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PROCEEDINGS

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[Image: A picturesque view of a mosque with surrounding palm trees and intricate geometric patterns]
CONTENTs

PROCEEDINGS IN ENGLISH

#E01
DISPUTE RESOLUTION FOR WAQF LANDS: THE NEED FOR A WAQF TRIBUNAL
Zati Ilham Binti Abdul Manaf

#E02
THE CHALLENGES OF INTEGRATING DOMESTIC VIOLENCE IN TO COURT CONNECTED ‘A’ PROCESSES IN NIGERIA
Mohammed Amin Umar, Ramizah Wan Muhammad, Najibah Muhammed Zin & Mohd Iqbal Abdul Wahab

#E03
BUILDING STRONG COMMUNITIES THROUGH MEDIATION IN MALAYSIA: THE NEED FOR A LEGAL FRAMEWORK
Hanna Ambaras Khan & Nora Abdul Hak

#E04
HAKAM (STATE OF SELANGPR) RULES 2014: AN OVERVIEW
Nora Abdul Hak & Sarafuddin Abdul Syahid Sowell

#E05
RESOLUTION OF MATRIMONIAL DISPUTE IN THE CIVIL COURT OF MALAYSIA: MEDIATION AS A WAY FORWARD
Norliah Ibrahim & Nora Abdul Hak

#E06
COMPARISON BETWEEN COMMUNITY MEDIATION PROGRAM IN MALAYSIA AND IRELAND: SOME LESSONS FOR MALAYSIA
Nora Abdul Hak & Hanna Ambaras Khan

#E07
RESOLVING CONFLICT OF LAW ISSUES IN PARENTAL CHILD ABDUCTION: MEDIATION AS AN EFFECTIVE MECHANISM
Roslina Che Soh, Nora Abdul Hak, Abdul Ghafur Hamid, Najibah Mohd Zin, Hidayati Mohamed Jani
PREFERENCES OF DISPUTE RESOLUTION MECHANISMS IN ISLAMIC FINANCIAL SERVICES INDUSTRY IN MALAYSIA: A CASE STUDY OF RETAIL CUSTOMERS
Engku Rabiah Adawiah Engku Ali, Nor Razinah Mohd Zain & Adewale Abideen

PREFERENCES OF DISPUTE RESOLUTION MECHANISMS IN ISLAMIC FINANCIAL SERVICES INDUSTRY IN MALAYSIA: A CASE STUDY OF CORPORATE CUSTOMERS
Nor Razinah Mohd Zain, Engku Rabiah Adawiah Engku Ali & Adewale Abideen

COMMON DISPUTES IN OIL AND GAS INDUSTRY AND THE A PROCESS
Wan Mohd Zulhafiz Wan Zahari & Nurah Sabahiah Mohamed

OVERVIEW OF FAMILY DISPUTES IN ADMINISTRATION OF ESTATES: ANALYSIS ON MEDIATION AS EFFECTIVE DISPUTE RESOLUTION MECHANISM
Muhammad Amrullah Bin Drs Nasrul, Nora Abdul Hak, Wan Noraini Mohd Salim & Akmal Hidayah Halim

EFFORTS TO SAVE SAVABLE MARRIAGE UNDER FAMILY LAW IN MALAYSIA: AN ANALYSIS
Noraini Md Hashim, Roslina Che Soh, Norliah Ibrahim, Nora Abdul Hak, Najibah Md Zain, Nur Ezan Rahmat & Sarafuddin Abdul Syahid Sowell

DISPUTE RESOLUTION OVER UNFAIR TERMS IN ISLAMIC BANKING CONSUMER CONTRACTS: MALAYSIAN PERSPECTIVE
Noor Mahinar Abu Bakar

SETTLEMENT OF DISPUTES RELATING TO THE AREA: ROLE OF SEABED DISPUTES CHAMBER OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
Mohammad Naqib Ishan Jan & Mohammad Shahadat Hossain

MEDICAL APOLOGY’ AT CROSSROADS: AN EFFECTIVE DISPUTE RESOLUTION MECHANISM VERSUS ADMISSION OF LIABILITY
Puteri Nemie Jahn Kassim & Duryana Mohammad

#E19
ENHANCING JUSTICE THROUGH EFFECTIVE UTILISATION OF ‘DISPUTE RESOLUTION MECHANISMS’ IN HANDLING MEDICAL DISPUTES IN INDONESIA
Muh Eniyo Susila & Puteri Nemie Jahn Kassim

#E20
A MECHANISMS TO RESOLVE POTENTIAL DISPUTES ON THE PAYMENT OF TAKAFUL BENEFITS UNDER CONDITIONAL HIBAH
Safinar Salleh, Uzaimah Ibrahim, Mohamad Asmadi Abdullah & Akmal Hidayah Halim

#E22
LEGAL FRAMEWORK FOR RESOLVING MISAPPROPRIATION OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE DISPUTE IN SOUTH AFRICA
Zinatul Ashiqin Zainol & Mr Abdussalam Mikail

#E24
FINDING A COMPREHENSIVE DISPUTE RESOLUTION MECHANISM FOR COMPENSATING OBSTETRIC INJURIES IN MALAYSIA: ISSUES AND CHALLENGES
Khadijah Mohd Najid & Puteri Nemie Jahn Kassim

#E27
MEDIATION V SULH: A COMPARATIVE STUDY
Mohammad Hafiz Bin Mohd Zaki, Mazbah Termizi & Muhammad Ridhwan Saleh

#E28
HOW ICT IMPACTS THE JUDICIAL BUSINESS OF THE MALAYSIAN COURTS
Ani Munirah Mohamad

#E34
DUTY OF AL-MUHTASIB AND PROTECTION OF MAQASID SHARIAH: A SPECIAL REFERENCE TO THE AML/CFT LAW IN MALAYSIA
Raja Madiah Raja Alias & Norhashimah Mohd Yasin

#E36
THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: ETHICAL CONCERNS AND REGULATIVE MEASURES
Achyut Tewari & Varunavi Bangia

#E37
OUTSOURCING JUSTICE AND THE EMERGENCE OF CONSUMER OMBUDSMAN REGULATORY FRAMEWORK
Sodiq Omoola & Nurah Sabahiah Mohamed

#E38
AVERTING POSTHUMOUS CONFLICTS OVER INHERITANCE: NEGOTIATION THROUGH TAKHARUJ
Isa Abdur-Razaq Sarumi, Abdul Haseeb Ansari, Azizah Bt Mohd & Norliah Bt Ibrahim

#E43
THE ROLE OF SHARIAH COUNCILS IN THE RESOLUTION OF MATRIMONIAL DISPUTES IN THE UK: ISSUES AND CHALLENGES
Rafidah Mohamad Cusairi & Mahdi Zahraa

#E44
DISPUTE RESOLUTION BETWEEN THE SUNNI & THE SHIA: MYTH OR POSSIBILITY?
Mohd Yazid Bin Zul Kepli

#E46
OVERVIEW OF LEGAL AND ADMINISTRATIVE APPROACHES TO MANAGE HUMAN-WILDLIFE CONFLICTS IN MALAYSIA
Maizatun Mustafa, Mariani Ariffin, Siti Fatimah Sabran & Sarah Tan

#E54
METHODS OF RESOLVING CRIMINAL DISPUTE WITHOUT A TRIAL: OPTIONS FOR AN ACCUSED
Norjihan Ab Aziz, Noorshuhadawati Mohamad Amin & Zuraini Ab Hamid

#E59
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
Azizah Mohd & Nadhilah A Kadir

#E65
THE ROLE OF SHARI’AH COUNCILS IN THE RESOLUTION OF MATRIMONIAL DISPUTES IN THE UK: ISSUES AND CHALLENGES
Rafidah Mohamad Cusairi & Mahdi Zahraa

#E66
RESOLVING MEDIA DISPUTES IN DEFAMATION CASES
Duryana Binti Mohamed & Nor Hafizah Mohd Badrol Afandi

#E68
ARBITRATION IN DOMESTIC AND INTERNATIONAL TAKEOVERS AND MERGERS OF COMPANIES
Mushera Ambaras Khan & Mohd Radhuan Arif Zakaria

#E69
THE FINANCIAL OMBUDSMAN SCHEME AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM FOR FINANCIAL DISPUTES: THE MALAYSIAN EXPERIENCE
Syed Fadhil Hanafi Syed A Rahman & Khairil Azmin Mokhtar

#E70
EFFECTIVITÉS: AN IMPERATIVE LEGAL PRINCIPLE IN RESOLVING THE SENKAKU/DIAOYU ISLANDS DISPUTE
Muhamad Hassan Ahmad, Ashgar Ali Ali Mohamed & Abdul Haseeb Ansari

#E71
STATUTORY ADJUDICATION: A GLOBAL TREND FOR RESOLUTION OF PAYMENT PROBLEMS IN CONSTRUCTION INDUSTRY
Barakat Adebisi Raji, Nurah Sabahiah Mohamed & Ashgar Ali Ali Mohamed

#E72
MUHTASIB, OMBUDSMAN AND MALAYSIAN FINANCIAL OMBUDSMAN SCHEME: A COMPARATIVE STUDY
Ibtisam @ Ilyana Ilias, Rusni Hassan & Uzaimah Ibrahim
RESOLUTION OF WAQF LAND DISPUTES: THE RELEVANCE OF A WAQF TRIBUNAL IN MALAYSIA

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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. 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 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. 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”. In Malaysia, Waqfs mainly been created over land for religious purposes such as for the creation of mosques, suraus and burial sites. 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

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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. 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.

In addition, land generally is also a state matter within List II (Item 2) in the Ninth Schedule. The State Authority 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. Waqf land however reserves a special position wherein the NLC cannot be applied.

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 NLC 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. 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.

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

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

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 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. 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 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. 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, 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. 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. By having parties questioning the court’s power to hear the disputed matter, more time...
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>
<thead>
<tr>
<th>No.</th>
<th>Case</th>
<th>Subject Matter</th>
<th>Judgment</th>
<th>Duration (including appeals)</th>
</tr>
</thead>
</table>

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

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)).
<table>
<thead>
<tr>
<th>Case</th>
<th>Parties</th>
<th>Issue</th>
<th>Outcome</th>
<th>Date</th>
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</thead>
<tbody>
<tr>
<td>2</td>
<td>Kamarolzaman Bin Hajar v Majlis Agama Islam Selangor</td>
<td>Application to change status of Waqf land from ‘Waqf am’ to ‘Waqf Khas’.</td>
<td>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.</td>
<td>August 2013 - November 2014</td>
</tr>
<tr>
<td>3</td>
<td>Mohd Ridza bin Abdul Latiff (berniaga sebagai Rimbunan Niaga) v Majlis Agama Islam Negeri Johor &amp; Anor</td>
<td>Tenancy Agreement made on Waqf land.</td>
<td>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.</td>
<td>April 2014 - July 2016</td>
</tr>
<tr>
<td>4</td>
<td>Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff Bin Hassan &amp; Anor</td>
<td>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.</td>
<td>Court dismissed the Defendant’s application and held that there are triable issues which cannot be summarily disposed of by a striking out application.</td>
<td>June 2014 - October 2015 (Striking out Application)</td>
</tr>
<tr>
<td></td>
<td>Case Title</td>
<td>Application Details</td>
<td>Preliminary Objection Details</td>
<td>Date</td>
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<td>5</td>
<td>Ajar Bt Taib &amp; Ors v Majlis Agama Islam dan Adat Istiadat Melayu Perlis⁵</td>
<td>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.</td>
<td>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.</td>
<td>April 2011- August 2013</td>
</tr>
<tr>
<td>6</td>
<td>Majlis Agama Islam Pulau Pinang v Kati-jah Yoan &amp; Ors⁶</td>
<td>Application to ascertain validity of Waqf and recognized trustees and validity of contract of sale involving Waqf land.</td>
<td>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.</td>
<td>SIRC Pulau Pinang brought the claim in 1987. Decision passed on 22 December 2009.</td>
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<tr>
<td>7</td>
<td>Cenderong Concession</td>
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<td></td>
</tr>
<tr>
<td>Case Reference</td>
<td>Party Details</td>
<td>Description</td>
<td>Settlement</td>
<td>Timeline</td>
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<tr>
<td>Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam Dan Adat Melayu Terengganu</td>
<td>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.</td>
<td>Parties reached an amicable settlement through <em>sulh</em>.</td>
<td>2008-2012</td>
<td></td>
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<tr>
<td>Majlis Agama Islam dan Adat Melayu Terengganu lwn Tengku Zainul Akmal bin Tengku Besar Mahmud dan Seorang Lagi</td>
<td>Application to review Family Waqf.</td>
<td>Appeal to review decision of High Court in ordering for all heirs of the waqf to be named in the suit was dismissed.</td>
<td>2008-June 2010</td>
<td></td>
</tr>
<tr>
<td>Tengku Zainal Akmal bin Tengku Mahmud &amp; Anor v Majlis Agama Islam dan Adat Melayu Terengganu &amp; Anor</td>
<td>Application to intervene as 2nd Defendant by SPPT Development Sdn. Bhd.</td>
<td>Application to intervene was dismissed on the grounds that directors and shareholders are non-Muslims.</td>
<td>September 2011-January 2012</td>
<td></td>
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<tr>
<td>Majlis Agama Islam dan Adat Melayu Terengganu v Tis ‘Ata’ Ashar Sdn Bhd</td>
<td>Declaration that the disputed land is a Waqf land and that the SIRC is the sole trustee to the property.</td>
<td>Parties’ undergone ‘sulh’ and Respondent agrees to the application made by the SIRC.</td>
<td>6 July 2008 - 13 July 2008</td>
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<tr>
<td></td>
<td>Claim/Case Description</td>
<td>Application/Object</td>
<td>Outcome</td>
<td>Timeframe</td>
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<tr>
<td>8</td>
<td>Majlis Agama Islam Selangor vs Hicom Gamuda Development Sdn Bhd &amp; One More</td>
<td>Application to ascertain validity of Waqf.</td>
<td>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.</td>
<td>2007-2011 (Suit was later withdrawn)</td>
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<td></td>
<td></td>
<td>Shariah Court of Appeal &amp; Shariah High Court</td>
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<td>Majlis Agama Islam Selangor vs Bong Boon Chuen &amp; Ors</td>
<td>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.</td>
<td>Appeal by SIRC to intervene was dismissed.</td>
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<td>10</td>
<td>Ismail Bin Wahab vs Majlis Agama Islam Melaka &amp; 3 Ors</td>
<td>Claim of Waqf Property (Waqf Khas)</td>
<td>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.</td>
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<td>Bakhtiar Bin Adnan vs Mohd Fawzi bin Nahrawi &amp; 6 Others</td>
<td>Application for an interim injunction to prohibit the Respondents from destroying and moving the surau located on the Waqf land.</td>
<td>Ex-Parte Application was rejected. Wilayah Persekutuan SIRC should be made the Respondent of the application.</td>
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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. 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. 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* and *Tengku Zainal Akmal bin Tengku Mahmud & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Anor*. Cases involving the question of title of Waqf lands will continue to persist.

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*, 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. The case in 2009 had since been withdrawn, after an extensive number of suits, through amicable settlement between the parties in 2012.

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30 Syed Khalid Rashid, ‘Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf’.
33 Summons No. 11200-099-0400-2008
34 [2010] 2 SHLR 181
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. 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.

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. 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.

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.
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 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
individual who has knowledge of Waqf law. 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.

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. 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:

‘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

42 Section 44 of the Wakf Act 1995.
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 courts 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.

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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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9  [2012] 3 SHLR 39
10  [2010] 2 SHLR 181
11  [2011] 1 SHLR 10
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. The cause list is overloaded and the atmosphere is intimidating and oppressive to the uninformed and therefore litigation became more complex, legalistic and institutionalised. 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

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 underlying 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. 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
\(^5\) Ibid at 44-45
\(^7\) 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. 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). 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. 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. 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. 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. 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. 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
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. 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 Okpurwu vs Okpokam, 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. 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. Subsequently the ordinance was re-enacted in to law as arbitration ordinance (Act) laws of the federation of Nigeria and Lagos. 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.

However the modern and contemporary governmental endorsement of ‘ADR’ was the promulgation of arbitration decree by the then military government. 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. 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”. 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

17 (1994) 4 NWLR, (Pt, 90) p, 554 at 586
19 Opct, Orojo & Ojomo, p, 3
20 Ibid Orojo & Ojomo, p, 13
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)
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

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)
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.\textsuperscript{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.\textsuperscript{37} With respective to the learned author’s insightful perspective, domestic violence is an emerging criminal liability that prevents certain treatment, exclusion, domination or restriction whether religious, traditional or socio-cultural as women’s human rights violation and criminal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{42} and plea bargain in all criminal trials.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45} The court is statutorily expected to consider and grant relief available under matrimonial causes act and under the child rights act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Thus Islamic law and customary law are part of Nigeria law and specific courts were statutorily established for their absolute application. Accordingly

\textsuperscript{36} Op, cit Ezejiofor. G, at 4
\textsuperscript{37} Ibid at 3
\textsuperscript{38} CEDAW committee Recommendation No. 19
\textsuperscript{39} Op, cit Lukman. A. A at 21
\textsuperscript{41} Ibid at 2151
\textsuperscript{42} Criminal procedure code, N. R 18 of 1960/cap. 80 laws of northern Nigeria, 1963
\textsuperscript{43} See section 493 of the administration of criminal justice act laws of the federation of Nigeria (2015)
\textsuperscript{44} See section 31 (2) (e) of VAPP Act 2015
\textsuperscript{45} See section 31 (8) of VAPP Act 2015
\textsuperscript{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
\textsuperscript{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 door53 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)
54 See section 257 (1&2) of the constitution (1999)
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

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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
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* committee 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/indigenous 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 outline if it depends on the *Rukun Tetangga* committee members. The same practice needs to be adopted in East Malaysia. Each ethnic 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

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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

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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 unwaried mediators.”

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. 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.”

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

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. 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.

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 have 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.”

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. 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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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.”

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.”

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’

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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”

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. 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.

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 regulations 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 Boulle 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.

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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.

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.

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.

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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. 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.”

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,
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.

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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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.
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 organisation 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 language, 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 decision 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 structure that covers the federal and states level to ensure government’s 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 Tahkîm

Tahkîm is a verbal noun of the ‘Arabic word ḥakkama. The word ḥakkama primarily signifies the turning of a man back from wrongdoing. Al-Zamakhsharî explains the meaning of the word ḥakkama as making someone an arbitrator (ḥakam/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’an and it is also the same if someone is asking a judge to decide in his case. Literally, tahkîm means to make someone an arbitrator (ḥakam) and to authorise him (the ḥakam) to pass judgement.

According to Islamic legal terminology, Tahkîm (arbitration) is an appointment, by the disputing parties, of someone (arbitrator) to judge between them. Al-Mawardî defines tahkîm 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-Zuhaîlî, Wahbah defines tahkîm as an agreement by the parties to appoint a qualified person to settle their dispute by reference to Islamic Law. Zîdân, Abd al-Karîm states that tahkîm 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 qâdî (judge) that has the power to give judgement. There should be clear pronouncement (lafaţ) that a person has been appointed as an arbitrator, for example, the parties should say, “We have appointed you as ḥakam (arbitrator) to judge over the dispute between us.”

The definition of tahkîm is also provided for under article 1790 of the Majallah al-‘Adliyyah 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 (ḥakam).”

It is to be noted that the terminological definition of tahkîm is close to its literal meaning. The jurists differ in words on their definitions of tahkîm. They were, however, in agreement as to its meaning and scope, in that tahkîm 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 qâdî, this appointment may come from individuals within the community or those with specific designation, responsible to the ummah (community), such as the imâm (leader).

The Characteristics of Tahkîm

The following are the characteristics of tahkîm that can be deduced from the above definitions of tahkîm. 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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4 Ibid.
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 ḍād.

**Stages of *Taḥkīm***

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 ḍād (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 *Taḥkīm***

The authorities for *taḥkīm* are derived from the Qur’ān, the *Sunnah* of Prophet Muḥammad (s.a.w.), consensus of opinions (*ijmāʿ*) 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 arbitrators is recommended if there is a marital dispute feared or anticipated to lead towards ṣhiqāq (marriage breakdown) between married couples. 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. This settlement by *taḥkīm* is also strongly encouraged in all types of disputes. According to al-Qurṭūbī, 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 ḥadīthhs of the Prophet on *taḥkīm* which clearly show that the Prophet himself approved tahkim as an institution in Islam. The following ḥadīthhs are authorities for *taḥkīm*.

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Prophet Muhammad (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 Quraizah in the battle of al-‘Ahzāb. In this case, Banū Qurayţah requested that the dispute should be arbitrated under customary law accepting Sa’ad as the arbitrator.\(^{18}\) Another example of *taḥkīm* is when the Prophet agreed with the arbitration of al-A’war bin Bashāmah in the case of Banū al-‘Anbar relating to the distribution of zamā (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-Ḥuṣṣān* 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 Muhammad s.a.w., who had unanimously agreed on *taḥkīm*.\(^{21}\) They resolved their disputes which occurred among them by appointing a ḥakam (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 Syarria 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 talhkim/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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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 of 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 pronunciation of ijab and qabul for khuluk is as specified in the Second Schedule.

(4) The pronunciation 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 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 hakam 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 hakam 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 hakam 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 hakam 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 hakam 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 hakam are many but they must be male following the majority opinion of Muslim scholars. Considering the issue of insufficient manpower in managing the hakam 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 hakam 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 Sharì‘ah 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 hakam 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/observations 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. 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. However, in assessing the suitability of any form of dispute resolution there are special characteristics of family disputes that need to be considered. 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. 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. 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. Furthermore, with the special nature of family disputes, mediation offers a more appropriate level of support, which focuses on problems-solving and private ordering. Walker points out that divorce is rarely easy, and almost always

6 Family Mediation in Europe (Explanatory Memorandum), para. 15, p. 168.
7 Ibid.
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 to Tun Zaki Azmi, the centre was set up in the KL Courts’ building to reflect the seriousness of the judiciary in integrating mediation

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\(^{11}\) Ibid.


\(^{13}\) 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. 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 as specified under the Law Reform (Marriage and Divorce) Act, 1976 (LRA). Failure of the parties to refer their case to a conciliatory body constituted under s 106 of the Law Reform (Marriage and

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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.\textsuperscript{17} Thus, reconciliation is mandatory in the following contested divorce cases;

1) adultery;\textsuperscript{18}

2) unreasonable behaviour;\textsuperscript{19}

3) desertion for a period of two years;\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{25}

\textsuperscript{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’).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{23} Ibid.

\textsuperscript{24} Third Schedule of the Legal Aid Act 1971 (Act 26)

\textsuperscript{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 Abraham the paralegals appointed have undergone training in mediation which was conducted by Singapore and New Zealand mediators. 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. 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.

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 besides, the Rules of the High Court 1980 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. 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. In the Singaporean case of Wee Ah Lian v. Teo Siak Weng, the parties had, in the course of divorce proceedings, entered into an agreement dealing with inter alia, the disposition of their matrimonial property. 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.”
32 Tan Cheng Han, Matrimonial law in Singapore and Malaysia, (Singapore, Butterworths Asia, 1994) p. 199.
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

37 *Ibid*.
38 [2014] 11 MLJ 843
39 [1988] 2 MLJ 103
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.

References

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

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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.

This 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

\(^3\) For example, Brown, Henry and Marriott, Arthur, ADR Principles and Practice, Sweet & Maxwell, London, 1999, at 127-8
\(^6\) 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
Gardai, 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.
mod=1&article=9 (accessed on 5 January, 2013).
http://www.jpnselangor.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 gatherings 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.”

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”.

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. 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. 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.

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

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

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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).

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.

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. 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 neighbourhood 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

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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/institute 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.

23 Ibid.
24 Item 8, II Mediasi, Prosedur Perlaksanaan Mediasi Komuniti, Jabatan Perpaduan Negara dan Integrasi Nasional Malaysia.
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. Continuous 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.” 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. Since the law considers abduction as an offence, persons that abduct children try to hide

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

3  Smith, A.M., International Parental Child Abductions, 2014,
5  See also Article 10 of the Convention.
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”. 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.

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.

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 Parent. Under Islamic law, a child is presumed to be a Muslim if either of his parents is a Muslim. 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.

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”. 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 Hague 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.

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7  Kilpatrick, T. (2012). Litigating international child abduction cases under the Hague convention.
8  ibid
13 Article 11 of UNCRC; see also Articles 35, 9 and 18.
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. 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. 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. 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.

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. 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. 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.

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. 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.

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.

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. 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
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. 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.

The Civil courts equally put the interest of the child higher than other matters. 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*. 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

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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 paramountcy 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

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\(^{31}\) Section 105 of the IFLA, 1984 & Section 101 of the LRA, 1976.

\(^{32}\) section 52(1).

\(^{33}\) section 52(3).


\(^{35}\) 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?

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38 Ibid., 11.
40 Ibid., 47.
Mediation is a process to facilitate disputing parties with the assistance of a third party that acts as a mediator in their dispute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{47} Compared to the process of litigation which 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.\textsuperscript{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”\textsuperscript{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.\textsuperscript{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”\textsuperscript{51} since they themselves workout on the terms of the agreement. As a result, it will

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 day conducted by two independent mediators. See Martin, International Parental Child Abduction and Mediation: An Overview, 325.
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.
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.\textsuperscript{52}\textsuperscript{53} 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.\textsuperscript{53}

A. Guide to Good Practice on Mediation

Mediation under this Guide to Good Practice\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 \textbf{speedy and safe} return of the child.

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


\textsuperscript{55} Ibid.

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

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

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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.
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 an aqualitative legal approach on the availability of 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 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). 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, 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 Sharī‘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.

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 employing qualitative 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 presents the 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 and Engku Ali et. al., the Malaysian dispute resolution legal landscape for IFSD is not uniformed, but remains flexible and versatile. While the litigation is
suggested to be set as the last resort for IFSD, 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. 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. 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), KLRCA Fast Track Arbitration Rules 2013, 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

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9 Rusni Hassan, “Championing... 1-16; “Dispute Resolution and Insolvency in Islamic Finance...,” (accessed 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 cap 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. The regulation is made as an effort by the Central Bank of Malaysia to upgrade dispute resolution arrangements for customers and customer protection mechanism. 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.

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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.

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4. SAC as an Expert Body for Reference of IFSD

Unlike other jurisdictions, Malaysia has high potential in providing Sharī‘ah-compliant resolution of IFSD. With proper structure of Muamalat Court, flexible legal framework in relation to ADR processes and concrete appreciation of Sharī‘ah through promulgation of specific Federal laws such as IFSA 2013, Sharī‘ah-compliant resolution of IFSD can be achieved and secured. Moreover, according to Mohamad and Trakic, Malaysia does not have problems as faced by other jurisdiction in resolving IFSD because a reference can be made to SAC for guidance on Sharī‘ah 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, since then, the Shariah Advisory Council plays an important role as the main reference to the civil courts in resolving Sharī‘ah issues in IFSD. Kunhibava is of the opinion that the Shariah Advisory Council can act as expert witness before the court proceedings.

Moreover, the resolutions of SAC are binding upon the arbitrators. Such initiative is necessary to ensure Sharī‘ah-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”.

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

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 Islamic financial 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
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.

References

“Dispute Resolution and Insolvency in Islamic Finance…, (accessed 1st September, 2014).


“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”

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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.

Nor Razinah Binti Mohd. Zain and Engku Rabiah Adawiah Engku Ali, “The Introduction of the Financial Ombudsman Scheme as an Alternative to Dispute Resolution in the Islamic Financial Services


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Central Bank Act 2009


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

Nor Razinah Mohd Zain,¹ Prof. Dr. Engku Rabiah Adawiah Engku Ali² and Assoc. Prof. Dr. Adewale Abideen³

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²Professor, IIUM Institute of Islamic Banking and Finance (IIiBF), International Islamic University Malaysia
³Associate Professor, IIUM Institute of Islamic Banking and Finance (IIiBF), International Islamic University Malaysia

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 a qualitative legal approach on the availability of 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

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). 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, 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 Shariah-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.

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 employing qualitative legal approach; (ii) 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 presents the 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 and Engku Ali et. al., the Malaysian dispute resolution legal landscape for IFSD is not uniformed, but remains flexible and versatile. While the litigation is

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4 Ibid.
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’ Haidar Mohd. Nor (as he then was) and came into force since 1\(^{st}\) 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

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\(^9\) Rusni Hassan, "Championing…, 1-16; "Dispute Resolution and Insolvency in Islamic Finance…, (accessed 1\(^{st}\) 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.


\(^13\) 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.

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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).


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<td>I will go and refer to Malaysian Mediation Centre under Malaysian Bar.</td>
<td>Yes</td>
<td>17</td>
<td>8.3</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>188</td>
<td>91.7</td>
</tr>
<tr>
<td>Not sure</td>
<td>Yes</td>
<td>71</td>
<td>65.4</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>134</td>
<td>34.6</td>
</tr>
</tbody>
</table>

4. SAC as an Expert Body for Reference of IFSD

Unlike other jurisdictions, Malaysia has high potential in providing Shari‘ah-compliant resolution of IFSD. With proper structure of Muamalat Court, flexible legal framework in relation to ADR processes and concrete appreciation of Shari‘ah through promulgation of specific Federal laws such as IFSA 2013, Shari‘ah-compliant resolution of IFSD can be achieved and secured. Moreover, according to Mohamad and Trakic, Malaysia does not have problems as faced by other jurisdiction in resolving IFSD because a reference can be made to SAC for guidance on Shari‘ah 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, since then, the Shariah Advisory Council plays an important role as the main reference to the civil courts in resolving Shari‘ah issues in IFSD. Kunhibava is of the opinion that the Shariah Advisory Council can act as expert witness before the court proceedings.

18 Abdul Hamid Mohamad and Adnan Trakic, “Enforceability…”, 1-34.
Moreover, the resolutions of SAC are binding upon the arbitrators. Such initiative is necessary to ensure Shari’ah-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”.\(^\text{21}\)

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”.\(^\text{22}\) 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.\(^\text{23}\)

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 Islamic financial 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 customers and the Islamic Financial Services Providers. The disputing parties may resolve these disputes through various means such as mediation, negotiation, and arbitration. The Islamic financial services providers in Malaysia are encouraged to undertake the aforementioned recommendations in promoting ADR among the retail customers of the Islamic Financial Services Providers.

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\(^{21}\) 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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Islamic Financial Services 2013

Central Bank Act 2009


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

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. According to Mokhtaret. al., such needs of Muslims lead to the establishment of Tabung Haji in 1963. 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, 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, 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. 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) and Financial 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. In relation

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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 and Olayini, 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 available previous 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 researches in 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 the preferences 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 their preferences, 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.

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Researches such as done by Amin and Isa, Ta and Har 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, Gait and Worthington in 2008, and Abdjalil et al. in 2010. From a research done by Haque et al., it is found that the perceptions of the customers towards the Islamic financial services providers are related positively with their quality 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 by Haron et al., Edris and Almahmeed, Frimpong, Metwally, Erol et al., and Liang and Wang.

Religiosity of the customers is also one of the important factors that may influence their preferences, 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

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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
In some other earlier researches, religiosity of the customers is less influential in their preferences, 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, Haron et al., Ahmad and Haron. 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. The corporate customers are found to be more concerned about the reduction of time, cost and confidentiality of the dispute resolution processes. However, similar with the findings found by Ahmad and Haron, Mohd. Zain 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 to Dusuki and Abdullah, 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. They are more inclined to look for better banking services, prolonged benefits and 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. 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

30 Ibid.
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. The corporate customers include the 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, 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. Due to this reason, according to an earlier research done by Haron et. al., 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 mechanisms for 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 lead the Islamic financial services providers to explore their market potential in 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 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, 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 the preferences 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.
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 for strongly 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 \( n > 50 \), 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.

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.

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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. 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.’ In addition, disputes may also arise as a result of ‘environmental claims; shareholder value related issues, regulatory issues, trade restriction’ etc.

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.

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. The contracting parties who were involved in the Macondo Prospect can be illustrated in the following chart:

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2 Ibid.
4 Alberto Serna Martin, Deeper and Colder: The Impacts and Risks of Deepwater and Arctic Hydrocarbon Development (Sustainalytics 2012) 6.
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

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**Notes:**


9 Zulhafiz (n6) 177.

courts. ADR, in essence, refers to all means of dispute settlement other than litigation which includes mediation, arbitration, expert determination, negotiations, conciliation. All in all, the disputes in the oil and gas industry can be divided into four categories.

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. 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.

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. 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. It is said that ‘these disputes make up the majority of disputes in which oil and gas companies find themselves.

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. Such aspect is very crucial in the oil and gas industry.

11 Mgaya (n1).
14 Ibid.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
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. The disputing parties are given right to select an arbitrator or venue depending on the contractual terms, complexity or expertise of each case. Moreover, the award made by the arbitrator can be enforced in countries that have ratified the New York Convention 1958. 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.’

**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.

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.’ For example, in a landmark case of *Susan Dunnett v. Railtrack Plc*, 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. 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.’

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.’

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. 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.

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

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21 Waqas (n15).
24 Luki (n3).
25 Waqas (n15).
27 Maluka (n11).
29 Ibid.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.’\textsuperscript{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.’\textsuperscript{36}

\textbf{Alternative Dispute Resolution in Malaysia}

Malaysia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.\textsuperscript{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.\textsuperscript{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.\textsuperscript{39} The MAA ‘repealed the old and outdated Arbitration Act 1952 which

\begin{footnotesize}
\begin{itemize}
\item[32] Luki (n3).
\item[34] Luki (n3).
\item[35] Ibid.
\item[36] Ibid.
\item[39] Schütze (n36) 678
\end{itemize}
\end{footnotesize}
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.

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).

46 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).

47 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.

48 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,’ it is argued that due


42 Ibid

43 Schütze (n36).


45 Nadkarni (n40).

46 Ranai (n43).


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.’

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.

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.

LOGIC, for example, is widely used primarily for offshore operations in the U.K. sector of the North Sea. 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.’ LOGIC publishes several standard forms of contracts to be used in marine construction contracts within the petroleum industry. 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.

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. Due to complexities and technicalities of the industry, it could be argued that

49 Ross (n27) 583
50 Maluka (n11)
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;


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


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.’

These commercial activities have given an enormous impact on the use of arbitration in Asia for large oil and gas projects. 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).


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.\textsuperscript{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.’\textsuperscript{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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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 mechanisms 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 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.

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\(^1\) 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.


\(^5\) Refer to Chapter Two of the thesis on the practice of dispute resolution under the Malay customary practices.


\(^7\) 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”.

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”.

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. This results in a win-win situation

9 Mediation Act 2012 (Act 749).
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

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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.
17 Ibid at 190.
it retains the same goal, which is to assist the parties to achieve an amicable solution.\(^\text{18}\)

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.\(^\text{19}\)

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.\(^\text{20}\) 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.\(^\text{21}\) 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.\(^\text{22}\) 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.


\(^{22}\) 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. 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. 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. 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. 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.

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. In addition, these solutions, also known

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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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 be set due to it being less formal.\textsuperscript{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.\textsuperscript{33} This is due to the involvement of the persons within the session whereby mediation focuses on the direct communication between the parties.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.
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.


40 Ibid at 399.
3. IMPLEMENTATION 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


\(^{42}\) 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.  

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. 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. 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 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. 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.

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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 matter, 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 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.

5. REFERENCES


Mediation Act 2012 (Act 749).

Practice Direction no.5/2010.

Public Trust Corporation Act 1995


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. 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 later. Meanwhile, those who choose divorce, showed somewhat higher number of depressive symptoms.

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. 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. 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'anic verse 128 chapter Al-Nisa’, especially the phrase “ءال يرخ حلصلاو” 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. 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”. 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 non-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.

2 Ibid, 12.
3 Ibid, 11.
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 (نخ يرخ حلصلاو)”. Muhammad Husain Mas’ud Al-Baghwì, Taʃsir Al-Baghwì (Riyadh: Darussalam, n.d.), 206-207.
7 This hadith is graded as authentic by Al-Hâkim in his commentary of Sunan Abî Daud. Refer to Abî Daud, Sunan Abî Daud, ed. Abû Ṭâhir Zubair ‘Alî Zâ’î (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. 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. 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. 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.
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 Qurʾān 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 couple13. 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 session14. 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 couple15. 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.

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12 Chapter Al-Nisa’ verse 35.
14 Section 106(5)(c) of the Law Reform (Marriage & Divorce) Act 1976.
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\(^\text{16}\). 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\(^\text{17}\). 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\(^\text{18}\).

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\(^\text{19}\) 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\(^\text{20}\). IFLA 1984 further provides wide jurisdiction to the Shariah Court in determining how the reconciliation process by the conciliatory committee is managed\(^\text{21}\). 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.


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. 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. 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

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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.

References


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 successful resolution 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 the legal responsibilities, liabilities and compliance of the concerned entities regarding exploration and exploitation of recourse in the Area. It further explores the jurisdiction and scope of the International Seabed Authority (ISA) and Seabed dispute Chamber (SDC) of International Tribunal for Law of the Sea (ITLOS) for resolving existing potential conflicts in the Area between and among the individual, entities sponsored by the government in 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 online resources.

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 enterprises of 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. ELUCIDATION 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.” 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 delimited 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”. 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”.

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

touch my property. If you take them away means to take away my property”.

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. 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 in every year. 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. 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. 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, 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. 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,

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9 “Polymetallic nodules”, International Seabed Authority, Courtesy of the Law of the Sea Geosciences Group., Southampton Oceanography Centre, United Kingdom, 2003,
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”. However, 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. 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 UNCLOS 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 the world’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

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13 Article 2 Agreement Relating to the Implementation of Part XI of the Convention, 1994

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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-fledged action in 1996 having permanent seat in Jamaica. 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. The “Authority” shall act in accordance with the powers and functions expressly or impliedly provided by the convention 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. 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.

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. 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 discharges its major functions. The Enterprise which is our concern in this article is 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. 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.
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.  

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. 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 and failure to pay fees determined by the Authority. 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.

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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 resolution is 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.” 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 coastal 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. 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.

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. 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.

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

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31 Article 290, 291 UNCLOS, 1982, Article 25 Annex VI. ibid
32 Article 296. ibid.
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 Polymetallic Nodules in The Area, and Regulations on prospecting and exploration for polymetallic sulphides in the Area.\textsuperscript{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”. \textsuperscript{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.\textsuperscript{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”; \textsuperscript{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”\textsuperscript{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 and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS)” \textsuperscript{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; 21\textsuperscript{st} 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

\textsuperscript{35} David, “Advisory Opinion”. p.56 see at: httpswww.itlos.org (last browsed July 20, 2017)
\textsuperscript{36} Ibid. p. 17
\textsuperscript{39} Sustainable Development Goal (SDG) Target 14.5, Ibid.
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

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9 Ibid.
Legislated laws to regulate apologies in healthcare settings to promote the usage of apology by medical practitioners. 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.” 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.”

Fourthly, is the reparation which includes the action plan after which the wrongdoer must execute towards the victim. 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. 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. There are two types of apology which have different implications in dispute resolution process. 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. The most important element in “full apology” is acknowledgement of fault and the acceptance of responsibility on the part of the wrongdoer. 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. 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. 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.

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15 Ibid.
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.”
23 Ibid.
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. This tends 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. 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. In majority of medical negligence cases, the patient does 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. 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. 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.

(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. 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. 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

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27 Cohen, “Advising Clients to Apologise.”


29 Slocum, Allan, and Allan, “An Emerging Theory of Apology”


32 Hodge and Saitta, “Physician Apologies.”

33 Kellett, “Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients.”

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\textsuperscript{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\textsuperscript{36}. Consequently, the harmonious and cordial relationship between the patient and the medical practitioner will be preserved.

\textbf{(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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{41}.

\textbf{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

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\textsuperscript{35} Melissa Barcena, “A Role for Apology in Medical Malpractice: Apology, Forgiveness and Reconciliation” 2013.


\textsuperscript{39} Kellett, “Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients.”

\textsuperscript{40} Carroll, “When ‘sorry’ is the Hardest Word to Say , How Might Apology Legislation Assist?”

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.

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. 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.

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, 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. 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’). 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.

(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. 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

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42 [2017] 1 MLJ 453
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.”
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 claim51. 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
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\(^{62}\).

\section*{(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

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  \item Carol Carman, “Apology Act Promotes Dispute Resolution,” 2006.
\end{itemize}
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". 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. 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. 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.

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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 and these disputes have been on the rise within the last 15 years. For instance, the Medical Disciplinary Tribunal (MKDKI) has received at least 220 complaints of medical malpractice cases between the years 2006 to 2015. 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 Secretary 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 easy way 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. Presently, the way medical disputes are handled in Indonesia is considered unsatisfactory for 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. 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, the initial 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 criminal 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 RESOLUTION 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.

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

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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 proceeded 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.  

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, particularly, 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 MEDIATION 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 registred in the mentioned court. The first method is done outside the court (this refers to out-court mediation), while the second methods takes place inside the court (this refers to in-court mediation/court-connected mediation/court-annexed mediation).

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

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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 or represented by their lawyers. 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 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 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’ reputation 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 intrinsic 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.

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 appropriately. 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.

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)\textsuperscript{14}. This regulation has been amended twice, in 2008\textsuperscript{15} and 2016\textsuperscript{16}. This procedure constitutes the development of peace agreement (\textit{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 (\textit{Undang-undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen}) and the Arbitration and ADR Act 1999 (\textit{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.\textsuperscript{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.\textsuperscript{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 different 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

\textsuperscript{14} Formerly the Supreme Court issued the Circular Number 1 of 2002 on the Empowerment of the Court of the First Instance for Implementing the Amicable Settlement System (Surat Edaran Mahkamah Agung Nomor 1 Tahun 2002 Tentang Pemberdayaan Pengadilan Tingkat Pertama Menerapkan Lembaga Damai).

\textsuperscript{15} The Supreme Court issued the Supreme Court Decree Number 1 of 2008 on the Procedure of the Court-Connected Mediation.

\textsuperscript{16} The Supreme Court issued the Supreme Court Decree Number 1 of 2016 on the Procedure of the Court-Connected Mediation.

\textsuperscript{17} See Section 52 point (a) of the Consumer Protection Act 1999.

\textsuperscript{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, \textit{Hukum Malapratik 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. Mediation 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 discourse or adaptation to the development of the international trend.  

Although the utilization of mediation for resolving medical malpractice disputes has been mandatory since 2009, 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 colleagues. 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.

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
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 committed by the health professional commits negligence while providing health service must be primarily settled outside the court as intended by the statutory provision. 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 office 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 Ministry 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 understand clearly on what medical malpractice is and how to deal with it. Since the basic domain of medical malpractice 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.\textsuperscript{22} It seems that these two provisions have been applied excessively to doctors due to medical

\textsuperscript{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 another, the more specific legislation should prevail.

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 doctors 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 and it is subject to maximum of three years imprisonment 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 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 and its violations. Furthermore, the issue of causation is another problem. 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 very good lesson on this problems as even the panel of judges in failed to establish the issue on causation.

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 colleagues, 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 fail 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 doctor’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‘īd* (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

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)
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).

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. 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.

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 who shall receive the takaful benefits as an executor and not solely as a beneficiary.

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*. The nomination is made by notifying the takaful operator in writing few details of the nominee for example, the name, date

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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.


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 takaful 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.\textsuperscript{13} The nomination could be made either at the beginning of the contract\textsuperscript{14} or at any time during the contract\textsuperscript{15} and must be witnessed by another person of sound mind and has attained the age of eighteen years.\textsuperscript{16} Besides the nomination, the takaful participant may also assign the takaful benefits to a nominee (known as an assignee).\textsuperscript{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 \textit{hibah} or appoint the nominee as an executor.\textsuperscript{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.\textsuperscript{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 \textit{fara‘id}. On the other hand, a nominee designated as a beneficiary under a conditional \textit{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.\textsuperscript{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.\textsuperscript{21}

A nomination made by the takaful participant shall be revoked in three circumstances:\textsuperscript{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.\textsuperscript{23} Where there is more than one nominee nominated as the beneficiaries under conditional \textit{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.\textsuperscript{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 \textit{hibah}.\textsuperscript{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 \textit{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

\textsuperscript{13} IFSA 2013 Sch 10 Para 2(1)
\textsuperscript{14} IFSA 2013 Sch 10 Para 2 (2)(a)
\textsuperscript{15} IFSA 2013 Sch 10 Para 2 (2)(b)
\textsuperscript{16} IFSA 2013 Sch 10 Para 2 (3)
\textsuperscript{17} IFSA 2013 Sch 10 Para 2 (4)(a)(i) & Para 7
\textsuperscript{18} IFSA 2013 Sch 10 Para 2 (4)(a)(i)(ii)
\textsuperscript{19} IFSA 2013 Sch 10 Para 6 (2)
\textsuperscript{20} IFSA 2013 Sch 10 Para 3 (2)
\textsuperscript{21} IFSA 2013 Sch 10 Para 7 (1)
\textsuperscript{22} IFSA 2013 Sch 10 Para 4 (1)
\textsuperscript{23} IFSA 2013 Sch 10 Para 4 (2)
\textsuperscript{24} IFSA 2013 Sch 10 Para 4 (3)
\textsuperscript{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. 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. 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.

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. 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.

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. 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. 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

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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
30 Mohd Zamro Muda, “Instruments of Hibah and Wills: Analysis of the Regulations and Applications in Malaysia.”, 10
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.

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. 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.  

36 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.  

37 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.

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. 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. 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. 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. 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-


43 Mohd Ma’sum 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.\textsuperscript{44} Razali Nawawi is also against the opinion of making the takaful benefits as \textit{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.\textsuperscript{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 \textit{hibah}.\textsuperscript{46} Akmal Hidayah also argued that, any form of \textit{hibah} after death is considered as a tactic to avoid the Islamic law of succession.\textsuperscript{47}

However, despite all of these opinions, the SAC of BNM has made it clear in its 34\textsuperscript{th} meeting, held on 21 April 2003 that takaful benefits can be used for \textit{hibah} since it is the right of the participants.\textsuperscript{48} The Council also cited that the status of \textit{hibah} in takaful plan does not change into a bequest since it is a conditional \textit{hibah}, in which the \textit{hibah} is an offer to the recipient of \textit{hibah} for specified period.\textsuperscript{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.\textsuperscript{50} If the participant remains alive on maturity, the takaful benefit is owned by the participant but if he dies within such period, then \textit{hibah} shall be executed. The \textit{hibah} shall also be revoked by the participant before the maturity date because conditional \textit{hibah} is only deemed to be completed after delivery is made\textsuperscript{51} and participant also has the right to revoke the \textit{hibah} and transfer it to the other parties or terminate the takaful participation if the recipient of \textit{hibah} dies before maturity.\textsuperscript{52} The SAC in its 165\textsuperscript{th} meeting, dated 26 January 2016 reiterated the previous resolution on \textit{hibah} in takaful.\textsuperscript{53} The SAC opined that the ownership of \textit{hibah} asset is effectively transferred to the \textit{hibah} recipient upon the occurrence of the agreed conditions and it is impossible for the donor to revoke the \textit{hibah} upon the occurrence of the agreed conditions.\textsuperscript{54} This is not withstanding that the subject matter of \textit{hibah} has yet to be transferred completely to the donee constructively or physically. The SAC further mentioned that \textit{hibah} which is attached to the condition of the demise of the donor shall only be applicable in the context of takaful.\textsuperscript{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:

\begin{itemize}
\item \textit{(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.}
\item \textit{(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.}
\end{itemize}

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 case that the subject matter of \textit{hibah} is effectively transferred to the donee constructively or physically.

\textsuperscript{44} Mohd Maʾsum Billah, \textit{Applied Takaful and Modern Insurance: Law and Practice}
\textsuperscript{45} Razali Nawawi, \textit{Islamic Law on Commercial Transactions} (Centre for Research and Training, 2009).
\textsuperscript{46} Abdurrahman Raden Aji Haqqi. \textit{The Philosophy of Islamic Law of Transactions} (Univision Press, 1999).
\textsuperscript{47} Nurdianawati Irwani Abdullah and Nazliatul Aniza Abdul Aziz. “Case studies of the practice of nomination and \textit{hibah} by Malaysian Takaful operators”, 80
\textsuperscript{48} Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (i)
\textsuperscript{49} Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (ii)
\textsuperscript{50} Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (iii)
\textsuperscript{51} Resolutions of Shariah Advisory Council of Bank Negara Malaysia (BNM/RH/GL/012-2) Para 57, Subpara (iv)
\textsuperscript{52} The SAC 165\textsuperscript{th} Meeting, \url{http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=480}
\textsuperscript{53} The SAC 165\textsuperscript{th} Meeting, \url{http://www.bnm.gov.my/index.php?ch=en_about&pg=en_sac_updates&ac=480}
\textsuperscript{54} The SAC 165\textsuperscript{th} Meeting, \url{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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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.\(^\text{59}\) 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.\(^\text{60}\) Mediation process is also a voluntary and confidential in nature and the end agreement


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. Mediation is a contextual alternative for litigation without compromising any side’s litigation strategy or blowing anybody’s cover. Timely mediation can save 80% of court and counsel costs. 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. 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 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. 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 a third party or 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.

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. The negotiator or the facilitator will assist the parties to reach for a settlement without influencing them. 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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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. 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
and knowledge. 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. A number of misappropriation of GRs and TK cases have been attraction of intense controversies not later than 1990s. This made the term misappropriation of GRs and TK to be under the discussion in various international organization.

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.

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.

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, and the

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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.
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.
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\textsuperscript{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 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\textsuperscript{11}.

Bioprospecting is defined under the Act as any research on, development or application of, indigenous biological resources for commercial or industrial application\textsuperscript{12}. It is illegal to obtain and utilize any extracts from indigenous plants or animals for commercial use without a permit\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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


\textsuperscript{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.


\textsuperscript{13} Section 76 of Biodiversity Act 2004

\textsuperscript{14} Section 77 of Biodiversity Act 2004

\textsuperscript{15} Section 82 (2) (a) of the Biodiversity Act 2004

\textsuperscript{16} Section 8 of the Regulation on Bio Prospecting Access and Benefit Sharing 2008. Section 83 and 84 of the Biodiversity Act 2004.

\textsuperscript{17} Section 82 (2) (b) (i) and (ii) of the Biodiversity Act 2004

\textsuperscript{18} Section 82 (3) (a) (b) and (c) of the Biodiversity Act 2004

\textsuperscript{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\textsuperscript{20}. Permits are required to engage in bioprospecting or any other kind of research\textsuperscript{21}.

