 1987م، ففي ظل الشروط العامة لعقود الاتحاد الدولي للمهندسين الاستشاريين، وذلك حتى تاريخ التعديل الأخير لتلك الشروط في المادة (67) في عام 1996 كان المهندس هو المحور الرئيسي لتنفيذ العقد، يقوم بالنظر بالخلافات التي تنشأ بين رب العمل والمقاول نتيجة تنفيذ عقد المقاولة، فعند نشوء نزاع بين المقاول وصاحب العمل وفق ما هو منصوص عليه في المادة (67) من الشروط العامة لعام 1987م، فأنه أولاً يجب محاولة تسوية النزاع عن طريق المهندس، وذلك بموجب خطاب (خطي) موجه للمهندس، يعرض له فيه وقائع النزاع وحججه ومستنداته، مع صورة من هذا الكتاب للطرف الآخر، ويطلب من المهندس أن يبدي رأيه في النزاع، خلال (84) يوماً من اليوم التالي لتسلمه الكتاب المتضمن النزاع، كما يمكن له الامتناع عن الرد، ويجب أن تتم الإشارة في الكتاب إلى المادة (67) من الشروط العامة، والتي تمت بموجبها إحالة النزاع للمهندس، فإذا أصدر قراره ولم يعترض أي من الطرفين خلال الـ 70 يوماً التالية لاستلام الرد، فإن قرار المهندس يكون نافذاً ونهائياً ولا رجعة فيه وملزم لكل من المقاول ورب العمل، وإذا لم يصدر المهندس قراره خلال تلك المدة، أو أصدر القرار ولكنه لم يرضى به أي من أطراف النزاع، فيكون لأي منهما الحق أن يبلِّغ الطرف الآخر، بأنه سيلجأ للتحكيم لتسوية النزاع، مع إرسال صورة عن الإخطار للمهندس، ويجب إرسال الإخطار قبل اليوم السبعين، من اليوم التالي لتسلم قرار المهندس، أو اليوم التالي لانقضاء مدة الـ (84) يوماً المشار إليها أعلاه، [٩]

[٩] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1987م)**، المادة (1/67-6).

وإن قرار المهندس النهائي في حال عدم تنفيذه من قبل المقاول أو من رب العمل، فيمكن للطرف الأخر اللجوء للتحكيم من أجل صدور حكم تحكيمي فيه. [١٠] كما أنه يجوز إحالة النزاع مباشرةً للتحكيم في حال عدم تعيين مهندس مشرف على المشروع، وهذا النهج تم تثبيته من خلال حكم صادر عن غرفة التجارة الدولية في باريس، [١١] علماً أنه إذا كان معيَّن للمشروع مهندساً استشارياً، وحدث أي نزاع فيجب عرضه أولاً على المهندس الاستشاري وإلا عد اللجوء للتحكيم سابقاً لأوانه، وفي هذه الحالة على هيئة التحكيم إعلان عدم اختصاصها بالنظر بالنزاع. [١٢] فأداء المهندس المهني والمحايد هو الأساس في تسوية مطالبات المقاول، لأن المهندس هو السلطة العليا في المشروع، التي تقييم الحقوق والمطالبات وفقاً لشروط العقد، فالمهندس يقوم بالإشراف على المشروع وإصدار التعليمات للمقاول، بصفته ممثل لرب العمل فهذه القرارات التي يصدرها ملزمة لرب العمل، أما القرارات التي يصدرها أثناء فصله بالمطالبات المقدمة من أطراف العقد، فإنه في هذه الحالة يصدر قراراته بحيادية واستقلال عن الأطراف وبما يفرضه عليه واجبه المهني، وبالتالي فقراراته هذه غير ملزمة لرب العمل وبالتالي لرب العمل الاعتراض عليها.[١٣]

ويرى الباحث أن العلاقة العقدية، هي بين رب العمل والمهندس وليس بالمقاول، وهذا الدور المزدوج الذي يقوم به المهندس، كممثل لرب العمل في المشروع من جهة، وكشبه محكم تكون مهمته فض المنازعات التي تنشأ عن تنفيذ