**The Patent Amendment Act 2005**

The Patent Act integrates conservation of indigenous biological resources and traditional knowledge into existing patent legislation\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{28}; (ii) the Integrated export and bioprospecting permit for exporting indigenous biological resources for the purpose of bioprospecting\textsuperscript{29}; (iii) the Export permit for research other than bioprospecting for exporting any indigenous biological resource for research other than bioprospecting\textsuperscript{30}.

Regulations contain application forms for the three types of permits, standard text of the three


\textsuperscript{22} Ibid


\textsuperscript{24} Ibid


\textsuperscript{26} WIPO 2008 \url{http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf/ic_13/wipo_grtkf_ic_13_7.pdf} para 64.


\textsuperscript{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

\textsuperscript{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. Some definitions in the law, for instance that of bioprospecting, 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. 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.

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.


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.

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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{38} and non compliance to the condition of the permit and contravention of any provision of the Act\textsuperscript{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\textsuperscript{40}, such mutually agreed terms is commonly by way of contract between the provider and recipient\textsuperscript{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 resolution.

\textsuperscript{35} N Chishakwe SADC: Access to Genetic Resources, and Sharing the Benefits of their Use International and Sub-Regional Issues in Young (n 55) at 32.

\textsuperscript{36} Ibid

\textsuperscript{37} Section 41 and 42 of the Biodiversity Act 2004

\textsuperscript{38} Section 40 of the Biodiversity Act 2004

\textsuperscript{39} Section 41 (a) – (g) of the Biodiversity Act 2004

\textsuperscript{40} Article 15(4) of CBD

\textsuperscript{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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The Convention on Biodiversity

The Patent Amendment Act 2005
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. 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 to bring out the desired result. Cumbersome, inefficient, and capricious in its operation, 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.

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

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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.


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

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.”

Most importantly, these bodies only take disciplinary actions against the doctor, but do not provide compensation to the injured patients.

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. 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. 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.

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. 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

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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.
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).
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.\(^\text{17}\)

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.\(^\text{18}\) 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\(^\text{19}\) 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.

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. 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. 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. 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, 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.

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

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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.


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.”

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, 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…”
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.” 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.”

Conclusion

The many problems encircling our medico-legal atmosphere demonstrate an urgent need for a less...
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.” 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 and he has no right to force the parties to accept the terms of agreement without their consent. The
primary function of the mediator is to facilitate communication regarding the dispute between the parties.\textsuperscript{6}

*Sulh* means “termination of a dispute.”\textsuperscript{7} The term *sulh* derived from the word “*salaha*” which have variety of meanings such as right, good and proper,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{10} However, some scholars distinguished between conciliation (*sulh*) and mediation (*wasaatah*) in terms of its nature.\textsuperscript{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.\textsuperscript{12} Bar Council managed to set up Malaysian Mediation Centre (MMC) on 5\textsuperscript{th} November 1999 in order to promote mediation and provide services for all kinds of commercial and matrimonial disputes.\textsuperscript{13} This center provides mediator if parties opt for a non-judge mediator.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} In Malaysia, the practice of *sulh* can be divided into three stages which are during pre-colonial period, during the period of British colonisation and after the independence. During pre-colonial period, Malay customary practice

\textsuperscript{6} Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review*, Law Business Research Ltd., London, 2014, Chapter 34
\textsuperscript{7} Hanis Wahed, *SULH: Its Application in Malaysia*, Journal of Humanities and Social Science, Malaysia, Jun 2015.
\textsuperscript{8} *Mu'jam Al 'Arabi al Asasi*, Arab League
\textsuperscript{9} Dr. Said Bouheraoua, *Foundation of mediation in Islamic Law and Its Contemporary Application*, Malaysia
\textsuperscript{10} Nora Abdul Hak, Sa’odah Ahmad, Umar A. Oseni, *Alternative Dispute Resolution (ADR) in Islam*, IIUM Press, 2013
\textsuperscript{11} Dr. Said Bouheraoua, *Foundation of mediation in Islamic Law and Its Contemporary Application*, Malaysia.
\textsuperscript{13} Khutubul Zaman Bin Bukhari, *Arbitration and Mediation in Malaysia*, Malaysia.
\textsuperscript{14} Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review*, Law Business Research Ltd., London, 2014, Chapter 34
\textsuperscript{15} Bernama, *Mediasi berjaya selesaikan kes mahkamah*, Utusan Malaysia, Malaysia, Ogos 2011.
\textsuperscript{16} Tiang Joo Su & Yin Faye Lim, *The Dispute Resolution Review*, Law Business Research Ltd., London, 2014, Chapter 34
\textsuperscript{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
\textsuperscript{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 colonisation, *sulh* had been allocated in Article 32 of the Malacca Law and in Pahang Code of Law. 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. 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. 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. 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.

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.”

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. 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.

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24 Al-Quran Al-Karim, 8:1
In addition, another verse that enjoins *sulh* is from Surah Al-Hujurat which concerns peaceful reconciliation process;  

“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.”

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. Another basis of *sulh* also can be seen from the following verse; Surah Al Nisa’:

“...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.”

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.

In Malaysia, the establishment of *sulh* can be found in Syariah Court Civil Procedure Enactment 2003 (Selangor) (SCCPE 2003). 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. 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. Lawyers also play an important role to advice the parties about the subject matter of the dispute including the

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28 Al-Quran Al-Karim, 49:9-10
30 Al-Quran Al-Karim, 4:128
prospect of mediation in settling the dispute. During a mediation session, several elements must be presence including neutrality, individual responsibility, and mutual fairness. As for the disputing parties, it can either be individual persons, entity or a group of claimants. 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. 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. 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. 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. 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.

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. The mediator for this dispute is guided by Central Bank’s Guidelines on Claims Settlement Practices and Guidelines on Unfair Practices Insurance Business. 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

38 Nora Abdul Hak, Sa’odah Ahmad, Umar A. Oseni, Alternative Dispute Resolution (ADR) in Islam, IIUM Press, 2013.
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.
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 Rahman50 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 musyuz, 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.
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
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. 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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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.\textsuperscript{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.\textsuperscript{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)\textsuperscript{3} and queue management system (hereinafter QMS)\textsuperscript{4}, technologies supporting judges incorporate electronic filing system (hereinafter EFS)\textsuperscript{5}, audio and visual conference system (hereinafter AVS)\textsuperscript{6} and court recording and transcription system (hereinafter CRT)\textsuperscript{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](image)

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\textsuperscript{1} Velicogna, M. (2007). \textit{Use of information and communication technologies (ICT) in European judicial systems}: Council of Europe Publ., p. 20.

\textsuperscript{2} Ibid.

\textsuperscript{3} CMS is a software system integrated with EFS for creation of electronic database, management of cases and monitoring of performance.

\textsuperscript{4} Electronic queue system to manage lawyer’s attendance crowd and facilitate holding of hearings before Registrars.

\textsuperscript{5} The electronic transfer of legal documents to and from court through internet.

\textsuperscript{6} Use of audio and video conference system for trial proceedings.

\textsuperscript{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 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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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](image)

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

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response to the technologies themselves.\textsuperscript{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.\textsuperscript{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 \textit{shall} be so filed using the electronic filing service …”\textsuperscript{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.\textsuperscript{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, to date, 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

\textsuperscript{20} Section 3(1) of Computer Crimes Act 1997.
\textsuperscript{21} O. 63A, r. 7 (1)
\textsuperscript{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,
ICT adoption in the courts is inherent to contemporary cybercrime.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{36} In addition to this, it is also believed that these technologies will contribute towards improving the quality of justice.\textsuperscript{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


\textsuperscript{33} Rule 2 of the ICT Security Policy of the Chief Registrar’s Office, Federal Court of Malaysia.

\textsuperscript{34} Ibid.


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. 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.

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. 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. In Sarawak alone, the Federal Government has spent RM1.9 billion in upgrading the ICT systems of the courts, while in West Malaysia, the setting up of the computerized system in the courts costs about RM69 million.

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 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 different locations.

Additionally, psychological implication could denote the fact that the selection or performance

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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. 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.

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.

References


DUTY OF AL-MUHTASIB AND PROTECTION OF MAQĀṢID SHARĪ‘AH: 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 sharī‘ah and not jeopardize the maslahah 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 AMLATFPUAA 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 sharī‘ah 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 sharī‘ah principles. Therefore, rigorous enforcement of regulations by the authorities is necessary to combat these organized crimes.

Keywords: Al-Muhtasib; Maqāṣid Sharī‘ah; 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 AML/TFPUAA. 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 shari’ah. Shari‘ah recognize that protection of the people from any criminal wrongdoing is for the maslaḥah or protection of public interest. The purpose is also to preserve the five objectives of shari‘ah 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 maslaḥah and objectives of the shari‘ah 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 shari‘ah 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 shari‘ah. 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 shari‘ah in combating these financial crimes.

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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 AMLATFPUAUAA 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

⁹ Norhashimah Mohd Yasin, Pari Materia Aspects of AML/CFT Legislation: Special Reference to Malaysia, 85
¹¹ See Recommendation 2 of the FATF 40 Recommendations.
necessary legal or regulatory measurement to curb the financial crimes in the financial institutions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{14}

In addition, the law enforcement authorities have responsibility for money laundering and terrorist financing investigations within the framework of national AML/CFT policies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} The FIU in all jurisdictions should apply for membership in the Egmont Group.\textsuperscript{19} In this regard, Malaysia official commencement and operational date for FIU was on 8\textsuperscript{th} August 2001 and official date of entry to the Egmont Group was on 1\textsuperscript{st} July 2003.\textsuperscript{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\textsuperscript{21} under AMLATFPUAA to ensure that the Reporting Institutions understand and comply with the requirements and obligations imposed under AMLATFPUAA 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);

\textsuperscript{12} Recommendation 26 of the FATF 40 Recommendations
\textsuperscript{13} Recommendation 27 of the FATF 40 Recommendations
\textsuperscript{14} Recommendation 29 of the FATF 40 Recommendations
\textsuperscript{15} Recommendation 30 of the FATF 40 Recommendations
\textsuperscript{16} Ibid.,
\textsuperscript{17} Recommendation 31 of the FATF 40 Recommendations
\textsuperscript{18} FATF Interpretive Note to Recommendation 29
\textsuperscript{19} Ibid.,
\textsuperscript{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 200225 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
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”.

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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
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 BNM38 and the Malaysian MER 201539 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 ministries40 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

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37 Section 9(1) of the AMLATFPUAA.
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 co-ordinates 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 organisations.

(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.

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\(^{41}\) 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-MUHTASIB AND MAQĀŠID AL-SHARĪ‘AH

The history of al-muhtasib begins when the al-muhtasib 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-muhtasib in the Quranic verses and a brief history of al-muhtasib is highlighted in this section. This section later follows on the aspect of the objectives of maqāṣid shari‘ah under the Islamic law.

A Brief Role of Al-Muhtasib in the Qurān

The role of al-muhtasib 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-‘Imrān (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 Qūṭb in Fī Zīlāl 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-‘Imrān (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 Qūṭb in Fī Zīlāl 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 Qūṭb in Fī Zīlāl 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-Muhtasib

The history of Islam shows that al-muhtasib 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-muhtasib which is also called as ‘amīl al-sūq and sāhib 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’īb b. Yazīd and ‘Abd Allāh B. ‘Uṭbā b. Mas‘ūd where al-Sā’īb stated that he was ‘amīl 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-muhtasib’.50

In the study of al-muhtasib 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-muhtasib which performed the functions of a night-watchmen (‘asas or tuggaf al-layl).51 Al-muhtasib duty concerned in pre-

45 Ibid., p. 170
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.\textsuperscript{52} The \textit{al-muhtasib} 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.\textsuperscript{53} In this relation, the duties of \textit{hisbah} perform its obligation which its duties were largely concerned with markets and trade generally.\textsuperscript{54} The institution of \textit{hisbah} refers to the office in which the officer, called \textit{al-muhtasib} has the task to promote good and prevent evil.\textsuperscript{55} The role of \textit{al-muhtasib} as a custodian of public morals and inspector of the markets makes the nature of this institution truly Islamic.\textsuperscript{56} \textit{Al-muhtasib} is regarded as a duty performed to bring a conditional change for the purpose of to protect the society.\textsuperscript{57}

The Objectives of Shari'ah (\textit{Maqāṣid Shari'ah})

Al-Ghazālī wrote that the purpose of law is divided into two types which are for the purposes pertaining to Hereafter (\textit{dīnī}) and pertaining to this world (\textit{dunyawi}).\textsuperscript{58} The worldly (\textit{dunyawi}) purposes are further divided into four categories which are: for the preservation of \textit{nafs} (life); the preservation of \textit{nasl} (progeny); the preservation of \textit{aql} (intellect); and the preservation of \textit{māl} (wealth).\textsuperscript{59} Further, al-Shāṭibī in his book on \textit{al-Muwāfqaṭ} states that the fundamentals of jurisprudence are definitive in nature and not just speculative.\textsuperscript{60} Al- Shāṭibī puts that:

\begin{quote}
“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”\textsuperscript{.61}
\end{quote}

Also, the purposes of the law should be in accordance with \textit{maslaha} or public interest. Al-Shāṭibī’s concept on \textit{maslaha} is to preserve its necessities and needs of mankind as well as for an improvements with regard to religion, life, progeny, property, and intellect.\textsuperscript{62} Al-Shāṭibī also wrote that necessities are preserved by rulings concerning the general \textit{maslaha} of all people.\textsuperscript{63}

The Role of the Competent Authority and Enforcement Agency under Al-Muhtasib in Securing Financial Control under \textit{Maqāṣid Shari'ah}


52 Ibid.,


56 Ibid., p. 263


59 Ibid.,


61 Ibid.,


63 Ibid.,
Al-muhtasib is the person that have an authority in enforcing the laws to the public. In this regards, the Al-muhtasib 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) 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. 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’ as specified in the Second Schedule of the AMLATFPUAA.

In this relation, some important criteria of maqāṣid sharī‘ah is identified and observed by many authoritative scholars which is regarded as a measure to determine as an objective of the maqāṣid sharī‘ah. These criteria to achieve for the protection of maqāṣid sharī‘ah 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.

Stability and Consistency
Maqāṣid sharī‘ah has significant role in developing sustainable economy and financial stability of the country. This important criterion is in one of the objectives of maqāṣid sharī‘ah which is for the protection of wealth. Thus, fighting an abuse in financial crimes is one of the significant aspects in maqāṣid sharī‘ah. 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.

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.

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.

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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.
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\textsuperscript{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.\textsuperscript{73}

**Apparent Criteria**

One of the criteria of \textit{maqāsid sharī‘ah} is clear without any ambiguity.\textsuperscript{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”.\textsuperscript{75}

Thus, the purpose of the AMLATFPUAA is clear which provides the laws in combating these financial crimes. The functions of \textit{al-muhtasib} 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 \textit{maqāsid sharī‘ah} is conceptually precise and clear, for instance for the protection of wealth. In combating these financial crimes, the functions of \textit{al-muhtasib} under AMLATFPUA is to protect the stability of the financial system in Malaysia. Section 29 of the AMLATFPUAA provides the duty of \textit{al-muhtasib} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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;\textsuperscript{79} power to examine persons during an investigations;\textsuperscript{80} search of a person not exceed twenty-four hours without the authorization of a magistrate,\textsuperscript{81} and to conduct an investigation without a search warrant.\textsuperscript{82} Also, an Enforcement

\textsuperscript{72} Act 574
\textsuperscript{73} Section 130N of the Penal Code (Act 574).
\textsuperscript{74} Ahcene Lahsasna, \textit{Maqāsid Al-Shari‘ah in Islamic Finance}, p. 13.
\textsuperscript{75} Preamble of the AMLATFPUAA
\textsuperscript{76} Section 29(a) of the AMLATFPUA
\textsuperscript{77} Section 29(3) of the AMLATFPUAA.
\textsuperscript{78} Section 30 of the AMLATFPUAA
\textsuperscript{79} See Section 31 of the AMLATFPUAA
\textsuperscript{80} See Section 32 of the AMLATFPUAA
\textsuperscript{81} See Section 33 of the AMLATFPUAA
\textsuperscript{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 \(\text{ṣiḥbah}\) is relevant in combating these financial crimes. This co-ordination and co-operation between the \(\text{Al-muḥtaṣib}\) or Competent Authority/Enforcement Agencies and \(\text{ṣiḥbah}\) or investigating officer shows that the ultimate objective \(\text{maqāṣid} \ \text{ṣaḥīḥ} \) 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 \(\text{al-muḥtaṣib}\) should be able to deter any form of abuse for illegal gains from these illicit crimes.

### Comprehensive and General

The objectives of \(\text{maqāṣid} \ \text{ṣaḥīḥ} \) 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 \(\text{ṣiḥbah}\) 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 \(\text{al-muḥtaṣib},\) 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 \(\text{maqāṣid} \ \text{ṣaḥīḥ} \) is based on the preservation and protection of the five protection of religion, life, intellect, lineage and property.\(^{90}\) Then, \(\text{ṣaḥīḥ} \) also emphasize the noble values of justice (\(\text{al-`adl}\)).\(^{91}\) In this relation, Dr Yūsuf al-Qaradāwī have categorized the value of justice in three categories which are; fair in the dispensation of punishment and adjudicating of cases (\(\text{al-`adl} \ \text{al-qanīnī}\)), be it to the commoner or to those in high appointments or nobility; social justice (\(\text{al-`adl} \ \text{al-ijtīmā'ī}\)) especially those concerning the division of wealth; and justice in Islam is applicable internationally (\(\text{al-`adl} \ \text{al-duwali}\)) 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.

\(^{83}\) Section 44(1) of the AMLATFPUAA


\(^{85}\) Ibid.,


\(^{87}\) Ibid.,

\(^{88}\) Section 5(1) of the AMLATFPUAA

\(^{89}\) Section 5(2) of the AMLATFPUAA


\(^{92}\) Ibid., p. 75-76.

\(^{93}\) Section 2(1) of the AMLATFPUAA.
Recognition in all religions

The objective of *maqāṣid sharī‘ah* is recognized in every religion as it is applicable to all human beings to ensure their existence and well-beings. 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 sharī‘ah* 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 *sharī‘ah* 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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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 in 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 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. 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.

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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)).

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.

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• 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.

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.”

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.\(^ {14}\)

\(^{11}\) Third Party Funding for Arbitration Report, The Law Reform Commission of Hong Kong (October 2016), Paragraph 7.31
\(^{13}\) supra note 8
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 ban 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
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. 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

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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

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).

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.”

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.

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 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
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.  

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 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 from 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.  

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.  

Incentivised disclosures always work better than straight-jacketed requirements which jeopardise the chances of success of a claim. 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.

Although this a paradigmatic shift from the current system where lesser accountability is assigned

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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

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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.\(^{11}\)

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\(^7\) Freeman, “The Private Role in Public Governance.”


\(^10\) Alternative Dispute Resolution Directive 2013/11/EU.

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.\textsuperscript{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 from unwholesome and unfair business practices in selected sectors ranging utilities, energy, aviation and service sector was transferred effectively to private ADR activities.\textsuperscript{13} The entities are popularly known as “Consumer Ombudsmen” 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.\textsuperscript{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 9\textsuperscript{th} July 2015 and the European Union (EU) Regulation No. 524/2013.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20}

\textsuperscript{16} Ibid.
\textsuperscript{17} Regulation 9, Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015.
\textsuperscript{18} First column of Part 1 and Part 2 of Schedule 1, Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015.
\textsuperscript{19} Regulation 10, ibid.
\textsuperscript{20} Schedule 4, ibid.
Similarly, any approved entity must publish on its website an “annual activity report” within a month after its first anniversary. 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. 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. 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. 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.

21 Schedule 5, ibid.
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.

d. the claim 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, pursuit 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 entities 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


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The Ombudsman Services had existed since 2003 and was given effect under the Regulation.

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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.

32 Ibid., 9.
Online contacts are very instrumental for consumer complaints in modern societies. As shown in figure 2, online tools such as email and web constituted 87 percent 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. 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. 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. 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.

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.
36 “Retail Ombudsman Set up to Aid Consumer Disputes.”
37 Ibid.
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

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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 recurrong 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. 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

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 takharuj³

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 ar-Rahman 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

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5  Surah al-Nisa, verse 29
Takharuj or Tasaluh. 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. In another narration, Ibn ‘Abbas said, one of the two beneficiaries is allowed to waive his right or inheritance.

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 (mut-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 fulfilled: (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. (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.

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.

iii- The property over which Takharuj is conducted must be a valuable asset, beneficial, possible to be delivered.

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.

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8 Al-Ghamidi Muhammad Nair, al-Takharuj Ahkamuhu wa Suwaruhu fi al-Fiqh al-Isami, (Makkah: Umm al-Qurah University), 199.
10 ibid
11 al-takharuj baina al-warathat, 202
12 ibid
15 Hashiyat al-Dusuqi ma’a al-Sharh al-Kabir, vol. 3, 315
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 or the negotiation is conducted from a different genus 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

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¹⁷ If the inheritance happens to a gold and mukharaj 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 Nataj al-Afkar, vol.8, 462
to a hindrance.\textsuperscript{20}

\textbf{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.\textsuperscript{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.

\textbf{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:

\textbf{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.

\textbf{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.\textsuperscript{22}

\textbf{Situation of Takharuj by the Malikis}

The Malikis distinguish between when the negotiation is based on Sulh with confession or avowal\textsuperscript{23} and Sulh with denial or disavowal\textsuperscript{24}:

\textbf{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.\textsuperscript{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.\textsuperscript{26}

\textbf{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.\textsuperscript{27} They, however, state that the compensation given to the relinquisher must be derived within the inheritance.\textsuperscript{28}

\textsuperscript{20} Hashiyat al-Dusuqi, vol.3, 310
\textsuperscript{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-nas'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).
\textsuperscript{23} This is called Sulh ‘an iqrar. The defendant confesses to a right against him. The plaintiff then compromises upon something
\textsuperscript{24} This is known as Sulh ‘an inkarin…
\textsuperscript{25} Mughni al-Muhtaj, vol.2, 232-233
\textsuperscript{26} Al-Shafi‘, al-Umm, vol.4, 417
\textsuperscript{27} Al-Hawi al-Kabir, vol.6, 368
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’ 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. In this regard, the principle of exchange must be taken into account if the negotiation is based on exchange of gold or silver.

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.

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

<table>
<thead>
<tr>
<th>Husband ( \frac{1}{4} )</th>
<th>6</th>
<th>6+2</th>
<th>having added the uncle’s share, the husband’s shares becomes 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daughter ( \frac{1}{4} )</td>
<td>12</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>Mother ( \frac{1}{4} )</td>
<td>4</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Uncle (residual bequest)</td>
<td>2</td>
<td>00</td>
<td></td>
</tr>
</tbody>
</table>

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.

<table>
<thead>
<tr>
<th></th>
<th>Share</th>
<th>Value</th>
<th>Calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband</td>
<td>1/4</td>
<td>2000</td>
<td>2000×1000=4000</td>
</tr>
<tr>
<td>Son</td>
<td>2</td>
<td>4000</td>
<td></td>
</tr>
<tr>
<td>Daughter</td>
<td>2</td>
<td>2000</td>
<td>2000</td>
</tr>
</tbody>
</table>

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.
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 Shari`ah 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. They were instituted with deep-rooted aspirations, among others to govern

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family matters and resolve any disputes in accordance with the *Shari`ah* as well as to safeguard the religion from the secular environment. 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. Therefore *Shari`ah* Councils are pursued in order to advocate ‘the moral authority of the Muslim community’ 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. 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 whose function is to deal with individual cases, most frequently of marital breakdown.

The terms ‘*Shari`ah* courts’ or ‘*Shari`ah* Councils’ seem to carry a similar connotation and ‘can be used interchangeably’. However, Bano notes in her exploratory report that ‘there is no single authoritative definition of Shari`ah Councils.’ 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. Positioning their role as ‘parallel quasi-judicial institutions’, 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 – the Muslim Law (Shariah) Council UK in Wembley, West London, the Islamic *Shari`ah* Council in Leyton, South London, and the Birmingham *Shari`ah* Council. The three *Shari`ah* Councils function independently of each other. They are neither unified nor do they represent a single school of Islamic

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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-

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\(^{17}\) 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 at 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, which means that their procedures are different. 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. 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. 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 which aimed at bringing the procedure closer 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).

23 Amra Bone, a female Shari’ah scholar at the BSC in Birmingham. Interview, 5 December 2012.
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.
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

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.
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.
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 (\textit{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, \textit{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, “\textit{Authority and Authenticity},” 125; Charlotte Proudman, “A Practical and Legal Analysis of Islamic Marriage, Divorce and Dowry,” \textit{Family Law Week} 30/01/2012.

\(^{43}\) ibid.

\(^{44}\) ibid.


\(^{48}\) 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. 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 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. 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 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

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 ongoing 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. 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. The total number of deaths from terrorism in year 2014 skyrocketted to 32,685, ‘constituting an 80 percent increase from 18,111 the previous year.’


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. 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
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. Significant and deadly terrorist attacks occur 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 dispute by arbitrator’. 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.

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”.

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, Apuleiuis, 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”.

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

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8 There are works that suggested that arbitration should not be included under ADR due to its characteristic and strong resemblance to litigation

298
the Western world. Arbitration originated in Roman and Canon law and was revived back during the Middle Ages in European civil law systems.\footnote{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} Elaborate ordinance on dispute settlement through various gilds can be traced back even in the 16\textsuperscript{th} 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.”\footnote{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.}

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 16\textsuperscript{th} century, especially through the gilds that provided sort of institutional arbitrations. In England, from the 17\textsuperscript{th} 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.\footnote{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}

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.\footnote{Bruce Harris, ‘London Maritime Arbitration’ (2011) Arbitration, 77(1), 116-124} In the late 19th and early 20th century, arbitration in country like the United States also expanded along with the growth of trade associations.\footnote{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}

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 freedom 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.”\footnote{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.  

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.

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.

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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 was one of the popular methods of dispute resolution 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 avoid 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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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 his 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 stranger 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 Shafies;

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 rightly 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 Shafiiess school is based on the view of Abū Abdullāh Muhammad ibn Idrīs al-Shafī‘ī. 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”.

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.

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.

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

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.\textsuperscript{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.”\textsuperscript{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 countries in 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.”\textsuperscript{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 sunt 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.”\textsuperscript{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 has

\begin{thebibliography}{999}
\item C.R. Tyser, D.G. Demetriades and Ismail Haqqi Effendi (translators), \textit{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
\item 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
\end{thebibliography}
(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.

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.

“...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.

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.

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:

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

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 context 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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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 ashab al-nuzul (reasons behind the revelation), Saidina Abu Bakar was migrating to Medina with the Prophet when a group of assassins 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 appointments 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 appointment 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

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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 saferkeeper. 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 appointments 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 conflict 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 eventually 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 tahlkim 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

<table>
<thead>
<tr>
<th>Year/Century</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>632</td>
<td>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.</td>
</tr>
<tr>
<td>657</td>
<td>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.</td>
</tr>
<tr>
<td>632-661</td>
<td>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.</td>
</tr>
<tr>
<td>661</td>
<td>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.</td>
</tr>
<tr>
<td>680</td>
<td>Saidina Muawiyah died and passed the caliphate to his son Yazid, and breaking the treaty with Hasan ibn Ali.</td>
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<tr>
<td>Year</td>
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<tr>
<td>719</td>
<td>Shah Rofidah murdered around 500,000 in Khorasan</td>
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<tr>
<td>719</td>
<td>Shia Zaidian murdered 50,000 Muslim in Yaman</td>
</tr>
<tr>
<td>788–985</td>
<td>A Shia Zaydi dynasty existed in what is now Morocco</td>
</tr>
<tr>
<td>909</td>
<td>Shia Hassasin murdered around 200,000 Muslim in Egypt</td>
</tr>
<tr>
<td>909</td>
<td>Shia Fatimids attacked Palestine and assist in the handover to the Christians</td>
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<tr>
<td>929</td>
<td>Shia Qurmutiah attacked the Holy city, Mecca, murdered 400,000 pilgrimage, and damaged the Kaabah</td>
</tr>
<tr>
<td>990–1096</td>
<td>A Shia Arab dynasty (Uqaylids) with several lines that ruled in various parts of Al-Jazira, northern Syria and Iraq.</td>
</tr>
<tr>
<td>934–1055</td>
<td>The Nuyids. At its peak consisted of large portions of modern Iraq and Iran.</td>
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<td>1258</td>
<td>The Shi‘ite chief minister (Wazeer), Ibn al-‘Alqamee, also played a major role in that tragedy. Shia 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.</td>
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<td>1347–1527</td>
<td>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.</td>
</tr>
<tr>
<td>909–1171</td>
<td>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.</td>
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<tr>
<td>1501–1736</td>
<td>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.</td>
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<td>1514</td>
<td>The Ottoman sultan, Selim I, was alleged to order the massacre of 40,000 Anatolian Shia.</td>
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<td>Shia Safawiah murdered around 1 million Sunnis in Iran</td>
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<td>Shia Qadianiah changed the Kiblah to Iran</td>
</tr>
<tr>
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<td>The Al Saud-Wahhabi armies attacked and sacked Karbala, the Shia shrine in eastern Iraq that commemorates the death of Husayn.</td>
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<td>1947</td>
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<td>1982</td>
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Overview of Legal and Administrative Approaches to Manage Human-Wildlife Conflicts in Malaysia

By:
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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. 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.

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. 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 33 million 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 185,000 species of fauna. 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>
<thead>
<tr>
<th>Forested Area</th>
<th>Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent Reserved Forests (PRFs)</td>
<td>14.55 mil. ha</td>
</tr>
<tr>
<td>Protected area (National Park/ Wildlife Sanctuary)</td>
<td>1.86 mil. ha</td>
</tr>
<tr>
<td>State land forests</td>
<td>1.86 mil. ha</td>
</tr>
<tr>
<td>Total Forested Area</td>
<td>18.27 mil. ha</td>
</tr>
</tbody>
</table>

Source: Ministry of Natural Resources and Environment Malaysia 2016

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

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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.
is estimated as only 1223-1677 individuals in the Peninsular Malaysia\textsuperscript{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\textsuperscript{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’\textsuperscript{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\textsuperscript{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’\textsuperscript{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’\textsuperscript{20}, while according to Conover, HWC are ‘situation occurring when an action by either humans or wildlife has an adverse effect on the other’\textsuperscript{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\textsuperscript{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’\textsuperscript{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.

\textsuperscript{18} IUCN World Park Congress (2003). Preventing & mitigating human-wildlife conflicts. WPC recommendation.
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 when 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,


fruit tree, car and furniture, requiring drastic measures including culling.

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. 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, 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, or when his livestock is exposed to inter-species disease whereas social impacts of HWC would include additional labour costs and work loss.

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. 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 as provided in Table 2 below.

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Table 2: Status of Human Wildlife Complaints (2006-2015)

<table>
<thead>
<tr>
<th>Wildlife Species</th>
<th>No. of Complaints</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long-tail Macaque</td>
<td>56760</td>
<td>66%</td>
</tr>
<tr>
<td>Elephant</td>
<td>7740</td>
<td>9%</td>
</tr>
<tr>
<td>Wild boar</td>
<td>6020</td>
<td>7%</td>
</tr>
<tr>
<td>Common Palm Civet</td>
<td>4300</td>
<td>5%</td>
</tr>
<tr>
<td>Pig-tail Macaque</td>
<td>2580</td>
<td>3%</td>
</tr>
<tr>
<td>Python</td>
<td>860</td>
<td>1%</td>
</tr>
<tr>
<td>Tiger</td>
<td>860</td>
<td>1%</td>
</tr>
<tr>
<td>Banded Leaf Monkey</td>
<td>860</td>
<td>1%</td>
</tr>
<tr>
<td>Cobra</td>
<td>86</td>
<td>0.1%</td>
</tr>
<tr>
<td>Dusky Leaf Monkey</td>
<td>86</td>
<td>0.1%</td>
</tr>
<tr>
<td>Other species</td>
<td>4300</td>
<td>5%</td>
</tr>
<tr>
<td>Total</td>
<td>86040</td>
<td>100%</td>
</tr>
</tbody>
</table>

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. It was 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. It was 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. It was 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.

Table 3: Record on Wildlife Attacks in Peninsular Malaysia (2004-2015)

<table>
<thead>
<tr>
<th>Group of Species</th>
<th>Injury</th>
<th>Fatality</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Snakes</td>
<td>493</td>
<td>12</td>
<td>505</td>
</tr>
<tr>
<td>Wild boar</td>
<td>90</td>
<td>9</td>
<td>99</td>
</tr>
<tr>
<td>Primates</td>
<td>91</td>
<td>1</td>
<td>92</td>
</tr>
<tr>
<td>Elephant</td>
<td>20</td>
<td>9</td>
<td>29</td>
</tr>
<tr>
<td>Bees/hornets</td>
<td>15</td>
<td>14</td>
<td>29</td>
</tr>
<tr>
<td>Tiger</td>
<td>7</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Sun bear</td>
<td>7</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>Leopard</td>
<td>4</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>Gaur</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Crocodile</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Monitor Lizard</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Leopard cat</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>733</td>
<td>48</td>
<td>781</td>
</tr>
</tbody>
</table>

Source: Ministry of Natural Resources and Environment

Wildlife attack on humans is another consequence 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 were 41 Department of Wildlife and National Park (2015). Annual Report. Kuala Lumpur: DWNP. 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. 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. 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’. 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>
<thead>
<tr>
<th>Class</th>
<th>First Schedule Protected Wildlife</th>
<th>Second Schedule Totally protected wildlife</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mammals</td>
<td>220</td>
<td>273</td>
<td>493</td>
</tr>
<tr>
<td>Birds</td>
<td>383</td>
<td>1007</td>
<td>1390</td>
</tr>
<tr>
<td>Reptiles</td>
<td>314</td>
<td>97</td>
<td>411</td>
</tr>
<tr>
<td>Amphibians</td>
<td>37</td>
<td>10</td>
<td>47</td>
</tr>
<tr>
<td>Arachnida</td>
<td>17</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>Insects</td>
<td>82</td>
<td>4</td>
<td>86</td>
</tr>
<tr>
<td>Hirudinoidea</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Gastropoda</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1054</td>
<td>1393</td>
<td>2447</td>
</tr>
</tbody>
</table>

Source: Wildlife Conservation Act 2010

Under such classification, wildlife species are being divided into specific categories, namely ‘protected’ and ‘totally protected’ wildlife as shown in Table 4 above. In relation to HWC, such listing is meant to provide mitigating factors. J. Int. Wildl. Law Policy 11, 189–206.


Section 3 of the WCA.

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. Wild animal is also being protected against human’s cruelty including the act of causing any unnecessary suffering, pain or discomfort to any wildlife.

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. 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. 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. 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’.

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. 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. 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.
51 See section 3 of the WCA.
52 See sections 9,10 and 11 of the WCA.
53 See Part IV of the WCA.
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

<table>
<thead>
<tr>
<th></th>
<th>Keeping/ Using</th>
<th>Smuggling</th>
<th>Business</th>
<th>Illegal Hunting</th>
<th>Encroachment</th>
<th>Zoo/ Exhibition</th>
<th>Research</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>1032</td>
<td>56</td>
<td>47</td>
<td>10</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2015</td>
<td>1280</td>
<td>34</td>
<td>21</td>
<td>18</td>
<td>11</td>
<td>2</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: Annual Report 2014, 2015 Department of Wildlife and National Park

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\(^{55}\) 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.


\(^{62}\) 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, and through the prohibition on any disturbances to the wild animal and its habitat. 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. 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.

### 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. 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. 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. 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. 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 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

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63 Section 49 of the WCA.
64 Sections 49 & 85 of the WCA.
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.
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 birds73. 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 dove74. 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 WCA75.

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 follows76:
 - 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>
<thead>
<tr>
<th>Type of Species</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crocodile</td>
<td>2</td>
<td>7</td>
<td>9</td>
<td>7</td>
<td>10</td>
<td>23</td>
</tr>
<tr>
<td>Wild boar</td>
<td>8</td>
<td>3</td>
<td>9</td>
<td>11</td>
<td>12</td>
<td>25</td>
</tr>
<tr>
<td>Monkey</td>
<td>2</td>
<td>5</td>
<td>13</td>
<td>19</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>Snake</td>
<td>7</td>
<td>10</td>
<td>64</td>
<td>106</td>
<td>72</td>
<td>187</td>
</tr>
<tr>
<td>Bear</td>
<td>–</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Elephant</td>
<td>–</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hornet</td>
<td>–</td>
<td>2</td>
<td>1</td>
<td>7</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Gaur</td>
<td>–</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
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77 Section 55 of the WCA.
78 Section 54 of the WCA.
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 officer81. 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 violent82.

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.

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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

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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. 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. 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 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 pleading 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. Hence, section 173A and section 172G are not applicable. As illustrated in Nor Afizal bin Azizan v Public Prosecutor, 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). In other words, plea bargaining is a process of

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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
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. 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 Mashayee bin Mohd Zaki, 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 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. 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. 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.

As illustrated in Ahmad Rashidi bin Zainol & Anor v Public Prosecutor, 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 Mashayee bin Mohd Zaki [2017] MLJU 581
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 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. 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. The stakeholders in victim-offender mediation are the offender, the victim and the community. 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
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.\textsuperscript{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 in 1980s 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.\textsuperscript{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.\textsuperscript{24} Thus, it is not considered as a punishment for the offender. Even though 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{23} Section 2 of the Mediation Act 2002 (lag 2002:445 on medling med anledning av brott)

\textsuperscript{24} Anna Mestitz, and Ghetti. \textit{Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries}, (New York: Springer, 2005), 82.


\textsuperscript{27} Anna Mestitz and Ghetti. \textit{Victim-Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries}, (New York: Springer, 2005), 84.

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. 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.

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.

In New Zealand, a family-group conference is available for a child or young person aged
between 10 and 14 years who has committed an offence. 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.
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.

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.

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
247.
31 Marie Connolly, and Margaret MacKenzie, Effective Participatory Practice: Family Group Conferencing in
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. The decision or recommendation reaches in the conference must be recorded by a care and protection co-ordinator. The chief executive shall consider any decision reached by the conference unless if it found that the decision or recommendation is impracticable or unreasonable. 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.

All communication, information and admission derive from the conference is confidential and inadmissible in any court proceeding. 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. It is an alternative sentencing program which involves members of aboriginal communities and concerns the victims’ expression, victims’ protection and victims’ support.

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. 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. 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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{50}

Once the group reaches a decision, the court has to pronounce the sentence in open court.\textsuperscript{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.\textsuperscript{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

\textsuperscript{45} Clause 6 of the Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{46} Clause 8 of Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{47} Clause 11 of Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{48} Clause 15 of the Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{49} Clause 25 of the Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{50} Clause 1(4) of the Schedule 4 of the Criminal Procedure Regulation 2005
\textsuperscript{51} Clause 2(h) of Schedule 4 of the Criminal Procedure Regulation 2005
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. In Mohamed Johan Mutalib v PP, and Raja Izzuddin Shah v PP, 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 pleads 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.

6.0 REFERENCES


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,

widely practised in pre-Islamic Arabia known as al-tabannī, an act of adopting a child that is “to make one’s son.” In al-tabannī, 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-tabannī is perceived as the deliberate and intended act of making someone else’s birth child as one’s own. 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. The basis for such non-recognition is traced in the Qur’ān and the case of Zayd bin Harithah, the adopted son of the Prophet Muhammad (s.a.w.). 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. It is also a reminder to the adoptive parents that they are not the child’s birth parents. 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. 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. Significantly, this concept is quite similar to legal adoption to a certain extent and it is known as kafālah. Kafālah literally refers to sponsorship, which derives from the root word that means “to have 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. 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.
feed”. The most precise translation of *kafālah* is “foster parenting” or “legal fostering”. It is also viewed as a legal guardianship of a minor referring to “wardship, tutelage, or the gift of care.”

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. Unlike legal adoption, the notion of *kafālah* is a “primarily gift of care and not a substitute for lineal descent.” 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. 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. 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. 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. 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.

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) and the Registration of Adoptions Act 1952 (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. 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 at the NRD of the district where the prospective adoptive parents reside. The adoption will be registered by the Registrar after he has been satisfied with evidence either oral or documentary that such adoption took place. 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

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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.
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; Yahyá Aḥmad Zakaşiyā, n. 96, at 35-39.
23 Ibid., at 407. See also, Ali Abu Noman & Zafрин, 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.
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.\textsuperscript{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 \textit{de facto} adoption and indirectly recognizes the adoptive parents’ right to custody and their continuing responsibilities to maintain and educated the adopted child.\textsuperscript{31}

Notably, the RAA provides for registration of \textit{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.\textsuperscript{32} It seems that the prospective adoptive parents must fulfill 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.\textsuperscript{33} The applicants may adopt a child at the age of 21 if they are related to the child.\textsuperscript{34} The RAA also requires for the prospective adoptive parents and the child to be ordinarily resident in West Malaysia.\textsuperscript{35} Though it is not explicitly mentioned in the RAA, Muslim prospective adoptive parents are allowed to adopt a non-Muslim child.\textsuperscript{36} The AA, on the other hand, clearly provides that adoptions of a Muslim child by non-Muslim prospective adoptive parents are not permitted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{39} It follows that the RAA confers no inheritance rights to the adopted child. In \textit{Re Loh Toh Met, Decd KongLai Fong & Ors v Loh Peng Heng},\textsuperscript{40} the court held that he registration of the \textit{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, \textit{waqf} or bequest.\textsuperscript{41} Furthermore, a Muslim adopted child under the RAA must observe some limitations prescribed by Islamic principles such as covering ‘\textit{awrah}’ while associating with the adoptive family member of different gender.\textsuperscript{42} Observation of the ‘\textit{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{30} Registration of Adoptions Act 1952, s. 6(1)(b)
  \item \textsuperscript{31} \textit{Harlsbury’s Laws of Malaysia}, n. 21, at 58.
  \item \textsuperscript{32} Registration of Adoptions Act 1952, s. 6(1).
  \item \textsuperscript{33} Registration of Adoptions Act 1952, s.10(2)(a)).
  \item \textsuperscript{34} Registration of Adoptions Act 1952, s. 10 (2)(b).
  \item \textsuperscript{35} Registration of Adoptions Act 1952, s.10(3).
  \item \textsuperscript{36} See e.g, \textit{Tan Kong Meng v Zainon bte Md Zain & Anor} [1995] 3 MLJ 408 (describing a case of \textit{de facto} adoption of a Chinese, non-Muslim child by a Malay couple).
  \item \textsuperscript{37} Adoption Act 1952, s. 31.
  \item \textsuperscript{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, \textit{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, \textit{Protection and Adoption of Abandoned Children in Malaysia: A Comparative Overview with Islamic Law}, International Law Book Services, 2008 [hereinafter Azizah, \textit{Abandoned Children}], at 101 (noting that adoption would render no parental status for the abandoned child).
  \item \textsuperscript{40} [1961] MLJ 234.
  \item \textsuperscript{41} Azizah, Protection of Rights, n. 39, at 239-240; Azizah, Pengangkatan dan Pemeliharaan, n. 38, at 302-303.
  \item \textsuperscript{42} Azizah, Protection of Rights, n. 39, at 240.
  \item \textsuperscript{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).
\end{itemize}
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.\footnote{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.}

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.\footnote{Azizah, Abandoned Children, n. 39, at 89-96.}

### 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 (\textit{Shari’ah}).\footnote{See Raymond Mah & Liow Pei Xia, \textit{Adoption in Malaysia}, \texttt{<http://www.mahwengkwai.com/adoption-malaysia/>} viewed on 23 July 2017.} 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.\footnote{See Adoption Act 1952, s. 9.} 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.\footnote{Raymond Mah & Liow Pei Xia, n. 46.} 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.\footnote{See, Azizah, Protection of Rights, n. 39, at 236.} 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\footnote{See, Islamic Family Law (Federal Territories) Act 1984, ss. 81–105.} as well as maintenance.\footnote{See Islamic Family Law (Federal Territories) Act 1984, ss. 72–80.}

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.\footnote{Hak Penjagaan Anak Angkat, \textit{Harian Metro}, 30 March 2017\texttt{<https://www.pressreader.com/malaysia/harian-metro/20170330/281784218930639>} viewed on 22 July 2017.}

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.\footnote{See Islamic Family Law (Federal Territories) Act 1984, section 81(1).} This can be seen in the case of \textit{Zawiyah v Ruslan}\footnote{(1980) 1 JH (2) 102.} 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 \textit{Rosnah v Mohamed Nor},\footnote{(1975) 1 JH (1) 42.} the court held that the mother was entitled to the custody of her child despite the uncle claimed...
that the child’s father had appointed him to be the guardian after he passed away. The IFLA further provides that the mother must fulfill 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 fits 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 adoptive 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 & ors65 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.
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.52.
64 See Islamic Family Law (Federal Territories) Act 1984, s. 78(2),(3)
66 [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 misconception 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 a 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 retain the biological parentage. 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* 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. 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. Furthermore, the Syariah High Court is empowered to decide cases pertaining to custody of Muslim children. 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* awarded the custody of a 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.

There are also several reported cases where the birth parents challenge the adoptive parents

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66 See Hak dan tanggungjawab, n. 64.
68 See Azizah, Protection of Rights, n. 39, at 237.
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*, 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 fulfill 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* 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* 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* 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*, 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.” 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.

Subsequently, this shows the weakness of the law in state enactments which fail to give protection to a Muslim adopted child. 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.

Nevertheless, the court in the case of *Rosnah v. Ibrahim* 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. 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. 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* 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

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77. (1986) 6 JH 272
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.
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. 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. 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. Therefore Shari’ah Councils are pursued in order to advocate ‘the moral authority of the Muslim community’ 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. 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 whose function is to deal with individual cases, most frequently of marital breakdown.

The terms ‘Shari’ah courts’ or ‘Shari’ah Councils’ seem to carry a similar connotation and can be used interchangeably. However, Bano notes in her exploratory report that ‘there is no single authoritative definition of Shari’ah Councils.’ 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. Positioning their role as ‘parallel quasi-judicial institutions’, 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 – the Muslim Law (Shariah) Council UK in Wembley, West London, the Islamic Shari’ah Council in Leyton, South London, and the Birmingham Shari`ah Council. The three Shari’ah Councils function independently of each other. 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.

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7 Nielson, “Emerging Claims”.
8 Nielson, “Emerging Claims”.
14 Arshad, Islamic Family Law.
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.

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Pakistan (United Kingdom: Ashgate Publishing Limited: 2005), 57.
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.’” 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. 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. 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. The nature of this training was not disclosed to the researcher. 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.

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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, 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.

353
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, which means that their procedures are different. 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. 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. 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 which aimed at bringing the procedure closer 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). 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.
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.
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`ah 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 Suhai Haasan (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.\textsuperscript{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.’\textsuperscript{31} Shari’ah Councils should be looked at as ‘a place of authority, a place of respect’\textsuperscript{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.\textsuperscript{33} They have in fact been condemned for not providing such facilities.\textsuperscript{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’.\textsuperscript{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.’\textsuperscript{36}

\begin{thebibliography}{99}
\bibitem{30} Interview with a Muslim Family Law Barrister, February 2012.
\bibitem{31} Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).
\bibitem{32} ibid.
\bibitem{33} This concern was raised by Arshad during the interview.
\bibitem{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.
\bibitem{35} Brunch, “And how are the children?,” 120 ; Bano, “in the ‘Shadow’ of the Law,” 204.
\bibitem{36} Interview with Interview with Raffia Arshad, Family Law Barrister (St Mary Chambers 9 February 2012).
\end{thebibliography}
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


\(^{40}\) 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 leads to ‘disparities in the way Shari’ah Councils operate and the decision they reach.’ This was claimed to encourage ‘forum shopping’ where a client ‘will contact a number of Shari’ah Councils to ascertain their school of law before making an application.’ 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, or as similarly commented by a former Archbishop of Canterbury, ‘unfinished business’. Such reaction worsens with the approach that ‘because of these diversities, the [UK] should be wary of legally recognising aspects of Islamic family law.’ 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, thereby ‘undermining the pluralism inherent in Islamic jurisprudence.’ 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

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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.
48 Ahmed, “Recent Development,” 496.
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 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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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. 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. 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’. 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’. 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. Media and entertainment industries cover eight (8) sectors namely, TV, radio, music, film, publishing, theatre, Internet and the ‘new’ media and gaming.

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 right 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.

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

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6 Business dictionary at http://www.businessdictionary.com/definition/media.html
7 Media of Malaysia at https://en.wikipedia.org/wiki/Media_of_Malaysia

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[2013] 3MLJ 534 , HC
receive funding, necessary tax breaks and grants especially in terms of local content creation.

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. 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.

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. This Content Code aims to prevent unreliable sources that produce fake news and false content. 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:

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.


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. 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.

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 suppress information, to correct inaccuracy and to avoid plagiarism. 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; etc

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. 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 ethics, they still need to know about the relevant laws governing media and communication laws as preparation for possible disputes and any potential legal consequences.

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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/
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 confined 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

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."
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.

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In Public Prosecutor v Pung Chen Choon, 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. 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. Following the act by the MCMC, the Malaysian Bar Council on 1 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”.

Again in January 2017, the Malaysian Bar had criticised the CMA 1998 stating that it was being abused like the Sedition Act. 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. Article 10(1)(a) of FC states, subject to clauses (2),(3) and(4), every citizen has the right to freedom of speech.

1) 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-
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.

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. 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.

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. 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
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.”

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.

The defamatory statements may be made either through printed form (offline) or online by using Internet.

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. 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. 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 even though 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. 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. 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.

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

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
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
In this case, the Respondent 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 Saha-mid (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 Omar49 Court of Appeal (Putrajaya)

In this case, the respondent/Plaintiff sued the Appellant/Defendant for libel or defamatory 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 others50 the appeal dismissed. It was decided that the impugned statements 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**

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. P1 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)**

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 agreed 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.

**Case 5 (reported on 13 July 2017): Datuk Seri Najib Tun Razak & Anor v Mkini Dotcom Sdn Bhd & Ors**

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 continuously 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 to settle out of court. The Star 13 July 2017 at 14.

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51 [2017] 7 MLJ 150
52 Anwar arrives at Penang Court for defamation case at www.thestar.com.my 9 January 2017
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. 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 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. 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 relied on the defence of fair comment but it was not available to D1.

56 Civil Suit No.23 NCvC-62-07/201
58 [2017] 7 MLJ 150
3- Defence of absolute privilege (s.11 of 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 prove 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's. The Appellant also never raised defence of justification. And in Lim Guan Eng Ivn Utusan Melayu (M) Bhd,62 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,63 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,64 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.
5- Defence of reportage (for journalists)\textsuperscript{66}

In describing this defence, it is best to refer to case Dato’ Seri Anwar bin Ibrahim v The New Straits Times Press\textsuperscript{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,\textsuperscript{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 plaintiff 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 plaintiff’s 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

\textsuperscript{66} Zaid Hamzah, (2013)
\textsuperscript{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.
\textsuperscript{68} [2013] 3 MLJ 534
happened in the case of Dato 'Seri Anwar Ibrahim against the NST and others.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 dilemma 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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\textsuperscript{70} See case Keluarga Communication v Normala Samsudin [2006] 2 MLJ 700 CA
\textsuperscript{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
\textsuperscript{72} Effect of apology on liability at https://www.alrc.gov.au/publications/7-fault/effect-apology-liability


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PP v. Ooi Kee Saik [1971] 2 MLJ 108

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Shaharuddin bin Mohammad v Malayan Banking Bhd. [2011] 7 MLJ 589, HC.


*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333


*Utusan Melayu (M) Bhd v Lim Guan Eng* [2015] 6 MLJ 113


Lexis Nexis.


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. 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. 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. 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
worldwide rates such that the region’s share in the global M&A has increased significantly. 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). Most Malaysian companies either consolidate within the country or they merge and acquire companies abroad. The increased competitiveness 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.

Takeovers and mergers are complex business transactions 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 successful 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 sensitive 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 arise 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

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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. 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. ‘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.”

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.” 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.

‘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.”

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

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9 Weinberg and Blank, Take-overs and Mergers, Sweet & Maxwell, 2003 para.1-1004
10 Ibid, para 1-1002.
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.\(^\text{13}\) 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.\(^\text{14}\)

**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.\(^\text{15}\) 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.\(^\text{16}\) 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.\(^\text{17}\) 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:


\(^{15}\) 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:

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.

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

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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.\textsuperscript{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.

\textbf{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.

\textsuperscript{26} Ibid at pg 78.
The Financial Ombudsman Scheme as an Alternative Dispute Resolution Mechanism for Financial Disputes: The Malaysian Experience

Syed Fadhil Hanafi Syed A Rahman1 & Khairil Azmin Mokhtar2

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 ombudsman3. 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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2 LL.B (Honours)(UIAM), MCL (IIUM), Ph.D (Aberystwyth), Associate Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.
In fact, Confucius despises litigation which is apparent from the words the great Confucius, “in death avoid hell, in life avoid law courts”.

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:

(a) Kuala Lumpur Regional Centre for Arbitration (KLRCA) established in 1978;
(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;
(e) Tribunal for Consumer Claims under the Consumer Protection Act 1999; 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;
(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.

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
company limited by guarantee established by the insurance industry on 23 August 1991 to serve as an alternative channel for the public to refer disputes 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. Modeled 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 as per the following details:

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</thead>
<tbody>
<tr>
<td>Cases brought forward</td>
<td>5</td>
<td>14</td>
<td>54</td>
<td>52</td>
<td>40</td>
<td>31</td>
<td>40</td>
<td>77</td>
<td>145</td>
<td>165</td>
<td>172</td>
<td></td>
</tr>
<tr>
<td>New cases</td>
<td>37</td>
<td>58</td>
<td>110</td>
<td>132</td>
<td>279</td>
<td>383</td>
<td>463</td>
<td>515</td>
<td>726</td>
<td>932</td>
<td>1070</td>
<td>1105</td>
</tr>
<tr>
<td>Cases resolved</td>
<td>32</td>
<td>49</td>
<td>70</td>
<td>134</td>
<td>291</td>
<td>392</td>
<td>454</td>
<td>478</td>
<td>658</td>
<td>912</td>
<td>1063</td>
<td>1115</td>
</tr>
<tr>
<td>Pending cases</td>
<td>5</td>
<td>14</td>
<td>54</td>
<td>52</td>
<td>40</td>
<td>31</td>
<td>40</td>
<td>77</td>
<td>145</td>
<td>165</td>
<td>172</td>
<td>162</td>
</tr>
</tbody>
</table>

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 as per the following details:

<table>
<thead>
<tr>
<th>Year</th>
<th>1997</th>
<th>1998</th>
<th>1999</th>
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<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
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<tbody>
<tr>
<td>Cases brought forward</td>
<td>-</td>
<td>28</td>
<td>34</td>
<td>164</td>
<td>166</td>
<td>87</td>
<td>163</td>
<td>155</td>
</tr>
<tr>
<td>New cases</td>
<td>87</td>
<td>134</td>
<td>125</td>
<td>447</td>
<td>346</td>
<td>503</td>
<td>468</td>
<td>443</td>
</tr>
<tr>
<td>Cases resolved</td>
<td>92</td>
<td>128</td>
<td>193</td>
<td>445</td>
<td>445</td>
<td>427</td>
<td>478</td>
<td>411</td>
</tr>
<tr>
<td>Pending cases</td>
<td>28</td>
<td>34</td>
<td>164</td>
<td>166</td>
<td>87</td>
<td>163</td>
<td>155</td>
<td>186</td>
</tr>
</tbody>
</table>

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, 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:

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:

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</tr>
</thead>
<tbody>
<tr>
<td>Cases brought forward</td>
<td>348</td>
<td>575</td>
<td>865</td>
<td>1166</td>
<td>1917</td>
<td>2743</td>
<td>3150</td>
<td>2540</td>
<td>1741</td>
<td>1030</td>
<td>615</td>
</tr>
<tr>
<td>New cases</td>
<td>1934</td>
<td>2107</td>
<td>2287</td>
<td>2437</td>
<td>2642</td>
<td>2450</td>
<td>2224</td>
<td>1919</td>
<td>1881</td>
<td>1691</td>
<td>1707</td>
</tr>
<tr>
<td>Cases resolved</td>
<td>1707</td>
<td>1817</td>
<td>1986</td>
<td>1586</td>
<td>1198</td>
<td>1743</td>
<td>2834</td>
<td>2718</td>
<td>2592</td>
<td>2106</td>
<td>1876</td>
</tr>
<tr>
<td>Pending cases</td>
<td>575</td>
<td>865</td>
<td>1166</td>
<td>1917</td>
<td>2743</td>
<td>3150</td>
<td>2540</td>
<td>1741</td>
<td>1030</td>
<td>615</td>
<td>446</td>
</tr>
</tbody>
</table>

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 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

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advisers and Islamic financial advisers who are members of the Operator\textsuperscript{16}.

The jurisdictions, powers and duties of the Operator are governed by the FOS Regulations\textsuperscript{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\textsuperscript{18} which shall be based on 6 basic principles namely independence, fairness and impartiality, accessibility, accountability, transparency and effectiveness\textsuperscript{19}. Disputes which are eligible for reference to the Operator encompass the following:

<table>
<thead>
<tr>
<th>Subject Matter of Dispute</th>
<th>Jurisdictional Limit (RM)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial services or products or Islamic financial services or products,</td>
<td>250,000</td>
</tr>
<tr>
<td>developed, offered or marketed by a by a Member, or by a Member for or on behalf of</td>
<td></td>
</tr>
<tr>
<td>another person, other than matter listed in rows (2) to (4) below.</td>
<td></td>
</tr>
<tr>
<td>Motor third party property damage insurance or takaful claims (not applicable to a Member</td>
<td>10,000</td>
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<tr>
<td>which is a prescribed development financial institution).</td>
<td></td>
</tr>
<tr>
<td>Unauthorized transaction through the use of a designated payment instruments or an Islamic</td>
<td>25,000</td>
</tr>
<tr>
<td>designated payment instruments or payment channel such as internet banking, mobile</td>
<td></td>
</tr>
<tr>
<td>banking, telephone banking or automated teller machine (ATM).</td>
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</tr>
<tr>
<td>Unauthorized use of a cheque as defined in section 73 of the Bills of Exchange Act 1949</td>
<td>25,000</td>
</tr>
<tr>
<td>(not applicable to a Member which is a prescribed development financial institution).</td>
<td></td>
</tr>
</tbody>
</table>

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\textsuperscript{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

\textsuperscript{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.
\textsuperscript{18} See paragraphs 1(7) and 19 of the Terms of Reference for the Ombudsman for Financial Services.
\textsuperscript{19} See paragraph 3 of the Terms of Reference for the Ombudsman for Financial Services.
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\(^\text{21}\). 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\(^\text{22}\). 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\(^\text{23}\).

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.

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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.
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:\n
\[[\text{Diagram of the dispute resolution process.}]\]

When a final decision is made by an ombudsman, such decision will only be binding on a member if the complainant agrees to it\textsuperscript{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 re-opened 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\textsuperscript{26} as per the following details:

<table>
<thead>
<tr>
<th></th>
<th>Under Predecessor Scheme</th>
<th>Under FOS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1 Jan 2015 to 30 Sept 2016</td>
<td>1 October until 31 December 2016</td>
</tr>
<tr>
<td>Cases brought forward</td>
<td>615</td>
<td>446</td>
</tr>
<tr>
<td>New cases</td>
<td>1707</td>
<td>1306</td>
</tr>
<tr>
<td>Cases resolved</td>
<td>1876</td>
<td>1527</td>
</tr>
<tr>
<td>Pending cases</td>
<td>946</td>
<td>125</td>
</tr>
</tbody>
</table>

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\textsuperscript{27} where Allah says:

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\textsuperscript{25} See paragraph 34(23) – 34(24) of the Terms of Reference for the Ombudsman for Financial Services.


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* (judge) 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 12830:

> If a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they

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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 effect32:

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 Operator33. 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

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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\textsuperscript{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 of consumers.

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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*Al-Majallah Al-Ahkam Al-Adaliyyah*


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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’); Taicho-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-koshima or Nanxiao Dao (Lat: 25° 44'/Long: 123° 34’). Three rocks are also named in both languages as Okino Kitaiwa or Dabeixiao Dao; Okino Minamiwa 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 uninhabited 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 have been the main arbiters of the territorial disputes between states.

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(ICJ) mainly focused on the element of ‘effective control’ in deciding territorial and boundary disputes. It can be seen from decisions of the international courts and tribunals in the following cases, namely, Island of Palmas; Clipperton Island Arbitration; Legal Status of Eastern Greenland; Minguers and Ecrehos; Frontier Dispute Case; Land, Island and Maritime Frontier Dispute; Land and Maritime Boundary Case; Pulau Ligitan and Palau Sipadan; and, Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. 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 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). The Chinese Emperors sent approximately twenty-four investiture missions to the Ryukyu kingdom during 1372-1879. 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. 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. 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. In the 16th Century, Diaoyu Tu and Chi Yu were used as

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6 Island of Palmas Case (Netherlands v. USA) (1928) 2 R.I.A.A. 829.
7 Clipperton Island Arbitration (France v. Mexico) (1931) 2 RIAA 1105; (1932) 26 AJIL 390; (1932) 6 ILR.
9 Minguers and Ecrehos Case (1953) ICJ Rep. 47.
16 See Lohmeyer, “The Diaoyu / Senkaku Islands,” 47.
20 Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 46.
part of China’s coastal defence system. In 1561, Zheng Ruozheng mentioned in his defence manual that the Diaoyu Islands were appurtenant to the Fujian garrison. 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. 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. 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. 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. 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.

In the 18th Century, most of the Japanese scholars believed that the Senkaku Islands belonged to China. 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. 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. 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. 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.

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.
23 Suganumu, Sovereign Rights, 54.
25 Suganumu, Sovereign Rights, 71.
26 Ibid., 76.
28 See Ibid.
32 Inoue, “Japanese Militarism.”
of the islands was uncertain for Japan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{35}

On 1\textsuperscript{st} 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.\textsuperscript{36} In the same year, the central government reacted to the third submission and conferred the islands to the Okinawa Prefecture. On 14\textsuperscript{th} January 1895, the Japanese government eventually instructed the prefecture to erect landmarks on the islands.\textsuperscript{37} Nonetheless, the Cabinet decision did not mention anything about the Chiwei Island.\textsuperscript{38} On 17\textsuperscript{th} 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.\textsuperscript{39} Nevertheless, no precise word mentioned in the said peace treaty pertaining to the Senkaku/Diaoyu Islands.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{43} On 20\textsuperscript{th} 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.\textsuperscript{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).\textsuperscript{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.”.\textsuperscript{46}

\textsuperscript{33} Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 30.
\textsuperscript{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.
\textsuperscript{35} Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 60-62.
\textsuperscript{40} See Lohmeyer, “The Diaoyu / Senkaku Islands,” 67.
\textsuperscript{42} Suganumu, Sovereign Rights, 119; Lohmeyer, “The Diaoyu / Senkaku Islands,” 70.
\textsuperscript{43} Okuhara, “The Territorial Sovereignty,” 100.
\textsuperscript{44} Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 32-33.
\textsuperscript{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. 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 US53 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 with some military significance as a strategic location in terms of national security.56 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


47 See Lohmeyer, “The Diaoyu / Senkaku Islands,” 73.
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.
between Taiwan and Japan may be one of the most prolific oil reservoirs in the world.\textsuperscript{58} A 200,000 sq km next to the Senkaku/Diaoyu Islands was predicted to be the vital part of the oil reservoirs.\textsuperscript{59} This discovery triggered the dispute concerning the sovereignty over the islands among three claimants, i.e., China, Taiwan and Japan.\textsuperscript{60}

3.1 Chinese Claims

Chinese claims to the Islands are mainly based on the historic title.\textsuperscript{61} It asserts undisputed sovereignty over the Diaoyu Islands as its historical records of the ownership of the islands dated back to 1372 AD.\textsuperscript{62} Geographically, the islands situate on the Chinese continental shelf and accordingly Chinese fishermen exploited waters surrounding the islands since time immemorial.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} The islands were annexed by the Japanese together with the island of Taiwan (Formosa) under the Treaty of Shimonoseki.\textsuperscript{66} After the WWII, 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.\textsuperscript{67}

3.3 Japanese Claims

Japan claims sovereignty over the Senkaku Islands which had become part of Okinawa prefecture since their formal prescription on 14\textsuperscript{th} January 1895. It asserts that the islands were totally uninhabited and thus were \textit{terra nullius} at that time of its occupation on the basis of repeated surveys of these islands between 1885 and 1895. Accordingly, occupation of \textit{terra nullius} was lawful at that point of time.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{58} See Lohmeyer, “The Diaoyu / Senkaku Islands,” 84; Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 13-15.
\item \textsuperscript{61} Tan, “The Diaoyu/Senkaku Dispute,” 142.
\item \textsuperscript{62} See Su, “The Territorial Dispute,” 48.
\item \textsuperscript{64} Soons and Schrijver, “What does international law say,” 4.
\item \textsuperscript{65} See Su, “The Territorial Dispute,” 48.
\item \textsuperscript{66} Manyin, “Senkaku,” 3.
\item \textsuperscript{67} Tan, “The Diaoyu/Senkaku Dispute,” 145.
\item \textsuperscript{68} Jon Lunn, “The territorial dispute over the Senkaku/Diaoyu Islands,” \textit{International Affairs and Defence Section} (20 November 2012): 4.
\end{itemize}
revealed oil reservoir in the region. 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. Since then, it continues to exercise of its sovereignty over the Senkaku Islands.

IV. THE JUDICIAL INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF ‘EFFEC-TIVITÉS’

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. 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.

Traditionally, there were five 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.

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.

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 possidetis and self-determination.

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.

69 Tan, “The Diaoyu/Senkaku Dispute,” 145.
72 Shaw, Title to Territory, xiii.
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 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…”

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…”

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, that:

“If 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”.

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.

4.3 The Permanent Court of International Justice (PCIJ)

In 1933, in the case of Legal Status of Eastern Greenland, 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 Arbitration (France v. Mexico) (1931) 2 RIAA 1105; (1932) 26 AJIL 390; (1932) 6 ILR.
83 Ibid.
84 See Sein, Public International Law,” 104-107.
“[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”.

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”.

It can be observed that the PCIJ applied the principle of ‘effectivités’ as an essential criterion in deciding the legal status of Eastern Greenland.

4.4 The International Court of Justice

In the case of *Minquiers and Ecrehos*, 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”.

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*, 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. In the same vein, in *Land, Island and Maritime Frontier Dispute*, 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 control.

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89 *Minquiers and Ecrehos Case* (1953) ICJ Rep. 47.
90 Ibid.
92 Ibid.
control. Again, in *Land and Maritime Boundary Case*, 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. 

Furthermore, in the case of *Pulau Ligitan and Palau Sipadan*, 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 *effectivités* referred to above”.

In correspondent to the case of *Minquiers and Ecrehos*, the Court gave title to Malaysia on the basis 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*.

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 of 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 as both based their claims mainly on historical facts. 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. Moreover, the Ryukyu Kingdom had never objected or challenged the fact that the Diaoyu Islands belonged to China. 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. This is what led some researchers to opine that the Diaoyu islands were integral part of Chinese territory until 1893.

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

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94 Ibid.
98 Ibid.
102 Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 43.
103 Inoue, “Japanese Militarism.”
104 Tan, “The Diaoyu/Senkaku Dispute,” 143.
January 1895, which was prior to the “Treaty of Shimonoseki”. Furthermore, none of these islands was the subject matter of the said treaty and it was perhaps by mistake that the Chinese assumed that Japan had annexed the said islands under the general wordings of such treaty. 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. In 1919, Japanese authorities rescued some Chinese fishermen who suffered breakdown and compelled to take refuge on the main Island. 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.

During the US administration period, the Senkaku Islands were regarded as part of Yaeyama Islands under Article 1(d) Ordinance No. 22. 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 and the US air-force used two of the islands for training purposes. 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.

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 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. Besides, the “ROC Yearbook” issued in 1962, 1963 and 1968, did not count the islands as falling under the sovereignty of Taiwan.

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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

126 Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 11.
128 Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 11.
129 Ibid., 34.
133 Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 37.
136 Beijing Review, “Tiaoyu and other Islands have been Chinese Territory since Ancient Times,” January 7, 1972, 13-14.
Reversion Treaty.\textsuperscript{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.\textsuperscript{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.\textsuperscript{139}

In accordance with the Sino-Japanese Communiqué 1972, China and Japan established diplomatic relations\textsuperscript{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.\textsuperscript{141}

In 1972, then Japanese Prime Minister Kakuei Tanaka and Chinese Prime Minister Zhou Enlai agreed to shelve the dispute for the future.\textsuperscript{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.\textsuperscript{143} The incident gave some favours to the Japanese claim and since then Japan acquired at least the de-facto ownership of the islands.\textsuperscript{144}

Yet again, the Senkaku/Diaoyu Islands dispute was left out from the content of the Peace and Friendship Treaty which was concluded on 23\textsuperscript{rd} August 1978 between China and Japan. Moreover, on 22\textsuperscript{nd} 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.\textsuperscript{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\textsuperscript{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\textsuperscript{147} and proclaimed the islands on behalf of Japan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{151} In 1996, it took

\begin{itemize}
  \item Niksch, “Senkaku,” 4-6.
  \item Blanchard, “The US Role,” 95-123.
  \item Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 13.
  \item See Lohmeyer, “The Diaoyu / Senkaku Islands,” 89-90.
  \item Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 16-17.
  \item Collins, “China and Japan’s,” 2.
  \item Lee, “Territorial Disputes,” 8.
  \item See Lohmeyer, “The Diaoyu / Senkaku Islands,” 90-91.
  \item Suganumu, Sovereign Rights, 139.
  \item Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 17-21.
  \item Su, “The Territorial Dispute,” 47; Mrosovsky, “International Law’s,” 928.
\end{itemize}
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. In July, the Japanese Youth Organisation returned to repair the lighthouse on one of the islands flying the Japanese flag and erected two memorials. Accordingly, series of demonstrations took place in Hong Kong and Taiwan. 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. 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.

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. In 2004 seven Chinese activists landed on the islands and they were later deported back to China by the Japanese officials. In 2005, Japan published marine maps that include the Japanese lighthouse on the islands and later it was recognised as an official beacon. 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. In 2007, disputing countries installed a 24/7 telephone hotline in the disputed areas.

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. In the same year, a Japanese patrol vessel collided with a Taiwanese fishing boat and detained the captain for three days. Later, Japanese officials apologised for the incident and paid compensation to the owner of the boat. In July 2010, nine Japanese fishing boats carried out fishing activities near the islands with the intention to assert Japanese sovereignty over the islands. 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.

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

157 See Ibid., 92-93.
159 Ibid., 20.
In July 2012, a Taiwanese coastguard vessel escorting activists in the area collided with Japan coastguard vessel. On 15\textsuperscript{th} August 2012, some activists from China managed to swim ashore. On 17\textsuperscript{th} August 2012, fourteen activists were deported for illegal entry into the Japanese territory by the Japanese officials. In the same month, four private Japanese vessels carrying Japanese activists travelled to the islands. 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. On 11\textsuperscript{th} 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. 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. 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.

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. In February 2013, a Chinese marine surveillance vessel sailed in the contiguous zone next to Japanese territorial waters surrounding the islands. In response to this, the Japan Coast Guard deployed Maritime Self-Defense Force (MSDF) destroyers to bolster patrols around the disputed Senkaku Islands. 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. On 30\textsuperscript{th} March 2013, 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.

However, on 31\textsuperscript{st} 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. Chinese public criticised the government for not being forceful enough against Japan as protests alone were not sufficient enough to prevent the

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Japanese exercise of effective sovereign authority over the islands.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, \textit{inter alia}.\textsuperscript{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 \textit{locas standi} before the ICJ as a member of the UN and the Statute of the ICJ.\textsuperscript{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;\textsuperscript{186} or, second, the judicial settlement before the ICJ\textsuperscript{187} or an \textit{ad hoc} international territorial arbitration.

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\textsuperscript{182} Tan, “The Diaoyu/Senkaku Dispute,” 155.
\textsuperscript{183} See Smith, “Japan and the East,” 380.
\textsuperscript{184} See Kudo, “Japan,” 3; Manyin, “Senkaku,” 1.
\textsuperscript{186} See also Shaw, “The Diaoyutai/Senkaku Islands Dispute,” 129-133.
\textsuperscript{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 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. 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. 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. 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. The Construction Act provides a statutory framework for payment provisions in construction contracts and a statutory basis for adjudication to resolve disputes. 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. 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. There is only a limited avenue of challenge against the adjudication decision if it has been improperly procured. 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.
7 Ibid.
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 make the collection of debts possible as well as avoidance of further financial exposure.  

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. 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 businesses; 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. 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. 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.


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. 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. 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.

Based on Malaysian contractors’ perceptions, delay for few days 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 involves 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. 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. 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. Where a party

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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. 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. 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.

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.

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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. 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 Muhtasib from 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); *tahkim* (arbitration); *med-arb* (a combination of *sulh* and *tahkim*); informal justice by the *wali al-mazalim* or chancellor; and fatwa of muftis (expert determination)(Rashid, 2004). *Muhtasib* which is frequently viewed as identical to ombudsman is also recognized 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 that appoint 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 involved 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 verse evidence 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 *Muhtasibs* since he personally oversees people’s compliance with Islamic moral and legal injunction. For example, it was reported that once the Prophet SAW saw 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 as ascertaining adequate repairs. In addition to that, inspection also covers building and road under construction to confirm if 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 officer appointed 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.
Characteristics of Muhtasib

Ibn Taymiyya (1983) has laid down several characteristics which must be fulfilled by a Muhtasib. Firstly, he must be a male Muslim with the highest sense of maturity, possessing a 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 Norse word ‘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 modern 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 ombudsman 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 re-takaful 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 significant, 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 role has 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 applicable since the relevant laws or regulations must be in accordance with Shariah principles.

The characteristics of Muhtasib laid down by Ibn Taymiyya are personal in nature in that they are devoted to the individual traits of being a 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 ombudsman as an alternative 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.

REFERENCES


الحقيقة أفضلية التحكيم عن القضاء في تسوية المنازعات

Preference of Arbitration over Judiciary in settlement of disputes

بحث قدمه كلأا من: 

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مقدمة: يرى جانب من الفقه أن التحكيم يتميز عن القضاء في تسويته للمنازعات، ويُبرر ذلك بعده من المزايا التي تُحاول أن تجعل من التحكيم بدلاً حقيقياً منافساً للقضاء، وهي وجهة خفية لما التحكيم بحثاً وتشريعاً، فقد أُدب الفقه بإسهاب على إدراج جوانب يُسمى بها مزايا التحكيم كلما تعرض له في أي من جوانب، وهو ما مارته القوانين المحلية والدولية بأن أقرت نظام قانونية مستقلة للتحكيم، مع هجر تام للإنفاذ إلى القضاء وتصويب ما يعترضه من مثالي في الوقت الذي يقوم فيه الأخير كجزء أساسي في الدولة لاغنى عنه لتمثيل سيادته القضائية، كما أن التحكيم ذاته على الرغم مما قدّم له من دعم يحيط وتشريعي إلا أنه يظل في جوانب واسعة من عملية التحكيم خاضعاً للقضاء، وهو ما أملّ البحث في حقيقة المزايا التي تُقدم للتحكيم كأساس لتفوقه عن القضاء، ومدى قدرته على القيام كبديل عن القضاء، وفي المقابل يبين 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 الدولة بذلك بمنهج تقديمي مُقابل يستند إلى نظام قانونية مختلفة ويتخذ من القانون الليبي كأساس لرجعية النصوص القانونية،

من أنوا من نتائج البحث والخطة التالية:

المبحث الأول: حقيقة مزايا التحكيم ومدى قيامه كبديل عن القضاء لفض المنازعات.

المطلب الأول: تقييم مزايا نظام التحكيم في فض المنازعات.

المطلب الثاني: حقيقة وجود التحكيم كبديل مستقل عن القضاء.

المبحث الثاني: تقييم النظام القضائي وتقويمه.

المطلب الأول: الجوانب المتعلقة ببطء العدالة.

المطلب الثاني: الجوانب المتعلقة بالكفاءة والسرعة.
المبحث الأول: حقيقة مزايا التحكيم ووجوده كبدائل مستقل عن القضاء:

دأب الفقه على اعتبار نظام التحكيم نظام متميز ومستقر لتسوية المنازعات يتفوق عن القضاء نظراً لما
له من عيب 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 مطلب ثاني.

المطلب الأول: تقييم مزايا نظام التحكيم في ضوء النظام القضائي:

تُحاول الدراسة ضمن هذا الإطار أن تتناول تقييم الجوانب التي يُقدمها الفقه كمزایا لأنظام التحكيم وذلك

بيبيان موقف النظام القضائي منها:

1- سرعة الفصل في المنازعات:

يقال 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
خلاصة على القضاء، نظراً لما يستغرقه الأخير من وقت في الإجراءات القضائية من مواعيد وإعلانات
وطعون وغيرها، وهي جوانب قد تضر بمصالح أطراف الخصومة، وتكون خصوصية السرعة في نظام
التحكيم في عدم التقيد بالأشكال القضائية، وتفرغ المحكمين لنظر المنازعات، والنقاضي على درجة
واحدة دون استئناف، بالإضافة إلى تحديد مدة إ_ATiment النزاع، وفي المقابل فإن ببطء العدالة في النظام
القضائي لم يعد يُضعى على أحد، إلا أننا نحاول أن نتوقف على حقيقة ذلك عملياً. ففي جانب التفرد
تشير إلى أن ذلك ينطوي جزئياً في القضاء أيضاً من خلال المحاكم الغير مكتظة المنازعات، أما من حيث
التقييد بالأشكال فإن نظام التحكيم أيضاً يقضي التقييد بالأشكال التحكيم التي قد تفرض تمديد

١ ولي، مفتاح قانون التحكيم في النظرية والتطبيق، منشاة ابتعاد، الاسكندرية، الطبعة الأولى، 2007، ص 14.
آجال التحكيم وِبُطُبِّ من عملية التحكيم 1، أما في ماتخص 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 القاضي من ضمانة جوهرية 2 من خلال إمكانية تلبية آثار ضرر الحكم في محكمة ثاني درجة أو نقضة من محكمة النقض، فضلًا عن ذلك فإنه على الرغم مما يفرضه القانون 3 من آليات تتمثل في سرعة مواعيد الحضور، وتنظيم القضاء المستعمل والتفعل المعجل ظرفًا لطبعة موضوع النزاع وال derecho الذي يلحظه بسبب التأخير 4 ونظام الأصول القضائية وتوثيق الصلح بين الأطراف وغيرها من النظم التي تُقدم بدلًا أفضل من حيث سرعة الإنجاز، إلا أنه مع ذلك يظل نظام التحكيم يتفوق عن النظام القضائي في هذا الجانب وهو ما سوف نتناوله بشيء من الإفصاح ضمن البحث الثاني.

2- السريعة: تعد السريعة أحد أهم المزايا التي تُقدم للتحكيم، وذلك للحفاظ على موضوع النزاع وجوانبه من الجائزة بالإضافة إلى الحفاظ على سرية قيم النزاع ذاته، لاسيما وأن الأمر يتعلق بشائعة أطراف النزاع من النواحي التجارية أو الاجتماعية أو السياسية وغيرها، وفي هذا الجانب يتفوق نظام التحكيم الذي يقوم علماء السريعة على القضاء الذي يقوم على مبادئ العائلية سواء من حيث الجلسات والرافعات 5، أو من حيث الأحكام 6، إلا أنه خروجاً عن مبادئ العائلية في المراقبات والجلسات في النظام القضائي يتيح القانون للمحكمة مكتبة إجراء الجلسة سريًا، وذلك للمحافظة على نظام العائلة والتراعااليات الآدمية، وهي حالة يمكن من خلالها البحث عن معالجة

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1 - نفس المراجع ص 16.
2 - تعددة القضاة على نبرة القضاء، جامعة ناصر / الطبعة الأولى، طرابلس 1991، ص 79.
3 - المادة (83) من قانون المراقبات، الليبية.
4 - المادة (378) من قانون المراقبات، ليبي.
5 - أظهر نفس المراجع، ص 378 وما بعدها.
6 - المادة (130) من قانون المراقبات، والمادة (20) من قانون نظام القضاء، الليبي.
7 - المادة (276) من قانون المراقبات، الليبي.
8 - المادة (130) المراجع إليها.
الفارق بين نظام التحكيم والقضاء، أما بالنسبة لعلبة الأحكام فهي تندرج من طبيعة النظام القضائي وهو ما يحتاج إلى تمحيص أرجاءات الدراسة التعرض له إلى المبحث الثاني.

3- الاحياد: 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 يجاهد الحقيقة، لذلك لأنه من حيث النزاهة فإن المحكم لا ينخض في عمله إلا إلى ضميره الشخصي وبعض النظم التي تقرها مؤسسات التحكيم. ووجدت، أما القاضي في نظام القضاء فإنه ينخض في ذلك لضميره الشخصي وفي عمليات الرقابة والتفتيش القضائي وتعقيد محكمة ثانية درجة ومحكمة النقض، وهو ما يميل عليه بدل كل ما في وسعه لإعمال مبادئ 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 يتعكس في تشريعاتها بمنح الأولوية لقانون القضائي، فضلًا عن امتثال القاضي إجمالًا لقاعدة النظام العام، وفي الوقت الذي لا يزال فيه نظام التحكيم مخصصًا توحيد وتفصيل قواعد للسلوك والأخلاقات المهنية للمحكمين. محاولة تعرّي نزاهة وحياد المحكم.

4- قلة التكاليف: تقدّم قلة التكاليف كميزة للتحكيم مقارنةً بالقضاء وذلك من حيث إخفاض قيمة الرسوم وقصر مدة التقاضي التي تستدعى دفع الرسوم في كل محلة بالنسبة للقضاء، بالإضافة إلى جوازية إقتسام الرسوم بين أطراف الخصومة في التحكيم، إلا أن ذلك غير دقيق نظرًا لأن المبادئ السائدة هو مبانة القضاء بإعتبار المؤسسة القضائية إحدى المؤسسات التي تقدّم خدمة عامة للمجتمع على الرغم من تحمّل الخصومة للرسوم القضائية إلا أنّ تبقى رسوم زهيدة في مقابل الرسوم التي تدفع لعملية التحكيم.

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2. أنظر، طلعت دويدار، ضمانات التقاضي في خصومة التحكيم، دار الجامعة الجديدة: الأريافنة، ص 124.
التحكيم، فضلاً عن جرائم بعض أنواع الدعاوى، كالدعوى العمالية وغيرها، يضاف إلى ذلك وجماهيرية
الخاصة، محكمةً للفهم الحق في النقض، وهو مبدأ يقوم على تحمل الدولة لنفسات المحامى وهو أمر غير
متفق عليه في نظام التحكيم، كما أن نظام القضاء يتيح أوجه عديدة للتدخل في الدعوى من
قبل دوي المصلحة برسم زهيدة، بينما نظام التحكيم لا يتيح ذلك ويقتضى تأسيس تحكيم مستقل برسم
جديدة مالم يترضى أطراف النزاع ذلك؟.

5-المحافظة على العلاقات بين أطراف النزاع
تقدم التحكيم عادةً، وأوسع وسيلة تو轨迹ية بين الخصوم تُحافظ على
العلاقات بين أطراف الخصومة كونه تم إختياره بارزًا جمعياً، إلا أن ذلك يُجيب الحقيقة، لذلك لأن
اللجوء إلى التحكيم يُتم بسبب وجود خلل في العلاقة بين الأطراف، ويتم في بعض الأحيان بناءً على
مشاركة تحكيم تمت عند إبرام العقد وقبل حدوث المنازعة مما يجعل إزادية اللجوء إلى التحكيم عند
حدوث النزاع غير متحذبة، وبعضاً النفسية الذي يُروج له، وفي المقابل فإن القضاة أيضاً يقع من ضمن
مهام التوفيق بين الأطراف ما أمكن للمحاربين القيام به بارز في ذلك وفقاً لما تقتضيه أخلاقياتهم
 المهنية، ومن زاوية أخرى يمكن النظر إلى القضاء كمؤسسة مختصة بتسوية النزاع وفقاً للحقيقة بشكل
إحتراقي، وفي ذلك أثر فعال في الحفاظ على علاقات الأطراف فيما بعد.

6-التحكيموسيلةلتشجيعالتجارة والإستثمار
يُروج للتحكيم عادةً على أهدافه رئيسية لتشجيع
الاستثمار وإزدهار التجارة، وذلك بسبب شكوك المستثمرين في القضاء الوطني من حيث عدم
الكفاءة لنظر المنازعة الإستثمارية، وعدم الحياد لإنشاف طرف أجنبي في مواجهة طرف محلي قد
يكون الدولة ذاتها، وهو أمر ليس له سندًا من القانون، ذلك لأنه وعلى الرغم من التفاوت المعرفي

1- القانون الليبي رقم (4) لسنة 1981 ب شأن المهام الشهية.
2- ويلي يختص بمراجعة سابق، ص 16.

ICDR 2017: Modern Trends in Effective Dispute Resolution
للفضالة وقد رافقهم إلا أشد في جميع الأحوال تبقى مهامهم تحقيق العدالة بصرف النظر عن جنسية أطراف
النزاع، ولا أساس لذلك إلا في جوانب ضيقة جداً بمكنة الفاضي التصدي لها من خلال الخبرة الفنية.

7- مرونة التحكمية في اختيار المحكمين: تُقدم مرونة اختيار المحكمين كمهمة أساسية للتحكيم، وذلك
من حيث مكنة اختيار أطراف النزاع شخص معين أو هيئة معينة متخصصة في موضوع النزاع بشكل
يُساهم في تسويته وإنصاف الأطراف، وهو جانبي يقوم على التوافق المحسوس لإرادات الأطراف التي
بإمكانها تجنح الخلاف من باب أولى، إلا أنه من حيث الواقع إذا أحتدم الخلاف، لم يكن الأطراف
حدودت سلفاً المحكم أو مؤسسة التحكيم المختصة بشكل دقيق، فإنه من الصعب توصلهم إلى اختيار
المحكم لدرجة اللجوء إلى القضاء لتعيين محكم، أما بالنسبة لموقف النظام القضائي من هذه المرونة
توشير إلى أن الإدانة تلعب دوراً مباشراً أيضاً في اختيار محكمة معينة بإرادتهم خروجاً عن قواعد الاختصاص
المكانى للمحاكم، فضلاً عما تحوله المحكم من دورات تخصصية، فإن يعوزها بعض التأهيل النسبي الذي
قد يوزع المحكمين أيضاً، كما سرد بحفه لاحقاً.

8- المرونة في اختيار القانون الواجب التطبيق: يتيح التحكيم لأطراف النزاع استعراض اختيار القانون
الواجب التطبيق، وهو أمر غير مُتاح أمام القضاء، وهو جانب له صحة إلى حد ما، ذلك لأن أطراف
النزاع في بعض المبادرات ترى أن بعض القوانين والنظم هي الأكثر ملاءمة لحكم منائعتهم خاصة فيما
يتعلق بالأعراف التجارية وبعض النظم القانونية الخاصة، كما أن التحكيم يغيي الخصوم عن تباع مسائل
تنازع القوانين وتنازع الاختصاص القضائي، أما بالنسبة للنظام القضائي فإنه يجوز أطراف النزاع تقديم
إثبات عن الأعراف الحاكمة لموضوع النزاع للمحكمة وطلب الحكم بمقتضاه، وهو أمر مقبول بإعتبار

1- يذهب القضاء الليبي إلى أن قواعد الإحصاء المحلي أو المكاني ليست من النظام العام، وبالتالي يجوز الإتفاق على مخالفة المحكمة العليا من الطعن المدني رقم 54/سنة 26 قضائية جلسة 1982/2/8.
أن هذه الأعراف من ضمن مصادر القانون التجاري طالما لم تتعارض مع النظام العام في الدولة، يُمكنها محكمة التحكيم المُستكملة.

البيان أنه على الرغم من اختيار المحكمة للقانون الواجب التطبيق إلا أن محكمة التحكيم المُستكملة.

الخروج عن ذلك القانون إلى قانون آخر، حيث تتعلق بعدم الكفاية أو التعارض مع النظام العام في دولة تنفيذ الحكم، أما فيما يتعلق بجوانب تنافس القوانين وتنازع الاختصاص القضائي، فإن قواعد الإسناد والإحالة في القانون الدولي الخاص غنية بالنظم الدورية، فإن المحكمة، في ضوء ما تقدمه من مرونة تضع إرادة الأطراف في مُقدمة الأطر التنظيمية للاختيار.

9- المرونة في اختيار مكان ولغة التحكيم: تُقدِّم المرونة في اختيار مكان ولغة التحكيم أهمية هامة لنظام التحكيم، إلا أن ذلك رغم أهميته إلا أنه لا يُعتبر مبرراً يتفوق بما النحاح عن القضاء ذلِك لأنه القضاء غالبًا ما يكون أقرب مكانًا إلى مواطن أطراف النزاع وفقًا لقواعد الاختصاص المكاني، فضلاً عن ذلك فإنه يُمكن الأطراف اختيار محكمة معينة بحكم الإتفاق الصريح أو الضمني بحضور الجلسات والتحلي عن قواعد الاختصاص القضائي، أما فيما يخص لغة التحكيم فإن القضاء يُقدم مرونة أكبر بالخصوص، وذلك من حيث توفير مترجم محترف يتوُّرkan ترجمة طلبات الخصوم.

وفي تتمة دراسة المزایا التي تُقدّم كأساس لنفوذ التحكيم عن القضاء يتبنى أن المحكمة لم تكشف عن فروق جوهريّة يمكن معاها القول بتغلب نظام التحكيم عن النظام القضائي، والموجود من وجود تفاوت بسيط بينه بعض العوائق التي يُعانيها النظام القضائي والذي تُحاول الدراسة تقييمها وتقویمها في البحث الثاني منها.

المطلب الثاني: حقيقة وجود التحكيم كبديل مستقل عن القضاء:

1- أَنظِر النظام القانوني للإتفاقيات البترولية في دول مجلس التعاون، أحمد عبد الحميد عوض، وعمر باحثب، مؤسسة شباب الجامعات الإسكندرية 1990، ص 375.

يُقدم الفقه تبريرات متعددة لإعتبار التحكيم وسيلة مستقلة عن القضاء ، إلا أنه من حيث الواقع فإن نظام التحكيم لايزال في جوانب متعددة منه رهن بما تفرده السلطة القضائية ، وفيما يلي تحاول الدراسة أن تقدم بعضًا من تلك الأوجه وتفسيرها إلى أوجه تتعلق بسير الدعوى ، وأخرى تنص على تبليغ حكم التحكيم.

أولاً : أوجه توقف التحكيم عن القضاء أثناء سير دعوى التحكيم :

تبرز التشريعات ذات العلاقة جوانب عديدة تتعلق بدور مباشرة للقضاء في العملية التحكيمية نسبيًا بعضاً منها فيما يلي:

1- دور القضاء في الجوانب الشكلية : يحدث أن تقع المنازعات ولم يتفقطرفان على تعيين المحكمة ، أو يتفقان على تعينه إلا أنه يبني لسبب أو آخر عن نظر النزاع ، وفي هذه الحالة يمنح القانون 1 للقاضي صلاحية تعين محكمة أو محكمين بناءً على طلب أي من الخصوم ، وذلك بموجب قرار غرقومللطعن نظر القضاء في دعوى المحكم وردة بإملأله بناءً على طلب دعوى المحكم والم devez أحكاماً ظلتهما ويؤذن فيه القاضي.

2- المادة (746) من قانون غرقومللطعن.

3- المادة (749) من ذات القانون.
دور القضاء في الجوانب الموضوعية:

ينص القانون 1 على مسائل محددة تعتبرها من المسائل الخارجية عنوانا للمحكمين، ومنها الطعن الطعن التوبوريفروحية أو أخذ إجراء أجنبيان أعمال أو إيداع إجراء أجنبيا خطر، وكذل

كإذا عرض سماسرة بريطانيون أن تركت أثرًا في موضوع التحكيم.

أوقف المحكمون عملهم وأصدروا مؤشرًا بقتبديلًا عمليًا للقضايا المتعت، وفي هذه الحالة، توفرت سريانًا المحاولة.

حكماً بعنوان مصيرهم، قد يعرض سريانًا المحتوا فضلاً عن ضرورة الرجوع للمحكمة في الحكم المتعلق بالخطورة أو أو أداء الشهادة، و الأمر بالانتقادات القضائية، كما أنه

نظرًا لعدم إختصاص المحكمين بالإذن بالحكم، فإن المحاكم أن يكون أطلق عقوبات، فإنه يجب الرجوع للقاضي لتقرير صحة الحكم.

ثانياً أوجه توقيف التحكيم عن القضاء أثناء تنفيذ حكم التحكيم:

تحدد النظم القانونية الخاصة بتنفيذ أحكام التحكيم من دولة لأخرى، لذلك وعلى الرغم من محاولة

إتفاقية نيويورك، 2 توحي أن نظام الإحراز للاعتراف، إلا أن الإحراز ذاته لم تحدد الإجراءات الواجبة إتباعها للإحراز بإجراءات التحكيم الأجنبية تاركًا ذلك لأحكام القوانين الوطنية في كل دولة.

وعليه فإن

إجراءات التنفيذ في ليبيا ومصر وغيرها من الدول التي تتخد من قانون المرافعات الفرنسية أساسًا لها

تفرض قيود متعددة لتنفيذ حكم التحكيم تنزل منها ما يلي:

1- إداعة أحكام المحكمين: تقضى المادة (762) من قانون المرافعات على أن

نظام أحكام المحكمين مرتبط بدراسات بإجراء اتفاقية نيويورك 1965 وإدلة على أصلامشارطة التحكيم معرفة أحد

2- وضع VICPOYD والأسس العامة للتحكيم التجاري الدولي، بدار الكتاب الحديث (دون بيان مكان نشر) طباعة 1996، ص 17.

3- إتفاقية نيويورك لتنفيذ الأحكام الأجنبية لنفس 1958.

4- بدر، أمل. في حالة الأعمال، الإجراءات على التحكيم التجاري الدولي: منشورات الجريدة الالكترونية: بيروت - لبنان، الطبعة الأولى 2012، ص 180.
لاصيحة المحكمة، توجّه المحكمة إلى القاضي لإلغاء المحكمة المبدلة وتصحيح الأخطاء النظرية، وبناءً على نص المادة (764) من القانون المذكور، وفقا لنص المادة (64) من القانون المذكور.

2- تنفيذ أحكام القضاة:

نص القانون: على أنه لا يصدر المحكمة بالعمل التنفيذ الخاص بذلك. وبذلك، ينفق على القاضي في حالة عدم تنفيذ الأحكام، ووضع أمر التنفيذ في آثار الجديدة، ويتوجب عليه الرجوع إلى طريق التحكيم.

3- التحقق من شروط تنفيذ حكم التحكيم:

تنفيذ أحكام المحكمة بناءً على نص المادة (408) من قانون المرافعات الأجنبية، يشير إلى أن تكون الدول القاضية أو المستلمة أو القاضي المقرر قد يؤذنان قاضي التنفيذ على تلبية شروط القانون على سبيل المثال:

- حكم التحكيم في دعوى التحكيم المقدم من شركة B.P. إلى المملكة المتحدة في عام 1981 (302) المقرر لуется على المادة (102) من القانون المذكور، كما أنه تم تنفيذ حكم التحكيم الصادر من شركة GUISTO مجموعة تكساكود (763) من القانون المذكور لуется على المادة (102) من القانون المذكور، كما أنه تم تنفيذ حكم التحكيم في دعوى التحكيم المقدم من شركة تكساكود (763) من القانون المذكور ل gratuitesية عرفية، وكتاباً (102) من القانون المذكور.

الدكتور عبد الرؤف سليمان، مساعد في القانون، جامعة طرابلس (القانون سابقا) 2003.
لتتحقق منها، وهو ما يتطلب رفض تنفيذ الحكم، وتؤدي في مقدمته هذه الشروط، عدم تعارض الحكم مع النظام العام، وهو مفهوم شديد الشمولية والمرونة، ويحتوي على مجموعة من المبادئ الأساسية السياسية والإقتصادية والإجتماعية والسائدة في دولة القاضي، ويتخص القاضي بتقدير ذلك وفقاً لسلطة التقديرية التي على ضوئها يقرر تنفيذ حكم التحكيم من عدمه، وهي حالة تُسمى تنفيذ حكم التحكيم، وهو ما يقتضي إخضاعها لرقابة محكمة النقض ودون تركها لمطلق السلطة التقديرية للفصل.

1. كما أن شرط عدم تعارض الحكم مع أحكام الشريعة الإسلامية الذي جاءت بو إتفاقية الرياض للتعاون القضائي، وهو أيضاً من الشروط الموضوعية التي تُغرق موضوع حكم التحكيم في الاختلافات الشرعية التي قد تنتهي إلى رفض تنفيذه.

4- إستئناف أحكام المحكمين وإلتماس إعادة النظر فيها: يُجرّم المادة (767) من قانون المراقبات الليبية إستئناف أحكام المحكمين بعد التصديق، طبقاً القواعد المقرّرة للاستئناف، ولا يجمهROW المراقبات ليبية، كما يُجرّم المادة (768) الطعن في هذه الأحكام بإلتماس إعادة النظر، وهي أحول يتصل فيها القضاء إتفصال مباشر بنتيجة العملية التحكيمية.

5- أحوال بطلان حكم المحكمين: وفي هذه الأحوال يُجرّم القانون ًطلبيان حكم المحكمين الصادرين جنباً جنباً، أو أشارت له وصولاً كذلك، فبعدة أحوال لا يتسع للمقام، لبئاماً منها ما يتعلق بصحة مشاركة المحكمين، ومنها ما يتعلق بصحة تعيين المحكمين، ومنها ما يتعلق بسير الدعوى وإجراءاتها ونطاقها الزمني، ومنها ما يتعلق بالحكم من حيث مشروعته وشمولاته وتعتبر دعوى
البطالان من أكثر الأحوال التي يتصل بها القضاء بنظام التحكيم، وفيها تحول
النزاوية بالتحقيق إذا رأت مفتيضًا لذلك، أو
إذا كانت موضوع النزاع مرتبطًا بنزاع آخر من منظور أحكام قضائية أخرى.

ومن خلال ذلك يتبنّى أن نظام التحكيم لايزال رهينًا للنظام القضائي في جوانب واسعة من عملية التحكيم، بما يصدق وصفه بأنه نظام قضائي خاص، وأوسلية إستثنائية لتسوية المنازعات، أما فيما يتعلق بالمرايا التي تُقدِّم له كأساس لأفضلية تعلي النظام القضائي كما تناولت المقالة الأولى من هذا البحث، فإنها تطرح بشكل مبالغ فيه في عمومها، وذلك لأن أوجه تفوق نظام التحكيم لم تأتي من تطور المبادئ التنظيمي لهذا النظام بقدر ما أنتم من بعض العيوب التي يعاني منها النظام القضائي، وهي عيوب
لا تمكن من معالجتها خصوصًا مع أهمية دور النظام القضائي عموماً، وفي نظام التحكيم بوجه خاص
 وهو ما يُعطي معالجة أوجه القصور فيه، وهي هنا تلك التي شكلت أساسًا لتفوق نظام التحكيم على نظام القضاء متمثلة في جوانب السرعة والكفاءة والسرعة تحديداً، وذلك في ضوء ما توصلت له بعض التجارب القانونية أو القضائية، بالإضافة إلى محاولة تفسير الوسائط العلمية الحديثة في ذلك، وهو في الواقع ما هجته للاسفلانظمة التشريعية والدراسات العلمية على الرغم من الأهمية الجوهرية للنظام القضائي للدولة والمجتمع.

البحث الثاني: تقييم النظام القضائي وتقواه.