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[١٠] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1987م)**، المادة (7/67)، وانظر: مُحَمَّد مُحَمَّد بدران، **عقد الانشاءات في القانون المصري –دراسة في المشكلات العملية لعقود الفيديك الاتحاد الدولي للمهندسين الاستشاريين**، (القاهرة: دار النهضة العربية، 2001م) ص257

[١١] انظر: حمزة حداد، **دور المهندس في تحكيم العقود الإنشائية، المؤتمر الثالث للتحكيم الهندسي**، الهيئة السعودية للمهندسين (2007/10/21). حكم التحكيم رقم (6230) صادر عن غرفة التجارة الدولية،.

[١٢] انظر: حكم محكمة استئناف القاهرة تاريخ 2005/3/30، منشور في **المجلة اللبنانية**، عدد 36، ص50.

[١٣] انظر: أحمد شرف الدين، **تسوية المنازعات عقود الإنشاءات الدولية (نماذج عقود الفيديك)** (القاهرة: دار النهضة العربية،1997م) ص14.

العقد، إعمالاً لأحكام البند / 67/ من الشروط العامة لعقود الفيديك(1987)، هذا الدور الذي كان يلعبه المهندس لا يسبغ عليه صفة المحكم، لأن المحكم يجب أن يتمتع بالحيادة والاستقلال، ولا يكون ممثلاً لأحد الأطراف، كما أن قراره يجب أن يكون نهائياً وملزماً، وهذا لا ينطبق على القرار الذي يصدره المهندس، ووفقاً لذلك قام الاتحاد الدولي للمهندسين الاستشاريين بتعديل المادة (67) من الشروط العامة لعقود الفيديك بإيجاد بديل لدور المهندس في فض المنازعات التي تنشأ عن تنفيذ العقد، ويتمثل هذا البديل في مجلس فض المنازعات، حيث أسندت هذه المهمة وفق للتعديل الصادر بالملحق لعام 1996م لمجلس فض المنازعات، **وفي التعديل الذي تضمنته قواعد عقود الفيديك الصادرة بتاريخ (1999م) حددت المادة (1/20) من الكتاب الأحمر** ، مطالبات المقاول وحالات تقديمها فهي تتناول إما تمديد مدة الإنجاز أو بدفعات إضافية، أو بكلاهما معاً، حيث يكون سبب هذه المطالبات ظروف طارئة قد تعترض تنفيذ العقد، تلحق بالمقاول خسائر كبيرة، أو تكون ناتجة عن أوامر تغيير،[١٤]

الفرع الثاني: ألية عمل مجلس فض النزاعات

تمتاز عقود الإنشاءات (المقاولات) المبرمة لتنفيذ المشاريع الضخمة، مما يتطلب وجود سلطة تعمل على حل النزاعات التي تنشأ أثناء تنفيذ العقد مباشرةً كي لا يتأخر أو يتوقف التنفيذ، وأن تكون هذه السلطة متمتعة بالإلمام بكافة جوانب العقد والأعمال المنفذة في المشروع، ورغبةً من الاتحاد الدولي للمهندسين الاستشاريين، بأن يكون من يتولى مهمة حل الخلافات يتمتع بقدر كاف من الحياد والاستقلال عن أطراف النزاع، فإنه قام بتعديل البند الخاص بتسوية الخلافات في عقود الفيديك، وذلك بإنشاء مجلس فض المنازعات (dispute Adjudication Board "DAB") حيث تم تعديل البند 67 من ملحق الطبعة الرابعة 1996 (تسوية المنازعات والتحكيم)

[١٤] **أوامر تغيير**: وهي سلطة إجراء تعديلات أو إضافات غير منصوص عليها في العقد الأصلي بهدف تحقيق مصلحة المشروع.