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 قبل التحكيم ذاته، عليه فإنه من الأهمية

1 المادة (771) من قانون المرا לנفاط النفي.
2 حكم محكمة النقض 16/1971م، مجموعة أحكام النقض، س، 22، حكم محكمة النقض 16/1978/2/16م، مجموعة أحكام النقض، س، 29، 472.
يمكن إصلاح نظام القضاء وتقسيمه وإعادة النظر فيه ،وهو ما هجرته الدراسات 1 وأثبتت على دعم نظام التحكيم على الرغم من دوره الثانوي في تنظيم المنازعات ،ولا تدعي هذه الدراسة بأنها ستتفعل ذلك بقدر ما تحاول أن تسلط الضوء على الجوانب التي يتأخر فيها النظام القضائي عن نظام التحكيم مع تقديم ما من مقترحات مقررة بالتجارب النادرة المقدمة في هذا الشأن ،وذلك من خلال مطلبين يتناول أحدهما جانب البطء في فض المنازعات في النظام القضائي ،فهنا يتناول ثانياهما جانبي الكفاءة والسيرة ،وهنا في الواقع الجوانب التي لاحظت الدراسة أن نتفق نظام التحكيم عن نظام القضائي فيها ،أو بالأحرى تأخر نظام القضاء عن نظام التحكيم فيها :

المطلب الأول : الجوانب المتعلقة بطء العدالة :

لا شك بأن معالجة بطء العدالة تقتضي عملاً موسوعياً يعيد النظر في كل المنظومة القانونية المتصلة بالدعوى ،عليه فإننا لن نضمن ضماناً هذا الوريقات إلا في تلك الجوانب القانونية القضائية التي تمنح أجلاً تستجيب بشكل مباشر في بطء العدالة ،وبهذا تقتصر على الدعوى منذ إقامتها حتى إتمامها حتى الحكم فيها دون التطرق إلى الطعن فيه وتنفيذه ،مع تقديم ما أمكن تقديم من مقترحات ضمن هذا الإطار :

أولاً : الجوانب القانونية :

الإعلانات القضائية : يعتبر الإعلان القضائي المدخل الرئيسي لتحريك الدعوى ،وهو عمل إجرائي يقترب مواعيد حددها القانون ،وقد كان المشرع دقيقاً في هذا الجانب بنصه على أنه "إذا تجاوز ظرف التحريض السيد لمожет إعادة Coppa لفترة أخرى أو لإجراء آخر خصصت الإعلان ،فلا تعتبر الميعادا معيلاً إلا إذا تم إعلامناً

1- قُدِمَت بعض الدراسات النادرة للإيجاد بعض الحلول لبطء العدالة في النظام القضائي تزامناً مع تنفيذ العهد الدولي للحقوق المدنية والسياسية لسنة 1966 منها وروقات قُدِمَت في الندوة إستقلال القضاء في المغرب على ضوء المعايير الدولية والتجارب في المنطقة المتوسطية انعقدت بالرباط - المغرب في 2-4 فبراير 2006.
خلاصة" (المادة 6 من قانون المراقبات اللبية)، عليه فإن للمعهد في الإعلان القضائي دور هام من حيث إنعقاد الدعوى ويطلاقها، ويتصل الإعلان بكل الأوراق القضائية ويفرض القانون أجلًا مختلفاً لإتمامها، وهي أجال تحتاج إلى إعادة النظر فيها لما يقرب التطور الناجم في وسائل الاتصالات والمعارضات الحديثة التي تساعد على التقليل من إهدار الوقت لرفع الدعوى أو السير فيها، ونصل للدراسة الضوء على معايير المسافة ذات الصلة بالإعلانات موضوع نص المادة (17) من ذات القانون التي تنص تحت عنوان زيادة المعايير بمسافات على أنه "إذا تحقق في القانون للحضور أو الاجراء فيهما على ميلادسافة مقدارها خمسة وعشرون كيلومترًا أقرب من جناح القانون.

وما نزيد من المعايير عند عكس بضعة عشرون كيلومترًا، ورغم ذلك، مثلاً بالنسبة للحري لرفع الدعوى، فضلاً عن المادة (18) من ذات القانون للقاطنين في الخارج من أجال متفاوتة وهي (30) يوم للبلدان الأخرى و (60) يوم لبلدان أوروبا و (150) يوم للبلدان الأخرى.

"وهي أجال في الواقع لعدم مقبولة بأي حال من الأحوال نظراً لإنتاج المبررات التي شنت لأجلها خصوصاً وأن القانون منح للفقاعة ضمن إطار هذه المادة مكينة تعدد معايير الحضور بناءً على التطور والوقت.

هذا الأمر يختص باللهلميوه من بعد اليوم. كما أنه منح للفقاية الأموروقتية صلاحية استثنائية بمؤهلة للاستثناء على الأصل العام وهو التقيد لمعايد السافات وهو أمر بطيئة الحال يحتاج إلى تدخل تشريعي لتقصيبه، إلا أنه مع ذلك بالمكان تدفيف ذلك بتنظيم إداري ضمن المؤسسة القضائية حرصاً على وقت النقاضي ومشاريع البت.
2- إنعقاد الدعوى وبدء السير فيها: دوماً حاجة للخوض في إجراءات إنعقاد الدعوى بين الإيداع والإعلان، فإنه ما يعني هذا هو الإشارة إلى أثر إنعقاد الدعوى على سرعة الفصل فيها وطاء العدالة بشكل عام، ويهيمنا هنا أن نشير إلى أهمية ما أمكن تسميتها بصحة وجهة الدعوى، نظرًا لما له من أثر على إهدار الوقت والمساس بصحة وسلامة تحقيق العدالة، ولا يُربِّ الإيداع في حد ذاته إشكالية قائمة.

3- آجال السير الدعوى: معلوماً أن السير في الدعوى يكون على مراحل، وهذه المراحل لعني بها هذا المراحل الملوثة من تحقيق ومواجهة وحكم، وإنما يعني بما تلك الآجال التي تسبب البطء في الفصل في النزاع والحكم فيه، وهي في الواقع كثيرة بشكل يتجاوز هذه الورقية وهو ما يقتضي تسييل الضوء على

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1- معرف فرج أحمد، البطء في الدعوى - الإختصاص القضائي، وزارة مقدمة للمؤتمر السابع للمتاح الاختصاص في الدول العربية، 26-23/10/2016 سداس - عمان.

2- وهو من المبادئ المعترف بها في المعاهدات الدولية وقوانين التحكيم بأنظير عبد الحميد الأحباط، موسوعة التحكيم، التحكيم الدولي في الجزء الثاني، بدار المعارف، 162.
أعمالها من وجهنا وهي تعدد الآجال وال嫣د بينها، ولعله من الأهمية والإنصاف أن نشير إلى أن بعض الآجال تستند إلى أسباب قانونية يقتضي الواقع تقويمها بوسيلة أو أخرى خدمة للمصلحة، أما البعض الآخر فتخضع لسلطة القاضي، وهو ما ستتناوله ضمن إطار الأوجه القضائية لاحقاً.

وأما بالنسبة للأسباب القانونية للتأجيل فعنني بما تلقي الأسباب التي يقتضي القانون تأجيل الفصل في الدعوى حين إنالفها بشكل أولي، وهي متعددة، بل أعمها أولوية القضاء الجنائي عن القضية المدنية، ومسألة إستناد الوسائل التوفيقية قبل الفصل في الدعوى بالشكل الذي تفرضه قوانين التوفيق والتحكيم، وطلب بعض الآراء الفنية سواء من الخبراء أو من بعض المسائل المختصة، كالمجالس المعنية بتقديم المسألة الطبية، يضاف إلى ذلك مسألة تنزيل الربط بين الدعاوى المتعددة من محكمة متعددة وضم ملفات الدعاوى المحكومة المتعلقة بالدعوى، وهي في الواقع أحوال تخلص مرات قانونية للتأجيل.

وعلى ذلك أحد أهم أسباب تأجيل الدعوى، وتطبيقية القضاء تعددت القضاة من محاكم متعددة لأصول في إعادة النظر في هذه التشريعات، إلا أنه نظرًا لما لذلك من آثار سلبية على تحقيق العدالة، فإنه بالإمكان معالجة هذه الأسباب بشكل تنظيمي وعملي بعيداً عن السلطة التشريعية وما تستغرقه من وقت، وثبت ذلك على سبيل المثال من خلال وضع قيود على قبول الدعوى تعدد من التوسع في الإلات من خارج الملف، وذلك بإيداع ملف متكامل الإثبات عندالقيد، ومن البيسبول تحقيق ذلك في مسائل متعددة محل تأثير أمام المحاكم، كإلات الحالة من خلال أمر وليامي وعرض الأمر على لجان التوفيق والتحكيم قبل الموجه إلى القضاء، وتتبع مسألة الإرتباط بشقي المدنى والجنائي، بتقى مسألة

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١ - المادة (22) من القانون الليبي رقم (6) لسنة 1374 م، بشأن تنظيم القضاة، والمادة (238) فقرة (1) من قانون الإجراءات الجنائية الليبي.
٢ - المادة (4) من القانون الليبي رقم (17) لسنة 1986 بشأن تفويق والتحكيم.
٣ - المادة (36) من القانون الليبي رقم (10) لسنة 1984 بشأن الزواج والطلاق وأثارهما.
٤ - المادة (27) من القانون الليبي رقم (17) لسنة 1986 بشأن تنظيم القضاة، والوائدة، بشأن تحديد المسألة الطبية من قبل المجلس الطبي.
التأخير في ضم ملفات الدعاوى المحكمة ذات العلاقة بمنطقة القاضي معالجتها بإصدار أوامره المباشرة إلى قلم الكتاب، وبذلك تحقق مجال واسع من العدالة.

ثانياً: الأوجه القضائية:

ونعني بما أسباب بيط العدالة التي تكون لسلطة القاضي دوارة فيها، أي تلك الأسباب التي يجد فيها القاضي مجالاً واسعاً لسلطة نظره نصاب المشترئ عنها، وفرع'RE أن المشترئ لم يقيد القاضي بآجال محددة للغفل في الدعوى حرصاً على عدم التأثير عليه أو إفراضاً منه تحقيق العدالة فيها، إلا أن الواقع أثبت أن عدد الأجواب الممنوحة في كل قضية تتناقص مع أي وصف للعدالة، وتمثل ذلك في آجال التقاضي وأجال النطق بالحكم:

1- آجال التقاضي: تعد آجال التقاضي السبب المباشر وراء بيط العدالة، وهو أمر يخضع في حقه.

لسلطة المحكمة، وقد قضى بأنه "تأجيل نظر الدعوى من إطلاع محكمة الموضوع، وليس حقاً للخصوم يتحتم إجابتهم إليه، ولا تنوي عليها إفراضاً من إبرام حجز الدعوى للحكم دون تصريح مقدم مذكرات أو مستندات،طلالا وجدت في الأوراق مايكفي لتكوين عقيدتها"، وهي مسألة تعلاني منها معظم الدول بحسب متظاهرة لاسيما الدول ذات الكثافة السكانية العالية، ففي لبنان على سبيل المثال وجدت دراسة إحصائية أن عدد الأشخاص الممنوحة في الدعاوى المدنية في عينية بعدد (1514) ملف (1099) مرة للمدعى، و (1511) مرة للمدعى عليه، أما حالات الآجال الممنوحة في نفس العينة لتكليف محام بلغت (151) مرة، وأنهت الدراسة إلى أن الأشخاص السبب الرئيسي لبيط العدالة، وفي دراسة


2- الإخراج القضائي في لبنان، دراسة أعدت عام 1994 لصالح وزارة العدل اللبنانية بدعم من البنك الدولي، ص 99.
أخرى تتراوح المدة بين أربعة إلى ستة أشهر، وللحد من ذلك حوّل قانون المرافقات المصري وفق تعديله في مادته (98) أن يضع حداً للتأجيلات بنصه على أنه لايجوز تأجيل الدعوى أكثر من مرة لسبب واحد من ذات الخصم ولا تتجاوز فترة التأجيل ثلاثة أسابيع، إلا أنه لم يُبرز آثاراً قانونية لذلك.

وتقدم الخبرة الفنية الأسباب الرئيسية لبطء العدالة نظراً للحري الصادرة وفق تعديل مادة (98)أن يضع حداً للتأجيل بنصه على أنه لايجوز تأجيل الدعوى أكثر من مرة لسبب واحد من ذات الخصم ولا تتجاوز فترته ثلاث أسابيع، وذلك إن بعض التشريعات حاولت تقيد دور القاضي في اللجوء إلى الخبرة الفنية إلا في أوضاع الحدود، وذلك بإضعافها، إلّا أن لم يُوحي من خلالها أن القاضي في الخبرة الفنية نظراً لها من آثار مباشرة في بطء العدالة، وبشكل أصبح محاولة للجبر ووسيلة يِلقي بها القاضي عليها بالجهالين.

وعلى الرغم من دور مباشرة للآجال في بطء العدالة وتأخير الفصل في الدعوى، إلا أن معظم التشريعات لم تفرض آجالاً محددة للنفي في الدعوى، خصوصاً فيما يتعلق بالقضاء المدني، وفي فرنسا مثلاً فقد حدد عدد متوسط أجل الثبوت في الدعوى المدنية بسعة شهرين، أو أربعة أشهر في محكمة الأمة، وقد أُدين القضاء الفرنسي بذل لعدة مرات، ومع ذلك لايزال لفظ (الأجل المعلوم) هو السائد في هذا الجانب وهو نظيف أورده القضاء الفرنسي نفسه بنصه على أنه

1 - الأمن القطبي ووجود الأحكام، دراسة أعدًا من منظمة عدالة بالإشراز مع مؤسسة فريدريش أبرت بدعم من وزارة الخارجية الألمانية. 2013، ص 40.
2 - هندي أحمد، التعليق على قانون المرافقات الجزء الثاني، دار الجامع الجديده للنشر، الإسكندرية 2008، ص 227.
3 - الماضي، و 2004، مفتاحاً قانونيًا للداخلية.
4 - مفتاحاً قانونيًا الاتحاد الفaces
5 - ويحيى محمد جمال، الجزء في المواد المدنية والتجارية، دراسة إقتصادية، ببطيئة جامعة القاهرة.: القاهرة 1990، ص 14.
6 - يحيى محمد جمال، الجزء في المواد المدنية والتجارية، دراسة إقتصادية، ببطيئة جامعة القاهرة.: القاهرة 1990، ص 14.
7 - الأمن القطبي ووجود الأحكام، مرجع سابق، ص 44.
"ستختلف محاكمة داخلية ولا محاكمة.

بنصه في الفصل (120) منه على أنه "كل شخص الحق في محاكمة عادلة وفي حكم يصدر داخل أجل معقول"، وعلى الرغم من غياب النص القانوني على تحديد الأجل المعقول إلا أن القضاء المغربي تقدم معايير يمكن من خلالها معرفة الأجل المعقول، وهو الأجل الذي يجب أن يراعيه جسمة الخطط والضرر الناجم عن الخطا القاضي، الناجم عن إحيان الإنتزام الدستوري بالبت في الأجل المعقول، وذلك من خلال البحث عن أسباب التأخير ومدى جدتها مع مراعاة طبيعة القضية ودرجة تعقيدها ودور الأطراف في عزلة تجهيز الملف قبل البت فيه وجسمية الضرر الناجم عن هذا التأخير، كما بين بأن "تجاوز الأجل الإقراضي لا يمكنا أن يُربى المسؤولية المباشرة للقاضي مادام القول خلاف ذلك قد يؤدي إلى أحكام متسندة لم تستنفد وقت مناقشتها بالشكل الذي يضمن حقوق الدفاع وهو ما من شأنه أن يحكم وحريات المحقين، ويقيني القيقد القانوني الوحيد هو ما نص عليه الدستور من عدم تجاوز الأجل المعقول للبت والذي يُجل إلى الخرج السافر لإجراءات النقضي الذي ينتج عنه تمييز المسطنة دون مبرر موضوعي، مع تقديم القاضيالمستوليته لتوفير ضمانات المحاكمة العادلة وكفاءة حقوق الدفاع دون إمكانية رفع رقبة قضائية مزاجية على هذه السلطة، ممادمت التأكيرات لها ما يثيرها سواء من حيث أسباب التأخير أو تتقيد القضية موضوع التحقق، كما أفاد التجاوز الأجل المعقول للبت الذي يُتم عن الخرج السافر لإجراءات النقضي وهو ما ينفي مسؤولية الدولة عن الخطا القاضي.

2- آجال النطق بالحكم: وتعني بدلاً من الأجال الخاصة للنطق بالحكم إبتداء من قرار المحكمة قلل بآجال

المراقبة في الخصومة، وهي مرحلة تلقى على عاتق القاضي مسؤولية التأخير فيها نظراً لما تُخرج من وقت

1- حكم محكمة الاستئناف في رين / فرنسا بتاريخ 21 يونيو / 2016 .
وما يتخللها من إعادة، حيث أن المحكمة تقضي بغلب باب المرافعة من تلقاء نفسها ويجوز لها العدول عن هذا القرار وإعادة الدعوى للمراجعة، وهي مرحلة جديدة تتطلب إعلان جديد وهو أول أسباب إهدار الوقت غير المبرر، أما إذا قررت المحكمة المحسودة قبلاً في قرارة، فهي أيضاً تتهيأ للنطق بالحكم في أجل يحدد وقد يكون عقب المدوالة مباشرة في نفس اليوم بعد رفع الجلسة مؤقتاً، و قد يتأجل إلى أجل آخر، وهنا تلعب السلطة التنفيذية للفقحي 1 دوراً واسعاً في إهدار الوقت قبل النطق بالحكم وبعده، وتتمثل الحالات الحالات التي تسبق النطق بالحكم في إعادة الدعوى للمراجعة ومد أجل النطق بالحكم الذي يتأجل عدة مرات على الرغم من نص القانون على أنه "بانتهاء المداولات الرئيسي المنوط بالحكم، يوقف عليه إهدار الوقت في إبداع الأسباب ثم في إعداد مسودة الحكم وإبداعها على الرغم من نص القانون على أن نودع الأحكام بكمالاتيفيخلالدة لاتجاوز ثلاثينيوماً مبتارخدامودة، فيما يتعلقة بأحكاما القاضياً جزئيكونمدة ع شرينونمآعطرةسلة"، وهي آجال هامة لاسيما وأنا تفتح ميدان الطعن في الحكم، وهي في الواقع تستغرق آجالاً طويلة دوماً مبررات مقنعة، إلا أنها تبقى مسألة تنفيذية يتفاوت القضاة بأشاها في التنفيذ بقواعدتها المشتركة إليها من عدمه، وهو ما قد يثار في هيئة التحكيم أيضاً ويرى بأطراف النزاع.

المطلب الثاني: الجوانب المتعلقة بالكفاءة والسرعة:

أولاً: الجوانب المتعلقة بالكفاءة:

لا شك بأن الكفاءة تلعب دوراً هاماً في تعزيز نظام الحكم في المنازعات تحكيمياً وقضايا، وتتضمن تعزيز الكفاءة في النظام القضائي ثلاثة جوانب أساسية: وهي الجانب الإداري، أو الغني المتصفح بالآداء وجودة

1- عمر، نبيل، "النظام القانوني للحكم القضائي بدار الجامعة الجدیدة للنشر: الإسكندرية 2006"، ص 20.
2- المادة (272) من قانون المرافعات النياب.
3- المادة (274) من نفس القانون.
النقضي في الدعوى، والجانب البشري المتمثل في الكوادر المتصلة بالدعاوى، والجانب المؤسسي المتمثل في المؤسسة القضائية، وفيما يلي سنورد توضيحًا لهذه الجوانب مقتراً بما أمكن تقديمه من مقتراحات:

1- الجوانب المتعلقة بالكوادر المتصلة بالدعاوى: ونعني بما الجوانب المتصلة بالقضاة والمحامين والكينية والخبراء والمترجمين وغيرهم، وبدون الكفاءة والجودة في عمل هؤلاء الكنائس، بالدور الذي يقومون به، كأن حسب مهامهم وهم يستشعرن جميعهم أهم يقومون على تحقيق العدالة، وذلك ليس من خلال الأداء بمعناه التقليدي، وإنما بمعناه الإبداعي لاسيما وأغلب معنى معنى تطبيق القانون على الواقع المتطور والمتغير، وذلك من خلال التحرر من التقليد والنموذج وهو جانب لم تعره الدراسات إتمامها، بطبيعه الحال، القاضي يواجه عند عدم الحكم بخصوص إنكار العدالة، إلا أنه بسبب ذلك فإنه أميل 1 إلى البحث عن سببًا لرفض الدعوى أو عدم قبولها أو عدم الاختصاص عوضًا عن الخروج في موضوعها، وهو في الواقع عمل يُثير استخدام 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 الإرتفاع بمصطلحات للفحص في مفاهم ومعاني لم تطرأ بعد ولو بطرق أبوات فروع أخرى غير مألوفة لإثراء القانون وإرساء قواعد التنافس الشريف بدلاً من تكرار الخطوات التي يتبعها أقرافهم، والعمل على استغلال هوات الغير والعمل على عامل الزمن لإلحاق الضرر بالخصم، ذات الحديث يثير عن الخبراء عن عدم مواكبتهم للتطورات العلمية في مجال المهام التي يقيدون كخبراء فيها، فالمطلوب منهم الإفادة بالعلوم معاها العلمي الدقيق للفحص، والإرهاق عن حلول بديعة لأن إرتباك ينسد ملف الدعوى.

1 - أنظر: التقدير القضائي المستقبلي في قانون المفاوضات، نبيل إسماعيل عمر، دائر الجامعة الجديدة، الإسكندرية 2011.
2- الجوانب المتعلقة بالمؤسسة القضائية: وهي جوانب تتعلق بالمؤسسة ذاتها، وأخرى تتعلق بدورها

تoward external elements, and some relate to the institution itself, and others relate to the roles played within the framework. Furthermore, some aspects relate to the institution itself, highlighting the importance of strengthening the specialized system within the judicial circles, and the ability to manage the judiciary, and other aspects relate to the specialization, and having the tasks of the judiciary within their specialized judicial departments.

It is essential to bifurcate the activities and on the basis of the fields they represent, and to develop and manage the judiciary, in the interest of developing the cases.

Also in cooperation with the institution itself, it places a duty on the high-level opening and widespread awareness of the use of modern tools and monitoring developments in the field of legislation or in international agreements.

On the other hand, some of the concerns of the issue of the electronic file system's role in controlling the situation of the judiciary's work with the advances in the legal language.

The institution as an agency in the modern judicial system, as he is considering the best way to work, and the ability to respond to the changes is a crucial aspect in this field.

As for the other aspects, they are related to the institution itself, and they are committed to الفاعليّات والإجراءات، وتقتصر مهمتها تخليص القضايا ورفع من القيمة الموضوعية لمستوى الخصومة.

وأما بالنسبة لمجاهدة الإدارة القضائية فهي بناءً على الاستفادة من التكنولوجيا الحديثة في العمل القضائي، لذلك لإعداد المعايير التي تعزز من القضايا وحجة وسرعة

وبناءً على ذلك، فإن الجوانب الأخرى بالإمكان إعماها بشكل تنظيمي كالأنظمة الإلكترونية، نظرًا لما هي من أهمية في إجراءات ضبط الملف والإطلاق وغيرها من الأوجه، وهي في الواقع في مجملها من أهم الجوانب التي يجب إعماها لإنقاذ الوضع المتردي لعمل النظام القضائي.

أما في جانب العاملين في المؤسسة القضائية فإنه يعنى فيها واجب تأهيل الكوادر للإرتقاء الفكري والإعلام الواسع بالألعاب الحديثة في العمل ومتابعة التطورات القانونية في القانون المقارن أو في الاتفاقات الدولية وهو ما يثير العمل القضائي ويحدده من خلال مواقف تطورات المفاهيم القانونية.
3- الجوانب المتعلقة بالآداء وجودة التقاضي: وهي تلك الجوانب التي تهدف إلى ترقية الأداء القضائي المتعلق بالدعوى، أو كما أمكن تسميته بحَرَّاسة الدعوى، ولن يعني بذلك تمهيد الأوراق القضائية كما تجمعها الكتب التي تعج بها المكتبات، ولا يعني بذلك العبارات الجارحة أو المخللة بالأداب في الأوراق التي أصدر القانون 1 للمقاضي مهما مُحَويا، وإلا نعني التركيز على الدقة والمنهجية في صياغة الأوراق القضائية، وذلك لأنه وعلى الرغم مما ينص عليه القانون 2 من ضرورة الإجتهاد في صياغة هذه الأوراق، إلا أن التكوين الأدبي للقوادر القضائية ظل له أثراً واسعاً في العمل القضائي من حيث الصياغة والمرافقية الشفوية أيضاً، خصوصاً وأن القانون لم يشترط صيغة معينة بالنسبة لمثل هذه الأوراق، بل كثير ما ينص عليه بشأن البيانات الجوهرية والطلبات، وهو ما يُطبث 3 في دواوي العمل القضائي، وهنا يجب أن يسود بالإضافة إلى المنطق القانوني بفلسفة الحامية المبتدئة والكتابة العلمية في سرد الوقائع وببيان الحقيقة مع هجر التزيد والإطلاع وتتبع المناهج الأدبية، ويجب على الكاتب أن لا يغفل على أنه لا يتجهم وكتبته إلى العامة، وإلا يتجه به إلى فئة متخصصة على دراية بما يقول سواء كان الكاتب محامياً في صحف الدعوى أو مذكرات الدفاع أو غيرها، أو كان قاضياً في صياغة الحكم وحياته وأسبابه مع الإحتراز من الوقوع في الأخطاء الفنية والتعدية التي تَحمَّل العمل وتَحمَّل جودته، وهي في مجملها تشكِّل عوامل تقويض العدالة التي هي غاية القضاء.

ثانياً: الجوانب المتعلقة بالسريّة:

1- المادة (135) من قانون المرافعات الليلي.
2- المادة (82) من قانون المرافعات الليلي.
3- أنظر يوسف مصوّرة، تنسب الأحكام، دار الثقافة والنشر، عمّان الأردن، الطبعة الثانية: 2010، ص 277.
سبقت الإشارة إلى أن العلانية هي من أهم أعمدة القضاء تحقيقاً لرقابة الشعب مصدر السلطات على القضاء. وتبرز علانية القضاء في جوانب المراجعة والحكم، فكما أوجب القانون أن تكون المرافعات أو الجلسات علنية، فإن الأحكام أيضاً يجب أن تكون علنية ومتاحة للجميع للإطلاع والنسخ، 1 المشروع على هذا المبدأ إلا أن المشروع كما أثار للمقام مكينة الخروج عن مبدأ العلانية إلى السارة، فإنه خرج في أحوال أخرى على مبدأ العلانية، إلى السارة، ويهيمنا هنا ونحن يعرض البحث عن أوجه يمكن للنظام القضائي إعمالها دراسة مدى نطاق الخروج عن مبدأ العلانية ليستوعب بعض المنازعات ذات الطبيعة التجارية التي تمحرر القضاء وتختار التحكيم لهذا السبب، وتحذير الإشارة هنا إلى أنه فضلاً عما يقضي به قانون المرافعات عن الخروج عن مبدأ العلانية وفقاً لما يقدر القاضي وفقاً لسلطته التقديرية حفاظاً على حرمة الأسرة في دعاوى الأحوال الشخصية، أو حفاظاً للنظام العام والأدب، 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 يجوز للمحكمة نظر الدعاوى الضريبية التي ترفع من الممول أو عليه في جلسة سرية، وذلك لأن النزاع في هذه الدعاوى يكشف تحديد الأرباح التجارية والصناعية الخاضعة للضريبة، وهو ما يثير نظره بصورة سريعة 3، عليه ومن باب أولي حماية سرية العمليات التجارية التي تؤدي إلى الأرباح، وهو أمر يندرج في الواقع ضمن نطاق النظام العام بمفهوم الاتقاني لحماية المعلومات التي يتم تداولها في الدعوى.

أما بالنسبة للعانية الحكم، فإنه وفي جميع الأحوال حتى وإن كانت الجلسة سرية فإن النطق بالحكم يجب أن يكون علنياً نوزولاً عند صراحة دستور القانون وعدم إثاثته أي مكينة يجعل منه سرياً، فضلاً عن إثاثته.

1 - هندي أحمد، مرجع سابق، ص 263.
2 - أحمد، النجفي علي، مرجع سابق، ص 87.
3 - هندي أحمد، نفس المرجع، ص 265.
الإطلاع عن الحكيم وأخذ صورة منه 1، إلا أنه وبالرجوع إلى الغاية من السرية في نظام التحكيم غالباً ما تكون في مرحلة النقاضي أو سير الدعوى لأنها تكشف عن حقائق الموضوع، أما بالنسبة للحكم فإنه عنوان الحقيقة التي لا تكشف أطراف الخصومة دبوعه في العادة، خاصة وأنه سوف يُقدم للقضاء لتنفيذها وفقاً لإجراءات التنفيذ التي تتيح تداوله بين الكنيبة والمحضرين والمحميين والقضياء.

خاتمة: وفي غاية الدراسة يتبين أن نظام التحكيم لا يتمتع بأفضلية حقيقية يتميز بها عن نظام القضاء في تسوية المنازعات، حيث أنه وفضلًا عن التحكيم من حيث تتعلق بالكلفة وضعف ضمانات النزاهة والحياد، فإنه بفضل غير قادر على الإسقاط من نظام القضائي في كل جوانب عملية التحكيم لاسيما في تنفيذ حكمه، كما أن تفوقه عن النظام القضائي في جانب السرعة والعلمانية المذات أظهرت الدراسة تفاوت في جانبيه لم يكن نتيجة تقدم حقيقي في هذا النظام، وإنما بسبب تدخل النظام القضائي نظرًا للظروف المحيطة به كمرفق عام يؤدي خدمة العدالة في الدولة، وتأتي الدراسة في تشريعتها في التصدي لها ومعالجتها بحذرًا وتشريعًا للاهتمام بمحاولة إقامة نظام جديد، وهو ما توصي الدراسة بمساءلة تقديم تطوير حقيقي لنظام التحكيم ينبع من إبتكار آليات خاصة به بإمكانها أن تحدث تطورًا نوعيًا في نظام تسوية المنازعات، نظرًا لأهميته في تسوية بعض المنازعات والمتساهمة في التخفيف عن كاهل القضاء.

1 المادة (276) من قانون المراجعات العليا.
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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 الدولي الذي أكدته مؤتمرات السلام التي عقدت في لاهاي بهولندا عامي 1899 و 1907. في اتفاقية التسوية السلمية للمنازعات الدولية التي صدرت عن المؤتمر الثاني عام 1907، قررت المادة الأولى منها: أنه حتى يمنع بقدر الإمكان، اللجوء إلى القوة في العلاقات بين الدول، المتعاقدة على بذل أقصى الجهد لتفعيل التسوية السلمية للخلافات الدولية. ونصت المادة الثانية من ميثاق الأمم المتحدة على أن من بين مبادئ الأمم المتحدة التي تلتزم الأمم المتحدة والدول الأعضاء فيها بالعمل وفقاً لها، تسوية المنازعات الدولية بالطرق السلمية على وجه لا يجعل السلام والأمن والعدل الدولي عرضه للخطر.

وتعرضت المادة 33 من الميثاق لبيان الطرق السلمية للتسوية المنازعات الدولية بقولها "يجب على أطراف أي نزاع من شأن استمراره أن يعرض حفظ السلام والأمن الدولي للخطر أن يلتفسا حالاً بآدي ذي بدأ بطرق المفاوضة وال Nghịي والوساطة والتوافق والتحكيم والتسويه القضائية، أو أن يلجأوا إلى الوكالات والتنظيمات الإقليمية أو غيرها من الوسائل السلمية التي يرفع عليها اختيار، وما جاء في هذه المادة هو تقنين لما جري عليه العمل الدولي من وسائل سلمية لتسوية الخلافات الدولية، بالإضافة إلى ما اقتضاه عصرًا لتنظيم الدولي من طرق جديدة للتسويه 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 إلى وسائل دبلوماسية والتي ترتبط بدور المنظمات الدولية وكذلك وسائل قضائية والتي ترتبط بالتحكيم والقضاء الدوليين وتحاول هذه الوفرة تسليط الضوء على وسيلة التحكيم من حيث قدرتها على حل النزاعات بين الطرفان الدولية في الوقت الحاضر وكذلك طرح بعض النماذج الدولية والتي كان للتحكيم دوراً واضحاً في حل نزاعاتها.
الأهداف:

(1) تسليط الضوء على وسيلة التحكيم من حيث ماهيتها ونشأتها.
(2) القاء الضوء على بعض النماذج التي استخدمت وسيلة التحكيم كحل لنزاعاتها.
(3) طرح الرؤية الإسلامية في مسألة التحكيم الدولي.
(4) القاء الضوء على بعض الاتجاهات الحديثة في مسألة التحكيم الدولي.

مفهوم النزاع الدولي:

يعبر النزاع عن خلاف بين اتجاهات دولتين أو أكثر حول مسألة أو قضايا محددة ويمكن أن ينشأ بين الأفراد والجماعات داخل الدولة الواحدة.

وتحدث النزاع نتيجة تعارض أو اصطدام بين اتجاهات مختلفة أو عدم توافق في المصالح بين طرفين أو أكثر مما يدفع بالأطراف المعنوية مباشرة إلى عدم القبول بالوضع القائم ومحاولة تغييره، فيكمن النزاع إذن في عملية التفاعل بين اثنين على الأقل.

وعرفت محكمة العدل الدولية النزاع الدولي بأنه عدم اتفاق على 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 على موقف دولة أخرى، وأن الادعاء مرفوض يجب التوضيح أن احتجاج أحد الأطراف يصدق بالتناقض المبين من الآخر. ويعتبر موضوع النزاع من أهم المواضيع التي واجب البرية في جميع المبادئ ولهذا لا يمكن دراسة أي نزاع مجزء عن هذا التطور، والدارس للنزاعات يجده حديثا قد زادت بعد الحرب العالمية الثانية نظراً للتطرف السريع في أغلب المجالات.

وتتميز الأوضاع النزاعية بعد الحرب العالمية الثانية بزيادة عدد النزاعات بشكل عام مع الفترات السابقة، وإن الملاحظ سيرود فيما يلي:
- حصول النزاعات ولا تزال في العالم الثالث (آسيا أفريقيا أمريكا اللاتينية) يقابل ذلك غياب النزاعات المسلحة في أوروبا نتيجة ميزان الرباع النووي بين القوتيين العظمتين.

- حصل ازدياد في عدد النزاعات الداخلية أو التي تبدأ على المستوى الداخلي وتحول إلى المستوى الإقليمي والدولي نتيجة قوى خارجية عسكرياً وسياسياً، وقابل ذلك انخفاض الحروب أو النزاعات المسلحة التقليدية بين الدول وخاصة الحروب الاستعمارية.

بالإضافة إلى ازدياد التدخل الخارجي في النزاعات 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 على ذلك ارتفاع عدد الضحايا، وزيادة حجم الأضرار المادية التي تحق المتضاربين.

ويعرف النزاع الدولي، على أنه خلاف بين دولتين على 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 الآراء القانونية لشخصين أو أكثر من أشخاص القانون الدولي.

أي أن النزاع يمثل حالة تتضمن تباين وجهات النظر واختلافها. وعرفت المحكمة الدائمة للعدل الدولي النزاع على أنه: "خلاف حول نقطة قانونية، أو واقعية، أو تناقض، أو تعارض للأطراف القانونية أو المنافع بين دولتين".
التسوية السلمية للنزاعات الدولية

يفترض بالتسوية السلمية للنزاعات الدولية "حل المنازعات دون الالتجاء إلي القوة". وهناك من يعرف تسوية المنازعات الدولية على أنها، إنهاء النزاع عن طريق اتفاق متبادل بين الأطراف ذات العلاقة، وهي بهذا المعنى 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 على طرف أو عدد من الأطراف، علي أن إنهاء النزاعات إذن أما أن تسوي سلمياً أو قسراً وقاس الحالة الأولى 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 بطريقة الإكراه والقسراً، يتم اللجوء إليه عندما يصل النزاع إلي درجة بالغة التعقيد والتكلفة هو ترك الصراع وتكسيره أو هجره بمعنى عدم المواصلة الفعلية لطرف أو أطراف الصراع ذات العلاقة بالنزاع.

وهناك من يري أن التسوية تعني الاتجاه نحو التنمية السلمية للنزاع، والإقلاط من الاتجاه نحو الحرب، لأن خطورة الحرب جعلت العالم لا يتصور التفكير في جولة أخرى " وهذا ما ينطبق على الصراع العربي الإسرائيلي وهناك من يري النسوية تعني التفاوض، والتفاوض يتطلب المرونة وتقدير الانتزاعات 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 وتقدير الانتزاعات من قبل الأطراف المتخاصمين، وصولاً إلى حالة عدم التعارض بين أهداف الطرفين، والسؤال الحقيقي، كما يقول، هو ليس ما نقدمه من مقترحات عامة، ولكن ماذا نحن على استعداد للإصرار عليه باستخدام الضغط في حالة الضرورة.
ويزي أخرون: المفاوضات التي يتوقف عليها الكثير فقط في المناورة والتدبير الدبلوماسيين، بل أيضاً علي التغيير النفسي، ويترتب علي كل طرف بان بعد موقفه تجاه الطرف الآخر. أن سر الفاوض هو التسوية أنك نقبل اليوم ما كنت تقسم في الأسبوع الماضي بأنه لا تقبله أبداً أن أساس التسوية هو مبدأ التنازل.

علي ضوء ما تقدم يمكننا أن نعرف التسوية بأنها تلك الجهود التي تسعى

لمعالجة مسألة متنازع عليها من أجل وضع حل لها، والتسويه السياسية، بهذا المعنى، تعني جهوداً دبلوماسية تسعى للتوفيق بين مواقف أطراف النزاع، وكم هو معروف أن التسوية بالطرق الدبلوماسية هي إحدى وسائل تسوية المنازعات الدولية، إلا أن إيجاد الحل دائماً يتتأثر بقانون التوازن، وأن أي اقتراح فيه يؤدي إلى 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 القوى والتي قد تتكمل بتعين الإجراءات المتخدة، أي بمعاهدة، ويمكننا أن نقول أن معظم الدول بدأت تؤكد علي السلام وتعترف هدفاً مركزاً من أهداف سياستها الخارجية، وعلي ما يبدو أنه اكتسب أهمية كبيرة في هذا القرن عنه في أي وقت مضى.

الوسائل الدبلوماسية لحل النزاعات الدولية

ارتباط وجود وسائل لتسوية المنازعات الدولية نشوء العلاقات الدولية فقد

عرفت المفاوضات أو أشكال من الوساطة التي يتولاها طرف ثالث بغية تسهيل

الاختلاف الأطراف المتنازعة في الحضارات القديمة، كما عرف التحكيم في

العلاقات ما بين المدن اليونانية، وأدي تطوير هذه التقنيات مع مرور الزمن

إلى نشوء قواعد عرفية، كما أدي تطوير العلاقات الدولية في القرنين التاسع

شعر والعشرين علي ظهور تقنيات جديدة كالتحقيق والتوافق والتسوية القضائية

واللجوء إلي المنظمات الدولية. وحظيت هذه الوسائلي باهتمام خاص في ميثاق

الأمم المتحدة نتيجة ربطها بمبدأ تحريم القوة في العلاقات الدولية والمحافظة

علي السلام، 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 لاهي لسنة 1907 علي: "أن الدول المتعاقدة اتفقت على بذل كل جهودها لتأمين التسوية السلمية للمنازعات وذلك بعیة الحيلولة قادر الإمكان دون اللجوء إلى القوة".

وقد عدّدت 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 يلتزموا حله بادئ ذي بدء بطرق المفاوضات والتوافق والتحكيم والتسوية القضائية، أو يلجأ إلى الوكالات والمنظمات الإقليمية أو غيرها من الوسائل السلمية التي تقع عليها اختيارهم.

ويتضح من جملة: "أو غيرها من الوسائل السلمية..." أن هذه التعداد على سبيل المثال وليس على سبيل الحصر، ومن الوسائل المخلوقة للتسوية السلمية التي لم تذكرها هذه المادة ", المساعي الحميدة" والتي نجدها من بين الوسائل التي عدّتها وثائق أخرى خاصة بالتسوية السلمية للمنازعات الدولية كإعلان مانيلا للتسوية السلمية.

التحكيم الدولي كآلية لتسوية النزاعات الدولية:

مهمة التحكيم

يحظي التحكيم بأهمية خاصة، حيث يساعد على فض المنازعات بطريقة ودية وسهولة تحافظ على بقاء العلاقة ومنائها 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: تولى الخصمين حكماً يحكم بينهما.
ويعرف أيضاً التحكيم بأنه عبارة عن اتخاذ الخصمين حكماً برضاهما لفصل خصومتهم ودعواهما.

وإلا أنه تعريف التحكيم لدى فقهاء القانون لم يختلف كثيراً عن هذه التعريفات، حيث تم تعريف التحكيم بأنه طريق خاص للفصل في المنازعات بين الأفراد والجماعات، قومه الخروج عن طريق التقاضي العادي وما تستغله من ضمانات، ويعتبر أساساً على أن أطراف النزاع موضوع الاتفاق على التحكيم هم الذين يختارون قضائاتهم، بدلاً من الاعتماد على التنظيم القضائي للبلد الذي يقومون فيها.

ومن خلال هذه التعريفات السابقة نجد أن نظام التحكيم يتم الاتجاه إليه بوصفه وسيلة من الوسائل السلمية لفض المنازعات بين الأفراد والجماعات بعيداً عن تدخل الدولة، ويسمي 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 آية سلطة مركزية معروفة يمكن الولاء إليها غير القبيلة، وكانت القبائل تقاتل لأسباب مختلفة، ولم تكن هناك آية وسيلة لحفظ الأمن والتنظيم 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 تحكيم القبائل وفقط إصدار قراره، أي أن يضع الأطراف الشيء المنزوع عليه لدى شخص ثالث ليستني 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 معروفًا وموثوقًا لدى الطرفين، حتى يتبنى 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 اللَّّ يَأْمُرُكُمْ أَن تُدُّواْ الأَمَانَاتِ إِلَى أَىْمِيَا وَ حَكَسْتُم بَيْنَ الشَّاسِ أَن تَحْكُسُهاْ بِالْعَدْلِ﴾[58: النساء]. وكذلك قوله ﴿فَلا وَرَبِّكَ لاَ يُمِشُهنَ حَتَّى يُحَكِّسَهكَ فِيسَا شَجَرَ بَيْشَيُمْ ثُمَّ لاَ يَجِدُواْ فِي أَنفُدِيِمْ حَرَجااً مِّسَّا قَزَيْ َ وَيُدَمِّسُهاْ تَدْمِيسااً﴾[65: النساء].

نجد أن الآية الكريمة الأولى كانت بمثابة خطاب لجميع المسلمين تكرساً للبدأ 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 على صراحة كما هو الحال في بعض المنازعات بين الزوجين؛ حيث جاءت الآية الكريمة: ﴿وَ ِنْ خِفْتُمْ شِقَاقَ بَيْشِيِسَا فَابْعَثُهاْ حَكَسااً مِّنْ أَىْمِوِ وَحَكَسااً مِّنْ أَىْمِيَا﴾[35: النساء]. حيث يعد نظام التحكيم ونظام الصلح من أقدم الأنظمة المتبقية في حل المنازعات والطرق السليمة، وكانتا معرفتين في جميع الشرائح 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 بالتحكيم 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 السلمية 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
المعقدة عام 1907 بشأن القوة السلمية للcontraventions الدولية حيث جاء في هذه المادة
تعريف التحكيم بأنه تسوية المنازعات بين الدول بواسطة قضاة من اختيارها وعلى
أساس احترام القانون، وإنالرجوع إلى التحكيم يتضمن تعهد بالخصوص للحكم بحسن
نية. وبين هذا التعريف أن ليستمته فرق بين التحكيم والتسوية القضائية، حيث إنهما
أسلوبان لتسوية المنازعات الدولية والفرق بين التحكيم والقضاء الدولي هو فرق شكلي
ففي بنشأة التحكيم على أساساً، وذلك بموجب معاهدة ثانية تتعلقها هذه الأطراف.
وذلك التسوية نزاع معين دونسواء فأن الجهاز القضائي الدولي معين سلفاً.
إن التحكيم الدولي هو تسوية المنازعات بين الدول بواسطة قضاة من
اختيارها، وعلى أساس من احترام القانون، وأن اللجوء إلى التحكيم ينطوي على تعهد
بالخصوص للحكم بحسن نية.
أنواع التحكيم:
النوع الأول: التحكيم الإجباري، وهو التحكيم الذي تتعدم إرادة أطراف النزاع
سواء فيما يتعلق باللجوء إليه أو فيما يتعلق باختيار الجهة المختصة، و تعد 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 تتناول 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 اختيارياً، حيث تنظر الهيئة أو الجهة التي تم إخبار الأطراف بوجود النزاع مهوناً بالإضافة إلى التحكيم، ويختص هذا النوع من التحكيم بنظر كافة المنازعات التي يمكن أن تتجاوز بها، حيث جاءت نص المادة: 16

التحكيم: (أ) من قانون التحكيم الأردني (الطرف في التحكيم الاتفاق على اختيار محكمين وعلى كيفية تأليفهم]

الاتفاقيات المنشئة للتحكيم

لا يتم اللجوء إلى التحكيم إلا بموجب الظروف وقد تحقق هذه الموافقة قبل حدوث أي نزاع وقد تحقق بعد حدوث النزاع فعلاً في العديد من المعاهدات قد بدر شرط تحكيمي ضمن المعاهدة تحقق بموجب الظروف على اللجوء في جميع أو بعض منازعاتهم المقبولة للمعاهده وقد تحقق الظروف أيضاً على اللجوء إلى التحكيم عن طريق اتفاق خاص أو مشاركة تحكيمية بعد حدوث النزاع.

والشرط التحكيم هو نص في المعاهدة يقضي بالتسوية عن طريق التحكيم لجميع المنازعات أو جزء منها التي قد تطرأ بشأن تفسير أو تطبيق المعاهدة، ويتذكر من الشروط التحكيمية تصاغ بعبارات عامة. وبينما تعتبر الشروط التنفيذية عن اتفاق الأطراف على اختصاص جميع أنواع المنازعات للتحكيم أو أنواع معينة منها إلا أنها تفتقر بوجه عام إلى التنفيذ فيما يتعلق بقواعد انتهاج وتشغيل المحكمة.

لذلك فإنه من أجل اختصاص النزاع للتحكيم بموجب شرط تحكيمي فإن على الأطراف أن يتعهدوا اتفاقاً خاصاً بمسارطة تحكيم، وتعتبر الاتفاقات الخاصة للمشاركين في التحكيم المنتشأ فما مع ذلك أكثر شمولاً لاتناها تعالج الجوانب البنائية للمحكمة

التحكيم المنتشأ ومشرفي التحكيم قد تبحث اطراف النزاع اذن القضايا التالية: تكوين المحكمة بما في ذلك حجم التعيينات وطريقيتها ومعايير وكلا اطراف النزاع والمسائل التي ينبغي للمحكمة أن تقريرها والنظام الداخلي وسهل عمل المحكمة بما في ذلك اللغات المستخدمة حيث يلزم والقانون الوارد التطبيق والمقر والجوانب الإدارية للمحكمة والترتبات المالية للفئات المحكمة والطابع الملزم لقرارات المحكمة والتزامات وحقوق الأطراف ذات الصلة.

الاتفاقات المنشئة للمحكمة

لا يتم اللجوء إلى التحكيم إلا بموجب الأطراف وقد تحقق هذه الموافقة قبل حدوث أي نزاع وقد تحقق بعد حدوث النزاع فعلاً في العديد من المعاهدات قد بدر شرط تحكيمي ضمن المعاهدة تحقق بموجب الظروف على اللجوء في جميع أو بعض منازعاتهم المقبولة للمعاهده وقد تحقق الظروف أيضاً على اللجوء إلى التحكيم عن طريق اتفاق خاص أو مشاركة تحكيمية بعد حدوث النزاع.
تشكل محاكم التحكيم

عادة تشكل محاكم التحكيم من أي عدد يتفق عليها الأطراف أو تحدده الإدارة القانونية المشتركة للتحكيم وقد يتولى التحكيم فرد وحيد كما قد تتولاه هيئة مكونة من عدة أشخاص ولا يوجد حد أدنى لعدد أفراد هيئة التحكيم ولكن بالطبع يجب أن يكون ذلك العدد معقولاً.

ويمكن أن يتولى التحكيم محكماً وحيداً بموجب معاهدة 6 نوفمبر 1901 المبرمة بين المملكة المتحدة والبرازيل فيما يتعلق بنزاع الحدود بين غينيا البريطانية والبرازيل وتعيين مأكوس هوير محكماً وحيداً في قضية جزيرة بالماس وهناك بعض الاتفاقات المتعددة الأطراف التي تنص كذلك على تعيين محكمة واحدة وذلك مثل اتفاقية المنظمة الهيدروجرافية الدولية المبرمة في 3 مايو 1967 (المادة السابعة) والاتفاق الأوروبي في 9 ديسمبر 1971 بشأن برنامج لتوابع الملاحة الجوية (المادة 13) والاتفاق المبرم في 19 أكتوبر 1973 بشأن إنشاء منظمة الإرهاب الجوي لمنطقة البحر الكاريبي (المادة 23).

وقد يتولى التحكيم مجموعة يغلب ان تكون فردية العدد وهذا ما يشير إليه مراجعة معظم معاهدات التحكيم فتحدد بعض هذه المعاهدات عدد المحكمين بخمسة أشخاص مثل ذلك قانون جنيف العام لتسوية المنازعات الدولية بالوسائل السلمية المادة (22) والاتفاق بين المملكة المتحدة وفرنسا المعقود في 10 يوليو 1975 للمتعلق بإنشاء محكمة تحكيم لحل منازعات تعيين حدود الجرف القاري في القناة الإنجليزية، الذي يقضي بإنشاء محكمة تحكيم تتألف من خمسة أعضاء وبموجبه تقوم كل من فرنسا والمملكة المتحدة بتعيين عضو واحد وثلاثة أعضاء محايدين.

وقد اتفق مشاركوا التحكيم المعقود في 11 سبتمبر 1986 بين مصر وإسرائيل بشأن النزاع على الحدود في طابا محكمة تحكيم تتألف من خمسة أعضاء وقد عين كل طرف منهما عضواً واحداً واشترك الطرفان في تعيين الاعضاء الثلاثة الباقين كان الرئيس واحداً منهم.
النظام الداخلي والمرافق

منحت مشاركة التحكيم لمحكمة التحكيم ذاتها سلطة كاملة في وضع نظامها الداخلي وإسلوب العمل والمرافق امامها وقد تمكنت هذه السلطة فلا تتمتع هيئة المحكمة سوى بصلاحية محدودة في هذا الشأن وذلك تحت هيئة واشراف الاطراف المتنازعه.

فمن جهة أخرى تخول بعض مشاركات التحكيم للمحكمة تقرير كافة المسائل الإجرائية مثل ذلك المادة الخامسة من مشاركة التحكيم المبرم في 22 يناير 1963 بين فرنسا والولايات المتحدة بشأن تفسير اتفاق خدمات النقل الجوى التي تقتضى بان على المحكمة ان تقرر رهنا بحكم هذه المشاركة، وإجازتها الخاصة وجميع المسائل التي تؤثر على سير التحكيم وكذلك المادة الخامسة من مشاركة التحكيم في 23 يناير 1925 بين الولايات المتحدة وهولندا بشأن قضية جزيرة بالمس التي تنص بأن على المحكمة ان يقرر أي مسألة أو اجراء قد يظهر في اثناء مجرى التحكيم وايضا المادة الثالثة من مشاركة التحكيم المبرم في 10 يوليو 1975 بين فرنسا والمملكة المتحدة بشأن تعين حدود الجرف القاري لهما التي تقتضى بان تقرر المحكمة رهنا بحكم هذا الاتفاق نظامها الداخلي وجميع المسائل التي تؤثر في سير التحكيم.

وقد وردت الصفحات بوضع الإجراءات واتخاذ القرارات الأخرى التي قد تنشأ نتيجة للمسألة المدروسة والتي قد تكون تمشيا مع حكمها ضرورية لتسهيل تنفيذ اغراض هذه الاتفاقية على نحو عادل ومشرف وذلك في المادة الأولى من مشاركة التحكيم المبرمة في 12 يناير 1922 بين المملكة المتحدة وكوستاريكا بشأن ادعاءات معينة ضد كوستاريكا (قضية تينوكو) ومن جهة أخرى استخدمت بعض مشاركات التحكيم اسلوبا أكثر تفهما في منح صلاحية كاملة للمحكمة في وضع النظام الداخلي فعلى سبيل المثال قرر الاتفاقية المبرمة في 3 أغسطس 1935 بين الولايات المتحدة وكندا بشأن المشاكل الناجمة عن تشغيل مصير تزيل بعد ان عينت النظام الداخلي لمحكمة التحكيم النما يلي: لدى تعيين المزيد من الاجراءات وترتيب اجتماعات
لاحقة فإن على المحكمة ان تنظير في الطلبات المنفردة او المشتركة الصادرة عن الحكمتين، وكذلك قررت معاداة التوافق والنسوية القضائية والتحكيم (ومراتباتها) المبرمة في 7 يوليو 1965 بين المملكة المتحدة لبريطانيا العظمى وأيرلندا الشمالية، وسويسرا أن المحكمة التأكد من اراء الأطراف قبل وضع نظام داخل معين.

ومن ناحية أخرى، فإن الأطر الأعلى للتحقيقات التي تجريها محاكم التحكيم واسلوب المرافعة امامها واسلوب عملها بصفة عامة تكاد تتشابه مع بعضها البعض اجمالا في الامام القضاء الدولي الدائم، فمن المسلم به أن يعين أطراف النزاع وكلاء عنهم لتمثيلهم امام المحكمة وعادة ما تنص مشاريع التحكيم على هذا الحق للإطارات ومع ذلك فهناك بعض المشاركين لا يشير إلى مسألة تعين هؤلاء الوكيل مثال ذلك مشارطة التحكيم الموقعة في يونيو 1964 بين ايطاليا والولايات المتحدة والمتعلقة بالطلاق لحوي المشترک بينهما.

لا أن عدم معالجة هذه المسألة لا يخل بضرورة تعين كل طرف لوكيل.

ينوبون عنه امام المحكمة وهذا ما جرى عليه العمل في كل محاكم التحكيم الدولية.

وللمؤلاء الوكيل الحق عادة في تعين وكلاء مساعدين حسب مقتضيات الحال وقد يساعدهم كذلك مستشارون ومحامون ومودعون وفقا لما يراه الوكيل لازما.

وللاطراف المتتازعة الحق وعليهم واجب تقديم الأدلة والوثائق اللازمة لاثبات دعاوا ونفى دعاوى الخصوم أو دفوعهم.

وفي هذا تفصي الماد (75) من اتفاقية لاهاى لعام 1907 بان تعهد الأطراف بالقيام على أكمل وجه تره ممكنا بتوسید المحكمة بجميع المعلومات المطلوبة من أجل البيت في النزاع.

وتملك محكمة التحكيم كل الصلاحيات التحقيقية التي تمكنها من اثبات وقائع النزاع وتكييفها وتطبيق القانون عليها.

فللمحكمة ان تستمع الى الشهداء وان تستفيد من لخبور الذين يقدمون رأيا تخصصيا للمحكمة بشأن القضية المنظورة امامها. ولكل من محكمين وأطراف النزاع الحق في استجواب هؤلاء الشهداء ويكثر استخدام هذه الصلاحيات في منازعات
الحدود التي قد تلجأ فيها محاكم التحكيم بالإضافة إلى ما ذكر لزيارة المواقع المتنازع عليها.

واعمالا لحق الدفاع فللطراف حق إبداء اسباب دعاوالم ودفعهم أمام المحكمة وفي هذا الاتهار يجري العمل استنادا إلى مشاركات التحكيم ذات الصلة او النظام الداخلي لمحكمة التحكيم على ان يقدم وكلاء اطراف النزاع مراجعات تحريرية في شكلا مذكرات ومذكرات مضادة وقد تقدم بالترتيب وفي اطار الحدود الزمنية المعينة من جانب المحكمة.

وذلك الاساليب قد تقرر المحكمة كذلك بالنسبة للمراجعات الشفوية ومن امثلة مشاركات التحكيم التي تنظم هذا الاسلوب في المراعات المادة ( 5) من مشارطة تحكيم 24 فبراير 1955 المعقدة بين اليونان والمملكة المتحدة في تحكيم امبايتيوس.

علمما بان بعض مشاركات التحكيم لا تتتنتش مسألة المراجعات الشفوية ويتكرك بعض الاخر لتقدر المحكمة.

وفيما يتعلق بتحكيم طابا نتص المادة الثامنة من مشاركات التحكيم على ما يلي:

تشمل الاجراءات على المذكرات المكتوبة، والمراعات الشفوية، والزيارات للموقع التي تعتبرها المحكمة وثيقة الصلة، وذلك وفقا للجدول لزمينى التالي:

أ - تتضمن المذكرات المكتوبة لوائحة التالية:
- مذكرة يقدمها كل طرف للمحكمة خلال 150 يوما من تاريخ الجلسة الأولى للمحكمة.
- ومذكرة مضادة يقدمها كل طرف للمحكمة خلال 150 يوما من تاريخ تبادل المذكرات.
- مذكرة إذا ما قام طرف بعد ابلاغ الطرف لاحرا بابلاغ المسجل خلال 14 يوما من تاريخ تبادل المذكرات المضاردة بنيية في ايداع مذكرة رد وفي
حالة قيام طرف يمثل هذا الإبلاغ بحق للطرف الآخر أيضا تقديم مذكرة رد وتقدم
مذكرات الرد للمحكمة خلال 45 يوما من تاريخ الإبلاغ.

ب - تجري الملاحظات الشفوية والزيارات طبقًا للنظام وعلى النحو الذي تقره
المحكمة. وتسعى المحكمة لإنهاء زياراتها والمراقبات الشفوية خلال (60) يومًا من
الانتهاء من تقديم المذكرات المكتوبة.....

القانون الواجب التطبيق

عادة ما تحدد مشارطة التحكيم القواعد القانونية التي تطبقها محكمة التحكيم
وفي بعض الأحيان تخلو المشاركة من الإشارة إلى القواعد واجبة التطبيق وفي حالة
اشتمال المشاركة على القواعد التي تطبقها المحكمة، فإن بعض المشاركات تقيد
سلطتها المحكمة في هذا الشأن، وتحدد لها قواعد خاصة لا ينبغي للمحكمة أن
تتجاوزها مثل ذلك معاهدة واشنطن المبرمة في 6 مايو 1871 والتي اشتملت على
أساسها محكمة التحكيم في قضية ادعاءات البارا بين الولايات المتحدة والمملكة
المتحدة وأيضا المعاهدة المبرمة بين بريطانيا وفنزويلا بشأن تعين خط الحدود
الفاصل بين مستعمرة غيانا البريطانية وفنزويلا.

وقد ينحصر دور محكمة التحكيم في مجرد تطبيق إحكام بعض الاتفاقات
الدولية بحيث يكون دورها تفسيريا لأحكام هذه الاتفاقات مع الأخذ بالاعتبار الأصول
القانونية العامة وقواعد الأورات القانوني مثال ذلك تحكيم طابا بين مصر وإسرائيل
والذي جاء بمشارتيه الموقعة في 11 سبتمبر 1986 المادة الثانية ان تفصل
المحكمة في النزاع وفقا لاتفاقية السلام المصرية الإسرائيلية المبرمة في 26 مارس
1979 والاتفاق الموقع بين البلدين في 25 أبريل 1982 والملحق. علما بأن المادة
الثانية من اتفاقية السلام المذكورة تقرر أن الحدود الدائمة بين مصر وإسرائيل هي
الحدود الدولية المعترف بها بين مصر وفلسطين تحت الانتداب وبذلك تكون تلك
المحكمة مقيدة بخط الانتداب المذكر والاتفاقيات المشار إليها.

وهناك بعض المشاركات تكون أكثر رحابة فتحيل بصفة عامة إلى القانون
الدولي أو مبادئ القانون الدولي كما بنيتها المادة (38) من النظام الأساسي لمحكمة

العدل الدولية من حيث أن محكمة التحكيم ينبغي أن تجري في المنازعة التي
تطرح عليها وفقا لإحكام القانون وهذا هو غير ما اشترطته المادة ( 28) من
القانون العام المنعقد لعام 1949 حيث تنص عليه: 

إذا لم يرد شيء في الاتفاق الخاص أو إذا لم يكن هناك اتفاق خاص فإن على
المحكمة أن تطبق القواعد المدرجة في المادة 38 من النظام الأساسي لمحكمة العدل
الدولية فيما يتعلق بجوهر النزاع. وبالقدر الذي لا تكون هناك قواعد منطبقاً على
النزاع يعين على المحكمة أن تقرر مراوحة العدل والحسن.

مقر محكمة التحكيم

يفتقت الأطراف في معظم الأحيان على تحديد مقر محكمة التحكيم في
المشارطة فعلى سبيل المثال تنص المادة (1/5) من شركة التحكيم المصرية
الإسرائيلية الخاصة بتحكيم طابا على أنه: يكون مقر المحكمة في سويسرا.

أما حينما لا يكون هناك اتفاق بهذا الصدد فلم المحكمة ذاتها تعيين المكان الذي
تمارس فيه اعمالها، بناء على توصية رئيسها مثال لذلك المادة الخامسة من مشارطة
التحكيم المبرمة في 10 يوليو 1975 بين فرنسا والمملكة المتحدة في القضية
المتعلقة بتعيين حدود الجرف القاري.

وقد يتولى اتفاق التحكيم تحديد المكان الذي تجتمع فيه المحكمة لأول مرة
والمحكمة بعد ذلك صلاحية اختيار مكان انعقاد الجلسات التالية. ويتخذ قرار اختيار
مكان الجلسات عادة على ضوء التسهيلات الإدارية الماحة والاعتبارات المالية.
ويتحمل اطراف النزاع النفقات المتعلقة بهم ويتقاسمون التكاليف الإدارية للمحكمة وقد
جري العمل على أن يتحمل اتعاب المحكمة كلا الطرفين على قدم المساواة.

وتفق بعض مشاريات التحكيم احياناً بأن يسد كل طرف من الطرفين اجور
الحكم الذي عينه ذلك الاتفاقية المبرمة في 29 فبراير 1892 بشأن تحكيم
المسائل المتعلقة بحقوق الولاية في بحر بيرينج المادة 12 فشارطة التحكيم المبرمة
في 16 يونيو 1930 بين هندوراس ووجواتيالا، والمادة التاسعة عشرة، ومشارطة
التحكيم المبرمة في 22 يناير 1963 بين الولايات المتحدة وفرنسا المادة الثامنة.
حكم محكمة التحكيم

تصدر محكمة التحكيم احكاماً نهائيةً وملزمةً للإطراف وتتص من جميع مشاركات التحكيم على أن تتعهد الأطراف بتقديم قرار المحكمة المصرية. وال.case (14) من مشاركة التحكيم المصرية الإسرائيلية بشأن نزاع:

(طابا) بأن:
- تتفق مصر و إسرائيل على قبول حكم المحكمة بوصفته نهائياً وملزماً لها.
- يتعهد الطرفان بتقديم الحكم بسرع ما يمكن ويسع نية وفقاً لمعاهدة السلام.

وتتص من محكمة التحكيم عادةً مكتوبةً وموقعةً ومؤرخةً وتقضي بعض مشاركات التحكيم بتقديم قرار المحكمة باللغة العربية. مصوبتها من ذلك على سبيل المثال المادة السادسة من مشاركة التحكيم المبرمة في 22 يناير 1963 بين الولايات المتحدة وفرنسا في القضية المتعلقة بتفسير اتفاقهما المتبادل بشأن خدمات النقل الجوي وكذلك المادة (2/4) من مشاركة التحكيم المصرية الإسرائيلية. بينما تمنح مشاركات أخرى للمحكمين الحق في تقديم رأى مستقل أو مخالف مثال ذلك المادة التاسعة من مشاركة التحكيم المبرمة في 10 يوليو 1975 بين المملكة المتحدة وفرنسا في القضية المتعلقة بعدة الجرف تنص على أنه لكل عضو في المحكمة الحق في تقديم رأى منفرد أو رأى مخالف ويعتبر الرأى المنفرد أو المخالف جزء من الحكم.

وبد أن يصدر الحكم فانة يكون خاضعاً للتصويت أو التنقيح فيما يتعلق بالأخطاء مثل الأخطاء الكتابية أو المطبوعة أو الحسابية.

ويخشى الحكم أيضاً للتفسير إذ تقضي المادة 82 من اتفاقية لاهاي لعام 1907 بالاختصاص العام لمحكمة التحكيم بتفسير الحكم الذي أصدرته. وتقضي بعض اتفاقيات التحكيم بإمكانية تفسير الحكم على سبيل المثال معاية التوفيق والتسوية القضائية والتحكيم المبرمة بين المملكة المتحدة وسويسرا المادة 34، وأيضاً
مشاركتها في عامي 1963، 1977 بين فرنسا والولايات المتحدة.

وقد تشير مشاركة التحكيم كذلك إلى وجود إعلان الحكم بالشكل الذي صدر به
بالتاريخ الذي تتفق عليه الأطراف على سبيل المثال. المادة السادسة(ب) من
مشارطة التحكيم بين فرنسا والولايات المتحدة المذكورة أعلاه.

وتتمثل المرحلة الأخيرة من التحكيم في تنفيذ حكم التحكيم ورحبًا بطبيعية النزاع.

قد البحث، قد تدرج الطرافات ضمن مشاركة التحكيم الخطوات اللازمة التي يجب
إعدادها من أجل تنفيذ الحكم في نزاع الحدود مثلما قد تتفق الأطراف على إنشاء لجنة
اخرة أو تعيين خبراء لرسم الحدود بمجرد صدور الحكم وبناء على اتفاقية لاياغ
لعام 1907 فإن أي نزاع قد ينشأ بين الطرافات فيما يتعلق بتسخير أو تنفيذ الحكم
ينبغي أن يرفع إلى محكمة التحكيم التي اصدرته ما لم تتفق على خلاف ذلك.

أهمية التحكيم الدولي

شهد التحكيم الدولي في العصر الحديث قفزة نوعية، من خلال إتفاقية لاياغ
1899، حيث تمت الدول جدياً إلى إنشاء محكمة تحكيمية دولية، حيث نصت
على الاتفاقية الخاصة ببعض المنازعات الدولية بالطرق السلمية بواسطة المساعي
الحميدة والوسامة 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 بغير تحقيق الأمن
والسلم، التي فشلت العصبة في تحقيقهما، وفي تاريخ 28 أبريل سنة 1945 تأسست
الجمعية العامة للأمم المتحدة بناءً 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
إلى وضع نموذج لقواعد إجراءات التحكيم، ليكون دليلاً مرشداً للدول عبر التوقيع على تعهدات باللجوء إلى التحكيم.

وعلى الرغم من هذه المحاولات إلا أن الجمعية العامة للأمم المتحدة، لم تصادق على هذا المشروع النموذجي بسبب معارضة العديد من الدول، وعلى رأسها الاتحاد السوفيتي سابقاً وأكثفت الجمعية العامة سنة 1958 ببعاً اعتبار هذه المشروع نموذجاً تقنياً به الدول عند إبرام اتفاقيات للإحالة إلى التحكيم، حيث يعتبر التحكيم إن صح التعبير هو الخيار الأول أمام المعاملين في حقل التجارة الدولية لكونه يعد الوسيلة المثالية الأكثر ملاءمة مع متطلبات الدول، وتنقسم أهمية التحكيم في تحقيق العديد من المزاعم والفوائد التي كانت السبب في كثرة اللجوء إليه في المنازعات، بدلاً من القضاء العادي للدول وأهم هذه المميزات:

- السرعة: حيث يلعب عامل الوقت دوراً هاماً 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، والجماعية للأطراف كما تحفظ هذه السرية مهما كانت نتيجة اللجوء إلى هذه البدائل، بغض النظر عن النتيجة النهائية سواء كانت بتسوية أو تعذر النسوية

- المحافظة على استمرار العلاقات بين الأطراف: يتلاشى الحقد بين الأطراف لأنهم اتفقوا على اللجوء إلى التحكيم بإرادتهم الحرة، وقبلوا مسبقاً ما يصدره المحكم من قرارات ويقومون بتنفيذها طوعياً واختياراً منهم، هو ما يجعل حكم المحكم وكأنه صادر من مجلس العقد، ومن ثم يتبقي عليه إحلال الوئام محل الخصم، ويكون له أثر فعل كما تتطلب في تحقيق السلم الاجتماعي واستمرار المعاملات واستقرارها مستقبلاً إجراءات التحكيم الشخصي لأطراف النزاع، ومشاركتهم في كافة أطراف الإجراءات، وهو ما يتيح لهم فرصة القيام بمكاشفة ومصارحة بعضهم لبعض، بدون وسيلة وتمكنهم من تغريح كل المآخذ المتبادلة، ومن
ثم النفوذ إلى جوهر النزاع في جو أقل عدوانية إن لم يكن أخويا وحتميا في بعض الأحيان ولقد أظهر التحكيم تطورا كبيرا اعتبارا لمميزاته العديدة، ولكن كان القضاء الوطني لم تعد له القدرة على التصدي لفض منازعات التجارة الدولية بالكفاءة والجسم اللازمة لأنه مفيد 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 والضرورا الاقتصادانية والصناعية، التي أملت كذلك أحكامها في التعاملات الدولية بين كافة الدول وتبورت مفاهيم التجارة الدولية ونسبيابة حركتها في شرايين العالم الذي أصبح أشد اتصالا وأكثر ارتباطا وأوسع نطاقا وبالتالي لا شيء يبرر اللجوء إلى القضاء على اعتبار هذا الأخير أصبح ضيفا بالنسبة لهذه المعاملات ولا يمكن أن يستوبيها من هنا ظهرت أهمية التحكيم. إن تطور فكرة أهمية التحكيم وازدهار أساليبه قد واعبه وساعد على تحقيق 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 التحكيم الدولي وطريقته المثلى في فض المنازعات دون اللجوء إلى القضاء ويعتبر التحكيم بقواعد وشروطه من أحدث الاتجاهات الممكنة والمتماكبة في فض المنازعات وهناك الكثير من النماذج الدولية التي اثبتت فعالية هذه الوسيلة وجدواها من حيث سرعة الوقت والتكلفة، لذا أرى أنه من أهم الاتجاهات الحديثة في مسائل فض النزاعات بين الدول وقد تصبح الوسيلة المعتمدة والمفضلة دائماً وذلك بسبب ما ذكرته عن ميزات وعيوب هذه الوسيلة وأرى أيضاً أن 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 أقر الإسلام مبادئ التحكيم بصفته الحالية حيث أنه كان معروفاً بين العرب وقد تركت مسألة تنفيذ أحكامه إلى العرف أو الخشية من الإقتتال وقد كانت تسند مهام المحكمين إلى أهل الأمانة والصدق بين الناس أما فيما يتعلق بمقاطع التشريع الإسلامي يرى الشارع أن التحكيم يحق مقصد إقامة العدل بين الناس ومن هنا برزت مكانة التحكيم وهميته والتي تتمثل في:

الإسراع في فض المنازعات.

إبعاد الحق والبغضاء بين الخصوم.

أن يحفظ العلاقة الطيبة وخاصة بين التجار.

أن فيه روح الإعتدال. وقطع النزاعات داخل المجتمعه المسلم.

أنه يتبع للأشخاص إختيار من يحكم بينهم.

أنه يبعث إلى الطمأنينة وخاصة للشركات المتعددة الجنسات.

أنه قد يتأثر قضاء بعض الدول بالضغوط السياسية.
أن التحكيم يتبّع للمحكرين اختيار المذهب الفقهي الذي يرغبونه في التحكيم.

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المختص

تزايد في العقود الأخيرة اللجوء للوسائل البديلة لتسوية المنازعات بالطرق الودية فأصبحت قضاء المنازعات الدولية بلا منازع، وذلك لما تميز به هذه الوسائل من سرعة وسعة، ومملكة الأطراف في إيجاد الحلول لمنازعاتهم، ومرنا وحرية اختيار الطريقة والأشخاص الذين يتولون هذه المهمة. وحيث أن ميثاق الأمم المتحدة يتضمن المحافظة على السلام والأمن الدولي، إلا أنه في حال حصول نزاع دولي بسبب تعارض المصالح الاقتصادية أو السياسية، فإن الميثاق

نص على فض هذه النزاعات وفق الوسائل السلمية التي تأخذ عدة أشكال، ويشار إليها بمصطلحات مثل المفاوضات والوساطة، وهذه المصطلحات تستخدم بشكل متزايد دولياً ومحلياً كبدائل للنقضي، واستخدام هذه الطرق لتسوية النزاع، يعود بفوائد كبيرة مثل: فض النزاعات المسلحة بسرعة، واستدامة الحل بسب صناعته من قبل الأطراف المنازعة. ويهدف البحث إلى التعرف على ماهية الوسائل البديلة لفض النزاعات والمقارنة بين احكام ومفهوم وطبيعة المفاوضات والوساطة الدولية وهميتها في تسوية النزاعات الدولية. ونظراً لطبيعة البحث تم
الاعتماد على المنهج الاستقرائي، تم استقراء الآليات التي تعتمدها المحادثات الدولية لفض النزاعات الدولية، وكذلك المنهج التحليلي، حيث تم تحليل تلك المادة العلمية، معرفة طبيعة كل وسيلة من الوسائل البديلة وخصائصها، وكذلك المنهج المقارن بإجراء المقارنة بين المفاوضات والوساطة الدولية من جهة وبين القضاء من جهة أخرى. ومن أهم النتائج التي وصلت إليها الدراسة إن نظام الوسائل البديلة ضماناً له منعوً أكثر من قرار المحكمة، وخلق بيئة استثمارية جاذبة، ويكون تنفيذ اتفاقيات التسوية رضيأً.

الكلمات الافتتاحية: المفاوضات، الوساطة، المصالحة، التوافق.

المقدمة:

وهناك صلة مشتركة بين كافة الوسائل البديلة، وهي حسم النزاع بعيداً عن قاعات المحاكم ومنصات القضاة، وما شبه العالم منذ نصف قرن ويزيد من حركة قلمية وتشريعية لتنظيم الوسائل البديلة، وما تملؤها في الحاضر من فعل مؤثر على صعيد النقاضي كان من الطبيعي أن تعمل الدول جاهزة لإيجاد إطار ملائم؛ يضمن هذه الوسائل تقنينها ثم تطبيقها لتكون بذلك أداة فعالة لتحقيق وثبت العدالة وصيانة الحقوق، فقد اتجهت المعاهدات والاتفاقيات الدولية لتفعيل دور هذه الوسائل على المستوى الدولي.

مفهوم المفاوضات الدولية
إن الحاجة البشرية إلى التفاوض قدمت منذ الأزمنة الأولى، ولن تتوقف هذه الحاجة أو تنخفض بل تزداد أهميتها، كلما تمت العلاقات بين الدول وتشعبت سواء على المستوى الاقتصادي أو الاجتماعي أو السياسي، وهو المخرج الوحيد الممكن استخدامه لمعالجة القضية المتنازعة عليها والوصول إلى حل للمشكلة المتنازعة بشفافية، وقد هذا البحث سوف يتناول إحدى الابعاد البديلة غير المكلفة، والتي تقتصر فيها المشاركة على أطراف التنازع فقط خلف نزاعاتهم، وتسمى هذه الإجراءات المفاوضات، حيث تم تقسيم هذا المبحث إلى مطلبيتين: المطلب الأول:

تعريف المفاوضات والاستراتيجية والتكنيك التفاوضي وأنواع التفاوض، والمطلب الثاني: مبادئ التفاوض وصفات المفاوض ومرحل العملة التفاوضية.

المطلب الأول: تعريف المفاوضات والاستراتيجية والتكنيك التفاوضي وأنواع التفاوض

الفرع الأول: تعريف المفاوضات والاستراتيجية والتكنيك التفاوضي

تعريف التفاوض: "عملية اتصال بين شخصين أو أكثر، يدرسون فيها البدائل للتوصيل لحل مقبول لديهم أو بلوغ أهداف مرضية لهم".  

التفاوض: "هو موقف تعبيري حركي، قائم بين طرفين أو أكثر حول قضية من القضايا، يتم من خلاله عرض وتقريب وتكيف وجهات النظر، واستخدام كافة أساليب الإقناع للحفاظ على مصالح قائمة أو الحصول على".

http://www.startimes.com  

1 مقال بعنوان: التفاوض علم وخبرة وأخلاق، الاستراتيج 22 جولان 2016 من
منطقة جديدة، بإجبار الخصم على القيام بعمل معين أو الانتفاع عن عمل معين، في إطار علاقة الارتباك بين
أطراف العملية التفاوضية باتجاه أنفسهم أو باتجاه الغير".

ويرى الباحث أن المفاوضات أو التفاوض هو آلية لتسوية النزاع، قائم على الحوار المباشر بين الطرفين
المتنازعين سعيًاً لحل الخلاف، بيد من مشاركة طرف ثالث، بل يعتمد على الحوار المباشر بين الطرفين، ويمكن
تمثيل المتنازعين بواسطة محاميين أو وكلاء لهم، يملكون سلطة اتخاذ القرار عن مكتبهم.

الاستراتيجيات التفاوضية:

يتبع المفاوضون عدة استراتيجيات أثناء عملهم وذلك وفقًا لطبيعة النزاع والأطراف والزمان:

أولاً- استراتيجيات منهج المصلحة المشتركة: يقوم هذا النهج على علاقة تعاون بين طرفين أو أكثر، يعمل
كل طرف منهم على تعميق وزيادة هذا التعاون وإتمامه لمصلحة كافة الأطراف.

ثانياً- استراتيجيات منهج الصراع: وتشمل الاستراتيجية الأولى: استراتيجية الالتفاف، وال استراتيجية الثانية:
استراتيجية التشتيت (التفتيت)، وال استراتيجية الثالثة: استراتيجية إحكام السيطرة (الإخصاع)، وال استراتيجية

- تكتيكات التفاوض:

2 محسن أحمد المصري، تنمية المهارات التفاوضية، القاهرة: الدار المصرية اللبنانية 1993م، ص25
3 انظر: عبد الله بصاعة، التفاوض أصول عملية ومهارات وفنون، مصر: مركز التعليم المفتوح في جامعة بنها، ص20.
تكون وفق الإجراء الوقتي أو الملمحي الذي يستدعه موقف التفاوضي القائم، لأن التكتيك يمكن بأنه الأقصر زمناً والأقل شمولًا، قياسًا ب استراتيجيته وكذلك العدد منها:


الفرع الثاني: أنواع التفاوض

1- اتفاق لصالح طرفين: مبدأ "أكسب أنا و أكسب أنا" و يكون التركيز على ما يحقق مصلحة الطرفين.

2- التفاوض من أجل مكسب لأحد الأطراف وخسارة للطرف الآخر: مبدأ (أكسب أنا - أكسب أنا - اخسر أنت).

3- التفاوض الاستكشافي: يهدف لاستكشاف أجندة الأطراف التفاوضية.

4- التفاوض الإستراتيجي: من أجل تبيع أو تسكن الأوضاع.
5- تفاوض التأثير في طرف ثالث: للتآثير في طرف ثالث لجهة نظر معيينة، أو تحديد دوره بصورة
صرع مع الخصم المباشر.

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:

- النظرية الثاقبة للأمور والقدرة على التمييز بين القضايا الأساسية والفرعية.
- القدرة على التحليل والاستنباط.
- معرفة نقاط القوة والضعف وتحليل المكاسب والخسارة.
- الحكمة والصرع والانتظار حتى تظهر الصورة بأكملها.
- القدرة على الاستماع للطرف الآخر بعقل متفتح.
- الالتزام بالوضعية وعدم الابتعاد عن الموضوع.
- الاستعداد والالتزام بالتخطيط الدقيق لكل التفاصيل وإيجاد البديل.
- امتلاك القدرة على النظر إلى الموضوع بوجهة نظر الطرف الآخر.
- الشجاعة في الاستعانة بالفريق المساعد في الوقت المناسب.

انظر: فوائد الصادق، المفاوضات للمفاوضات أم للتحالفات، الاستعراض بتاريخ 13 نوفمبر 2016 من:
http://www.siironline.org
وأهم المهارات التي يجب أن يتميز بها المفاوض الناجح:

1- أن يعرف الطرفان المتفاضبان بقدرة المفاوض وفعاليته، والمفاوض الجيد ليس الذي يستطيع أن يصل إلى اتفاق نتيجة المفاوضات، بل أن يكون اتفاقاً جيداً وهذا قيمة وتفاهم.

2- المفاوض الجيد والناجح عندما يقرر، يجب أن يحمي بدون تردد لأن التردد فيه أخطار قد تكون أقصى من أخطار الأقدام والجزء.

3- أجمع الباحثون في فن التفاوض على أن المفاوض الناجح، هو الذي يتقن طريقة طرح الأسئلة والاقتراحات، فإن فن طرح الأسئلة له تأثير كبير في تقدم المفاوضات ونجاحها.

الفرع التالي: مراحل العملية المفاوضية

http://www.siironline.org

انظر: مصادر المفاوض الناجح، الاسترجاع بتاريخ 11 سبتمبر 2016 من
للتفاوض خطوات يجب على المفاوض أن يعلمها ويتقنها وهي:


ويمكن تقسيم هذه الخطوات إلى مرحلتين:

الأولى: مرحلة ما قبل العملية التفاوضية: وتشمل:

أ- التحضير للتفاوض: وذلك بمواقفة الأطراف على مابدأ التفاوض: وتعني اقتراح الأطراف 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، والقيمة المخصصة للطرف الآخر المفاوض، وأثناء مرحلة التحضير للتفاوض يجب مراعاة عدة نصائح أهمها: إعطاء وقت كاف للتحضير، والعمل على خلق أجواء تفاوضية مناسبة تنجز التفاوض.

ب- التمهيد والإعداد للعملية التفاوضية: ويشمل: اختيار أعضاء الفريق المفاوض، وتوافر المعلومات الوفية المذروبة عن الطرف الآخر، وتحديد موعد ومكان العملية التفاوضية، ويجب تنسيق اتصالات بين الطرفين قبل العملية التفاوضية، وتحديد الأهداف والأولويات الرئيسية، ووضع وتحديد الاستراتيجية التفاوضية والتكنيكات المناسبة لها.
ثانياً- مرحلة الجلسات التفاوضية: وتشمل:

- 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.

ولكي تكون ناجحة يتوجب على كل طرف أن يحدد ما يريد من الآخر، مقابل تنزيلات متبادلة يقدمها، حيث أثناء الجلسات التفاوضية يتمثل التكتيك فيما يلي:

البدء بمناقشة القضايا ذات الاختلاف الكبير، وجب 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 الاعتراف التفاوضية: عدم تقديم عروض سخية في البداية، ثم إتاحة المجال للمساومة، وعند تخاية
الجلسات التفاوضية: القيام بتلخيص ما يريده الطرف الآخر، واستحضار المعلومات، وتبني الأخطاء والهفوات.

ب- خاتمة التفاوض والوصول 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 التوقع النهائي، في شكل اتفاقية موقعة ومملوءة للطرفين المتضاربين، يجب 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 البحث سوف تتناول الوسائل البديلة غير الشرطة التي يشار إليها الأطراف، شخص ثالث إجراءات حل النزاع، وتسمى هذه الإجراءات إما الوساطة أو التواقيق أو المصالحة، وهي ألفاظ لها مدلول عملي واحد، ينجم في قيام شخص ثالث يسمى (الوسيط، الوسيط، الوسيط) مهمة تقريب وجهات النظر بين أطراف النزاع، وذلك بغية توصلهم إلى 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 لمتطلبين: المتطلب 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، بحيث تهدف إلى تسوية مرضية بين الفرقاء المتزائرين، وهي تؤكد على حماية مصالح الفرقاء أو الفرقاء الموفترين عليها، وهي اختيارية ولا تتبع قواعد إجرائية، وإذا تمت حواراتاً مفتوحاً على قدم المساواة بكل حريه وثقة، والقرار فيها ذي دون تدخل الوسيط.

إذاً يوجد طرف ثالث، يتوسط بين فرقاء النزاع، إذاً يتضع الثالث نفسه وسط خصمين أثنين - سواء كانا شخصين أم جماعتين أم شعبين - يتواجهان، ويتضادان، فالوساطة تهدف إلى توجيه الفرقاء من حالة (المصادرة) إلى حالة (المحادثة)، أو تهدف إلى الوصول كما إلى الاتفاق كل منهما نحو الآخر، للتحداد والتفاهم وإيجاد تسوية.

الفرع الأول: تعريف الوساطة وصورها وأنواعها

- تعريف الوساطة:

الوساطة هي عملية تتسم بالمرنة والسرية التي تتولى موجبة شخص محاي، يعين بواسطة أطراف النزاع أو نياة عنه، لجعلهم يتوصلوا إلى تسوية النزاع أو الخلاف، مع تحكمهم الكامل في قرار التسوية، وكذلك بنود اتفاق التسوية.

http://www.crcica.org/rules/mediation/crcica_mediation_rules

انظر: قواعد الوساطة مركز الوساطة والصلح في مركز القاهرة الإقليمي للتحكيم التجاري لعام 2013.

الاسترجاع بتاريخ 5 يوليو 2016 من
الوساطة: "وسيلة حل النزاعات من خلال تدخل شخص ثالث نزيه وحيادي ومستقل يريل الخلاف القائم، وذلك باقتراح حلول عملية ومنطقية تقرب وجهات نظر المنزاعين، يهدف إيجاد صيغة توافقية، وبدون أن يفرض عليهم حالاً أو يصدر قراراً ملزماً.

ويرى الباحث تعريف الوساطة: بأنها وسيلة يلجأ إليها الأطراف لحل نزاعها، بمساعدة شخص ثالث محايد يسمى الوسيط، حيث يتم نقل المختصمين من مقاعد المرتبطة والمنشتر لمقاعد الحكم، وتتعاونهم ببناء حيويات الحكمهم 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، وأنشئ الكتابة: إما بعقد رسمي أو عرف أو إما بحضر يحرر أو برسائل تبادلية أو باتصال بالكلكس أو البرقيات، أو أي وسيلة أخرى من وسائل الاتصال تثبت وجوده.

أنواع الوساطة:

 注: بن حمري الهادي، الطابع القانوني لنظام الوساطة كديمل لقضي النزاعات على ضوء أحكام قانون الإجراءات المدنية والإدارية، محاورًا أليفي تملس قضاء المسيلة-الجزائر 2009م.
للوضاءة عدة أنواع فهي إما وساطة قضائية أو قانونية وتعتبر هذه النوع واحداً مع بعض الفروق، وساطة اتفاقية وهي الأكثر استخداماً وانتشاراً.

قضائية: إذ يُحيل 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 (قضية الوساطة).

قانونية: وذلك حين يُحيل النص التشريعي إلى اتباع طريق الوساطة قبل المرور إلى المحاكم، وتتم من خلال أشخاص خارجيين عن مرفق القضاء، هم الذين يمثلون الخيرة اللازمة ويتمتعون بالقدرة المطلوبة، ويتمتعون بفرضيةيستند من طرف وزير العدل، ويُعينهم من طرف القاضي في النزاعات المطرودة أمام القضاء، وفقاً للمقاطع المعمودة والمعدة مسبقاً على مستوى كل مجلس قضائي، وكذلك يُطلق عليها تسمية وساطة خاصة: وتم من خلال القضاة المتقاعدين والمحامين والمهنيين وغيرهم من أصحاب الاختصاص المشهود لهم بالحياد والنزاهة، ويُسمى رئيس المجلس القضائي بتعيين من وزير العدل، ويُطلق عليهم اسم (وسيط خصوصي).

الحالة: 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، بحيث يتفقون على تسمية وسيط معين يجدكون لديه القدرة الكافية والكفاءة لحل النزاع، عند اختيار هذا الوسيط يتم التقدم بطلب للقاضي الذي ينظر في

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انظر: قانون الوساطة لتسوية النزاعات المدنية الأردن، رقم 12 لسنة 2006، المادة 2، وقانون الإجراءات المدنية والإدارية الجزائر، لعام 2008م، المادة 994/994.

انظر: قانون الوساطة لتسوية النزاعات المدنية الأردن، 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.1

الفرع الثاني: تعريف الوسيط وشروطه

تعريف الوسيط:

الوسيط: "هو كل شخص مكلف بإدارة الوساطة، بفعالية وحيادية وكفاءة مهما كانت طريقة تعيينه، وذلك لمساعدة أطراف النزاع على التواصل إلى تسوية ودية".11

ويعهد بالوساطة إلى شخص طبيعي أو شخص معنوم.

شروط الوسيط:

11انظر: قانون الوساطة لنزاعات المدنية الأردني، المادة 3، والقانون رقم 08-05 الخاص بالتحكيم والوساطة الاتفاقية المغربي، الفصل 56، المادة 327.3.

12تعلمية الاتحاد الأوروبي للوساطة، رقم CE/52/2008، المادة 1/3، المادة 1.

13سكلت ميكين، برنامج تبادل خبرات منفذي القانون لعام 2011 أساسيات القانون الأمريكي (ولاية كاليفورنيا)، كلية توماس جيفير سوف للقانون.
للوساطة شروط خاصة يجب أن تتمتع بما واعية أن يكون ذو عقل راجح، ويتمتع بحسن السلوك والاستقامة والتزام، ولا يكون قد تعرض إلى عقوبة عن جريمة مختلفة بالشرف، ولا يكون ممنوعاً من حقوقه المدنية، وأن يكون مؤهلاً للنظر في المنازلة المعروضة عليه، وأن يكون محايداً ومستقلًا في ممارسة الوساطة، حيث يجب عليه أن يفصل عما قد يثير الشكوك حول حياده واستقلاله.

حدود المسؤولية: لا يسأل الوسيط سواء كان شخصياً طبيعياً أو معنويً، عن أي عمل أو امتلاك عن فعل ذلك فيما يتعلق بأي وساطة قامت، مالم يكن متمتعاً بتسوية نية، وتعين، لا يكون الوسيط تحت أي النزام قانوني لتقدم أي بيان إلى أي شخص عن أي مسألة تتعلق بالوساطة، ولا يجوز أن يسعى أي طرف لمجل الوسيط شاهداً في أي إجراءات قانونية أو أخرى ناشئة عن وساطة.

المطلب الثاني: مجال الوساطة ومرحل سير إجراء الوساطة

الفرع الأول: نطاق الوساطة ومهام مهمة الوسيط

إذاً مجالات النسوية من خلال الوساطة تشمل جميع المجالات السياسية والتجارية والمدنية، وإنّ نطاق تطبيق قواعد تسوية النزاعات ودياً لدى غرفة التجارة الدولية وفقاً المادة 1، أنه يجوز إحالة جميع نزاعات الأعمال،

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13 انظر: قانون الإجراءات المدنية والإدارية الجزائري، المادة 998/1 وقانون الوساطة الأردني، المادة 29.
14 انظر: وقواعد الوساطة في مركز التحكيم المشترك مركز في القانون الدولي وممكناً لمن للمطالبة بالتحكيم، لعام 2012، المادة الحادية عشر.
ورعالة الوساطة مركز الوساطة والمصالحة في مركز القاهرة الإقليمي للتحكيم التجاري، لعام 2013، المادة الثانية عشر والثالثة عشر.
ورعالة السوقية الودية للنزاعات الخاصة بغرف التجارة الدولية برلين، المادة السامسة.
تكوّن النزاعات كبصيغ القواعد، ويجوز إجراء المصالحة على الأوقاف ولا على أموال القصر ولا على ما يحتاج النظر فيه إلى الغبطة والمصلحة.

وعلى الصعيد الدولي ليست كل النزاعات الدولية قابلة للوساطة، وهناك بعض المؤشرات التي تدل على إمكانية أن تكون الوساطة فعالة، ففي المقام الأول: يتعين أن تكون أطراف النزاع الرئيسية قابلة لمحاولة التفاوض بشأن النسوية، وثانياً: يتعين أن يحظى الوسيط بالقبول، وأن يكون ذا مصداقية، وأن يكون مدعوّا إلى حذر كبير، وتالتاً: يتعين أن يكون هناك توافق عام في الآراء على الصعيدين الإقليمي والدولي على دعم العملية، وعندما تتعرقل عملية وساطة فعالة، قد يكون مطلوبًا بذل جهود أخرى لاحتواء النزاع أو للتخفيف من المعاناة الإنسانية، إلا أن ينبغي مواصلة الجهود لاستمرار المشاركة، من أجل التعرف على الآفاق الممكنة لفرص الوساطة في المستقبل واستغلالها.

ومهمة الوسيط: لا تتجاوز تقرب 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 وسبيلًا لحل النزاع القائم، فيجوز لل وسيط أن يستمع إلى الأطراف وأن يقارن بين وجهات نظرهم، لأجل تمكينهم من إيجاد حل للنزاع القائم بينهم، والمشرع.

16 قواعد العمل في مكاتب المصالحة وإجراءاتها بوزارة العدل السعودية، المادة الخامسة عشرة.

15 مصادر: قانون الإجراءات المدنية والإدارية الجزائري، المادة 995/1995/
الجزائر: أشار إلى المهام الأساسية للوساطة، مثل التمثيل في تلقي وجهات نظر كل واحد منهم، ومحاولة التوفيق بينهم، ويمكنه كذلك ترتيب كل شخص يري في مجموعة قائدة للتوافقة للنقاط، وذلك بعد موافقة أطراف الخصومة.  

فعلى الوسيط المتخصص، اتباع نهج احتفائي، يوفر منطقة عازلة لأطراف النزاع، وغرب النبض بين الأطراف في عملية الوساطة، و يوفر الاعتقاد بأن التوصل إلى حل سلمي أمر قابل للتحقيق، والوسيط الجيد يعزز التبادل من خلال الاستماع وال الحوار، ويوجد روحًا من التعاون من خلال حل المشكلات، ويضمن أن الأطراف المتفاوضة لديها ما يكفي من المعارف والمعلومات والمهارات اللازمة للتفاوض بثقة، وينجح الوسطاء إلى أقصى حدٍ في مساعدة الأطراف المتفاوضة، في إبرام اتفاقات عندما يتخلّون بالإمام الواسع، والصبر، والتوازن فيما يتخذونه من قرارات.

الفرع الثاني: مراحل إجرا إجراء الوساطة

هناك خطوط عريضة للأسس الرئيسية للوساطة، من أجل الوصول إلى عملية وساطة فعالة، يجب أن يحظي بها الوسيط قبل البدء في إجراءات الوساطة وهي:

1- الاستعداد. 2- الموافقة. 3- الحياض. 4- الشمول.

**الملاحظة:** انظر: قانون الإجراءات المدنية والإدارية الجزائري المادة 665/2017.
The text is in Arabic, discussing the complexity of mediation, which becomes more complicated (and thus less effective) when it is used to consult and/or involve multiple stakeholders for varying levels of involvement.

The text also outlines the stages of mediation:

- The first stage: Establishing a relationship with the disputing parties: the first step.
- The second stage: Choosing a strategic approach to lead the mediation process: the second step.
- The third stage: Collecting and examining the background information: the third step.
- The fourth stage: Designing a comprehensive mediation: the fourth step.
- The fifth stage: Building trust and cooperation: the fifth step.
- The sixth stage: Start of mediation session: the sixth step.
- The seventh stage: Defining the issues and setting the agenda: the seventh step.

المرحلة الثامنة: كشف المصالح الخفية للأطراف المنازعة:

المرحلة السابعة: إيجاد خيارات للتسوية:

المرحلة العاشرة: تقييم خيارات التسوية:

المرحلة الحادية عشر: الحسمات الأخيرة:

• توصيل إلى اتفاق عبر تغيير المواقف تدريجياً، أو القفز إلى تحقيق التسوية، أو تطوير معادلة تلقي إجماعاً في الرأي أو عبر توظيف آليات إجرائية للوصول إلى اتفاق ملموس.

المرحلة الثانية عشر: إنجاز التسوية الرسمية:

• عدد الخطوات الإجرائية لوضع الاتفاقية موضع التنفيذ.

• اتخاذ إجراءات للتقييم والمراقبة، وفق بصياغة اتفاق التسوية ووضع آلية للالتزام والتنفيذ.

إجراءات الوساطة:

إجراءات الوساطة مشابهة لكن هناك بعض الاضطلاع في الوساطة القضائية، حيث سوف تستعرض إجراءات الوساطة القضائية، وإجراءات الوساطة الاتفاقية من خلال مراكز الوساطة:

إجراءات الوساطة القضائية لدى القضاء:

- كما رسمها الدشرع الأردني في قانون الوساطة:

1- إحالة ملف الدعوى إلى قاضي الوساطة: حيث يحال إليه الملف كاملاً، ويجوز له تكليف الخصوم بتقديم مذكرات موجزة بأقوامهم، وأهم البيانات والبيانات 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 بأقوامهم وبياناتهم وبياناتهم، ودون الحاجة لتبادل هذه المذكرات والمستندات فيما بينهم.

3- تعيين موعد جلسة وتلبيته لأطراف النزاع أو وكلائهم القانونيين.

4- حضور أطراف النزاع وكلائهم جلسات الوساطة للاستماع، ويحق للوسيط الاجتماع بكل طرف منفرداً على حدة.

5- اتخاذ الوسيط ما يراه مناسباً لتقريب وجهات النظر وتسهيل إجراءات الوساطة، كإبداء الرأي، وتقديم الأدلة، وعرض الأساديد القانونية والسوابق القضائية.

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10 انظر: قانون الوساطة لتسوية النزاعات المدنية الأردني، المادة 4.
ناستعرض إجراءات الوساطة كما رسمها المشروع الجزائري:

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أولاً- عرض الوساطة: القاضي أثناء نظره للنزاع، عليه أن يعرض الوساطة على الخصوم، خلال دراجات النقاضي، فعرض النزاع من قبل القاضي ووجوب، والرضي بما من قبل الخصوم جوازي، ولا تتم الوساطة إلا بموافقة الأطراف عليها.

ثانياً-تعيين الوسيط: إذا وافق الخصوم على الوساطة، يقوم القاضي بتعيين الوسيط بوجوب أمر يتضمن اسم الوسيط وعنوانه، والمهمة الموكلة إليه، وتحديد الأجال الأول للتوضم على ألا تتجاوز مدة ثلاثة أشهر، ويمكن تجديدها مرة واحدة لمدة ثلاثة أشهر، بطلب من الوسيط وموافقة الأطراف، وتقوم المحكمة بتبليغ نسخة من أمر التعيين للوسام وللمخصول، وعلى الوسيط إعلام القاضي بقبوله للمهمة الوساطة، حيث يقوم القاضي بعد ذلك بدعوة الجميع لأول جلسة، طالما أن تحويل النزاع للوسام لا يرفع بيد القاضي عن النزاع مثل التحكيم، بل يبقى القاضي يراقب سير الوساطة، ولله اتخاذ الإجراءات والتداير لحسن سيرها.

ثالثاً-جلسات الوساطة: بعد موافقة الأطراف على الوساطة وقبول الوسيط مهمة الوساطة، يتم الدعوة للجلسات الأولى التي يجب حضورها من قبل الأطراف أو ممثليهم، حيث يقوم الوسيط بالتعريف بنفسه وطلب منهم التعريف بأنفسهم، ثم يشرح لهم دور الوسيط، وأنه حيادي تجاه الجميع، ويدعو على سرية الوساطة، ويدعوهم لضرورة وجود الثقة فيما بينهم لأغتم الأهم لنجاح الوساطة، ثم تبدأ مرحلة التفاوض حيث
على المدعى عرض دعوته، ثم يقوم الوسيط بتحديد نقاط الخلاف وترتيبها، ويعمل لتقصيب 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 الإطلاع على الوثائق المتعلقة بالنزاع، ونتهي جلسات الوساطة، إما بنجاح الوساطة وذلك بتوصول الأطراف لحل، حيث يتم تنظيم محاكمة بذلك يوقع من الأطراف والوسيط، ورفع للقاضي في الجلسة المحكمة لذلك مسبقاً ليصادق عليه، حيث يعتبر الاتفاق قطعياً غير قابل للطعن وبعد سنداً تنفيذياً، وذلك مرفقاً بالوثائق المقدمة خلال جلسات الوساطة وكذلك جدول بتوقيعه، علمًا بأن القاضي عند نظرة الاتفاق للمصادقة عليه، يتأكد من عدم تجاوز الوسيط حدود المهمة المولدة إليه، وأن الاتفاق الذي توصل إليه الأطراف لا يتعارض مع النظام العام، ويمكن أن تنتهي الوساطة بالفشل، وكذلك للقاضي إجاء الوساطة وذلك لعدم حسن سير الوساطة، أو طلب من الوسيط عند استحالة توصول الأطراف لحل ودياً، أو طلب من المصوم إذا وجدوا عدم جودة الوساطة لحل نزاعهم، حيث في هذه الحالة يقرر الوسيط محضر فشل الوساطة، يرفع للمحكمة الناظرة بالنزاع، ومواصلة إجراءات التفاوض.

**إجراءات الوساطة الاتفاقية لدى مراكز الوساطة**

في حالة وجود اتفاق مسبق على الوساطة بين الأطراف، يتقدم طالب الوساطة للمركز طلب خطي للوساطة (طلب وساطة)، و التي يجب أن يذكر فيه إلزام طبيعة النزاع وقيمة المطالبه، و ينبغي أن تكون مصحوبة بنسخة

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من اتفاق الوساطة المسبق، وأسماء، وعناوين، وأرقام الهاتف والفاكس وأرقام التلسكس وعناوين البريد الإلكتروني

أطراف الوساطة، وممثليهم القانونيين (إذا كان معروفيين) واسم الوسيط المقترح (إن وجد) من قبل الطرف أو
الأطراف طالب الوساطة، وطلب الوساطة يجب أن يكون مصحوبًا 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 فإنه تتبع ذات الإجراءات السابقة:

أ) الطرف الذي يرغب في بدء وساطة يقوم، في نفس الوقت، إرسال نسخة من طلب الوساطة إلى الطرف

الأخر أو الأطراف الأخرى.