حيث أُعدَّ هذا الملحق ليستخدم مع " شروط التعاقد لأعمال مقاولات الهندسة المدنية " الطبعة الرابعة 1987، وتضمن التعديل:

1-في حال نشوب أي نزاع بين صاحب العمل والمقاول لها صلة بالعقد أو بتنفيذ الأعمال، وكذلك أي منازعة تتعلق براي أو أمر أو قرار أو شهادة أو تقدير من المهندس، يتم إحالة موضوع الخلاف كتابياً أولاً لمجلس تسوية المنازعات، لإصدار قرار بشأنه، ويتعين النص على أن الإحالة قد تمت وفقاً للمادة (67).

2-في حال لم يقم أطراف العقد بالاتفاق مسبقاً، على تحديد شخص أو أشخاص أعضاء للمجلس في العقد؛ فأنه يتعَّين عليهم خلال (28) يوماً من تاريخ بداية التنفيذ، تعيين أعضاء المجلس معاً.

3-يتعين أن يكون أعضاء المجلس، من ذوي الكفاءة بحيث يكونوا مؤهلين للقيام بمهمتهم، وعددهم ما بين واحد وثلاثة أعضاء، وإذا كان المجلس مكون من ثلاثة أعضاء فيجب أن يرشح كل طرف عضو يوافق عليه الطرف الأخر، وعلى الأطراف الاتفاق فيما بينهم على تعيين العضو الثالث، ويكون رئيساً للمجلس.

4-يكون تعيين الأعضاء وفقاً لشروط عقد الفيديك، كما يراها الأطراف، كما يجب أن يكون كل عضو مستقلاً ومحايداً عن أطراف العقد طوال مدة تعيينه.

ولا يجوز فصل أي عضو من أعضاء المجلس، إلا بموافقة كل من صاحب العمل والمقاول، ويجوز استبدال عضو المجلس بذات الطريقة التي تم تعيينه فيها.

5- في حال لم يستطع الأطراف تعيين عضو أو أعضاء المجلس وذلك خلال (28) يوماً من تاريخ البدء، يجب على جهة التعيين المحددة في ملحق العطاء، بعد التشاور مع الأطراف القيام بالتعيين ويكون هذا التعيين نهائياً.[١٥]

ويمتلك مجلس فض النزاعات الصلاحيات والسلطات التالية:

[١٥] انظر: مُحَمَّد مُحَمَّد بداران، **عقد الانشاءات في القانون المصري –دراسة في المشكلات العملية لعقود الفيديك الاتحاد الدولي للمهندسين الاستشاريين**، ص 271.

1-تحديد الإجراءات الواجب تطبيقها.

2-تحديد اختصاصه، وتحديد نطاق المنازعة المحالة إليه.

3-تحديد المسائل والوقائع اللازمة لاتخاذ القرار.

4-اتخاذ إجراءات تحفظية.

5-مراجعة أي رأي أو تقييم أو شهادة صادرة عن المهندس متعلقة بموضوع المنازعة.

وعلى المجلس أن يصدر قراره خلال(84 يوماً) من إحالة المنازعة إليه، وعليه إعلان الأطراف والمهندس بالقرار الصادر، وفي حال عدم الموافقة على قرار المجلس من قبل أحد الأطراف، فيتم الاعتراض عليه خلال (28 يوماً) ويبلغ فيه الطرف الأخر والمهندس، وفي هذه الحالة يجب على الأطراف العمل على تسوية النزاع بالطرق الودية (المفاوضات، الوساطة)، علماً أنه يجوز البدء بإجراءات التحكيم، في أو بعد اليوم (56) من تاريخ الاعتراض، ولو لم تجري أي محاولة للتسوية الودية، أما إن انتهت مدة (28 يوماً) ولم يقدم أحد الأطراف اعتراضاً على قرار المجلس، فإنه يصبح نهائياً ويجب على الأطراف تنفيذه، لكن إذا لم يتم تنفيذه فإنه يلجأ للتحكيم، وتطبق قواعد غرفة التجارة الدولية بباريس للتحكيم على النزاع، مالم يتفق الأطراف على خلاف ذلك.[١٦]

أما تشكيل المجلس وفق الطبعة الأخيرة 1999 تضمنه البند (2/20)، حيث نص على أنه يتم إنشاء هذا المجلس ضمن التاريخ المحدد في ملحق عرض المناقصة- مما يميز عقود الفيديك أن الملحق المشار إليه و المرفق مع الشروط يتضمن كل التفاصيل المتعلقة ب " مجلس تسوية النزاع" فيما بين الأطراف و التزامات أعضاء المجلس ودورهم التفصيلي في تسوية النزاع، وذلك لتوفير بديل مناسب وسريع لحسم أي نزاع يطرأ أثناء تنفيذ العقد

[١٦] انظر: عصام عبد الفتاح مطر، **عقود الفيديك لمقاولات وأعمال الهندسة المدنية ووسائل فض المنازعات الناشئة عنها** (الإسكندرية: دار الجامعة الجديدة، 2009م) ص 398.

ومهمة المجلس: هي حل الخلافات بين صاحب العمل والمقاول فقط، الناشئة عن تنفيذ عقد المقاولة، ولا تمتد صلاحية هذا المجلس لفض النزاعات التي تنشأ بين المقاول الأصلي والمقاول الفرعي، وكذلك يمكن لأطراف النزاع مجتمعين أخذ رأي المجلس في واقعة معينة، ويكون عدد أعضاء المجلس واحد أو ثلاثة وفق ما يحدده ملحق العطاء(المناقصة) من الأشخاص المؤهلين، وفى حال عدم تحديد عدد أعضاء المجلس، ولم يتم الاتفاق على العدد، يعتبر عددهم ثلاثة، يتم تعيينهم باتفاق طرفي العقد إذا كان عضواً واحداً، وإذا كانوا ثلاثة أعضاء، فكل طرف يعيَّن عضو، والأطراف مع العضوين يتوافقوا على تعيين العضو الثالث (رئيس المجلس)، حيث تتم صياغة الاتفاقية بين الأطراف وأعضاء المجلس، بالإشارة للشروط العامة المتعلقة باتفاقية فض الخلافات المرفقة كملحق للشروط العامة للعقد، مع إمكانية إدخال أي تعديلات يتفق عليها الأطراف، ويتم تحديد أتعاب أعضاء المجلس فيها، حيث يتحمل الطرفان الأتعاب مناصفةً، وفي حال امتنع أحد الأعضاء أو أصبح غير قادر على العمل؛ نتيجة الوفاة أو العجز أو الاستقالة أو إنهاء التعيين؛ فإنه يتم تعيين البديل بنفس الطريقة التي تم فيها تعيين العضو الأصيل، كما يحق لأطراف النزاع في حال اتفاقهم، استبدال أي عضو من أعضاء المجلس، ويلتزم أعضاء المجلس الحياد والاستقلال، وكذلك السرية لكل ما يطرح عليهم، وتنتهي مهمة المجلس عند اعتبار قرار المخالصة بين أطراف العقد نافذاً، وفق المادة (12/14) من الشروط العامة لعقد الفيديك (الكتاب الأحمر).[١٧]

وآلية عمل المجلس وفق المادة (4/20) هي أنَّ أي نزاع بين الطرفين فيما يتعلق بالعقد، بما في ذلك أي خلاف حول ما يصدر عن المهندس من شهادات أو تقديرات أو تعليمات أو رأي أو تحديد قيمة، يحال خطياً لمجلس فض الخلافات، للحصول على قراره بشأنه، مع إرسال نسخة من الطلب للطرف الأخر والمهندس، وفي سبيل ذلك على

[١٧] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1999م)**، المادة (20).

كلا الطرفين، أن يقدما على الفور للمجلس كافة المعلومات وإمكانية الوصول إلى الموقع، والتسهيلات المناسبة وفق ما يطلبه المجلس، لأغراض اتخاذ قرار بشأن تسوية هذا النزاع، **علماً بأن المجلس لا يعمل كهيئة تحكيم** ، وعلى المجلس إصدار قراره خلال 84 يوماً من تسلمه الإحالة، أو خلال أية مدة أخرى يقترحها المجلس ويوافق الطرفان عليها، ويجب أن يكون قراره مسبباً، وأن ينص فيه على أنه قد صدر بموجب هذه المادة، ويكون القرار ملزماً للطرفين وعليهما تنفيذه، إلا إذا تمت مراجعته في طريقة تسوية ودية أو من خلال إجراءات التحكيم، ويصدر هذا القرار إما بالإجماع أو بالأغلبية حيث تنظم الأغلبية قرار، والأقلية قرار، ويتم تسليمهما للأطراف.