ب) يتمتع على الطرف أو الأطراف الأخرى، في غضون 14 يومًا 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 14 يومًا، لن تكون هناك وساطة، وإذا تم الموافقة على الوساطة، فيجب

على الطرف أن يعيد إلى مركز الوساطة طلب الوساطة في أقرب وقت ممكن بعد بدء وساطة، مع إبلاغ الطرفين

الختياء أو الوظائف الفنية السابقة والهندية، وأن يوقع إعلانًا مفاده أنه لا يوجد ظروف معروفة له، من

المراجع أن يؤدي إلى أي شكوى بما يبررها حول حيازته أو استقلاله، ولأي طرف الحرية في الاعتراض على

تعيينه، وفي هذه الحالة يجب على المركز تعين وسيط آخر، واملطفيين حرية الاتفاق بأي شكل يتم إبلاغ

الوساطة بيانات الأطراف، وما لم يتفق على خلاف ذلك، كل طرف يقدم إلى الوسيط، في موعد أقصاه

أيام قبل موعد المتفق عليها بين الوسيط والأطراف لجلسة وساطة المقرر الأول، وهو بيان مكتوب باختصار

23
يلخص القضية وخلفية النزاع والقضايا التي تتعين حلها، وأن يرافق كل بيان مكتوب نسخ من أي وثائق يشير إليه، ويجب على كل طرف، في الوقت نفسه، تقديم نسخة من البيان المكتوب والوثائق الداعمة لطرف أو الأطراف الأخرى، حيث يتناقش الوسيط والأطراف آلية التسوية التي ستستخدم، ويسعون للوصول إلى اتفاق بشأنها، وفي حالة عدم اتفاق الأطراف على آلية التسوية الودية المستخدمة، للوصول إلى اتفاقية التسوية في الطريقة التي يراها مناسبة، مع الأخذ في الاعتبار في جميع الأحوال ملابسات القضية ورغبات الطرفين، ويسترشد بمبادئ العدل والجواب، وللowskiط أن يتعاون مع الأطراف شفويًا أو خطاب، جنباً إلى جنب، أو بشكل فردي، ويمكن عقد اجتماع أو اجتماعات في مكان يجدوه الوسيط بعد التشاور مع الطرفين، وعلى الوسيط عدم إخفاء أي أسرار يطلع عليها في جلسات الدولة للطرف الأخر، بدون موافقة الطرف الأول، ويطرد كل طرف الثلاثة الأطراف وال وسيط بعدد وهوية الأشخاص الذين سيحضرون أي اجتماع يعقده الوسيط، ويحق لكل طرف تحديد كتابة ممثل له مخلو تسوية النزاع نيابة عن هذا الطرف، وما لم يتفق الطرفان على خلاف ذلك، فإن الوسيط يقرر اللغة (اللغات) التي تحوي ما الوساطة، إذا تم الاتفاق على بين الأطراف على تسوية النزاع، بمساعدة الوسيط، يجب أن يتم كتابة الاتفاقية التسوية والتتوافق عليها من الأطراف وال وسيط، وفي ختام وساطة، المركز بهدف التكاليف، علماً أنه ما لم يتفقوا على خلاف ذلك، وعلى الرغم من الوساطة، ويجوز للطرفين بدء أو موافقة أي تحكم 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 للوسیط ولا الأطراف أن الكشف إلى أي شخص أي معلومات بشأن الوساطة أو شروط التسویة، أو نتيجة الوساطة.

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 تسویة ودية.

ج- عند إبرام اتفاق تسویة ودية مكتوب.

ح- عند انتهاء أي آجال محددة لإجراءات تسویة النزاعات وديًّا، ما لم يتم الأطراف بمددها، ويقوم الوسيط بإخطار الأطراف بهذا الانتهاء كتابياً.

خ- عند عدم إتمام تسديد أحد الأطراف الدفعات المستحقة كأجر الوساطة، أو عدم التمكن من تعيين وسط من الجهة المتنوعة فيها التعين.

انظر:

- قواعد محكمة وسط العدلين لندن للوساطة، المادة 2/13، والمادة 3-4-5-10؛ وقواعد الوساطة في مركز التحكيم المشترك لمركز دعوة دولي.
- وقواعد المحكمة لندن للتحكيم؛ وقواعد الوساطة لمراكز التحكيم والمساهمة في مركز القاهرة الإقليمي للتحكيم التجاري، لعام 2013؛ وغرفة التجارة الدولية بباريس، المادة الثانية، والمركز الدولي لتسوية النزاعات في جامعة التحكيم الأمريكية.
- أمر: قواعد الوساطة لمراكز التحكيم والمساهمة في مركز القاهرة الإقليمي للتحكيم التجاري، لعام 2013.
- إقرار كتابي أو شفهي من جميع الأطراف يفيد بانتهاء إجراءات الوساطة.

و - يمكن للقاضي أن يرفع إجراءات الوساطة تلقائياً، عندما يبين له استحالة السير الحسن لها.

نتائج الوساطة:

أ - في الوساطة القضائية إذا توصل الأطراف مع الوسيط إلى تسوية للنزاع 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 قضائي، ويكتسي الصلح بين الأطراف قوة الشيء الم قضى به، ويمكن أن يذيل بالصيغة التنفيذية، من رئيس المحكمة المختصة محلياً للبت في موضوع النزاع.

- قانون الإجراءات الددنية والإدارية الجزائري، المادة 1003/ 
- قانون الإجراءات الددنية والإدارية الجزائري، المادة 1002/ 
- قانون الإجراءات الددنية والإدارية والأردني، المادة 7/ 
- القانون رقم 08-05 الخاص بالتحكيم والوساطة الاعتفافية الحغر، الفصل 69/6972. قانون الإجراءات الددنية والإدارية الجزائري، المادة 1003/
ب- إذا لم يتوصل الوسيط لتسوية النزاع فعلياً تقدم تقرير إلى قاضي إدارة الدعوى أو قاضي الصلح، يذكر فيه
عدم توصل الأطراف إلى تسوية على أن يوضح في هذا التقرير مدى التزامهم ووكيلاتهم بحضور جلسات
الوساطة.

c- إذا فشلت التسوية بسبب تخلف أحد أطراف النزاع أو وكيله عن حضور جلسات التسوية، فيجوز لقاضي
إدارة الدعوى أو قاضي الصلح فرض عقوبة على ذلك الطرف أو وكيله، لا تقل عن مائة دينار ولا تزيد عن
خمسة مائتين دينار في الدعاوى الصلحية، ولا تقل عن مائتين وخمسين دينار في الدعاوى البدائية.

ه- عند انتهاء الوساطة يعيد الوسيط إلى كل طرف، ما قدموه إليه من مذكرات ومستندات ويعتم عليه
الاحتفاظ بصورتها تحت طائلة المسؤولية القانونية.

المحاكمة والاتفاق الوساطة:

- يجب على المحكمة المحالة إليها نزاع في مسألة أطراف النزاع في شأنا الاتفاق وساطة، أن تصرح بعدم القبول
إلى حين استنفاد إجراء الوساطة أو بطلان اتفاق الوساطة.

ميزات الوساطة:

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111 أنظر: قانون الوساطة لتسوية النزاعات المدنية الأردني، المادة 7.

200 أنظر: القانون رقم 08-05 الخاص بالمصالحة والوساطة الاتفاقية المغربي، الفصل 40، المادة 327/40.
1- ضمان السرية والخصوصية، حيث تعتبر إجراءات الوساطة سرية ولا يجوز الادعاء بها أو بما تم فيها من تنازلات من أطراف النزاع أمام أي محكمة أو أي جهة كانت.

2- محدودية التكاليف مقارنة بإجراءات النقاضي أو التحكيم.

3- تحقيق مصلحة طرف النزاع.

4- المرونة والخروج بحلول إبداعية وخلافة.

5- المحافظة على العلاقة الودية بين الخصوم.

6- استثمار الوقت.

7- عدم تحمل أدنى درجة من المخاطرة، نظراً لحرية الخصوم في الرجوع عن أي عرض تقدموا به أثناء جلسات الوساطة ما لم يتم تثبيته خطياً.

ويرى الباحث أن الوساطة الفعالة 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 التوسل إلى حل عن طريق الوساطة أو الانتقاص منه، وتحتاج الوسيط إلى الصمود أمام الضغوط الخارجية، وتجنب المواعيد النهائية غير الواقعة مع العمل، كذلك الحصول على دعم متمن من الشركاء لجهود الوساطة،

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1- قانون الوساطة لتسوية النزاعات المدني، المادة 8.
وفي بعض الظروف يمكن أن تكون قدرة الوسيط على استعمال الحوافز أو الوكالات التي تقدمها الجهات الفاعلة الأخرى مفيدة للتشجيع على التزام الأطراف بعملية السلام، حيث أن عملية الوساطة تؤثر بطبيعتها في ميزان القوى والخصائص السياسية داخل المجموعات المختلفة وبينها، ومن الضروري أن يكون لدى الوسطاء المجتمع الدولي، بوصفهم الجهات الفاعلة المتوفرة للدعم، حساسية للآثار الإيجابية والأثر السلبي المحتمل لعملية الوساطة على حلّ سواء، ومن الضروري أن يحتفظ الوسطاء بخيار تعليق مشاركتهم أو الانسحاب، إذا ما رأوا أن الأطراف تواصل المخادعات في جو من سوء النية، أو إذا كان الحل الذي في طريقه إلى الخروج للنور، يتعارض مع الالتزامات القانونية الدولية، أو إذا كانت جهات فاعلة أخرى تتحكم بالعملية، وتحتٍ من المساحة المتاحة أمام الوسيط للمشاركة، وهذا القرار يحتاج إلى التفكير ملياً في مخاطر الانسحاب، مقابل قيمة إبقاء الأطراف على الطاولة عند تغير عملية الوساطة، مع استكشاف وسائل بديلة لتسوية المنازعات بالوسائل السلمية.

ومن خلال ما تم دراسته في هذه الورقة تبين لنا أهمية الوسائل البديلة في حل النزاعات المدنية والتجارية، وكذلك النزاعات السياسية والسلبية، وذلك لما تتميز به هذه الإجراءات، وأهم مزايا استخدام الوسائل البديلة:

1- تقليل عدد الدعاوى التي تخالط القضاء، فقد أثبتت التجارب البلدان التي اتخذت بهذا النظام بأناiosaهم بشكل مباشر في تخفيض العبء على المحاكم.
2- محدودية التكاليف واستغلال الوقت: تؤدي الوسائل البديلة لتوفير الوقت والجهد والنقاط على الخصوم ووكالاتهم 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 نظم الوسائل البديلة ضماناً له مفعول أكثر من قرار المحكمة، لأنها تكون مبنية على الواقع الحقيقي للأحداث، بينما يشبه هذا الواقع عندما يعرض أمام القاضي، لذا يمكننا القول بأن هذا النظام أقرب إلى الواقع من القضية.

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 للrôيجين تقييم الأمور والبحث عن مصلحة الأبناء، وإيجاد طرق أفضل للمستقبل بالحوار والاحترام المتبادل مما يساهم في المحافظة على الروابط الاجتماعية.

6- تحقيق مكاسب مشتركة لطرفين: فالتسوية النهائية لهذا النظام (خاصة الوساطة) قائمة على حل مرض لطرفين.

7- المرونة: تنقسم إجراءات هذا النظام بالمراتع لعدم وجود إجراءات وقواعد مرسومة محددة.

8- المحافظة على العلاقات الودية بين الخصوم: تبقى العلاقات الودية بين الخصوم قائمة بعكس الخصوم القائمة 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 الحارس قد يساهم في حل النزاع.

10- الحلول الخلاقة التي يمكن التوصل إليها: تساعد جلسات نظام الوسائل البديلة على تجاوز العقبات وتوفير الحلول الخلاقة والإبداعية لحل النزاع.

11- تنفيذ اتفاقية التسوية رضاياً: 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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نجاة العابد
ملخص البحث

تهدف هذه الورقة البحثية إلى دراسة دور العشيرة واهتمامه ضمن الاتجاهات الحديثة كأداة لتسوية المنازعات داخل الدولة. سوف يركز الباحث على أهمية دور العشيرة في التخفيف من حدة المنازعات التي قد تج ↔راء القتال والحروب التي تؤدي إلى الموت. سوف يتبع الباحث المنهج النشيط وذلك عن طريق إجراء مقابلات مع شيوخ العشائر (8 شيوخ من عشائر مختلفة) في ليبيا وسوف تتمحور المقابلة كتالي: هل نستطيع أن نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير إيجابي في حل النزاعات بين الأشخاص والأطراف عن طريق تدخل العشيرة أو حكم العشيرة، ما هي النتائج التي يمكن أن تعكس على النزاعات بين الأشخاص بعد تدخل العشيرة. أشارت نتائج هذه الدراسة إلى أنه لا يمكن الاستغناء عن دور العشيرة في حل النزاعات والحلفاءات بين الافراد والأطراف ويدخل بين المحاكم المدنية والسلطات الحكومية ويرجع سبب ذلك إلى صفات المجتمع الليبي الذي يتصف بالجتمع العشائري الذي تخضع العادات والتقاليد المورطة من الأباء 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, الأفراد, شيخ العشيرة, ليبيا.
المقدمة

يشير مصطلح العشيرة إلى اسم لكل جماعة من أقارب الرجل، وهم بذلك لأن الرجل يعاشرهم ويعاشرونه. والقبائل هي التي يقبل بعضها على بعض، وهي جمع قبيلة والقبيلة جمع العتائل والعمائر تجمع البطون والبطون. تجمع الأخذة والأفخاذ تجمع الفصائل والفصائل تجمع العشائر، وأخيراً اتخاذ مصطلح العشيرة يطلق على اجتماع مجموعة من الناس والتزامهم بتقاليد معينة (تقاليد العشيرة) حتى وان لم يكونوا متعارفين من جهة النسب بل يكفي الاعتقاد حول عشيرة معينة ليحسوا عليها، وهم يؤدون الطاعة لرئيس واحد هو كبير العشيرة، وتأخذ العشيرة اسمها في الغالب من اسم جدها الأعلى الذي تنسب إليه مثل بني تميم وبني أمية وكنانة... الخ (الطيار، 2009: حيد، 2011).

يشكل العشيرة أو القبيلة في المجتمع الليبي الحجر الأساسي التي يرتكر عليها الأفراد في تعريفهم هويتهم. حيث يعتبر الانتماء للعشيرة من الأمور الأساسية في المجتمع العربي خاصة، والاعتماد على العشيرة يعزز ويعتبر بها الكثيرون لا سيما اذا شكل وحدة الارتباط والتماسك الاجتماعي لهم. وتلعب العشائر الليبية دور مهمًا في تنظيم علاقات الأفراد مع بعضهم وأيضا تنظيم علاقات المجتمع مع الدولة. وتقدم العشيرة دورًا مهمًا ورئيسًا في حل الكثير من النزاعات التي تنشأ بين الأفراد وهي بذلك تعتبر عنصر فعال لتحقيق الأمن والسلام الاجتماعي بين الناس (يعز مرسى عيد، 2010).
وقد برزت أهمية العشائرية قديماً وما زلت تعتبر اسلوباً حديثاً لحل النزاعات في ظل غياب القانون الذي ينظم العلاقة بين الأفراد قبل نشوء المجتمع المدني والنيظام القضائي الموجود حالياً (مجد حسن أبو حامد، 1987: إدريس محمد صقر، 1986). حيث ما زلت الكثير من الدول خاصة الدول العربية ترتقي بشكل أساسي على العشيرة في حل النزاعات. فهناك رجال العشائر مثل الشيوخ أو القضاة العشائريين الذين يتمتعون بالسمعة الطيبة والتقدير الكبير في المجتمع ويكون لهم دور فعال في تسوية النزاعات (عمرو خيري، 2007).

استخدام الدراسة

تحاول الدراسة عرض مشكلة البحث وتحديد أبعادها من خلال الإجابة عن الأسئلة التالية:

1. هل نستطيع أن نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات؟

2. هل هناك تأثير إيجابي في حل النزاعات بين الأشخاص عن طريق تدخل العشيرة أو حكم العشيرة؟

3. ما هي النتائج التي يمكن أن تكون على النزاعات بعد تدخل العشيرة؟

أهداف الدراسة

وبناء على ما تقدم فإن أهداف الدراسة تتعلق في العناصر التالية:

1. لبيان دور و أهمية العشيرة كاتجاه حديث في حل المنازعات.
2. لدراسة الأثر الاجتماعي في حل النزاعات بين الأشخاص والأطراف عن طريق تدخل العشيرة أو حكم العشيرة.

3. تعرض النتائج التي يمكن أن تعكس على النزاعات بين الأشخاص بعد تدخل العشيرة.

أسباب اختيار الموضوع

لقد دفعت الباحث جملة الأسباب لإختيار هذا الموضوع منها:

1. يعتبر الموضوع من المواضيع الهامة التي تستدعي الدراسة والتحليل لما له من علاقة هامة وقوية على الحد من النزاعات بين الأفراد والأطراف.

2. الكشف عن دور العشيرة في حل النزاعات حيث تعتبر العشيرة من أهم الأساليب التي يلجئ لها المتخصصين في حل النزاعات خصوصا في المجتمعات العشائرية.

3. قلة الدراسات العلمية حول هذا الموضوع، فأغلب الدراسات تركز على حل النزاعات عن طريق القضاء أو الحكومة، فدراستنا ستضع لكل موضوع نصيب كاف.

حدود الدراسة

وتتمثل حدود هذه الدراسة بالتالي:

اولا: الحدود الموضوعية
تقتصر هذه الدراسة على تناول الاتجاهات الحديثة في الالتباس الفاعلة لتسوية المنازعات: دراسة تجريبية على دور العشيرة في حل المنازعات في ليبيا.

ثانيا: الحدود البشرية

تقتصر هذه الدراسة على شيوخ العشائر في ليبيا

ثالثا: الحدود المكانية

تقتصر هذه الدراسة على ليبيا فقط

رابعا: الحدود الزمنية


المنهجية

اتبع الباحث المنهج النوعي وذلك عن طريق إجراء مقابلة مع شيوخ القبائل في ليبيا. حيث تم إجراء ثمان مقابلات مع شيوخ العشائر الليبية وقام الباحث بتوجيه الاستمالة التالية نحن نستطيع أن نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير إيجابي
في حل النزاعات بين الأشخاص والطراف عن طريق تدخل العشيرة أو حكم العشيرة، ما هي النتائج التي يمكن أن تتعكس على النزاعات بين الأشخاص بعد تدخل العشيرة.

كما قام الباحث بتسجيل اجبار كل شيخ ومن ثم تحليلها تحليل دقيق للوصول إلى أهم النتائج التي سوف تساعد الباحثين والمهتمين بمواضيع النزاعات على حل هذه النزاعات بالطرق السلمية والحمد من هذه النزاعات لما تسببه من أذا بشري ومادي.

كما قام الباحث بالرجوع إلى الكتب والبحوث والمقالات المنشورة في المجلات المحكمة المتعلقة بمواضيع العشيرة ودورها في الحد من النزاعات حيث قام الباحث بمراجعة المراجع والمصادر وجمع المعلومات وتحليلها وتفسيرها للوصول إلى أهم النتائج المتعلقة بدور العشيرة في الحد من النزاعات.

النتائج والمناقشة

قام الباحث بإجراء مقابلة مع شيوخ العشائر في ليبيا والبالغ عددهم ثماني شيوخ حيث قام الباحث بتوجيه الاستمارة التالية لهم هل نستطيع أن نعتبر دور العشيرة في حل المنازعة من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير ايجابي في حل النزاعات بين الأشخاص والطراف عن طريق تدخل العشيرة أو حكم العشيرة، ما هي النتائج التي يمكن أن تتعكس على النزاعات بين الأشخاص بعد تدخل العشيرة.

أولا خخة عن ليبيا ومجتمع الليبي.
تتبع ليبيا في شمال قارة أفريقيا وتبلغ مساحتها نحو 1,8 مليون كيلومتر مربع وبلغ عدد سكانها نحو 6 مليون.

يسود معظم أنحاء ليبيا مناخ صحراوي بما يزيد عن 85% من المساحة الكلية ومعظم سكان المناطق الصحراوية هم من البدو الرحل والمقيدون في الواحات الصحراوية مثل واحة الكفني وتبر المذكور في الكنjos蜷 الجنوبي الشرقي من ليبيا قرب الحدود المصرية والسودانية، والمجتمع البدوي في هذا الجزء له علاقات مع البدو من الجانب الآخر في مصر والسودان وتشاد وهم جميعا من أصول عربية ولهم نفس العادات والتقاليد.

اما سكان منطقة جنوب ليبيا فهو لهم علاقات مع بدو سكان واحة سبها في جنوب غرب ليبيا بهذا اضافة من اصول عربية وافريقية لهم صفات بديلية مشتركة مع البدو في جنوب شرق الجزائر وبدو شمال النيجر (محمود السيد، 2010: المولد للاحمدر، 2010).

لا شك ان المجتمع البدوي في ليبيا له نفس الصفات والعادات والتقاليد السائدة لدى المجتمعات البدوية في الشمال والجزيرة العربية والصحراء الكبرى والتي تحمها:

1- اللاتساع الاتم بالانتماء للعشيرة اولا والسلطات الحكومية ثانيا.
2- تفضيل حل النزاعات والخلافات بين الافراد والاطراف عشائري وليست لدى المحاكم النظامية والمدنية.
3- غياب مبدأ المصالحة عند النزاع بما يقره شيخ العشيرة.

ثانيا نتائج السؤال الأول (هل نستطيع ان نعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات؟)
التي الحديثةىل نستطيع ان نعتبر دور العشيرة في حل الدنازعات من الاتجاىات (اشارات نتائج السؤال الاول في وحديثاالذ ان شيوخ العشائر اترعو على اهمية دور العشيرة قديما وحديثينا ححل 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 احيانا بالعشيرة في حل النزاعات التي تتسبب بين الافراد مثل القتل وحوادث الطرق وغيرها.

يمكن القول بأن دور العشيرة في المجتمع البدوي في حل المنازعات والخلافات في القرن الحادى والعشرون هو

دور مقبول لدى المجتمعات البدوية وهو دور ليس جديد فهو دور موروث عن الآباء والأجداد منذ الألف السنين ومقبول أيضا لدى أفراد العشيرة ولدى أفراد المجتمع البدوي بالاضافة الى أنه معتمد من قبل السلطات الحاكمة والنظام الحاكم سواء كان ملكي او جمهوري او غيره من أنظمة الحكم في الوطن العربي.

ان دور العشيرة في حل النزاعات والخلافات في القرن الحادي والعشرون لا يمكن الاستغناء عنه وهو بديل مقبول للمحاكم المدنيه والقوانين الحكومية والسلطات المحلية.

ثالثا نتائج السؤال الثاني (هل هناك تأثير إيجابي في حلال النزاعات بين الأشخاص والأطراف عن طريق تدخل العشيرة او حكم العشيرة؟)

اما فيما يخص السؤال الثاني (هل هناك تأثير إيجابي في حل النزاعات بين الأشخاص والأطراف عن طريق تدخل العشيرة او حكم العشيرة؟) الاشارات نتائج المقابلة الى ان هناك تأثير إيجابي في حل النزاعات بين الافراد والأطراف عند الاحتكام الى العشيرة او شيخ العشيرة وهذا يدل الى أهمية دور العشيرة في حل النزاعات وتخفيض
حالة النزاعات واضرار النزاعات التي قد تؤدي الى قتل المزيد من الأفراد والجلوة للعائلة. وتعني الجلوة اي رحيل عائلة القاتل أو المتسبب بالنزاع الى منطقة أخرى وهذا بدءته لمجر عائلة المتسبب بالنزاع من الأقامة في منطقة التي ولد وترعرع فيها.

لا بد من الاعتراف ان حل النزاعات والخلافات بين الأفراد في المجتمع بديوي له تأثير ايجابي على سلوك المتنازعين فيما بعد، اي بعد حل النزاع أو الخلاف من قبل شيخ العشيرة بعد اخذ ما يسمى بالعطاء بين الشخصين المتنازعين. واكد ان اجماع بأن الحلول العشائرية هي اقوى في حل النزاعات، ويمكن للمجتمعات والافراد من البدو الالتزام بما يحكم شيخ العشيرة ويمكن رفض الحل ان كان عن طريق المحكم المدنية أو السلطة الحاكمة ذات الشأن.

رابعا: نتائج السؤال الثالث (ما هي النتائج التي يمكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة؟)

واخيرا كانت نتائج السؤال الثالث (ما هي النتائج التي يمكن ان تنعكس على النزاعات بين الاشخاص بعد تدخل العشيرة؟) فقد اشار الشيوخ الى ان دور العشيرة مهم في حل النزاعات ولا يمكن ان يستغني عنه لما له من نتائج ايجابية في حل النزاعات وعدم النفوس وكما ذكرنا سابقا ان الدولة أو النظام يستعين في بعض الأحيان بحكم العشيرة عندما تعجز الدولة أو النظام عن حل النزاع ومن النتائج الإيجابية لحكم العشيرة في حل النزاعات ما يلي: ان العشيرة تعتبر نظام اجتماعي يساعد على الاستقرار وفض النزاعات وتعمل على تمازج المجتمع.
يعكس الدول العربية التي يكون فيها نظام العشيرة ضعيف ولذلك تجد ان المجتمعات العربية تتسم بالتفكك.

تعمل العشيرة على ضبط سلوك الأفراد وتحث الأفراد على اتباع العادات والتقاليد.

من الغريب أن العشيرة والتعامل تعود سريعا بين المتخصصين إذا كان الحكم صادر عن شيخ العشيرة وكان شيئا لم يكن حتى لو كانت المشكلة قتل أو نهب أو سلب. بينما تبقى الكراهية سائدة فيما بعد بين المتنازعين في حالة صدور الحكم من المحكم المدني أو النظامية.

خلاصة القول تشير حل المنازعات حاليا بين أفراد المجتمع البدو في الصحاري العربية وفي الواحات والتي تسبق وان ارتنا إلى أن هذه المساحة الصحراوية في ليبيا تبلغ نحو 85% من مساحة الدولة، وهي لا تقل عن هذه النسبة في معظم الدول العربية الأخرى با تزيد عن ذلك في بعضها. تشير إلى ضرورة الاستمرار في تبني الدولة لحل المنازعات لسكان هذه المناطق عن طريق شيخ العشيرة اعتبارا من الاتجاهات الحديثة والافضل من تطبيق القانون أو القضاء في حل المنازعات في المجتمعات البدوية.

الخاتمة

هذ هذا البحث الى دراسة دور العشيرة كأسلوب لفض النزاعات بين الأفراد والأطراف. وقد قام الباحث بإجراء مقابلة مع شيوخ العشائر وتوجية الأسئلة التالية لهم هل تستطيع ان تعتبر دور العشيرة في حل المنازعات من الاتجاهات الحديثة التي لا يمكن الاستغناء عنها في حل النزاعات، هل هناك تأثير إيجابي في حل النزاعات بين الاشخاص والإطراف عن طريق تدخل العشيرة أو حكم العشيرة، ما هي النتائج التي يمكن ان تكون على النزاعات بين الأشخاص بعد تدخل العشيرة.
والنتائج التالية:

1. أن المجتمع في ليبيا هو مجتمع عشائري تلعب فيه العشيرة دوراً مهماً في جميع المجالات السياسية والاقتصادية والاجتماعية...

2. العشيرة كانت وما زالت وحدة سياسية واجتماعية واقتصادية متكاملة وهي سر فعالية المجتمع.

3. عمّار العشيرة دوراً مهماً في ضبط سلوك أفراد المجتمع وكذلك تلعب دوراً رئيسيًّا في حفظ كيان المجتمع من الإخطار الخارجي.

4. العشيرة الدول الأكبر في فض النزاعات والصراعات وكذلك معالجة المشاكل التي تواجه الأفراد.

5. حافظت العشيرة على خصوصية وتوكالاتها بصورة خاصة وبباقي أفراد المجتمع بصورة عامة. تبين من دراستنا أن العشيرة لها قوة على الساحة الاجتماعية نتيجة ضعف أو خلل في أجهزة الدولة.

التوصيات

1. الحكم العشائري من أهم الأساليب الحديثة التي تسهم في زرع المحبة بين الأفراد والأطراف المنازعين لذلك يجب عدم استثناء العشيرة في حل النزعات.

2. خان دور العشيرة في حل المنازعات والخلافات في القرن الحادي والعشرون لا يمكن الاستغناء عنه وهو بديل مقبول للمحاكم المدنية والقوانين الحكومية والسلطات المحلية.
3- لا بد من الاعتراف ان حل المنازعات والخلافات بين الافراد في المجتمع البدوي له تأثير إيجابي على سلوك المنازعين فيما بعد، أي بعد حل النزاع أو الخلاف من قبل شيخ العشيرة بعد اخذ ما يسمى بالعطوة بين الشخصين المتنازعين.

4- ليس في الدولة حل النزاعات بين الافراد والاطراف عن طريق شيخ العشيرة اعتبارا من الاتجاهات الحديثة والافضل من تطبيق القانون أو القضاء في حل المنازعات في المجتمعات.
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The inevitability of institutionalizing arbitration to settled Halal products disputes

بحث قدمه كلاً من:
أحمد سالم أحمد العجيلي و د. محمد ليباً

للمشاركة في المؤتمر العالمي لتسوية المنازعات ضمن محور الإتجاهات الحديثة في الآليات الفاعلة لتسوية المنازعات المعقد في كلية أحمد إبراهيم للقانون بالجامعة الإسلامية العالمية ماليزيا في الفترة من:
(9/10- أغسطس -2017 - كوالالمبور - ماليزيا)

1- طالب دكتوراه في كلية أحمد إبراهيم للقانون، الجامعة الإسلامية العالمية ماليزيا.
2- أستاذ مشارك بقسم الشرعية، كلية أحمد إبراهيم للقانون، الجامعة الإسلامية العالمية ماليزيا، موبايل: 0132189737

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مقدمة: يشهد المنتجات الحلال رواجاً تجارياً عالمياً منقطع النظير، إلا أنه على الرغم من ذلك فإنه لايزال تفتقر إلى نظام قانوني قادر على التصدي للمنازعات التي تثيرها سوأ من ناحية من الإطار القانوني وواجب التطبيق على هذه المنتجات، أو من حيث الجهات التي يمكن الالتفاف إليها لتسوية النزاع، فمن حيث الإطار القانوني الواجب التطبيق فإن هذه المنتجات تُخصب إلى جزء من النظم القانونية والشرعية وفنية والتجارية، المحلية والدولية المتنوعة التي تُنتج في إطار قانوني يتجاوز المفهوم القانوني المألوف لدى المؤسسات المعنية بتسويتها، وأما من حيث الجهات التي يمكن الالتفاف إليها لتسوية النزاع، فإن المنتجات الحلال لم تحظى حتى الآن برؤية مُحصنة بتسويتها منعاً على الرغم مما تميز بها من طبيعة خاصة تكاد تتجاوز الوسائط التقليدية المعمولة بما في النظم القضائية والودية، وهو ما يقتضي تداول هذه الوسائل في ضوء الطبيعة الخاصة لهذه المنتجات لبيان مدى إسهامها على الرغم من إفراز الدراسة لملاءمة التحكيم الأساسي لطبيعة هذه المنتجات من حيث استيعاب الجوانب المرتبطة بها، وهو ما يُعلي تمحيص خصائص هذا النوع من التحكيم، ومع محاولة إجراء مقارنة بين المؤسسات ذات الصلة بالمنتجات سواء من حيث إخصاصها بتسويتها المنازعات ذات الطبيعة المشابهة في بعض جوانبها مع المنتجات الحلال، أو من حيث المؤسسات العامة في الجوانب الفنية المتعلقة بالمنتجات، أو تلك المؤسسات الإسلامية عالمية الدواج، والتي يمكن أن تقدم دوراً في تسوية هذه المنازعات، وصولاً إلى قاعدة يُمكن الاستناد إليها لتأسيس مؤسسة تحقيق مُخصصة في تسوية منازعات المنتجات الحلال التدابير الصعوبات التي تواجهها بشكل يكفل تحقيق أهميتها التجارية وتحافظ على طبيعتها الفنية والشرعية، وذلك من خلال تحقيق دخول أولاً وثانياً الطبيعة القانونية للمنتجات الحلال، ومدى ملاءمة الوسائط القضائية والوسائط البديلة لتسويتها منعاً، فيما يتم إدراهما دور التحكيم الأساسي في تسوية منازعات المنتجات الحلال.
المبحث الأول : الطبيعة القانونية للمنتجات الحلال ومدى ملائمة الوسائط القضائية والوسائل البديلة لتسوية منازعاتها

تُشكل طبيعة المنتجات الحلال أساس البحث عن الوسيلة المناسبة لتسوية المنازعات المتعلقة به، وهو ما يقتضي بحث الطبيعة القانونية للمنتجات الحلال في مطلب أول، ثم بيان مدى ملائمة الوسائط القضائية والوسائل البديلة لتسوية المنازعات لطبيعة المنتجات الخاصة لهذه المنتجات في مطلب ثان.

الطلب الأول : الطبيعة القانونية للمنتجات الحلال :

تتفرد المنتجات الحلال بطبيعة قانونية خاصة أمثلتها الجوانب المتعددة والمتنوعة، بما في ذلك النظرة القانونية ذات العلاقة بالمنتجات محلية ودولياً، وهي تشكل فيما بينها الإطار القانوني لهذه المنتجات، وهو ما يعلي بيان مضمون هذا الإطار من حيث الجوانب المتصلة به، والقوانين الحاكمة له، ثم بيان الطبيعة الخاصة للتنظيم القانوني للمستقبلات:

أولاً : مضمون الإطار القانوني للمنتجات الحلال:

يُعرف الفقه القانوني المنتج بتعريف مختلف، نورد منها تعريفاً له بأنه "كل منقول مادي قابل للبيع والشراء جنباً جنباً، وكذلك تعريفه "بأنه كل منقول سواء تعلق الأمر بمادة أولية تم تحويلها صناعياً أو لم يتم تحويلها و سواء تعلق الأمر بمقدار أندمج في منقول أو لم يندمج"، كما تُعرف المنتجات الحلال ب أنها المنتجات المباحة وفقاً للشريعة الإسلامية، وعما تقدم يتبين أن المنتجات الحلال تجمع بين صفات

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1 - قطعة بسارة، المستويلة المدنية للمستقبل وآرائها على حماية المستهلك، ماجستير مقدمة إلى كلية الحقوق والعلوم السياسية بجامعة تيميم، دباغين - سطيف 2 الجزائر، 2016، ص 14.
المنتجات عموماً، بالإضافة إلى الضوابط الشرعية للإباحة وفقاً لأحكام الشريعة الإسلامية، وهي جوانب متعددة ومداخلة يقتضي الأمر توضيحها ليبيان أثرها على توسيع طبيعة هذه المنتجات:

- الجوانب الفنية: وفيها تكاد تتطابق المنتجات الحلاؿ مع نظائِها من المنتجات غير الحلاؿ، وتعني كما كل ما ينصح بالمنتج من حيث مكوناته ومعادها الأولية ومصدرها وغيرها من الخواص الفنية المتعلقة ByValowاء، فضلاً عن عملية التصنيع وما تنطليه من أسس فنية، وهي أسس ترتبط مباشرة بممارسات السلامة والجودة وغيرها من النظم المتعلقة بالإنجاح والتسويق وغيرها وصولاً إلى المستهلك النهائي، وهي نظير مختلفة حسب المواصفات القياسية للمنتجات من دولة لأخرى، وهنا تبرز إشكالية تتمثل في الطبيعة المركبة للمنتج ومكوناته، حيث أنه يفعل التكامل التجاري والتنمو الصناعي أصبحت المنتجات تأتي عناصر ومحتويات ترد من دول متعددة تنتمي نظام قانونية مختلفة، كأن تخضع لقانون من حيث مواده الأولية وأخرى من حيث عملية الإنتاج وتاثير من حيث التعريف، وأخير بشأن التوصيف بوصف الحلاؿ، إلى أن يصل إلى المستهلك في قانون آخر، وهو جوانب تنتقى إلى تدقيق مركلي بشأن التحقق من وصف الحلاؿ فيها، وهو ما يعكس على عمق الإشكاليات والمشاكل المثيرة بشأن هذه المنتجات في هذا الجانب؟

- الجوانب الشرعية: سبقت الإشارة إلى أن المنتجات الحلاؿ عبارة عن منتجات مطابقة للشريعة الإسلامية، إلا أنه مع تطور النظم العلمية المتعلقة بالمنتجات باتت هذه الصناعة تحت مسائل شرعية ليمكن نظرها بمعزل عن تمحيض الجوانب الفنية المرتبطة بها، وهي مسائل تثير بشأن كل جوانب المنتج كمكوناته وعملية إنتاجه وإعادة التدوير والتسويق، وهو ما يقتضي التعرض إلى قواعد شرعية متعددة كقواعد.

1 - هناك تفاوت بين الحلاؿ والطيب، ويزيد بالطيب هو مبادئ المنتج للعمر والجودة وفقاً للأحكام العامة للشريعة الإسلامية بعملية تقديم من د. نورالذدى أحمد فضيلة.
2 - HAJAH ZAWIAH ABDUL MAJID ,halal logistics , seminar INHART IIUM 23/may/2017
الاستحالة الشرعية والإستهلاك والاستقلال، فضلًا عن ضوابط الشهادات وقواعد الضرورة وقوادها وغيرها، وهي مسائل محل إختلاف واسع بين المذاهب الشرعية، وهو ما يлуكس بشكل مباشر على إختلاف المؤسسات للمأثرة لشهادات الحلال وتصنيف المنتجات فيما بينها تبعًا لإختلاف المذاهب المعتمدة من قبلها، خصوصًا مع غياب معايير متعارف عليها للمنتجات الحلال.

- الجوانب العلمية: تلعب الجوانب العلمية دورًا هامًا في المنتجات، ولا يعني بالجوانب العلمية هنا تلك الجوانب المتعلقة بتطوير المنتجات، وإنما يعني بما الجوانب المترتبة بتبادل المنتج واعتماده، وهي جوانب يختلف الفقه القانوني حول آثارها القانونية لضمان المنتج وسلامته، وتتفق هذه الجوانب كواقع حقيقي أمام المنتجات الحلال وذلك بإثارة جوانب تثير الشكوك في صحة وصف الحلال وفقًا للضوابط الشرعية.

ويؤخذ على هذه المنتجات عدم مواكبتها للتطورات العلمية لموائم للجوانيات الشرعية هذه المنتجات ١، كما يؤخذ عليها في بعض الأحيان عدم توفر الإمكانيات اللازمة لتحقيق من الحلول خاصة فيما يتعلق بتقنيات النانو والجزيئات متناهية الصغر في المنتجات، ٢، كما يلعب البيقين العلمي دورًا بارزاً أيضاً في تداول المنتجات واعتمادها، ومن ذلك الجوانب المتعلقة بتبادل المنتجات المعدلة جينيًا، وحيث جوانب تسعى على الإختلاف حول صحة وصف الحلال في المنتج.

- الجوانب التجارية: تنتمي المنتجات الحلال بمزية إضافية وهي إستثناءاً بفترة تستهلك هذه المنتجات وفقًا لإتزامها الدينية، وهي بذلك تشهد رواجاً تجارياً عالمياً متقطع النظير يعدل تداول بلغ ٣.٥.

- ٧- 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, ٢٠١٢.

١- مجلة الجزيرة عدد ٥٤- أغسطس / ٢٠١٦ بعنوان صناعة الحلال، ص ١٤
٢- من المادة ١١ من إتفاقية AIA كما وردت في الجزء ١ من المرحلة الثالثة من موديل الدليل التعريفي لإعداد أطر السلام الإحياية الوطنية - مشروع لجنة الأمم المتحدة للمينة ورفقة البيئة العالمي ص ١١.
تريليون دولار في 2012 ومتوقع أن يصل إلى 4.6 تريليون في 2020، وهو ما يوضح الوتيرة التجارية المتسارعة لها، والتي تُسهم بشكل كبير في تطور كل الآليات المتعلقة بهذه التجارة وفق مقتددها نظم تسوية المنازعات بشكل يكفل تنفيذ المتطلبات التجارية لهذه المنتجات بميزارا تنافسياً عالمياً.

- التعددية والعالمية: وتعني بما المستهلك والمتحضر أو المنتج، فبما المستهلك، فعلى المستهلك، فعلى العلامة التجارية.

المعنية بالمنتجات الحلال، أي المسلمين وتعدهم وإدارتهم حول العالم يจบون تمتاوات، دون تبني نظم إسلامية، وأخرى تحتوي على غالبية مسلمة، وأخرى تشكل أغلبية في بلدان لاتنبذ النظم الإسلامية، وهو ما يُصعب هذه المنتجات إلى نظام قانونية مختلفة عند إنتاجها ضمن هذه الدول أو استيرادها إليها بشكل يتجاوز نطاق القضائي المحلي، أما المنتج فبُرّك به تداوله ضمن الأسواق التجارية كمنتج قابل للإستهلاك، أو كمواد مصنعة بقدر أو آخر وهو ما يُعترضه إلى نظم وقوانين متعددة ومتعددة محلية ودولية.

- تعدد القوانين الحاكمة: تُصعب المنتجات إلى عدد من القوانين والنظم التشريعي والتنظيمية والفنية المحلية والإقليمية والدولية للتنوعة التي لا تفتح تحت حصار، وهي بذلك يُجرر إشكالات يمكن حصرها في فنين رئيسيين، تكمن أولهما في تعدد النظم القانونية بشكل يتجاوز العلامة الذي يلم به الفاضي، وكمن ثانيهما في المحتوى الفني لهذه النظم بما يجعلها مدعية للإستخدام بخبر قضائي يتولى محصصها وبيان جوانبها الفنية، وهي إشكالات تزداد تعقيداً تبعاً لتعدد النظم الحاكمة للميزانات عند تداولها في الأسواق العالمية، أو عند تصنيعها تبعاً لنظم الحاكمة لمكوناتها كما يُقدم، وبأيّ ذلك من خلال الفُراغ التنظيمي الذي تعانيه هذه المنتجات على المستوى الدولي على الرغم من وجود مبادئ توجيهية لمنجات

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1- بيانات من المؤتمر الدولي لاقتصاديات المنتجات الحلال المعقود في جامعة سفاريا تركيا في 19-20 مارس/2015.
الغداء النشط ضمن دستور الغداء العالمي، إلا أن تعاون تعاوني ضعيف يعجج على حل المنازعات التي تثار بشأن هذه المنتجات، وهو ما يعكس على دور القائم على تنمية هذا النزاع.

ثانياً: التنظيم القانوني للمنتجات الحلال:

يعكس تعدد الجوانب المتصلة بالمنتجات على النحو المقدم على وضع الآلية القانونية لتنظيم المنتجات، وهو جانب رافعة معظم التشريعات من خلال سن قانون ذو طبيعة تستوعب النظريات الناجحة عن المنتجات ومتابعتها حالةً بحالةً إجراء تعديلات تشريعية، وذلك من خلال منح السلطة التنفيذية صلاحية توصيف المنتجات من الناحية الفنية ومنح المواصفات القياسية لها، ومن ذلك ما نص عليه القانون الليبي رقم 5 لسنة 1990 بشأن إنشاء المركز الوطني للمواصفات القياسية الذي ينص في مادةه الأولى على إختصاص المركز بكافة ما يتعلق بضبط الجودة وإعداد المواصفات واعتمادها والرقابة عليها وفقاً للأصول العلمية والحضارية، وتأسساً على ذلك يتولى المركز المذكور إعداد وإعتماد المواصفات القياسية للمستجدة، أو تلك التي طرأت عليها تغييرات وفقاً للظروف الحالية، وذلك بإعلان المواصفة لتنفيذها والتفتيش بما من قبل المصمرين والمستوردين والعمل بمضاها من قبل المؤسسات الضبطية المعنية بالمنتجات كجهاز الجمارك وأجهزة مراقبة المنتجات والحرس البلدي، وهم هذه المواصفات تتغير تبعاً للتطورات الفنية والعلمية التي تطرأ عليها من جهة، وبفعاً لإختلاف معايير إعتماد المواصفات من دولة إلى أخرى حسب الظروف الداخلية لكل دولة، وهو ما يخلق صعوبات حقيقية تواجه القائم على

(CAC-GL – 24 – 1997) - أعتمد في الدورة 22 جلالة الدستور الهاشمي (1)
(CAC-GL – 24 – 1997) - أعتمد في الدورة 22 جلالة الدستور الهاشمي (1)
(CAC-GL – 24 – 1997) - أعتمد في الدورة 22 جلالة الدستور الهاشمي (1)

1 - وفقاً لتعريف المواصفة القياسية الدولية ISO 9001:2000 و المواصفة القياسية الليبية رقم (0) لسنة 2005 المواصفة القياسية هي وظيفة صنفت بالتعارض أو التفاوض أو المواصفة من جميع الأطراف ذات العلاقة وتكون الموضوع المواصفة وهي تتعلق بإنتاجية والعملية، وتهدف إلى تحقيق المصلحة العامة وتشجيع عن هيئة معرف بما على المستوى الوطني أو الإقليمي أو الدولي.
2 - قانون إنشاء المركز الوطني للمواصفات القياسية الليبية رقم 5 لسنة 1990، صدر في 15/8/1990.
المنشآت التي ينظر بشأن هذه المنتجات لحالتها، إذا تجاوزت نطاق الدولة الواحدة، لا سيما مع ضعف النظام القانوني للمنتجات الحلال على المستويين المحلي والدولي، وذلك 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 موافقات موحدة تستوعب كل الجوانب المتعلقة بالمنتج، وفي مقدمتها الجوانب الشرعية التي يقتضي مفهوم الحلال صحة مراعاها في كل الجوانب المتعلقة بالمنتج، الأمر الذي لا يزال يعاني من اختلافات واسعة يصعب معها توحيد المعايير وفقاً لأحكامها.

المطلب الثاني: مدى ملاءمة الوسائط القضائية والوسائط البديلة لتسوية منازعات المنتجات الحلال.

لا تنفق منازعات المنتجات الحلال أن تصل بكل الجوانب الإجرائية المتعلقة بالمنتجات في النظام القضائي، إلا أنه نظرًا للطبيعة الفنية لهذه المنتجات التي تقتضي إعمال الخبرة الفنية بأشعة من قبل القضاء، سوف تقتصر على استعراض مدى كفاية الاستناد إلى الخبرة الفنية في تسوية منازعات المنتجات الحلال.

أولاً: مدى ملاءمة الوسائط القضائية لتسوية منازعات المنتجات الحلال.

ويمنا وفقاً للمدراسة بحث مدى ملاءمة الآليات التي يُعملها القضاء للتصدي لمنازعات المنتجات الحلال، وتتحصص هذه الآليات في الخبرة الفنية أساساً، وهي الوسيلة التي يلجأ إليها القضاء لنظر المنازعات ذات الجانب الفني، والحبرة الفنية عبارة عن إجراء للتحقيق يعهد به القاضي إلى شخص خبير في جانب في معين، يرغم بحث واقعية معينة أو تقديرها أو إبداء رأي علمي أو فني بشأناً، وهي واقعة تتجاوز فهم الشخص العادي، كما تتجاوز نطاق معارف القاضي، وتتنخض للخبرة الفنية للسلطة التشريعية.
لمحكمة، كما يتعهد لسلطتها أيضا الأخد بتقرير الخبير من عدمه كليا أو جزئيا، كما أن المحكمة تترخيص بسلطة تعين الخبير من عدمه كومقا صاحبة الولاية في تقديم أهمية دور الخبير في الدعوى، مما تقدم ينتج أن الخبرة الفنية لانعدموا كومقا وسيلة من وسائل الإثبات التي تترخيص المحكمة بالإستناد إليها أو الإلتقادات عنها إلى جانب ما يخص له الخبر من مسارات قضائية أخرى تتتعلق برد وعيشماه، مما تقدم ينتج أن القضاء غير قادر على استعداد الجوانب الفنية للمعتردة التي تثار من مانعية منازعات المنتجات الحلأة من خلال اللجوء إلى الخبرة الفنية، وذلك من حيث عدم إلزامية اللجوء إلى الخبرة الفنية وخصوصها المطلق لسلطة القضاء من حيث إعماها وإهمالها وهو ما قد يؤدي إلى الفصل في المنازعات على غير أساس فني، فضلا عن أن مهمة الخبير في الخبرة الفنية تكاد تكون محدودة وتقتصر على خبر أو أكثر في مجال معين، وهو ما لا يكفل الإحاطة بالجوانب التي تثيرها المنتجات الحلأة والتي تنتج فيها الجوانب العلمية إلى الحد الذي يوجب تناولها كمزيج علمي دوما فصول فيما بينها وهو ما لن ينصبه الإدارة بخير ولا فريق من الخبراء، ولن يلب قلبي مقتضياتها التجارية، مما نتهي معه إلى عدم ملاءمة القضاء لنسوية منازعات المنتجات الحلأة.

ثانيا: مدى ملاءمة الوسائط البديلة لسوسية المنتجات المنتجات الحلأة.

الوسائط البديلة هي عبارة عن وسائل أو طرق يتم اللجوء إليها من أطراف المنازعات لنسويتها خارج القضاء، وهي وسائل بسيطة وعملية ومرونة تستأثر بمكناتها في فض المنازعات بدلا من التقيد بالإجراءات القضائية التي قد لا تتناسب مع طبيعة النزاع المعروض، وهي أسباب أدت إلى نكران صفة

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1- المادة (201) من قانون المراهقات المدنية والتجارية الليبي.

547
The alternative methods of dispute resolution are not subject to any priority, and their use depends on the relationship between the disputants. These methods are not limited to the legal or social relationships, and they are based on the principles of the dispute resolution processes. The alternative methods are considered an alternative to the legal methods.

- Settlement: This is a friendly method in which two or more parties agree to settle the dispute or conflict between them, as defined by the Libyan law as a "settlement agreement that must be signed by both parties and authorized by the court", and the settlement can be achieved by the parties themselves or with the help of a mediator or arbitrator.

- Mediation: This is a method in which a third party helps the disputants reach an agreement through discussion and negotiation.

- Arbitration: This is a method in which a third party helps the disputants reach an agreement through discussion and negotiation.

- Litigation: This is the traditional method of resolving disputes through the court system.

References:
2. Look up data (525) in the Libyan law.
3. Look up data (548) in the Libyan law.
الوساطة: وهي عبارة عن مفاوضات غير ملمحة يقوم بها طرف محلي يسعى إلى التوسط بين طرفي النزاع لتسوية النزاع، فيما بينهم معاً، على قدرات ووسائل الشخصية الخاصة مع الحفاظ على سرية المعلومات التي يطلع عليها.