وفي حال لم يرضى أي طرف بقرار المجلس، فعليه خلال (28) يوماً من بعد تسلمه للقرار، أن يرسل إشعاراً للطرف الآخر يعلمه فيه بعدم الرضا؛ كما أنه في حال أخفق المجلس بإصدار قراره خلال (84) يوماً من تاريخ تسلمه طلب إحالة الخلاف إليه، فيجوز لأي من الطرفين وخلال (28) يوماً من انقضاء فترة (84) يوماً، أن يعلم الطرف الأخر بعدم رضاه من خلال إشعار، يتضمن موضوع الخلاف وأسباب عدم الرضى، مع التنويه أنه تم إصداره وفق أحكام هذه المادة، أما إذا أصدر المجلس قراره، ولم يرد على هذا القرار إشعار بعدم الرضى من قبل أحد الطرفين خلال مدة (28) يوماً من بعد تسلمه قرار المجلس؛ فإن هذا القرار يصبح نهائياً وملزم لكلا الطرفين.[١٨]

ويمكن اللجوء للقضاء للحصول على حكم مستعجل لتنفيذ هذا القرار،[١٩] أو من خلال اللجوء للتحكيم، وهذا ما أكدته الأحكام الصادرة عن غرفة التجارة الدولية.[٢٠]

[١٨] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1999م)**.

[19] Robert ,Knutson ,An English Lawyer's View of the New Fidic Rainbow :Where is the Pot of Gold?2003,p4.

[20] Christopher R. Sepal . An Engineer's / Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award. http://www1.fidic.org/resources/contracts/seppala_paris_2220321_1.pdf

يرى الباحث أنه كان من الأجدى أن يمتد اختصاص المجلس لكافة النزاعات التي تنشأ عن تنفيذ عقد المقاولة، بما فيها النزاعات التي تكون بين المقاول الأصلي والمقاول من الباطن، وذلك كون هذا المجلس على دراية وإطلاع، على كافة مراحل تنفيذ العقد منذ بدايته، وبالتالي هو الأقدر على معرفة وفهم طبيعة كافة الخلافات التي تنشأ عن تطبيقه، ويرى الباحث أن الطبيعة القانونية للقرار الصادر عن المجلس، هو ليس بقرار تحكيمي بل هو قرار يجمع بين الخبرة الفنية والوساطة، ولا يعتبر ملزماً إلا بعد قبوله من الأطراف.

المطلب الثاني: التسوية الودية للنزاع – التحكيم

الفرع الأول: استخدام أنواع التسوية الودية لحل النزاع

وفق البند (67) من الكتاب الأحمر الطبعة الرابعة الصادرة عام 1987، للطرف المتضرر من القرار الصادر عن المهندس، تبلّيغ الطرف الآخر خطاب بعزمه على اللجوء للتحكيم، وللأطراف الحق خلال/ 56 / يوماً من تاريخ استلام خطاب اللجوء للتحكيم، العمل على تسوية النزاع ودياً، أما وفق البند (5/20) من الكتاب الأحمر الصادرة عام 1999م، فإنه إذا صدر إشعار بعدم الرضى من قبل أحد الطرفين خلال مدة (28) يوماً من بعد تسلمه قرار المجلس، فإنه وقبل المباشرة بإجراءات التحكيم، يتعيَّن على الأطراف تسوية الخلاف بينهما بشكل ودي، قبل الذهاب إلى التحكيم، وأهم وسائل التسوية الودية هي:

المفاوضات: تقوم على تلاقي ممثلَّين عن الجهتين المتنازعتين لبحث أسباب النزاع وعناصره، بقصد التوصل إلى تسوية له.

الوساطة بأنها:وسيلة لفض النزاع، تتطلَّب تدخل طرف ثالث محايد، للعمل مع الأطراف الذين عجزوا عن حل نزاعهم بالمفاوضات، لإيجاد بمساعدته تسوية يرضى عنها الطرفان المتنازعان.

الفرع الثاني:إجراءات التحكيم لفض النزاعات

إن إجراءات التحكيم لا تختلف بين قواعد عقود الفيديك لعام 1987م، وقواعد عقود الفيديك لعام 1999م، إنما الاختلاف يتجلى بالإجراءات التي تسبق إحالة النزاع على التحكيم، حيث أنَّ إجراءات الإحالة إلى التحكيم وفق قواعد عقود الفيديك لعام 1987م، تكون عندما يصدر المهندس قراره بحل النزاع خلال المدة الممنوحة له، ولا يرضى به أحد الأطراف، أو يمتنع عن إصدار أي قرار بخصوص النزاع المحال إليه، فيتم بعد ذلك وخلال المدة المقررة، أن يقوم الطرف الراغب بالتحكيم، بإرسال خطاب للطرف الأخر يبلِّغه فيه بلجوئه للتحكيم.

أما إجراءات الإحالة للتحكيم وفق قواعد عقود الفيديك لعام 1999م، فإنه لا يجوز لأي من طرفا النزاع المباشرة بإجراءات التحكيم، حول الخلاف الناشب بينهما، إلا إذا تم إصدار الإشعار بعدم الرضا على قرار مجلس فض الخلافات، على النحو المحدد في المادة (4/20)، ومالم يتفق الأطراف على خلاف ذلك، فإنه يجوز البدء بإجراءات التحكيم في أو بعد اليوم (56) من تاريخ إرسال الإشعار بعدم الرضى، حتى ولو لم تتم **محاولة** تسوية الخلافات بينهما ودياً، وذلك فق المادة (5/20).

كما إن لم يكن قد تمت تسوية الخلاف ودياً، فإن أي نزاع يكون حول قرار المجلس، (إن وجد) ولم يصبح نهائياً وملزماً، تتم تسويته بواسطة التحكيم الدولي، وفق المادة (6/20) وما لم يتفق الطرفان على خلاف ذلك، يتم تسوية النزاع نهائياً بموجب قواعد التحكيم لغرفة التجارة الدولية، حيث يتم تسوية النزاع بواسطة هيئة تحكيم

مكونة من ثلاثة محكمين يعينون وفقا لهذه القواعد، وتتم إجراءات التحكيم بلغة المراسلات المحددة في المادة (4/1).

وتتمتع **هيئة التحكيم** بصلاحيات كاملة في مراجعة وتعديل أي شهادات أو تقديرات أو تعليمات أو رأي أو تقييم صادر من المهندس، وأي قرار صادر عن مجلس فض الخلافات متعلق بالنزاع.

كما يحال أي خلاف ينشأ بين الطرفين مباشرة للتحكيم بموجب احكام المادة (6/20) دون تطبيق المادة (4/20) المتعلقة بقرار المجلس، ولا المادة (5/20) المتعلقة بالتسوية الودية، في الحالتين التاليتين:

1-حالة صدور قرار عن مجلس فض الخلافات، ولم يقم أي من الطرفين بإرسال إشعار عدم الرضى عنه، وأصبح القرار نهائياً وملزماً، **لكن لم يمتثل أي طرف لهذا القرار**، فيتم إحالة موضوع عدم الامتثال إلى التحكيم.