وقد هجرت معظم التشريعات هذا اللفظ لصالح لفظ التوكيف دونما تفريق بينهما، ومن ذلك ما نص عليه قانون الأونستال النمودجي للتوكيف التجاري الدولي لسنة 2002 الذي يقضي في مادته الأولى على أنه "الأغراض تنفيذ هذا القانون يقصد بمصطلح التوكيف أي عملية سواء أشير إليها بتعهد التوكيف أو الوساطة أو تعهد آخر ذو مدلول مماثل أن يطلب فيها الطرفان من شخص أو أشخاص آخرين مساعدةهما إلى التوصل إلى تسوية ودية لنزاعهما ..."، وهو اللفظ الذي أختاره القانون الليبي، وطرق فيه بين ثلاثة أنواع، يمكن تسميتها توكيف قضائي وتوكيف إداري وتوكيف خاص، وأما القانون الطبيعي فهو المهمة التوكيفية التي تؤكلها المحكمة إلى وسيط أو خبير يتوتي عملية التوكيف بين الخصوم في منازعة عضوية أمامها وفقاً لأحكام قانون المرافعة المدنية والتجارية، وأما الإداري هو الذي تتولاه لجنة مكونة من وزارة العدل ضمن نطاق الإداري الذي وقعت فيه المنازعه، ويتم اللجوء إليها من قبل طرف أو أكثر من أطراف النزاع، وإذا توصلت اللجنة إلى التوفيق بين الأطراف أعدت محاضراً بذلك وصدمتها من قبل المحكمة الجزائية بموجب أمر من القاضي بشكل ينفي الخلاف بين الأطراف، أما النوع الثالث والأخير وهو الوساطة أو التوكيف الخاص، ففيه يتوسط شخص أو أكثر طرف نزاع إرادته المنفردة وبناءً على لجوة أحد الأطراف أو كليهما إلى أن التوكيف وعلى الرغم من الدور الذي يتولاه لتسوية المنازعات بشكل عام، إلا أنه لايمكن أيضاً التعويل عليه بشكل كلي لتسوية

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1- مزيد من التعريفات تبطر: أ. نوري محمد صدقي و د. بشتة زغلوش، الوساطة في إنهاء الخصومات الجنائية "دراسة تعديلية نقدية"، مجلة الشريعة والقانون، العدد الأربعون، أكتوبر 2009 ص 294 ومابعدها.
2- القانون الليبي رقم (4) لسنة 2010 بشأن التوكيف والتحكيم.
منازعات المنتجات الحلال نظراً لما لها من خصوصية تقتضي تسويتها بشكل مؤسسي قادر على
الإحاطة بكافة الجوانب المتصلة بما .

- التحكيم : ويمكن تعريفه بأنه اتفاق يقضي بعرض النزاع القائم أو المحتمل بين الأطراف برأي
ئيس المحكم ، أو مؤسسة مختصة بالتحكيم مع اختيارهم لكيكية الفصل في النزاع والقانون الواجب
التطبيق خارج نطاق القضاة . وفضلاً عنما يحتوي نظام التحكيم من خصوصية من حيث مكانته الاتفاق
على طريقة تسوية النزاع والقانون الواجب التطبيق ، فإنه يتميز عن غيره من الوسائل الودية الأخرى في
جانب المؤسسي الذي يتضمن نظام متكامل يمكن التعويل عليه بشكل يتوافق طبيعة هذه المنتجات
وهو ما يقتضي من الدراسة أن نفرد له مبحثاً مستقلًا لتناوله بشأ 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
للقضايا من ولاية عامة في نظر المنازعات ، وتأتي ذلك من خلال ثقة المنازل بين الآليات البديلة التي
تقدمها لتسوية المنازعات والتي تُقدّم كمزايًا لنظام التحكيم ، وتحقيق من مدى ملاءمة التحكيم للطبيعة
الخاصة للمنازعات المنتجات الحلال ، حريّاً بنا تقليم مزاياه في ضوء الطبيعة الخصبة للمتنازعات الحلال
وذلك ما ستتناوله في مطلب أول ، ثم بيان المؤسسات المختصة بالتحكيم ، وتلك المعنية بالمنتجات
والجوانب المتصلة به والتي يمكن من خلالها تأسيس مؤسسة تُغنى بتسوية منازعات المنتجات الحلال ، وهو
ما ستتناوله في المطلب الثاني .

1 ملاحظة : نظر في تعريف التحكيم مثلاً د. رفيق نجمي حاجي ، المحاكمة التجارية الدولي ، دار الثقافة للنشر والتوزيع ، الطبعة الأولى ، 2006 . عماني 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 لتوقف على مدى ملاءمة نظام التحكيم لهذه المنازعات:

- السرعة في حسم النزاع: يذهب الفقه إلى قدرة التحكيم على تسوية النزاع بشكل سريع يُخطئ أي تعقيدات إجرائية، كتلك التي يتبعها القضاء في نظرة للمنازعة والفصل فيها من إجراءات سير الخصومة والمراقبة والحكم وطرق الطعن ومواعيدها، كما أنه يتولى الفصل في النزاع بشكل نهائي غير قابل للإستئناف، وهو بذلك يحمل النزاع بشكل سريع وفوري وهو الشغل الشاغل لأطراف النزاع في المعاملات التجارية. لا سيما أن خصوصية السرعة في嗔 العدل في النزاعات الحلال قد تكون أكثر أهمية ليس فقط لأهميتها التجارية وإنما لإحتمالها وظروف الاستعمال خوفاً مما تتعرض له من أضرار التلف وغيره، وهو بالتالي يُلبي خصوصية هامة للمنازعات المنتجات الحلال.

- حرية اختيار القانون الواجب التطبيق: يمتاز التحكيم بأنه يُحول الأطراف فيه اختيار القانون الواجب التطبيق على النزاع بدلاً عن القانون الواجب التطبيق على النزاع أساساً، ومن خلال ذلك يمكن الأطراف من اختيار القوانين الأقرب لحل نزاعهم خاصة إذا تعلق الأمر بإختلاف القوانين أو الأنظمة القانونية وهي جوانب لأنماط في القضاء العادى نظراً لتقليده بتطبيق قانون القاضي بشكل أساسي. ذلك إذا إنفتاح إلى مدى مناسبة هذه القوانين للنزاع المعروض، ولهذا الجانب يقدم التحكيم فلسفة هامة لأطراف الخصومة لتطبيق القوانين المحلية أو المشتركة أو الأعراض الخاصة بالمخلوقات الحلال التي يتضع لها موضوع النزاع بما في ذلك القواعد الشرعية وتفصيلها المذهبية الحاكمة بالضوابط الشرعية لوصف الحال.

2- رضوان، «الأسس العامة للتحكيم التجاري الدولي»، دار الكتاب الحديث (دون بيان مكان نشر) طبعة 1996، ص 17.
الحالة في المنتجات، وتعد الإشارة ضمن هذا الإطار إلى أنه نظرًا لتفريز التحكيم بالقوة في إطار تعدد الثقافات القانونية في المنازعات الدولية بين الأطراف، فقد إجحده نحو 80% من الشركات والمؤسسات الإسلامية إلى اختيار التحكيم لتسوية المنازعات التي تنشأ عن العقود المبرمة مع الأطراف الأخرى. وفي سوق التحكيم أمثلة كثيرة عن جودة هيئة التحكيم لتطبيق أحكام الشريعة الإسلامية، نذكر منها ما أوردته المحكمة ديبوي في حيبات حكمته في دعوى التحكيم المرفوعة من شركة تكساكو ضد الحكومة الليبية سنة 1977، التي أستند فيها إلى قاعدة الوفاء بالعقود إستنادًا إلى الشريعة الإسلامية. كما أن هيئة التحكيم أحيانًا تتطور إلى الإختلافات الفقهية القائمة بين المذاهب، ومن ذلك ما ذهبت إليه هيئة التحكيم في خلاف وقع بين وكيل لإحدى شركات الطيران العامة في المملكة العربية السعودية والشركة الأم حول مستحقات مالية ناشئة عن عقد وكالة يقضي للموكيل ببيع تذاكر الطيران للشركة مع تزويج المبلغ له بعد خصم عمولته، يعده حيث الوكيل أنه لم يخصم عمولته مستنداً إلى فتوى شرعية تقضي بمكنة حجز ما في يده من أموال الشركة لحين تسديد عمولته كوكيل (أنهته مهمته). وقد كان عليه هيئة التحكيم بأن الرأي الذي يستند له المدعى مستند من مجلة الأحكام العدلية وهي مبنية على المذهب الحنفي، في حين أن المذهب السائد في المملكة السعودية هو المذهب الحنبلي، والعقد ينص على الأخذ بأحكام الشريعة الإسلامية كما هي مطبقة في المملكة السعودية. الأمر الذي يُقدم فيه التحكيم وجه آخر من مقتضيات المنافع المنتجات الحالة وما يثار بشأنها من إختلافات، بما يجعله يتلاحم معها.

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1- المعلومي، هاني إ.، إتفاق التحكيم وعقود الاستثمار الدولي، دار الفكر الجامعي: الإسكندرية، الطبعة الأولى 2011، ص. 51.
2- مذكرات قدما الدكتور عبد الرؤف الم탕ي سليمان لطلبة الدروس العليا، كلية القانون، جامعة طرابلس (الفرائها سابقة) 2003.
3- علم الدين محمد الدين، إسحاق، منصة التحكيم التجاري الدولي، الجزء الرابع، النشر الديب، حامدين، مصر، ص. 67.

- كفاءة المحكمين: يكون المحكم عادة شخص ملم إسلام كافى بجانب النزاع ويتمتع بخبرة ومعرفة قنونية واسعة تجعل منه مثال اختيار أطراف النزاع لتسوية المنازعات الناشئة فيما بينهم، لا سيما في نظام التحكيم المؤسسي الذي يتيح للطرفين التحكيم عدد من المحكمين لإختيار فيما بينهم، وهم غالبًا يتميزون بقدرتهما الخاصة وخصوصية في تسويتها المنازعات، وهو ما يلي جانبي الجانب الطبيعة الخاصة للمستخدمين الحلال ولا يتمباليا من منازعات.

- الحياد: يُشدد الحياد كمهمة خاصة لنظام التحكيم من حيث التهرب من اختصاص القضاء المحلي في نظر المنازعات، وذلك من حيث التشكيل في قدرة القضاء المحلي ونواهته خصوصًا في المنازعات ذات العنصر الأجنبي، وهو ما يتوقف على حسب ما مع مقتضيات الطبيعة الخاصة للمستخدمين الحلال وذلك من حيث الطبيعة الفنية الخاصة لهذه المنتجات على النحو المتقدم بيانه، ومن حيث تعدد النظام المحكم.

- السرية: تعتبر السرية من أهم الجوانب في المعاملات التجارية، وتتميز التحكيم بكونه قانوناً على السرية بعكس القضاء الذي يقوم على مبدأ العلانية، وهو ما يوفر جوانب حماية هامة للمستخدمين خاصة فيما يتعلق بالمنازعات ذات الصلة بالعلومات الفنية غير المفصح عنها والأسرار التجارية ومضامين الإختلاقات وغيرها من الأعمال التي تبرز جوانب المناقصة في المنتجات، مما يجعل التحكيم يقدم ضمانة هامة لأطراف النزاع في هذا الجانب.
الحلاؿ للمنتجات الخاصة تُلبي جدية مزايا يُقدـ الدؤسسي التجاري التحكيم يُتبـ ولا لتشا لتسوية منازعات المنتجات الحلاؿ 

المطلب الثاني : المؤسسات ذات العلاقة بتسوية منازعات المنتجات الحلاؿ 

سبقت الإشارة إلى أنه لامناص من تسوية منازعات المنتجات الحلاؿ من خلال التحكيم الدؤسسي ،إلا أنه بالإطلاع على نُظم مؤسسات التحكيم العاملة يتبين أنه لا يوجد مؤسسة خاصة بالتحكيم لتسوية منازعات المنتجات الحلاؿ ،على الرغم من وجود بعض المؤسسات التي يُمكن أن تُساهم في تسوية منازعات المنتجات الحلاؿ من خلال إنشاؤها بأدار تتعلق بالمنشآت الحلاؿ سواءً من حيث طبيعتها الشرعية أو الفنية أو التجارية ،والتالي يُمكن من خلالها بيان المؤسسات وثيقة الصلاة لهذه المنافع التي من شأنها أن تسهم في تأسـ مؤسسة تـحكم خاصة لـنـوية منازعات هذه المنافع ،وهو ما يِّملي إستعراض هذه المؤسسات إبتدأ بـنة تلك المؤسسات المعـنية بـنـوية منازعات وفقاً لنظام الشرعية الإسلامية أو تلك التي تقدم أدارًا فنية أو إستشارية متعلـة بالمنشآت فيكنها تقـيم الدعم الفني للمؤسسات المعـنية بـنـوية منازعات أو تلك المؤسسات ذات الانتشار العالمي الـواسع ذو الطبيعتة الإسلامية التي يُمكن من خلالها تـقيم أدارا في تسوية المناـعات في الدولة المضيفة لها .

أولاً : مؤسسات التحكيم ذات الطابع الإسلامي : 

ويُزد بإستعراض هذه المؤسسات محاولة بيان تجربتها فيما يتعلق بـتطبيق الشريعة الإسلامية على المناـعات ،وهو ما يُـقدم جانب من الجوانب الأساسية للنظام الحاكمة لـمنازعات المنتجات الحلاؿ
1- مركز كوالالمبور الإقليمي للتحكيم (KLRCA) وهو أول مركز تجسس للتحكيم على نطاق دولي، وقد تم تأسيسه سنة 1978، ويعتمد المركز على قواعد يونيسانت للتحكيم بصيغتها المعدلة لسنة 2010، وقواعد التحكيم الإسلامي وقواعد الوساطة الخاصة بالمركز، وقواعد التحكيم الإسلامي الخاصة بالمركز هي ذاتها قواعد يونيسانت للتحكيم بصيغتها المعدلة لسنة 2010 مع تعديلاتها بشكل يتوافق مع قواعد الشريعة الإسلامية في كل الجوانب المتصلة بعملية التحكيم، ويتطلب بثبطتها بناءً على طلب أطراف النزاع لإعتمادها كقانون حاكم للنزاع، ومع إثابة مكتبة الرجوع إلى قواعد يونيسانت الأصلية، ويتطلب المركز بناءً متصل فيما يتعلق بتسوية المنازعات التجارية، خصوصاً من حيث تطبيقه لقواعد الشريعة الإسلامية، إلا أنه لا يختص أساساً بتسوية المنازعات المنتجات الخلال، إلا أنه يمكن اللجوء إليه لتسوية المنازعات المنتجات الخلال مع النموذج إلى ضرورة تأسيس مركز متخصص للتحكيم في تسوية منازعات المنتجات الخلال.

2- المنظمة الإسلامية للتجارة: هي مؤسسة غالية غير حكومية تأسست في 23/6/2015، وتعتبر من ضمن أهدافها حل 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 تولى المنظمة متابعة مدى إنسجام تطبيق القواعد التجارية مع ضوابط وأحكام الشريعة الإسلامية وذلك من خلال علاقاته مع المؤسسات ذات الصلة كغرفة التجارة الإسلامية، مركز الجودة الإسلامية ومعايير المنتجات الخلال بالكويت، وهيئة
The criteria of Islamic law in the evaluation and handling of cases – Dubai: It is a center located in Dubai, United Arab Emirates, established in 9/4/2005 on the basis of the Islamic Bank of Development for the Islamic trade, as it is a center for Islamic law, and the Islamic society of the central bank, and it is a center for the Islamic Law Court to handle cases related to the Islamic law, and its main functions are to handle disputes of the Islamic trade and all related matters, and it is a center that specializes in resolving disputes.

4 - The Islamic Chamber of Commerce and Industry: It is one of the Islamic organizations of the Islamic Chamber of Commerce and Industry, which is located in Karachi, the capital of Pakistan, and it includes, and the Chamber is working to promote commercial relations in the member countries, and its main function is to handle disputes related to the Islamic trade and all related matters, as well as the Islamic Law Court to handle cases related to the Islamic law, and its main functions are to handle disputes of the Islamic trade and all related matters.

\[<http://www.iicra.com> - 1 \]
\[<www.icci-oic.org> - 2\]
التجارية والصناعية من خلال التحكيم، والتي يمكن اللجوء إليها لتسوية منازعات المنتجات الخالدة نظراً لطبيعة الجوانب المرتبطة بعملها والمسجدة مع الطبيعة الخاصة للمنتجات الخالدة في جوانبها التجارية والشرعية.

ثانياً: المؤسسات الفنية والاستشارية:

تتعدد المراكز الدولية التي تقدم أدواراً فنية واستشارية يمكن توظيفها في دعم تسوية منازعات المنتجات الخالدة، ويعقض من ضمن هذه المراكز بعض المؤسسات التي تقدم أدواراً تصل إتصالاً مباشرةً بالمنتجات من جوانبها الفنية أو التجارية التي نستعرضها فيما يلي:

1- الهيئة الإسلامية العالمية للحلال: وهي إحدى الهيئات التابعة لرابطة العالم الإسلامي وقдв أساساً إلى تعيين الإهتمام ويلتزم بتحقيق الإباحة الشرعية في المنتجات الخالدة، وذلك من خلال التعريف بالمنتجات الخالدة، والتنوع والتحديث على منتجات الخالدة، بالإضافة إلى تحديد الضوابط الشرعية في المنتجات الغذائية والدوائية من خلال الرقابة والإشراف على صناعة الخالدة، وتقدم الاستشارات اللازمة لتطبيقها، كما تؤدي رسوم الآليات الخاصة بمنح شهادات الخالدة وفقاً للمعايير الدولية للتصدير، وإدارة المختبرات الخاصة ببحث الغذاء والخلال، بالإضافة إلى دعم صناعة الخالدة والتقنيات والبرامج المتصلة بها، وهي بذلك تقدم جوانب تنظيمية وإستشارية هامة يمكن تطويرها في جانب تسوية المنازعات أو الاستناد إليها كدعم فني للمؤسسة الفنية بتسوية المنازعات.

<http://www.iiho.org/ar> - 1
2- معهد المعايير والمقاييس للبلدان الإسلامية: وهو إحدى المؤسسات المنتمية لمنظمة المؤتمر الإسلامي تم تأسيسه في مارس 2010، ويقع مقره في إسطنبول بالجمهورية التركية، وذلك ضمن إطار محاولة المنظمة البحث عن آلية لتوحيد المعايير بين البلدان الإسلامية من خلال اللجنة الدائمة للتعاون الاقتصادي والتجاري (الكومسيك). يهدف المعهد أساساً إلى توحيد المعايير والمقاييس والإختبارات العملية ونشاطات توحيد المعايير بين الدول الأعضاء وإزالة أي معوقات تجارية تتعلق بالمعايير الخاصة بالمنتجات ومتاجبها، وذلك لإزالة الحواجز الفنية التي تعيق تجاارة المنتجات في هذا الجانب من خلال توحيد الأنظمة الخاصة بالإعتماد والإعتراف المتداخل للشهادات المطابقة، وحيث أن المنازعات حول المنتجات تتطلب أحياناً من عدم وجود معايير ومواصفات فنية إسلامية موحدة تتفق حولها المؤسسات المانحة للشهادات الدولي؛ فإن المعهد سوف يقدم دور فعال في تطوير المعايير القائمة بنسبية المنازعات المنتجات، فضلاً عما يقدمه للمواصفات ذاتها من خلال توحيد معاييرها على أساس إسلامية موحدة للحد من منازعاتها، فضلاً عما تقدمه اللجنة الدائمة للتعاون الاقتصادي والتجاري (كومسيك).

ثالثاً: المؤسسات الإسلامية العالمية: وتعني بما المؤسسات الإسلامية ذات الانتشار العالمي، وهي مؤسسات إلى جانب طبيعتها الإسلامية التي تنفق مع المنتجات الدولية، فإنها تواجد في معظم دول العالم وتتمتع بثقة واسعة في كل الدول المصغرة. نظراً لما تقدمه من أدوار دعوية وتعليمية وإنسانية، وهو تصل بالمكتبة الداخلية للدول المختلفة بكل بساطة، وهو ما يؤهلها لأن تقدم دور مناسب في تنفيذ النظم المتعلقة بالمنتجات الدولية وتسوية منازعاتها.

<www.smiic.org> - 1
<www.comcec.org> - 2
خصوصاً من حيث طبيعتها الحكومية التي تسهل عملية تأسيس مركز متخصص بتسوية منازعات

المنتجات الخلا، وترجح بعض المؤسسات التي ترسي أهميتها في تأسيس هذا المركز:

1-منظمة التعاون الإسلامي: وهي منظمة دولية أنشئت في 25/سبتمبر/1969 بالملكة المغربية، وتتخذ من جدة بالتحديد العربية السعودية مقراً لها، وتعتبر ثاني أكبر منظمة حكومية دولية بعد الأمم المتحدة، حيث تضمن في عضويتها سبعًا وخمسين دولة، وترتبط المنظمة بعلاقات تشاور وتعاون مع الأمم المتحدة وغيرها من المنظمات الحكومية الدولية، كما تعمل ضمن إطار عدة مؤسسات متخصصة منها البنك الإسلامي للتنمية، والمنظمة الإسلامية للتجارة والعلوم والثقافة (الأيسيسكو)، وتركز المنظمة على تعزيز التعاون التجاري الإسلامي لإنشاء سوق إسلامية مشتركة وذلك من خلال المنظمة، أو من خلال المؤسسات التابعة لها، وهي بذلك مؤهلة لأن تُشجع مركز قادر على تسوية منازعات المتعلقة بالمنتجات الخلا، لما يتمتع به من تواجد في كل الدول الإسلامية أو المغيبة للنظم الإسلامية بشكل يتيح لذلك المنظمة الدبلوماسيّة والتشريعيّة في كل النظم القانونية المحلية في هذه الدول، وتسوية المنازعات فضلاً عن إمكانية التنسيق لتوحيد النظم القانونية لهذه المنتجات.

2-رابطة العالم الإسلامي: وقد تم إنشاؤها بموجب قرار المؤتمر الإسلامي العام الذي عقد بمكة المكرمة في 18/مايو/1962م، ويعتبر مقرها في مكة المكرمة، ولرابطة دور دعوي وتنسيق في دعم العمل الإسلامي المشترك وتنسيق جهود الفائزين به، بالإضافة إلى بعض الأعمال الإنسانية والإغاثية، وتتولى أملاكها من خلال عدد من المكاتب والمركبات المنتشرة في عدد من دول العالم، وتمتلك الرابطة بصفة مراقبي في كل من: المجلس الاقتصادي والاجتماعي للأمم المتحدة، ومنظمة المؤتمر الإسلامي و في...
منظمة التربية والتعليم والثقافة (اليونيسكو) ومنظمة الطفل العالمية (اليونيسيف)، وتتميز بتواجد عالمي مميز.
وعلاقات واسعة يمكن توظيفها للعمل على تأسيس مركز خاص لتسوية منازعات المنتجات الخالل، أو دعم المؤسسات المعنية بذلك.

3- جمعية الدعوة الإسلامية العالمية 1: وهي منظمة غير حكومية تأسست عام 1970م بناءً على توصية المؤتمر الإسلامي وقع مقرها بالعاصمة الليبية طرابلس، وتعمل في المجالات الدينية والثقافية والترفيهية، فضلاً عن جوانب الحوار الدولي والتعاون الثقافي والعمل الإنساني، وتحظى بعضاً عدد من المنظمات الدولية والإقليمية، كالبطريركية الإنسانية والاجتماعية، ومنظمات الأمم المتحدة للثقافة والثقافة والعلوم "اليونيسكو" ومنطقة التعاون الإسلامي، والتي تملأ من خلالها تنفيذ عدة برامج مشتركة في عدد من دول العالم بحكم تواجدها، وهي بذلك تستطيع أن تقدم دور فعال في جانب تسوية المنازعات المعنية بالمنتجات الخالل نظراً لما من كواكب متخصصة وتباعدها في عدد كبير من الدول الذي يتبع لها الإمام بنظمه وقوانينها المحلية التي تساعده على الإمام بالنظم المحكمة للمنتجات الخالل، والمساهمة في تأسيس مركز يتولى تسويات المنازعات.

خاتمة: ينتهي في خاتمة الدراسة إلى أن الوسائل التقليدية لتسوية المنازعات بشقيها القضائي والودي غير قادرة على استيعاب الجوانب المرتبطة بالمنتجات الخالل، وهو ما يقتضي دراسة وإلمام خاص ليمكن أن يتوفر إلا من خلال عمل مؤسسي، وذلك بواسطة مؤسسة تهدف لتسوية منازعات المنتجات الخالل بتحقيق إزدهار هذه التجارة بالإستعانة بالمؤسسات المعنية ذات الصلة المنتجات. 

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رابعاً: الأقضية:

دور الأعراف والتقاليد القبلية في حل النزاعات في المال المغصوب في الصومال:

في ضوء الشريعة الإسلامية

أسمهان علي فارح عثمان
أ.د عارف علي عارف

ملخص البحث:

من أعظم المعاصي التعدي على حقوق العباد، والتي يتولد عنها النزاعات والتطاحن بين الناس؛ وقد وجدنا حلولًا قانونية نظامية وكذلك عرقية تقليدية تُبَقى بما نزاعًا قائمًا أو محتملاً بسبب هذا التعدى. ويعد المجتمع الصومالي من المجتمعات التي لاعادات وأعراف وتقاليد وقيم دينية واجتماعية، فالصوماليون قد سَلَموا منذ آلاف السنين بالنعمة العرقية، ومن والدائها في النزاعات توسع نفوذ العدل العرقية للفصل في النزاعات وارجاع الحقوق إلى أهلها لاسيما بعد غياب نظام الدولة. يهدف هذا البحث المقترح إلى تحقيق حل في النزاعات القائمة بين بدي القضاء الصومالي العاجز، ونظامية في المال المغصوب إثر الحرب الأهلية، وبيان البدائل التي لاجأ إليها المجتمع الصومالي للمحاكم إليها في حل نزاعاته. وسيظهر خلال هذا البحث مدى اعتماد المجتمع الصومالي على الأعراف القبلية في فصل منازعاتهم. وقد اعتمدت الباحثة في دراسة هذا البحث على المنهج الوصفي الاستقرائي. ومن أهم المقترحات والحلول لهذه المشكلة تكفين الأسس المتعدة من قبل الأعراف القبلية لتسوية المنازعات بين الناس في ضوء عرف في الصومال وهما "الحير" و "الجوري"، ويشترط البحث إنشاء لجنة تضم مجموعة من الشيوخ الفقهاء، ومن كواهد القانونيين بحيث تجمع القانون والعرف في فصل النزاع.

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الكلمات الدفتارية: المال المغصوب، تسوية النزاعات، الحرب، العرف، الصومال.

المقدمة:

الحمد لله رب العالمين نعمه حمد الشاكرين، وشكره شكر الجامدين، والصلاة والسلام على رسول الله وعلى آله وصحبه ومن وراءه إلى يوم القيامة.

أما بعد! إن للصلح أهمية كبيرة في المجتمع خاصةً المجتمع أكثر الحرب أخضراء وثبها مثل الصومال، وقد تولدت بسبب هذه الحروب النزاعات والخصومات حول الأموال المغصوبة. ثم إن الحكومة المركزية الصومالية قد سقطت فسقطت على إثر ذلك الهيبات القضائية؛ فمن المؤكد أن الناس يعاجل إلى من يزعمون إليه حقوقهم بالعدل سواء تم ذلك عن طريق القانون القضائي أو الصلح القضائي أو عن طريق التحكيم التقليدي العرفي، فهمهم إرجاع الحقوق إلى أهلها وأن يعيش الناس في سلام وأمان.

وعدد المجتمع الصومالي من المجتمعات التي لها عادات وأعراف وقيم دينية واجتماعية، تربي عليها كل فرد من أفراد المجتمع منذ نشأته ويكون حريصاً على التمسك بها؛ لأنه يؤمن بأنها تأتي حاجته وحاجة الجماعة التي ينتمي إليها.

دور القبيلة في المجتمع الصومالي كما له سلبيات فإن له إيجابيات كبيرة؛ فعقب إخفاء النظام ظلت القبيلة توفر ولو اليسير من احتياجات أبنائها مثلما ظلت المراجع 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، ومعرفة دور العادات والتقاليد في حفظ النظام واستقرار المجتمع وإرجاع الحقوق إلى أهلها والذي له دور مهم لابد من تعزيزه.
البحث الأول: وجهة نظر الشرع حول الأساليب العرفية التقليدية لحل المنازعات

ويتضمن هذا البحث من خمس مطالب:

المطلب الأول: الصلح في نظر الشرع

تعريف الصلح:

ورد عدة تعاريف عن الصلح في اللغة ولاصطلاح الفقهية منها:

أولاً: تعريف الصلح في اللغة: يقال صلح الشيء، وصلح صلحاً، فهو صلح: من الصلح الذي هو خلاف الفساد، قال ابن فارس: "الصاد واللام والحياء أصل واحد يدل على خلاف الفساد. يقال صلح الشئ يصلح صلحاً". 

أحمد بن فارس بن زكريا، معجم مقاييس اللغة، ج.3، ص303.
وقال الراغب: الصلاح ضد الفساد، وما يختص من أكثر الاستعمال بالأفعال، والصلاح يختص بإزالة النقاو بين الناس، ومنه يقال: اصلحوا وتصالحا. قال تعالى: ﴿أن يُصْلِحَا بِنَفْسِهِما صَلِحًا، وَالصَّلِحُ خَيْرٌ﴾[النساء:128].

وإنّما تصلحوا وتتفقوا ﴿النساء: 129﴾، فأصلحوا بنفسهما ﴿الحجّ: 9﴾.

وعلى هذا فلرارد بالصلح عند أهل اللغة: إزالة الفساد الواقع بين الناس وذلك بالمسألة بعد المنازعة، والاتفاق بعد الاختلاف، ومن ثم يختص بإزالة النقاو بين الناس، لتحقيق الخير والصلاح بعد الشر والفساد.

ثانيًا: تعريف الصلاح عند الفقهاء: لقد اختالف الفقهاء في المراد من الصلاح لاختلاف مقاصده عندهم:

فذهب الأحناف إلى: ﴿أن الصلاح عبارة عن عقد وضع لرفع نزاعٍ وخوف وقوعه﴾.

وقال ابن عرفة الأبالي: ﴿أنه انتقال عن حق أو دعوى بوعض لرفع نزاع أو خوف وقوعه﴾.

وهما على آراءهم فقال: ﴿أنه عقد يحصل به قطع النزاع﴾.

وذهب ابن قدامة الأبلي إلى أن عقدة يتوصل بها إلى الإصلاح بين المختصمين.

والراحج من التعريفات: هو تعريف ابن عرفة لدقة تعريفه؛ حيث بين فه أن رفع النزاع في الصلاح يكون بالتنازل عن بعض الحق، وليس بالاستفاء لكل الحق الذي هو موضوع الحكم والقضاء. وهذا التعريف هو الذي يختصنا هنا؛ حيث ذكر أن طريقة العرف في الصلاح بعد حصول النزاعات بين الناس أو الخوضية من وقوعها أي قبل حصولها فيأتي هنا.

1. أصحاب بن محمد الأصفهاني، الدفردات في غريب القرآن، ص 373.
2. يسري عبد العليم عجصُّور، الصلاح في ضوء الكتب والسنة، ص 32.
3. كمال الدين بن عبد الواحد الرازي، المعروف بن الهيثم، شرح فتح القدير، ج 8، ص 423.
4. أحمد بن محمد الخليلي، الشهير بالصاوي الماليكي، حاشية الشاوري على الشرح الصغير، ج 3، ص 405.
5. زكريا بن مهدي بن إبراهيم الباجي، شهاب أحمد الشهر، أنسى المطالب في شرح روض الطالب، حاشية الدويمي لمحمد بن أحمد الشهر، ج 2، ص 241.
6. موفق الدين بن عبد الفتاح، الحشيش في ضوء الكتاب والسنة، ج 6، ص 3.
7. يسري عبد العليم عجصُّور، الصلاح في ضوء الكتب والسنة، ص 33.
الصلح ويشمل ذلك، أما التعريفات الأخرى فقد كررت أكثر في الصلح الذي يحصل بين المعاقدين على البيع وغيره أي في العقود. وقال أيضاً ابن جرير الطبري، وابن عاشور "أن الصلح يمكن أن يتم قبل وقوع النزاع وفاية، وذلك يتوقف من محاولة الوقوع وهو ما نص عليه القرآن الكريم في قوله تعالى: ۚ فَمَنْ خَافَ مِنْ ذُو جَنْبَةٍ أَوْ أَمِّهِ فَأُصِلِّحَ بِنِعْمَتِهِمْ فَلا إِنَّ اللَّهَ عُفُوٌّ رَحِيمٌ [ البقرة: 182].

المطلب الثاني: تعريف الصلح في النظام الصومالي

عرف القانون المدني الصومالي الصلح في المادة: (512) بأنه "عقد يجمع بهطرفان نزاعًا قائمًا أو يتوافقان به نزاعًا محتملًا، وذلك بأن ينزل كل منهما على وجه التنازل عن جزء من ادعائه".

كما ذكر القانون المدني الصومالي في مادتي (513، 514) أركان الصلح كالآتي:

- يشترط فين المتصرف ينعقد صلحًا أن يكون أهلًا للنصر ببعوض 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: ۚ لا خَلَقُ فِي كُلِّ شَيْءٍ مِّنْ نَّفْسِهِنَّ إِلَّا مِّنْ أَمْرِ يُصِيرُهُمْ أَمْرًا يَضُرُّ فِي جَهَنَّمْ أَجْرًا عَظِيمًا [ النساء: 114]، والأية فيها دلالة على الناس، ومن يفعل ذلك انياء مرضات الله فسُوْفْ نُوْلِدُ أَجْرًا عَظِيمًا [ النساء: 114]، والأية فيها دلالة على الناس.
فضل الصلح في كل شيء يقع فيه النزاع والخلاف بين المسلمين، ويقول ابن رشد في هذا الصدد: "فالإصلاح بين الناس فيما يقع بينهم من الخلاف والتداعي في الأموال وغيرها من نواقل الخير المرحب فيها المندوب إليها".

وقدما يقول القرطبي أيضاً في قوله تعالى: "أو إصلاح بين الناس، عام في الدماء والأموال والأعراض، وفي كل شيء يقع التداعي والاختلاف بين المسلمين، وفي كل كلام برد به وجه الله تعالى".

وقوله تعالى: "وَإِذْ جُهَّلُوا بِاللَّهِ عَرِضَتْ لَهُمْ أَنَّهُمْ أَتْبَعُوا وَتَصِلَّوُا بَيْنَ النَّاسِ وَاللَّهُ سَمِيعُ عَلِيمُ" [البقرة: 224]، وقوله تعالى: "فَمَنْ خَافَ مَنْ فُوَصِّىْا أُوْلُوا إِنَّمَا فَأَصْلَحْ بَيْنَهُمْ فَإِنَّمَا فَأَصْلَحُ بَيْنَهُمْ إِنَّمَا غَفُورُ رَحِيمُ" [البقرة: 128].

أما في السنة:

فقد قال الرسول ﷺ: "كل سلامي من الناس عليه صدقة، كل يوم تطلع فيه الشمس يعدل بتُ الناس صدقة".

وقال الرسول ﷺ: "ليس الكاذب الذي يصلح بتُ الناس ينمي ختًا أو يقول ختًا".

ومن أبى هريرة ﷺ قال رسول الله ﷺ: "الصلاح جائز بين المسلمين" وفي رواية "إلا صلحًا حرم حلالًا وأحل حرامًا".

وزاد: والمسلمين على شروطهم إلا شرطًا حرم حلالًا أو أحل حرامًا.

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11. محمد بن أحمد بن رشد القرطبي، أبو الوليد، المقدمات المهمدت، ج2، ص151.
12. القرطبي، الجامع لاحكام القرآن، ج5، ص384.
13. البخاري، صحيح البخاري، كتاب الصلح، باب فضل الإصلاح بين الناس والعدل بينهم، ص71.
14. البخاري، صحيح البخاري، كتاب الصلح، باب ليس الكاذب الذي يصلح بين الناس، ص354.
15. نيل الأوطار من أسرار منتقى الأخبار ص269-405، رواه أبو داود وأبن ماجو والتيمي، وقال التيمي: هذا حدث حسن صحيح.
أما بالإجماع:

ثبت مشروعية الصلح بالإبصاع لدى جمهور الفقهاء، وإن كان بينهم بعض الاختلاف في بعض صوره.  

المطلب الرابع: حكم الغصب في الفقه الإسلامي

للحسب أحكام ثلاثة: الإمام من علم أنه مال الغير، ورد العين المغصوبة مادامت قائمة، وضماغًا إذا هلكت.

وفيما يلي التفاصيل:

1 - الحكم الأول: الإمام وهو استحقاقالمواحدة في الآخرة، إذا فعل الغصب علماً أن المغصوب مال الغير؛ لأن ذلك معصية، وارتكاب المعصية عمداً موجب لالمواحدة، قال ﷺ: "من غصب شرشاً من أرض، طوطه الله تعالى من سبع أرضين يوم القيامة".  

فعند المالكية أنه "يجب على الغاصب حقان: أحدهما: حق الله تعالى، وهو أن يضرب ويسجن، زجرًا له ولأمثاله؛ على حسب اجتهاد الحاكم". أما عند الحنفية: "فحكمة الإمام من علم أنه مال الغير... وحكمه لغير من علم أنه مال الرد أو الغرم فقط دون الإمام". وعند الشافعية: "الإجماع على أن من فعله مستحلاً، أي وهو ممن لا يخفى عليه تجرمه كان كافراً، ومن فعله غير مستحلاً كان فاسقاً". وعند الخانفة يقول الشيخ ابن عثيمين في كتابه الشرح المعنين: "لم يُفصل المؤلف - رحمه الله - بحكمه الشرعي، وحكمه الشرعي أنه حرام... وإذا كان في حق الفحمة، خرج الأمر من الفحمة صار أشد إثمًا... قد لا يُخرج أن من كبار الذنوب ونتصرع على ما ورد فيه. ضمان الشيء الذي

17 ابن قتادة، المغني، ج7 ص6، الشربيني، مغني المحتاج، ج6 ص180، التصويي المالكي، الشرح الصغير، ج3 ص405، أبو حاشي شبان الدين، المبسط الشرح المفتن، ج4 ص378.
18 أخرجه البخاري في صحيحه، في كتاب المثل، باب إثم من ظلم شيئاً من الأرض، رقم 2320.
19 نقله ابن جنيي الصغير، القواعد اللغة، ص496.
20 نقله ابن شهرابين عائشة، رد اعتبار على الدار المختار شرح توير الأصبار، ج9 ص263.
21 الشربيني، المغني المحتاج، ج3 ص335.
يمكنه أن يتخلص منه برداء إلى ما كان في يده وعباراته فيه: "الغاصب ضامن لما غصب، سواء تلف بأمر الله، أو من مخلوق". وكيفية الضمان أو قاعدته: أنه يجب ضمان المثل باتفاق العلماء إذا كان المال مثليًا، وقيمه إذا كان قيمياً، فإن تعذر وجود المثل وجبت القيمة للضرورة.

أما ضمان المثل فقوله تعالى: ﴿فَمَنْ اغْتَدَىُّ عَلَيْكُمْ فَاتْبَعْهُ مَا اغْتَدَىُّ عَلَيْهِمْ ﴾. ﴿وَاعْلَمُوا الْلَّ وَاتْقُواْ ﴾، وقوله تعالى: ﴿بِثْلِ عَلَيْكُمْ فَاعْتَدُوا عَلَيْكُمْ ﴾، وقوله تعالى: ﴿عَلَيْكُمْ اعْتَدَى مَا بِِِثْلِ عَلَيْوِ ﴾ (البقرة: 194)، وقوله تعالى: ﴿وَلِلْمُتَّقِنِّ﴾، وقوله تعالى: ﴿عَلَى فَأَجْرُهُ وَأَصْلَحَ عَفَا فَمَنْ﴾ (الشورى: 40).

والأسسية الأصلية، والرواه في الضرر، والواجب في الضمان الافتراض من الأصل بقدر الإمكان تعويضاً للضرر، وأما ضمان القيمة فلنكن

تعذر الوفاء بالمثل مثلاً صورة ومعنی، فيجب المثل المعنوي وهو القيمة؛ لأنه تقوم مقامه، ومحصل بها مثله، واسمها ينبع

عنه ؟؟.

وذهب جمهور الفقهاء إلى أن أحكام الغصب تجري في العقار إذا يمكَن غصب، ويجب الضمان على

الغاصب، وخالف في ذلك أبو حنيفة وأبو يوسف.

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11 الفتاوي الفقهية: ص 331.
10 ظاهرة الفقه: اللفظ الإسلامي وادله، ص 720.
9 نفس المرجع.
8 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
73 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
16 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
14 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
12 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
10 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
9 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
8 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
7 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
6 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
5 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
4 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
3 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
2 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
1 الفتاوي الفقهية: اللفظ الإسلامي وادله، ص 720.
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 بالاستياء على أموالهم، ومقدارهم، ومقدراتهم، وأهما آثارها على المجتمع فمن خلال عدة جوانب وهي كالتالي:

أولا: الآثار السلبية على الجانب الاجتماعي:

تدعي جريمة الغصب إلى تبديل معايير المجتمع الاجتماعية، ليكون معيار المجتمع، وشعاره أكمل حق الغير بالذراع والظلم والاستبداد، ومن الآثار التي تتولد منها هذه الظاهرة أيضًا التالي:

-تأثير الجاني والمجني عليه بسبب هذه الظاهرة؛ وذلك أن المغتصب يتضرر نفسياً ومادياً مما يؤثر في مساهمه في المجتمع الذي ينتمي إليه. أما الغاصب فيصبح منبوذاً في المجتمع بالإضافة إلى معاناة أسرته مادياً ومعنويًا، كما يسهم تواصله الاجتماعي بعد انقضاء عقوبته.

-انتشار الغصب يمثل تقدمًا للقيم السائدة والمشوهة في المجتمع.

-يؤثر في الاستقرار الأرضي بحيث تحصل الأسرة بلا مزيد ولاسكن بسبب غصب بيتهما فتكون عالة على المجتمع والدولة.

-إن البنية الاجتماعية الصومالية مبنية على أساس قبلي وهي أساس الحروب الراهنة في الصومال مما يعني جريمة الغصب سوف تتفاقم 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، وفعاليتها في تحقيق الأهداف العظيمة التي أنشأت من أجلها مثل تحقيق الأمن والمصلحة.

ضعف أوتلاشي الأمل في إصلاح المجتمع خاصةً في مجتمع أعيكته الحروب.

- إهدار القوانين واللوائح، وعدم الالتزام بها، لتبوع عدم جدواها في الحد من ظاهرة غصب حقوق الناس.

ثالث الآثار السلبية على الجانب الاقتصادي:

في الواقع الاقتصادي والعملي، يعد الصومال من الدول التي تعاني الفقر والخروج بسبب الحروب والظواهر الطبيعية 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 إزاحه 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 فيطلبها فتنشأ من ذلك منازعات لا حل لها.

- واغتصاب الأراضي العامة يعود بآثار سلبية على نمو الخطط السكنية النظيفة، وتراجع عمليات البيع والشراء في سوق العقار الرسمي بسبب تزايد نزاعات الغصب الحاكمة في العقارات.

- إن انتشار جريمة الغصب في المجتمع يقابل الحاجة إلى نشر مزيد من التوعية في الأجهزة الأمنية والقضائية مما يعكس ذلك سلباً على النواحي الاقتصادية والتنموية الاجتماعية التي تحتاج إلى إنفاذ مستمر على خدمة وازدهارها وهذا ما لا تستطيع الحكومة الصومالية الجديدة تكبد عنه ذلك.
الأثار السلبية على الجانب الأمني:

ومن الأثار الأمنية التي يخلفها غصب الأموال العامة والخاصة تزايد الخصومات الموقعة التي هددت أمن المجتمعات واحتحنت الاضطراب فيها، وبيت الفوضى في أرجائها. ومن أفعض الأضرار الأمنية المتربعة على الغصب؛ سفك الدماء والتقاتل بين أفراد القبائل مما يؤدي إلى نشر الفساد في الأرض والذي حرم الله في كتابه العزيز.

وأخيراً ونظرًا لما تكون جريمة غصب الأموال العامة والخاصة من العقارات والأراضي منتشرة في المجتمع الصومالي ويسعى لتقويض بنائها، وهدم أخلاقياته ولعو الأثار السلبية الناجمة منه كثرة على الجانب الاجتماعي، أو النظام الاقتصادي وغيرهما مما ذكرناه أعلاه، فإنه لا بد من السعي لمعالجة هذه الجريمة، والحد من انتشارها، وترى الباحثة أن الأساليب العلاجية التي لا بد من تفعيلها ما يلي:

1- حسن نظام خاص بهذه الجريمة يحدد نوعية الجريمة وبيان عقوبتها، وإنشاء مركز يجمع فيه الشكاوي خاصة في ما يتعلق بأمور الغصب حتى يتبني نسبة معاناة الناس من هذه الجريمة فتحل مبكراً قبل تفاقمها.

2- توعية المجتمع بكل شرائحه بخطر جريمة الغصب من خلال وسائل الإعلام المتعددة، وشهر أسماء المتورطنين في هذه الجريمة زجراً لهم، وردعاً لأمثالهم.

3- خشر الوعي الديني، وتنظيم الازمات الراقي عند الأفراد بزع الخوف من الله، وحرمة مال المسلم، وعدم الاستيلاء عليه إلا برضا صاحبه.

4- تناول مناهج الدراسة لهذا الموضوع، وأشباهه تخديرًا، وتنذيرًا، وتربيّة على الأخلاقيّ الفاضلة، واحترام حقوق الآخرين، وأموالهم.

5- تشد العقوبات الجزائية على الفاسدين والمتعلدين على حقوق الغير.
6 - تطهير المؤسسات القضائية من الفساد حتى يتم إعادة الحقوق المغصوبة بالعدل والإنصاف بين الطرفين،

7 - إنشاء لجنة متكونة من علماء الشريعة والقضاة لنظر في قضايا غصب الأموال والخروج بحلول فعالة لإرجاع الحقوقي إلى أهلها للححد من الآثار السلبية الناتجة من ظاهرة غصب الأموال.

8 - التوجه إلى التحكيم العرفي المنتشر بين المجتمع حل النزاعات القائمة بهذا الصدد.

المبحث الثاني: نبذة تاريخية عن المفاهيم العرفيّة في المجتمع الصومالي

من المفاهيم العرفيّة في حل المنازعات ما يلي:

المطلب الأول: مفهوم الحبّر

الحبّر في اللغة: حاز، خيمًا، خابرة، وحر، واستحاز: نظر إلى شيء، فغشي عليه، ولم يهتد لسبيله، فهو حيّر، وحائر، والحائر: مجتمع الماء، والمكان المظلم، والبستان، وحمّر الماء: دار واجتماع، والحبّر: جميلة الحظيرة أو الحميّ.

يقول الراغب الأصفهاني: والحبّر: موضوع، قبل سمي بذلك لاجتماع ما كان فيه. وثمة نستطيعه من التعريف اللغوي أن الحبّر هو التحير في أمر ما أو إجتماع شيء ما في موضوع معين وهذا ما يعنينا في حديثنا وهو أن شيوخ العشيرة في الصومال يجتمعون تحت شجرة على شكل حلقة لإيجاد حلول لأمر ما عبرهم أو لفصل النزاعات بشكل عام لسمي هذا الاجتماع بالحبّر.

الحبّر اطصحاّياً: هو نظام قانوني يستمد شرعيّته من الأحكام العرفيّة والقوانين المعروفة بين العشائر وليس هناك أي وكالة أو هيئة أو جهة احتكارية معينة توضح ماهية القانون والحكم المتبع في حالة قضائيّة معينة، ويُعتبر "الحبّر" نظاماً

الفيزيز آيادي، القاموس المحيط، ص382.
الراقب 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 سواه كان وضعيًا أو عشائريًا أجنبيًا على الإطلاق وفعل خلو المصطلحات القانونية من أي دخائل لغوية دليل قاطع على أن "الجرب" هو قانون داخلي صومالي برمته، ويبتسم هذا النظام بأنه قد تختلف تطبيقاته بين القبائل، بل من سنة لآخر، ومن حدث لآخر، ومن مبادئ وقوانين هذا النظام.

التالي:

- دفع الدية في الجرائم الموجهة ضد الأفراد مثل التشهت والسرقة والإيذاء الجسدي والاغتصاب والقتل، بالإضافة لتقديم العون ماديا ومعنويا لأهالي الضحية لفترة زمنية معينة.

- الحض على إقامة علاقات جيدة وارساء روح الإخاء داخل العشيرة الواحدة بالإضافة للعشائر بعضها البعض وذلك عن طريق حسن معاملة النساء والتفاوض مع مبعوثي السلام من العشائر الأخرى بصداق 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 الإبادة وذلك حديثي الإنجاب.

- مساعدة الفقراء والمحتاجين عن طريق منحهم الدواجن الحية لتربيتها والاستفادة منها.

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" موسوعة التكامل الاقتصادي العربي الأفريقي، المؤشرات الاقتصادية جمهورية الصومال، 2014م،
تاريخ الإطلاع: 16-3-2017م، وأنظر: تقرير الخبر المستقل المعين بحالة حقوق الإنسان في الصومال" ص.3.
المطلب الثاني: مفهوم الجوري

الجوري في اللغة: الجور: نقيض العدال، ضد القصد، والجائز: المجاور، والذي أجرته من أن يظلم.


لا يمكننا أن نجزم أن المعنى اللغوي بوضوح المقصود من كلمة الجوري في المصطلح الصومالي، ولكن ترى الباحثة أن هناك تقارب في المقصود فيما أن من المعاني اللغوية لكلمة الجور تعني الجار أي القرب لذا فإن الجوري هو نموذج ممتاز لإشراف معايير الصومالي في إعادة بناء البلاد بعد أن فرقن النزاعات القبلية في غرب الصومال.

الجوري إصطلاحاً: يعرف الجوري بأنه عبارة عن منتدى تقليدي للشيوخ من أجل الوساطة أنشئ في العاصمة متنكر الشيخ في بوراما وهي محافظة في الصومال في عام 1993م وهذا المجلس مكون من 82 عضواً. ومنذ زمن بعيد كان هذا المجال وسيلة لتسوية النزاعات، وقد اعتاد الشيوخ الاجتماع تحت ظل شجرة السنط للتحكيم في النزاعات مستخدمين عملية قانونية معروفة في الصومال باسم "أكستَ". وتقوم الأطراف المتنازعة بعرض مشاكلها على الشيوخ حيث تتواصل المباحثات إلى أن يتم التوصل إلى قرار.