2- حالة عدم وجود مجلس فض الخلافات لأي سبب كان.[٢١]

- إجراءات التحكيم وفق قواعد التحكيم لغرفة التجارة الدولية في باريس:

محكمة التحكيم الدولية، المنبثقة عن غرفة التجارة الدولية، هي جهاز التحكيم المستقل التابع لغرفة التجارة الدولية، لا تفصل «المحكمة » بنفسها في المنازعات، ولكنها تعيِّن وتستبدل المحكمين، وتقرر بشأن طلبات ردهم (الطعن فيهم)، وتراقب وتتابع عملية التحكيم، لضمان تنفيذها بسرعة وكفاءة وبالأساليب الصحيحة، وتدقق وتعتمد قرارات هيئات التحكيم، **والأمانة العامة** تدعم المحكمة، وهي الرابطة الرئيسية بين الأطراف والمحكمين والمحكمة،

[٢١] انظر: الكتاب الأحمر، **الشروط العامة لعقد المشاريع الإنشائية (فيديك 1999م)**، المادة (8/20).

وتعمل كلاً من المحكمة والأمانة العامة، على تسيير الإجراءات وتقديم المساعدة الجوهرية وضمان الجودة العالية في كل خطوة.[٢٢]

وفق ما تم بيانه آنفاً، فإن الطرف الراغب بالتحكيم، يقوم بإرسال خطاب للطرف الأخر يبلّغه فيه بلجوئه للتحكيم، ثم يقوم بتقديم طلب تحكيم إلى الأمانة العامة لمحكمة التحكيم الدولية، التي تبلّغ المدعي والمدعى عليه بتسلمها الطلب، حيث يعتبر في جميع الحالات تاريخ تسّلم الأمانة العامة للطلب، هو تاريخ بدء التحكيم.[٢٣]

وعلى المدعى عليه خلال ثلاثين يوماً من يوم تسلمه طلب التحكيم المرسل من الأمانة العامة؛ أن يقدم ردّاً على طلب التحكيم.[٢٤]

وبمجرد تشكيل هيئة التحكيم فعلى الأمانة العامة إرسال الملف إلى هيئة التحكيم، بشرط تسديد الدفعة المقدمة من المصاريف التي طلبتها الأمانة العامة في هذه المرحلة، وتقوم المحكمة بتحديد مكان التحكيم ما لم يتفق الأطراف عليه، والقواعد واجبة التطبيق على الإجراءات هي قواعد التحكيم لغرفة التجارة الدولية في باريس، أما لجهة القواعد القانونية واجبة التطبيق على النزاع فهي القواعد التي يتفق عليها الأطراف، وقواعد وأحكام وشروط عقد الفيديك المبرم بينهم، وعند تلقي الملف من الأمانة العامة، تقوم هيئة التحكيم بإعداد وثيقة المهمة الخاصة بها، ويوقع وثيقة المهمّة كلٌ من الأطراف وهيئة التحكيم، وترسل هيئة التحكيم إلى المحكمة وثيقة المهمة، موقعةً منها ومن

[٢٢] انظر: **خدمات تسوية المنازعات**، الاسترجاع بتاريخ 9-5-2017 من www.storeiccwbo.org

[٢٣] انظر: غرفة التجارة الدولية – المادة الرابعة من قواعد التحكيم لعام2012م، **نشرة عدد 865-3** -ISBN 978-92-842-0211-**ARA** 9، www.storeiccwbo.org

[٢٤] انظر: غرفة التجارة الدولية – المادة الخامسة من **قواعد التحكيم** لعام2012م. (فرنسا: مطبعة بور روايال، تراباس2016).

الأطراف خلال شهرين من تاريخ إحالة الملف إليها،[٢٥] ثم تعقد هيئة التحكيم جلسة لإدارة الدعوى ووضع الجدول الزمني للإجراءات الذي تعتزم اتباعه لإدارة التحكيم، وبعد دراسة المذكرات الكتابية المقدمة من الأطراف وكافة المستندات المعتمد عليها، تستمع هيئة التحكيم الأطراف جميعهم حضورياً إذا طلب أحدهم ذلك، ويجوز لهيئة التحكيم أن تقرر الاستماع إلى شهود، أو إلى خبراء معينين من الأطراف، ويجوز لهيئة التحكيم الفصل في الدعوى استناداً فقط إلى المستندات المقدمة من الأطراف، وبعد عقد آخر جلسة مرافعة متعلقة بالمسائل التي سيُفصل فيها بحكم تحكيم، أو بعد تقديم آخر مذكرات مسموح بها بخصوص تلك المسائل، أيهما لاحقاً، تقوم هيئة التحكيم بإعلان غلق باب المرافعات الخاص بالمسائل التي سيتم الفصل فيها بحكم تحكيم؛ وبإخطار الأمانة العامة والأطراف بالتاريخ الذي تتوقع فيه تقديم مشروع حكمها إلى المحكمة، لاعتماده وفقاً للمادة الثالثة والثلاثين، وعلى هيئة التحكيم إصدار حكمها النهائي خلال ستة أشهر، فإذا كانت هيئة التحكيم مكوّنة من أكثر من محكم، يصدر حكم التحكيم بالأغلبية، وإذا لم تتوفر الأغلبية، يصدر الحكم رئيس هيئة التحكيم وحده، ويجب أن يذكر حكم التحكيم الأسباب التي استند إليها، ومصاريف التحكيم ويُعتبر حكم التحكيم قد صدر في مكان التحكيم وفي التاريخ المدون فيه، ويتعين على هيئة التحكيم، قبل توقيع أي حكم تحكيم، أن تقدّم مشروعه إلى المحكمة، وللمحكمة أن تُدخل تعديلات تتعلق بشكل الحكم، ولها أيضاً دون المساس بما لهيئة التحكيم من حرية الفصل في المنازعة، أن تلفت انتباه الهيئة إلى مسائل تتعلق بالموضوع، ولا يجوز أن يصدر أي حكم تحكيم من هيئة التحكيم حتى تعتمده المحكمة من حيث الشكل، وتخطر الأمانة العامة الأطراف بنص حكم التحكيم الموقع من هيئة التحكيم بمجرَد صدوره، ويكون كل حكم تحكيم ملزماً للأطراف، ويتعهد الأطراف عند إحالتهم المنازعة إلى التحكيم بموجب

[٢٥] انظر: غرفة التجارة الدولية – المادة الثالثة والعشرون من **قواعد التحكيم** لعام 2012م.

هذه القواعد؛ بتنفيذ أي حكم تحكيم دون تأخير، ويُعتبر قد تنازلوا عن أي شكل من أشكال للطعن، وذلك إلى الحد الذي يكون فيه هذا التنازل صحيحاً.[٢٦]

الخاتمة: يرى الباحث، أن الطبعات الحديثة من عقود الفيديك، تميَّزت بالنص على ألية محددة بدقة لفض النزاعات التي تنشأ خلال تنفيذ العقد، حيث تبدأ مع مجلس فض النزاعات الذي يعايش المشروع منذ بدايته وحتى الانتهاء منه، ثم في حال عدم الرضى بقرارات المجلس يلجأ للتسوية الودية لفض النزاع، وذلك من خلال المفاوضات المباشرة بين الأطراف أو من خلال تدخل طرف ثالث حيادي كوسيط لتسوية النزاع، وفي حال لم تفضي الوسائل السابقة لتسوية النزاع، يتم اللجوء إلى التحكيم، وإن اختيار إجراءات تحكيم غرفة التجارة الدولية، من قبل واضعي عقود الفيديك يعود إلى أن هذا الإجراءات تتسم بالدقة والشمولية، وتخضع للتطور المستمر، إلا أن النص على اعتماد هذه الإجراءات ليس ملزماً، بل يمكن للأطراف اختيار أي قواعد تحكيم يرونها مناسبة لفض نزاعاتهم، مما يجعلها أفضل العقود الدولية النموذجية، المتعلقة بصناعة البناء والتشييد، بما تضمنته من بنود تنظم بدقة وتوازن العلاقة بين أطراف العقد، وتوزيع عادل لتحمل المخاطر، وألية لتسوية النزعات تتسم بالتسلسل والوضوح.

[٢٦] انظر: غرفة التجارة الدولية – المادة الثالثة والعشرون حتى المادة الرابعة والثلاثون من **قواعد التحكيم** لعام 2012م.

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