[1] مقالة في شبكة الأنباء الإنسانية ( إيرن )، بعنوان: "جدل حول إصلاح مجلس الشيوخ في أرض الصومال، تاريخ 2013م، ( تاريخ النشرة، 1-5-2017)

[2] الرابح الأصفهاني، الحسين بن محمد، مفردات غريب القرآن، ص 211.
البحث الثالث: عوامل جوهر 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 جوهر الفرد الصومالي للتحكيم العرفي التقليدي وقبل أن تسود 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 الحالية بسبب غصب الأراضي والعوارض، فتحاول الباحثة تسليط الضوء على الكلمات المفتاحية في هذه التقارير التي تبين الأسباب التي أدت بالمجتمع الصومالي إلى صرف النظر عن المحاكم النظامية والتوجه إلى التحكيم العرفي.

المطلب الأول: تحليل تقارير تشير إلى صعوبة حل النزاعات المتعلقة بغصب الأراضي والعوارض بعد الحرب الأهلية

إن من أهم القضايا المعروضة في المحاكم الصومالية هي قضايا النزاع حول ملكية الأراضي والممتلكات الخاصة المعصوبة، فهذا ما تم ذكره وتوثيقه في تقارير الأمم المتحدة عن الصومال كالآتي:

التقرير الأول الختامي المستقلة تقول: "تعتبر قضايا النزاع حول ملكية الأراضي والممتلكات الخاصة المعصوبة من أكبر القضايا صعبة أمام القضاء الصومالي منذ أن تم إعادة تفعيل المؤسسات القضائية في مرحلة ما بعد الحرب الأهلية في البلاد، وقد طال النزاع بعض الأحيان دون البت عبر اليوسات الشرعية مما يؤدي إلى اللجوء إلى العنف واستخدام السلاح الناري في كثير من الأحيان" 20.

تحليل التقرير الأول: أهم المعطيات المستفادة من توثيق هذا التقرير الثاني:

20 تقرير وطني مقدم وفقاً للقرعة 5 من مرفق قرار مجلس حقوق الإنسان، ص.9.
"إعادة تعديل المؤسسات القضائية": معنى هذا أن المؤسسات القضائية كانت غير مفعلة من قبل بسبب سقوط الحكومة المركزية الصومالية لفترة طويلة وتم تفعيلها من جديد وهذا معناه أن سوف تبرز مشاكل كبيرة في هذا المجال; فمنها: برز قلة الخبرة في إمكانية إيجاد حلول للفصل في نزاعات قضايا الأموال المعصوبة لأنها ببساطة لم يتم الفصل فيها من قبل فهي مشكلة جديدة، وعدم توفر كوارد أكفاء من قضاة ومحامين بالإضافة إلى ذلك وجود مشاكل في فعالية النظام القضائي ومصداقيتها واستقلاليتها. والنقطة الثانية أن كمية القضايا المتعلقة بهذا الموضوع كبيرة ومن الصعوبة بمكان استيعابها في هذه المحاكم الصغيرة والجديدة.

"وقد يطول النزاع بعض الأحيان دون البت عبر الوسائل الشرعية": يعني أن هذه القضايا سوف تتمكث في أدراج المحاكم لفترة طويلة ولا يتم الفصل فيها في وقت وجيزة لتعمل سلبية كثيرة. والملاحظ على عبارات "عبر الوسائل الشرعية" تدلنا على أن هناك وسائل غير شرعية ونظامية بلجأ إليها المواطن الصومالي لاستجواب حقه على سبيل المثال اللجوء إلى التحكيم العربي، هذا إن كان شخصا مسلما، 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 وجيزة.

والتنقيح الثاني يقول: "إن ملكية الأراضي مسألة بالغة الحساسية والتعقيد في الصومال، وخاصة في مقديشو. فسأفر الاندفاع للحصول على الأراضي في أنحاء المدينة عن عدة نزاعات. وكثر من الأراضي المميزة متنازع عليها نظرا للاستيلاء على أجزاء كبيرة من الأرض خلال الحرب الأهلية في عام 1991 وعودة الملاك السابقين للمملكة بما مثلا، مقاومة الغاصبين، ولم تنشئ الحكومة الصومالية حتى الآن هيئة قانونية لتناول هذه المسألة. وتدعي المحاكم المحلية في مقديشو أنها مثقلة بالأعباء نتيجة حجم القضايا ومدى تعقيدها. وما يزيد المشكلة هو عدم وجود وثائق يمكن
لا يمكن استخدامها لتحقيق الفصل في الأراضي والقضايا في السنوات التالية دون التعرض إلى الخلافات والصراعات في المجتمع. ولأن هناك تاريخًا من الملكية الجماعية للأراضي.

تحليل التقرير الثاني: المعطيات المستفادة من توثيق هذا التقرير كالتالي:

إن أكثر الأماكن التي تثير نزاعات الأراضي المغوصية 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 طالبا بإرجاع حقوقهم.

مقاومة الغاصبین لهذه الأراضي ورفضهم إرجاع حقوق الآخرين لأسباب عدة تطول شرحها وهنا ليس مجالًا.

اعتراف المحاكم بعدم قدرتها على استيعاب الكميات الهائلة من هذه القضايا، وعدم قدرة للفصل فيها للتعقيدات الكبيرة لهذه القضايا.

عجز الحكومة الصمومية عن إيجاد حلول قانونية فعالة ومناسبة أو اتخاذ خطوة إيجابية نحو هذه المسألة لضعفها في سلطاتها.

وأكبر مشكلة تواجهها الصمومية هو عدم توفر وثائق لكلاً من تحته، وبالتالي عدم الاعتماد عليها لتم الفصل.

وأكبر مشكلة تواجهها المحاكم الصومالية هي عدم توفر وثائق لكلاً من تحته، وبالتالي عدم الاعتماد عليها لتم الفصل.

وهناك مشكلة أخرى وهي وجود ملكيات جماعية بسبب القوانين الاشتراكية المفروضة في عهد الرئيس زياد بري حيث أنه أعطى حقوق الملكية الخاصة وفرض حقوق الملكية الجماعية.


หยام توم نياندوغا، تقرير الخبر المستقل المعني بحقوق الإنسان في الصومال عام 2010، انظر: "
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 بصفة حقوق الملكية إلى أصحابها الشرعيين الذين فقدوا ملكيتهم بحكم الواقع بسبب وضعهم كأقليات
أو لافظارهم إلى الموارد. وتُستخدم في ذلك، مؤقتاً، معلومات تسجيل الأراضي التي جمعت قبل عام 1990 وإفادات
الشهاده".

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 أنه يحاول إصدار الأحكام ولكن هناك صعوبات أخرى تؤدي دون تنفيذ هذه الأحكام
من أهمها ضعف سلطة الحكومة ونهوضها في البلاد وبالتالي هناك صعوبات جمة تؤدي دون تنفيذ القوانين بشكل
فعال.

تشمل هذه الأحكام أحكاماً صادرة عن اللجنة الوطنية: التي من مهامها إعادة الممتلكات المغصوبة إلى أصحابها.
إن أصحاب هذه الممتلكات فقدوا بسبب الحروب الأهلية في الصومال ولم يستطيعوا استرجاعها بسبب فقدانهم
الوثائق التي تثبت حقهم في الممتلكات.

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.

1 "تقرير وطني مقدم وفقاً للفقرة 5 من مقر فار مجلس حقوق الإنسان 16/21، (الدورة الرابعة والعشرون، 18-29 يناير-216م)، ص.9.
2 "اللجنة الوطنية" هي لجنة مشكلة من أعضاء يمثلوا جميع القبائل الصومالية، أُنشئت على إثر وقوع اجتماعات الصدارة الوطنية المتعددة في العاصمة إثيوبيا
آنس أيبا" في عام 1993م، ومن ضمن مهام هذه اللجنة إعادة الممتلكات وتسوية المنازعات. أنظر: موضوع القابل، المبحث السادس، جهد المستشار
المطلب الثاني: عوامل جوء الفرد الصومالي إلى التحكيم العرفي التقليدي

"ومع تدهور الثقة بالجهاز القضائي النظامي، فإن النظام التقليدي وخاصة مع تعاون قوة العشائر أخذ يكتسب زماماً، بما أن الصوماليين عموماً هم شعب من الرجولة فقد وفر لهم النظام التقليدي طريقة أكثر كفاءة لحل المنازعات، ويقوم جوهر النظام التقليدي على التعويض المادي عن الأخطار المرتكبة، والсистем يعمل بسرعة وتطبيقه فوري، كما أن تطبيق أحكام الشريعة الإسلامية أخذ يكتسب زماماً في قضايا الأحوال الشخصية.

بالإضافة إلى ما سبق ذكره في التقرير أعلاه ترى الباحثة بناء على استقرائها، ومعارفها بغالة المجتمع الصومالي أن هناك عدة عوامل أدت بالمجتمع الصومالي للجوء إلى التحكيم العرفي التقليدي وتفضيله على الهيئات القضائية النظامية وهي كالآتي:

- 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 مظالمًا بغض النظر عن معايير الحق، وتدعمه سياسياً واقتصادياً كما بني ذلك في نظام الخير.
- 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 يهددون عن الحق عند إصدارهم الأحكام؛ وخاصة في حالة المحاكم القضائية الصومالية ومع عضالاتها الحالية.
- اعتياد الناس في معظم الأحيان حل قضاياهم عن طريق الأعراف بسبب قوة النفوذ القبلي في المجتمع الصومالي.

31 تقرير المقررة الخاصة، السيدة منى رشماوي، المقدّم عملاً بقرار لجنة حقوق الإنسان 1997/47، ص.12.
الخاتمة: أهم النتائج والتوصيات

بعد هذه المراجعة لموضوع الأعراف والتقلييد القبلي في حل النزاعات في الصومال في ضوء الشريعة الإسلامية توصلت الباحثة إلى ما يلي:

أولا: نتائج البحث:

1- ثبوت مشروعية الصلح في القرآن الكريم والسنة بإبراهيم الأم手続きة.

2- تضحك الشرعية واضح حيال التعدي على أموال وحقوق الغرب وقد أجمع الفقهاء على تحريمه ونصت الآيات والأحاديث على حرمة الغصب والتعدي على أموال الغرب.

3- أن مجتمع الدراسة يتبع أساليب عرفية تسمى الحير والجوري لحل النزاعات المختلفة خاصة النزاعات الخاصة بالأموال المغصوبة.

4- فضح غصب الأموال من النزاعات التي برت مؤخراً في الصومال بسبب سقوط الحكومة المركزية الصومالية.

5- خشل القضاء النظامي في الفصل بين النزاعات المتعلقة بالأموال المغصوبة لأسباب عدة أعمها ضعف سلطة الحكومة ومؤسساتها وعدم فعالية تنفيذ الأحكام الصادرة من قبلها.

6- ضعف سلطة القبيلة في الصومال.

- سرعة الفصل في القضايا عن طريق التحكيم العربي بينما يطول الفصل فيها في القضاء أو تضيع القضايا في أدراجها.

- فقدان الوثائق التي تثبت الملكية لهذه الأراضي العقارية في الحرب وصعوبة إثبات حقها في هذه الملكية فيضطر إلى الحل السلمي العربي والتسليم للحكم الذي يصدره الشيوخ.
من أهم العوامل التي أدت للمجتمع للجسر 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 طريق التحكيم العرفي، وغيرها من العوامل.

غَتَىا من العوامل.

تضح 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 بالعقار أو بالأراضي الزراعية أو بالآبار أو بالدماء، كونه من المجتمعات البدوية والقويرة.

ثانيًا: التوصيات:

1. العمل على توعية الناس بحرم الاعتداء على حقوق الغتَ وبأهمية الصلح لضمان استقرار، وأمن، ومستقبل باهر للمجتمع.

2. خلق أسس من قبل الأعراف القبلية لتسوية النزاعات بين الناس، حيث "الجرين" و "المجيري"، وإنشاء مؤسسة تضم مجموعة من الشيخ الفقهاء ومن كواذر القوانين بحيث يجمع القانون والعرف في فصل النزاع وإيجاد أدوات فعالة لتطبيق هذه القوانين كالتعليم والتثقيف بما

وآخر دعوانا أن الحمد لله رب العالمين.

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584
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فاعلية التحكيم كضمانة إجرائية لحماية الشركات النفطية الأجنبية

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الخلاصة

بين البحث أن شرط التحكيم في عقود البترول يعتبر الوسيلة القانونية الإجرائية الفعالة لضمان حقوق الشركات النفطية الأجنبية ضد تصرفات الدولة المضيفة المساسة بعقودهم، 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، أي أن البحث يرصد أثر بعض المبادئ القانونية الناتجة عن النص على التحكيم في ترسيخ الحماية القانونية للمتعاقد الخاص الأجنبي، وقد كان نموذجاً للعقود النفطية الليبية.

إن إشكالية البحث تكمن في التساؤل التالي: كيف يمكن لشرط التحكيم باعتباره آلية من الآليات الفعالة لمتتلاع الخاص الأجنبي؟، لتسوية المنازعات الدولية من ترسيخ الحماية القانونية للمتعاقد الخاص الأجنبي؟.

أما هدف البحث فهو إبراز بعض المبادئ القانونية واستظهار تأثيرتها الإيجابية في تقرير وترسيخ الحماية القانونية للشركات النفطية الأجنبية، مع التعرض لدور الممارسة التعاقدية الليبية في مجال العقود النفطية لتأكيد ذلك، والإستعانة ببعض قضايا التحكيم الدولية في مجال النفط والتي كانت ليبية طرفًا فيها.

أما أهمية البحث فتكمن في بيان الجوانب الإيجابية من إدراج شرط التحكيم كوسيلة لفض المنازعات النفطية في العقود النفطية، بالنسبة للشركات النفطية الأجنبية، والجانب السلبي بالنسبة للدول المضيفة.

لذلك سنتناول الموضوع باستخدام المدخل الكيفي واستعمال أدوات تحليل النصوص والوثائق، والدراسات المكتوبة، مع الاستعانة بالمصادر الوصفية، والاستقرارية، والتحليلية، والتي نراها الأسباب لمعالجة الإشكالية، وبالتالي الوصول لنتائج تعمقها، أهمها: إن وجود شروط التحكيم يؤثر على سيادة الدولة، فيسهمها بعض خصائصها، كالحصانة القضائية، بجرد موافقتها على إدراج شرط التحكيم.

الكلمات المفتاحية: التحكيم، المنازعات النفطية، الاستثمارات النفطية، العقود النفطية، استقلالية التحكيم.
القدمة

لا يخفى على أحد أهمية الاستثمارات بصفة عامة والأجنبية منها بصفة خاصة، حيث تعمل الدول المتقدمة والناحية على حد سواء على الاستفادة من الاستثمار لما له من أثر في الإسهام في عملية التنمية لهذه الدول. فالدول الرأسمالية تمتلك رأس المال، ومتلك المقدار التكنولوجيا والمهارات الإدارية، بينما الدول النامية تمتلك الموارد الطبيعية والقوى العاملة الأقل تكلفة، وتفاعل بين الدول المصدرة لرأس المال التي تبحث عن المزيد من الربح والدول النامية التي تحتاج إلى الاستفادة من مقدرات الدولة الرأسمالية وشركائها المتعددة الجنسية يتم إبرام عقود الاستثمار.

إلا أن هذه التعاضرات يتوقف إبرامها على العديد من العوامل المهمة المتصلة في الضمانات التي تقدمها الدول المضيفة للمتعاقدين الأجانب خاصة، أهمها الضمانات التشريعية التي تنص عليها قوانين الاستثمار أو القوانين الخاصة في الدول المضيفة مثلـ قانون النفطـ وماتشمله من محفزات للاستثمار، ومن مزايا مالية كالإعفاءات الضريبية وحرية التحويلات المالية، إلا أن أهم الضمانات التي ينشدها المستثمرون الأجانب هي الضمانات الحماية المتصلة بالوسائل المتاحة لتسوية ما قد يثار من منازعات الاستثمار والتي قد تنشأ نتيجة انتهاك أحد طرف العقد للحقوق، والالتزامات المنصوص عليها، أو اتخاذ إجراء من شأنه الضرر بالطرف الآخر.

ويمكن القول بصفة عامة إن هذه الأسباب تنجم عن الإجراءات الفردية المضيفة للاستثمارات الأجنبية، كتلك الناتجة عن استيلاء الدولة على الاستثمارات عن طريق نزع الملكية أو المصادرة أو التأميم، أو الناجمة عن قيام الدولة المضيفة بغير تشريعاتها المنظمة للاستثمار.

وأما أن عقود الاستثمارات النفطية تعد من العقود التي تميز بالزمنية - طول المدة- وبالتالي يُنظر خلافاً 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،

وأيضاً كانت أسباب النزاع فقد أصبح لزاماً أن يلجأ الأطراف إلى تسويته بالطرق السلمية أو الودية كالملتوسطة والتوافق، وفي حالة بانت تلك الجهود بالفشل ينتقل الأطراف إلى الطرق الإلزامية المتمثلة في القضاء سواء الدولي أو الداخلي. ونظراً للصعوبات التي قد تواجه الأطراف في هذه الطرق نظراً لضعف المركز القانوني للمتعاقد الخاص الأجنبي حيث لا يستطيع الوقوف في مواجهة الدولة كطرف أصيل أمام القضاء الدولي ممثلاً في محكمة العدل الدولية إلا في حالة تبني دولة جنسيته قضيته عبر ممارسة الحماية الدبلوماسية وهذا نادر لحرص الدول على المحافظة على علاقاتها الدبلوماسية فيما بينها، وكذلك لتوفر المستمر من التوجه للقضاء الداخلي للدولة المضيفة نتيجة للظروف المحيطة بهذه الوسيلة والتي أدت إلى ضعف ثقة المستثمر الأجنبي فيها وعدم اطمئنانه على نتيجة عرض دعوته لدى قضاةها، أدت ذلك إلى ضرورة الانجذاب إلى آلة تلقى القبض من جميع الأطراف وهي التحكيم كوسيلة مناسبة وفعالة لتسوية المنازعات لارتكزها على مبدأ إرادة الأطراف الذين لم اختيار بين التحكيم الحر أو التحكيم المؤسسي بناءً على اتفاق تحكيم منصوص عليه ضمن بنود العقد.

هذا الآلية ستكون محور البحث هذا، إلا أن ما يمكن للفت النظر إليه هو أن البحث لايتناول عرض آلية التحكيم كوسيلة مثلية وملائمة لفض المنازعات الناشئة في إطار العلاقات التعاقدية بين أطراف العقود الدولية فحسب، بل أيضاً لذلك إتضح أن تلك الآلية وتقرر فاعليتها في ترسيخ وضمان الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) من خلال البحث في الأدوات القانونية القبلية المرتبطة بها.

إن الأدوات القانونية القبلية المرتبطة بنجاح آلية التحكيم كوسيلة حماية المتعاقد الخاص الأجنبي ليس المقصود بما الوسائل المادية لممارسة الحماية التحكيمية بالمعنى الشكلي، بل المقصود بما نتائج الأخير بشرط التحكيم والمتمثلة في بعض المبادئ القانونية الدولية التي تضمن وترسيح الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية
الأجنبي) حتى قبل مباشرة آلية التحكيم. لذلك سنحاول القراءة في هذا الموضوع من خلال تلك الزاوية وعلى مستوى مروحين 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 نتعرف بالتحليل لعدد من الأدوات والتي تعتبر مبادئ قانونية رسخت الحماية القانونية للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) الناجية عن قبول الدولة المضيفة لألية التحكيم، ومعرفة أكثر ووضوحًا التعرض لبعض الآثار الناجية عن النص على خضوع الدولة المضيفة للتحكيم في العقود النفطية والتي تؤتي أكملها لت gegenüber 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 استقلال شرط التحكيم عن العقد النفطي في خضوع الدولة المضيفة للتحكيم (المطلب الثاني)، وأثر عدم قبول دفع الدولة وأجهزتها العامة بعدم أهليةهم للخضوع للتحكيم (المطلب الثالث)، وأثر إختصاص المحكمين بالفصل في النزاع- مبدأ الاختصاص 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 التنزل الضمي عن حصانتها القضائية، حيث تعد الحصانة القضائية للدول من المبادئ المستقرة في القانون الدولي، وهو مبدأ مسلم به في مختلف دول العالم، ولقد كان الأرجاء السائد في العالم حتى أوائل القرن الماضي هو تمتع الدولة بالحصانة القضائية المطلقة، فلم يكن من الجائز أن تخضع الدولة لمحاكم دولة أخرى في كافة المنازعات.
فيها طرفان تكون التي،

غتَ أن مبدأ الحصانة الدطلقة للدول بدأ يتقلص بعد الحرب العالدية الأولى نتيجة لاتساع دور الدولة وقيامها بأعمال تخرج عن إطار نشاطها التقليدي، خاصة بعد تدخلها في المجال الخاص واتساع نشاطها التجاري والاقتصادي، لذلك بدأ أنو ليس من العدل أن يسمح للدولة بالتعامل مع الأفراد الخواص مع حرومان هؤلاء الأفراد من الضمان الأساسي لازم لحماية حقوقهم، وبالتالي أخذت الكثير من الدول تعيد تدريجياً عن مبدأ الحصانة القضائية المطلقة. وبدأت وفقاً لمصلحتها بالتنازل نسبياً عن بعض من حصائنا خاصة القضائية.

وكلما شعرت لكى يجد هذا التنازل أثره أن يكون واضحاً لا ليس فيه، وقد يكون كذلك ضعفاً ويظهر من اتباع الدولة مسلكاً يتضح منه نزولها عن الحصانة القضائية، كان لاندفع في دعوى مرفوعة عليها بخصائصها القضائية، أو أدرجت في العقد المرم بينها وبين الشخص الخاص الأجنبية نص يهل المنازعات

المتارا بين الطريقين إلى محاكم دولة أجنبية. إلا أن السؤال الذي يطرح نفسه الآن: هل يعتبر قبول الدولة لإدراج مسألة التحكيم لزكمة أمام المحاكم القضائية؟

شروط التحكيم في العقود النفطية تنازلأ منها عن النمسك بخصائصها القضائية أمام محكمة التحكيم؟

يرفض البعض الغالب من تعرضوا لهذه المسألة الاختلاف من قبول الدولة للمجاوع للتحكيم، ويرون أن هذا النمسك لا قيمة له. وقد برع بعضهم ذلك بالقول بأن قبول الدولة للمجاوع للتحكيم وخاصة في عقود التنمية الاقتصادية والتي منها بطيعة الحال العقود النفطية يعد بمثابة تنازل من قبل الدولة عن التمسك بخصائصها القضائية، والذي قيلت بمحض إرادتها الخضوع له، وذهب آخرون للقول بأن فكرة الحصانة دون

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القضائية ذاتها لا محل للتمسك بما أمام قضاء التحكيم، على أساس اندماج 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 تملأ بين طباخا التناقض أن يتعترف بالخصانت القضائية للدولة والتي تحمي الهيئة القضائية التي تتمسك بما أمامها من سلطة القضاء أمام محكمة التحكيم على الرغم من أن محكمة التحكيم لا تستمد من تولية الأطراف إلا من تولية الأطراف. وعلى النقيض من ذلك يرى البعض من الفقهاء أن التحكيم يسمح بمبادئ القانون العام التي تخول الدولة سلطة تدابير تسمح لها بأن تأتي بما تراه مناسباً لصالح العام ومن ثم فإن اشتراك التحكيم لا يقيم على الدولة التزامًا قانونيًا وإنما هو التزام أولي فحسب.

لا أن الفقه في مجمله يرى أن الدولة التي تنتفق على الاتفاق على التحكيم لن تسود المنازعات الناشئة عن العقد النفطي المبرم بينها وبين أحد الأشخاص الخاصة الأجنبية لا يمكنها بعد ذلك أن تنتمك بخصائصها القضائية أمام محكمة التحكيم. وإذا أفتقرها نظرة صوب أحكام التحكيم الدولية في قضايا نفطية فكانت ليبيا طرفًا فيها، لم يجد أن المحكمة يرفضون قبول الدفع بالخصانة 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 0/12/1977. فهي في هذه القضية، رفضت الدولة الليبية المشاركة في إجراءات التحكيم بحجة أن التحكيم يتعرض مع سبادها إلا أن المحكمة الوحيد في هذه القضية الأستاذ (صباحي المحمصاني) رفض هذه الحجة مؤكداً على أن الدولة يمكنها دائماً أن تنزل عن حقوقها السيادية وتقود على اتفاق التحكيم وتنطلق ملزمة به.

خلاصة القول: أنهنئ الفقه في مجموعه، وكذلك أحكام التحكيم في قضايا نفطية كانت الدولة الليبية طرفًا فيها إلى أن الدولة التي وافقت على اللجوء للتحكيم لن تسود المنازعات الناشئة عن العقد النفطي المبرم بينها.

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 وبين أحد الأشخاص الخاصة الأجنبية، لا يجوز لذا الاحتجاج بخصائصها القضائية أمام محكمة التحكيم، وبالتالي فإن المعاهد الخاص الأجنبية (الشركات النفطية الأجنبية) تمتع بضمان أولي تتبع على النص على آلة الحماية الإجرائية (التحكيم) وسابق لإعمالها تمثل في إمكانية إخضاع الدولة الليبية لسلطة محكمة التحكيم، ومن ثم إمكانية اصدر 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 بخصائصها القضائية أمام محكمة التحكيم التي تشكل للفصل في النزاع الذي قد ينشأ بينهما بمناسبة تنفيذ هذا العقد.

المطلب الثاني: أن 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 الأجنبية (الشركات النفطية الأجنبية)؟

بدأياً 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 محكمة التحكيم الحر، أو من محكمة التحكيم المشكلة لدى مراكز التحكيم ذات الطابع الدولي، بذاتها المبدأ. وبناءً عليه يترتب على مبدأ استقلال اتفاق التحكيم نحو العقد المتعلق به أثر هام وحيوي بالنسبة للمتعاقد الخاص الأجنبية يتمثل في عدم ارتباط مصير اتفاق التحكيم بمصير العقد، أي أن صحة اتفاق التحكيم ونفاذها لا توقف أو تتأثر بصحة العقد الذي يتعلق به هذا الاتفاق، ومن ثم فإن بطلان العقد أو فسخه أو إنهاءه من قبل الدولة المضيفة - وهو معرض

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لذلك - لا يترتب عليه أي أثر سلبي بالنسبة لاتفاق التحكيم، إذ كان هذا الاتفاق صحيحًا في ذاته. ومن ثم ضمان تطبيق الحماية الإجرائية المنصوص عليها بين الطرفين في اتفاق التحكيم، أي أن الأخذ بمبدأ استقلال شرط التحكيم عن العقد يمكن أن يضمن تنفيذ لآلية التحكيم وبالتالي مثول الدولة الدضيفة أمام الشروط الإجرائية (محكمة التحكيم). وهذا ما ينسحب بطبيعية الحال على إتفاق الأطراف بعدد العقود المبدعة، وقد أخذت أحكام التحكيم الصادرة في المنازعات الناشئة عن عقود النفط المهمة 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 بإتخاذ إجراءات التأميم ضدها، طبق المحكمون مبدأ استقلال اتفاق التحكيم، وأكدها على أن اتفاق التحكيم يظل قائماً على الرغم من قيام ليبيا بوضع نهاية لعقود الامتياز المهمة بينها وبين هذه الشركات بطرق التأميم. حيث أصدر المحكمة الوحيد الاستاذ (جان ديبوي) في قضية (تكساكو) ضد الدولة الليبية حكماً تمهيدياً بشأن اختصاصه في 27/11/1975م، رفض فيه وجهة النظر التي تمسك بها الدولة الليبية والتي مفادها أن إجراءات التأميم مادمت قد وضعت نهاية لعقود الامتياز ذاتها الدبرمة بينها وبين هذه الشركات، فإن هذا الأمر يجب أن يمتد إلى شروط التحكيم المبدعة في هذه العقود، حيث استند المحك مند ديبوي إلى مبدأ استقلال شرط التحكيم عن العقد الوجود فيه. 2 كذلك فإن المحكمة الوحيد الاستاذ (صبحي المحمصاني) في قضية (ليامكو) ضد الدولة الليبية، قد ذهب في الحكم الذي أصدره بتاريخ 12/4/1977م، إلى أنه "من المسلم به عموماً في الواقع وفي القانون الدولي أن شرط التحكيم يظل باقياً بعد فسخ الدولة بإادة المنفردة للعقد الذي يتضمنه، وأن هذا الشرط يظل نافذ المفعول حتى بعد هذا الفسخ". وكذلك يمكن القول بأن المحكمة الوحيد الاستاذ (لاجاجرينج) في قضية (b,p) ضد الدولة الليبية قد أخذ

1 راجع أحكام التحكيم المتعلقة بهذه القضية في ترجماتها العربية، المصدر: وثائق المؤسسة الوطنية للنفط ليبيا.
2 حكم محكمة تكساكو، 1977م. دعوى شركة كاليفورنيا تكساكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط، طرابلس.
3 حكم محكمة تكساكو، 1979م. دعوى شركة ليامكو ضد الدولة الليبية. (ترجمة) المؤسسة الوطنية للنفط، طرابلس.
على نحو ضمني بدأ استقلال شرط التحكيم عن العقد الوارد فيه، وذلك في حكم التحكيم الذي أصدره في حكم التحكيم الذي أصدره في 10/10/1973 م، فقد ذهب المحكم ردًا على إدعاع الشركة بأن قانون التأمين لا أثر له على إلغاء عقد الامتياز الذي يظل صحيحًا وواضح التطبيق، إلى القول بأن "القانون الصادر بتأميم شركة (b.p) قد وضع خاصية لعقد الامتياز الممنوع لهذه الشركة، باستثناء أن هذا العقد يشكل أساسًا لاختصاص هذه المحكمة، وحق الشركة المدعية في مطالبة المدعى عليه بالتعويض أمام هذه المحكمة".

المطلب الثالث: آخر عدم قبول الدولة وأجهزها العامة بعدم أهليتهما للتحكيم في ترسيخ الحماية.

يعني ذلك أنه لا يكمن للدولة الضيفة أو المؤسسة العامة التابعة لها أن تدفع بعدم أهليتهم للتوقيع على اتفاق التحكيم للتهرب من ذلك الإتفاق الذي سيق وأن وافق عليه بإرادة قومية مع المتاعب الخاص الإنجليزي. ويذهب رأي فقهية أن مبدأ عدم قبول دفع الدولة أو المؤسسة التابعة لها بعدم أهليتهما للتحكيم بعد الموافقة عليه يعتبر من المبادئ المستقرة في التحكيم الدولي.

بالنسبة للليبيا تواتت صدور التشريعات المتعلقة بالتحكيم وقد تأرجحت مابين منعه أو الخذ منه أو إقراره إستثناءً.

حيث قبل المشرع الليبي بداية اللجوء إلى التحكيم متمثلاً في قانون النفط رقم 25 لسنة 1955 م، كذلك نص عليه في العقود النموذجية المبرمة في إطاره، وإذا كانت الإجراءات التشريعية المتخذة بعد ثورة 1969 م رفضت التحكيم التجاري الدولي في البداية ثم قبعت اللجوء إليه خاصة في العقود الإدارية، فإنه في مرحلة ثانية أجازت اللجوء له بعد التأكيد على أولوية إختصاص القضاء الوطني.

1 حكم محكمة حكم 1973 م. دعوى شركة ب ب ضد الدولة الليبية (ترجاه) المؤسسة الوطنية للنفط. طرابلس.
3 الأسعد، بشار عبد. 2006 م. عقود الاستثمار في العلاقات الدولية الخاصة. منشورات الحلبي الحقوقية. بيروت ص. 405.
إذن يمكن التأكيد على أن عدم قبول المحكمين بدفع الدولة المضيفة والأشخاص الدعنوية التابعة لها بعدم أهميتهما للتحكيم سوف يجعل من النص على التحكيم آلة ذات فاعلية ضد محاكاة الدولة المضيفة وفسكها ببطلان إتفاق التحكيم للتهرب من الموجب إلى بعد أن قانوناً مبنية على 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 ترسيح الحماية (ببدأ الاختصاص بالاختصاص).

ينتج عن إبرام إتفاق التحكيم أن يلتزم أطراف النزاع بعرض النزاع القائم بينهم على المحكمين الذين يتم اختيارهم للفصل في النزاع عوضاً عن التوجه للمحكمة القضائية المختصة بذلك، وهو ما يمثل آثر إيجابي لإتفاق التحكيم، أما إمتناعهم عن عرض النزاع على القضاء الوطني فيمثل الأثر السلبي.

وببدأ الاختصاص بالإختصاص هو مبدأ نتج عن مبدأ استقلال شرط التحكيم، وهو يعني أن يختص المحك بتحديد إختصاصه، ونظر المنازعات المختصة بنظرها، وتحديد إطار سلطته، وتقرر صحة المنازعات من عدمها.

وعلوه لو اعترضت الدولة المضيفة بعدم اختصاص محكمة التحكيم بالنظر في إجراءات الفردية الناتجة عن تغيير التشريعات في موضوع التحكيم، أو النازعة عن نفسها للعقد الذي تضمن الإتفاق التحكيمي، هذا تعامل الدولة على نفي قضائها، وتقوم هيئة التحكيم بالفصل في ذلك تطبيقاً لبدأ الاختصاص بالإختصاص، وتحقيقاً لبدأ إستمرار العلاقة التعاقدية ضماناً وموازنة بين الأطراف وهو ما يؤدي إلى تأكيد فعالية التحكيم كآلية ضامنة لحسم المنازعات المثارة بين الأطراف من خلال السرعة.


الإيراىيم، أحمد إبراىيم. 2007م. القانون الدولي الخاص. دار النهضة العربية. القاهرة. ص.48 ومايدها.
ويستمد مبدأ اختصاص الإختصاص أساسه القانوني من عديد القوانين الوطنية للدول 
1. والاتفاقيات الدولية المتصلة بالتحكيم. وعديد قواعد التحكيم. 

إذن يمكن القول أن مبدأ الاختصاص بالاختصاص ينطوي مع الغاية من التحكيم والسرعة المطلوبة فيه على عكس القضاء، والأهم من ذلك أنه يدعم فاعلية التحكيم كآلية إجرائية لضمان الحماية والأمن القانوني للشركات النفطية الأجنبية، بحيث يقطع الطريق أمام الدولة المضيفة التي تعمل سوء النية لتعطيل إجراءات التحكيم فيما لو أجري 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 عقد أمام المحكمة تنال توافق وتحقيق وسيلة واضح في حالة استبعاد تطبيق قانون طبيعي طرفي العقد على إجراءات التحكيم، حيث يمثل ذلك ضمان إضافي قبل للمتعاقد الخاص الأجنبي (الشركات النفطية الأجنبية) بعدم تطبيق قانون الدولة المضيفة على إجراءات التحكيم، أي أن المتعاقد الخاص الأجنبي في هذا الفرض يضمن لنفسه نوع من الحماية القانوني القائمة على قواعد الدولة المضيفة أمام المحكمة وذلك عندما يتم استبعاد قانون دولة واحدة وقانون الدولة المضيفة على إجراءات التحكيم، ويؤخذ بقانون إجراءات التحكيم لدولة مقر التحكيم أو غيرها، حيث تنتهي النتيجة الإيجابية للأخير بناءاً على حالة فرضية ممارسة السلطة القضائية لدولة قانون إجراءات التحكيم تخفق في الوقاية على التحكيم والتدخل في بعض الأحيان أثناء الإجراءات. أيضاً

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1. أظهر: قانون التحكيم، المادة 22، فقرة 1. كذلك، فرنسا، قانون المخالفات، المادة 1466. كذلك، إجوتا، قانون التحكيم. المادة 9، الفقرة 1.
2. مثل الاتفاقيات الأوروبية للتحكيم التجاري الدولي لسنة 1961م. المادة 5، فقرة 1. كذلك إتفاقيات وشيك لمستوى لأسعار الاستكمال 1956م.
3. أظهر: القانون الموحدي للتحكيم التجاري الدولي لسنة 1956م. المادة 1، فقرة 1.
4. مثل حكم التحكيم الجهوي بين الشركة الإيرانية بيك والشركة الفرنسية (ELFAQUITAINE) (B. GOMORD) للمحامين الوحيد (ELFAQUITAINE) الصادر في الدنمارك.
من نتائجها الإيجابية أن طرق الطعن في حكم التحكيم والاعتراف به وتنفيذه توقف على القانون الواجب التطبيق على إجراءات التحكيم، وبالتالي فإنه في حال كان القانون الواجب التطبيق على إجراءات التحكيم هو قانون دولة ثالثة ضمن المعاقب الخاص من الأطراف (الشركات النفطية الأجنبية) الإفلاسات من قانون إجراءات التحكيم الدولية المضيفة الذي قد يعرقل حصوله على حقوق الحاكم في غير صالحه (فرضية الطعن)، أو في صالح (فرضية الاعتراف بالحكم وتنفيذته). وهذا ما من شأنه أن يكرس ضمان أكثر وحماية أكثر له. لذلك سنتناول تطبيق هذا المبدأ وهو مساواة الأطراف حول القانون الواجب التطبيق على إجراءات التحكيم في العقود النفطية الليبية، من خلال الممارسة التعاقدية للمستورث الليبي في (المطلب الأول)، ووقف أحكام التحكيم في منازعات نفطية كانت ليبية طرفاً فيها (المطلب الثاني).

المطلب الأول: موقف الممارسة التعاقدية الليبية من هذا المبدأ.

في مجال الممارسة التعاقدية الليبية نصت بعض عقود النفط الليبية، والموثقة قبل تعديلات قانون النفط الليبي العديد 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 الإمتياز النموذجي الثاني الملحق بالقانون المذكور على أن "يقرر الحكم الثالث أو الحكم الفرد إجراءات التحكيم وعليه أن يستند 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...

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1 أبوزيد، سراج حسن. 2004م، التحكيم في عقود البيع (رسالة الدكتوراة). كلية الحقوق جامعة عين شمس، ص 455.
الحكم الفرد أن يعين مكان التحكيم وموعده" 1. ثم صدر تعديل لقانون النفط الليبي في 3/7/1961م عدلته على أثر الفقرة (6) من البند (28) من ملحق عقد امتناع على النص التالي "... يعين رئيس التحكيم أو الحكم المفرد الإجراءات الواجب اتباعها في التحكيم". حيث أنه في هذا التعديل أعطى القانون حرية واسعة للمحكمة في اختيار إجراءات التحكيم مما يسمح لهم بتطبيق مبدأ المساواة بين أطراف العقد بعدم تطبيق قانوني
للدولة المضيفة والشركة النفطية الأجنبية، بعدها صدر في 20/11/1965م تعديل آخر يمقتضى 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 الحكمين) أو من الحكم المفرد (في حالة تعيين حكم منفرد)". كذلك أبقى هذا التعديل على حرية الحكمين في اتخاذ إجراءات التحكيم مع توضيح أكثر في مسألة عدم اتفاق المحكمين على اختيار إجراءات معينة.

إذن يستحب من ذلك أن الممارسة التعاقدية الليبية في شأن تطبيق إجراءات التحكيم قد ضمت مبدأ مساواة الاتراف حيث أثبتت للمحكمة المختارة من الأطراف حرية اختيار القانون الواجب التطبيق على إجراءات التحكيم بما يتفق ومبدأ المساواة بين الأطراف ولم تفرض تطبيق إجراءات تحكيم القانون الليبي، وهذا ما يمثل ضمانة قيبلة 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 مناسبة

1 أنظر: ليبيا.551م. قانون النفط الليبي في نسخته الأولى- الملحظ الثاني لعقد امتناع، البند 28/6.
2 أنظر: الحريدة الرسمية.611م. عدد خاص - 15/7/1961م
3 أنظر: الحريدة الرسمية.1965-26/12/1965م
عقدت النفط المبرمة بينهم موافقةً موقعةً موجهًا تجاه اختيار القانون الواجب التطبيق على إجراءات التحكيم إلا أن الموقف الموحد الذي جمع بينهم هو تكييفهم لمبدأ المساحة القانونية بين أطراف النزاع، حيث تم استبعاد تطبيق قانون أطراف النزاع على إجراءات التحكيم، وبالتالي تتمتع المعقد الخاص الأجنبي بالمساحة مع الدولة الليبية في هذا الشأن، الأمر الذي وفره حظاً أوفر من العدالة والإنصاف. وفي هذا الشأن سوف نتعرض لثلاثة أحكام تطبيقية دولية كانت ليبياا طرفًا فيها لتحقق من تكييف مبدأ مساواة الأطراف فيما تعلق باختيار القانون الواجب التطبيق على إجراءات التحكيم.

١- حكم التحكيم الصادر في 19/1/1977م في دعوى شركة تكساكو ضد الدولة الليبية

لقد بدأ المحكمة الوحيد في هذه القضية الأستاذ جان ديبوي 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 الواجب التطبيق على إجراءات التحكيم، وفي هذا الصدد هناك نوعان من الحلول يمكن الاستناد على أي منهما، الحل الأول والذي اخذ به الأستاذ كافين في التحكيم الذي جرى بين الشركة الكندية سافير (Sapphir) والشركة الوطنية الإيرانية للبتًول (نيوك) والذي يتمثل في إخضاع التحكيم لقانون ديبوي الأستاذ، إذ أن هذا الحل كان له ما بيته في القضية المذكورة وذلك على أساس أن النزاع لم يكن طرفه دولياً ذات سيادة، كما أنه من المفضل من الناحية العملية أن يستند حكم التحكيم إلى نظام قانوني وطني عندما يراد تجليده. بيد أن المحكم قد قرر عدم ملاءمة الأخذ بهذا الحل في القضية الحالية حيث أن الطرف المدعى عليه في هذه القضية دولة ذات سيادة هذا من ناحية، ومن ناحية أخرى

١ حكم محكمة تكساكو. 1977م، دعوى شركة 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 المحكمة الصادرة في قضية أرامكو والذي يتمثل في إخضاع إجراءات التحكيم للقانون الدولي العام مباشرة، وقد قدر المحكمة أن هذا الحل هو الحل الأكثر ملاءمة في القضية الحالية، ولقد استند في تبرير هذا الحل على نفس الواقعة التي استند عليها المحكمة السابق، فقد أوضح المحكمة أنه عندما يكون أحد طرفي إجراءات التحكيم دولة ذات سيادة، فإن مبدأ الحصانة القضائية التي يتمتع بها الدولة تعارض مع ما يمكن أن تمارس السلطات القضائية في الدولة صاحبة الدقر لحقها في الرقابة على التحكيم والتدخل في بعض الأحيان أثناء الإجراءات، وانتهى المحكمة إلى أن إجراءات التحكيم في القضية الحالية لا يمكن إلا أن يخضع مباشرة لقانون الدولي العام. ولقد استند المحكمة على بواعث أخرى إضافية لصالح تطبيق القانون الدولي على إجراءات التحكيم فقد ارتأى المحكمة الأستاذ ديبوي (DUPUY) في طريقة تعيين المحكم الوحيد وبصفة خاصة النص على اللجوء إلى رئيس لجنة العدل الدولية لتعيينه، أن هذا يعني أن الأطراف قد اتفقوا على أن يكون التحكيم الحالي موضوعًا 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.

وفي هذه القضية أوضح المحكمة 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 الاتفاق. يتعين محكمة التحكيم يحكم فيها في حالة عدم وجود اتفاق بين الأطراف في هذا الشأن. وإجمالاً لهذا الشروط، ونظراً لعدم وجود اتفاق بين الأطراف بشأن تحديد مقر التحكيم والإجراءات واجبة الاتفاق، قررت محكمة

1 حكم محكمة توكايك. 1979م، دعوى شركة ليامكو ضد الدولة الليبية (ترجمة) المؤسسة الوطنية للنفط، طرابلس.
التحكيم في حكمها التمهيدي الصادر في 9/6/1975م 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 الارتداء بقدر الإمكان بالدبادئ العامة الواردة في مشروع الاتفاق بشأن إجراءات التحكيم والمعدل بواسطة لجنة الأمم المتحدة للفترات الدولية عام 1958م، ولقد أوضح المحكم أن هذا المبدأ كان معتمداً من قبل العديد من الاتفاقات الدولية والتي من أهمها اتفاقية البنك الدولي للإنشاء والتعمية لتسوية منازعات الاستثمار لعام 1965م المادة (44) والمعاهدة السويسرية بشأن التحكيم لسنة 1969م المادة (34)، كما ذكر أن هذا المبدأ كان متبناً 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 داخلي.

3- حكم التحكيم الصادر في 10/10/1973م في قضية (B.P) ضد الدولة الليبية.

وفي هذا الحكم أوضح المحكم أن القانون واجب التطبيق على إجراءات التحكيم سيكون محدداً منذ البداية، ثم تساؤل 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 طرف التحكيم دولة ذات سيادة. وبعد أن عرض المحكم للمحل الذي أخذ به حكم التحكيم الصادر في قضية أرامكو والحجج التي استند عليها، فرض أن يشارك هذا الأخير في حجته التي مفادها أن تطبيق قانون الدولة مقر التحكيم على إجراءات التحكيم يعد بمثابة اعتداء.

1 حكم محكمة تعقيم.1973م، دعوى شركة B، ب ضد الدولة الليبية (ترجمة) المؤسسة الوطنية للنفط طرابلس.
لأجل الحفاظ على الحصانة القضائية للدولة الطرف في التحكيم، موضحًا 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 المجهود إلى التحكيم كأداة وحيدة دون غيرها لحل المنازعات التعاقدية فإنه يجب افتراض أن الأطراف، حتى وإن كان أحدهم دولة، كان لديهم القدرة في إيجاد وسيلة قوية 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 المحلي على قانون إجراءات لنظام قانوني وطني معين، ولهذا السبب فإن المحكم لم يرجح القيادة الكاملة في تحديد القانون واجب التطبيق على إجراءات التحكيم، كما هو الحال بالنسبة لمجلس التحكيم الحالية، فإنه من المناسب والمفيد إسناد إجراءات التحكيم إلى نظام قانوني معين. وبناءً على ذلك حدد المحكم مقر التحكيم في كوبنهاجن بالدنمارك، وبناءً على الأسباب التي تقدم ذكرها ونظرًا للحرية الكبيرة والاستقلال الذي تتمتع به محكم التحكيم التي تفصل طبقاً لقانون الدنمارك، قدر المحكم أن القانون واجب التطبيق على إجراءات التحكيم هو القانون الدنماركي.
الخاتمة

ان دراسة فاعلية التحكيم كضمانة إجرائية لحماية الشركات النفطية الأجنبية قادتنا إلى جملة من النتائج والمقترحات نلخصها في الأتي.

أولاً: النتائج.

1- يقوم نظام التحكيم على الإرادة الذاتية لأطراف العلاقة العقدية، لأن هذه الأخيرة تلعب دورا هاما في الفصل في منازعات التحكيم.

2- إن وجود شروط التحكيم يؤثر على سيادة الدولة، فليس بها بعض خصائصها، كالخصوصية القضائية، إذ أن الدولة بمجرد موافقتها على إدراج شرط التحكيم تكون قد نازلت 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 تتضمن الدولة المضيفة للتحكيم والمتمثلة في استقلال شرط التحكيم عن العقد، واختصاص المحكمين بالفصل في النزاع (ببدأ الاختصاص بالاختصاص)، وعدم قبول دفع الدولة والأشخاص المعنية التابعة لها بعدم أهليتها للتحكيم، فضلاً عن ذلك ضمان مبدأ مساواة الأطراف أمام محكمة التحكيم.

ثانياً: الاقتراحات.

1- يجب أن تتمسك الدولة بأن يكون التحكيم داخلياً في منازعات العقود الإدارية المتعلقة بالثروات الطبيعية، إعمالاً لمبدأ سيادة الدولة، ولضمان تطبيق القانون الداخلي الذي يحكم هذه العقود، حيث أن قواعد الإسناد في القانون الدولي الخاص غالباً ما تقتضي بذلك.
2- تجربة المناخ التشريعي الملائم للأخذ بالتحكيم في منازعات العقود النفطية، خصوصاً في ظل التوجهات الاقتصادية للدول المضيفة نحو الاستثمار، وما يشجع الاستثمار الأجنبي.

3- نظراً لتنامي دور التحكيم وتحوله إلى فضاء اصيل في مجال العقود الدولية في كافة بلدان العالم تقترب التوجه إلى دعم مؤسسات التحكيم في الدول الإسلامية لغرض توحيد وتشجيع التعاون بينها باعتبارها اجهزة متخصصة تساهم بدور فعال واساسي في مجال تشجيع الاستثمار والتجارة في هذه الدول، وذلك للحد من ما عانته تلك الدول من تأخير تمييز ضد مصالحها في القضايا التحكيمية التي تم نظرها أمام هيئة تحكيم اجنبية. فضلاً عن الاستعانة بالمحكمين المسلمين المشهود لهم بالكفاءة والعدالة والعلم.
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حل المنازعات في القضايا التي يرتكبها الأحداث الجانحة في القانون العُماني

مقدم إلى المؤتمر العالمي لتسوية المنازعات المنعقد في الجامعة الإسلامية العالمية
لل فترة 9-10/8/2017م

إعداد

بدر بن خميس بن سعيد اليزيدي
طالب الدكتوراه في الجامعة الإسلامية العالمية
كلية أحمد إبراهيم للحقوق

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ملخص البحث

رغم إحتفاء المشرع العماني بوسائل وأنظمة حل المنازعات ودليلاً إلا أنه ألم ذلك بشكل واضح فيما يتعلق بنسوبية المنازعات في القضايا التي يتركها الأحداث الجائحون مطباً في ذلك ذات القواعد التي طبقها على البالغين، في حين أن الأحداث فئة خاصة يجب أن يوجه إليها إهتمام وعناية أكبر لتجنبهم عناء المحاكمات وتعقيدتها التي تخلف أثراً سبيلاً على الحدث.

ويتعمّ بغذى البحث إلى تحقيق جملة من الأهداف تتمثل في التعريف بمفهوم الحدث وقضاء الأحداث في القوانين العمانيّة، وعرض أنظمة حل المنازعات لقضايا الأحداث في النظام القضائي العماني، وبينما كيفية معالجة القانون العملي لحل المنازعات في القضايا التي يتركها الأحداث الجائحون في المجالات الجزائي والمدنى واقتراح وسائل تحسين عملها.

ويتعذر البحث على جملة من مناهج البحث العلمي، حيث يأخذ بالمنهج الاستقرائي من حيث استقراء المواد القانونية المرتبطة بنسوبية المنازعات في النظام القانوني العماني، والمنهج التحليلي من حيث تحليل المبادئ والقواعد العامة في القانون العملي في مجال نسوبية المنازعات الخاصة بالحدث الجائع، و المنهج المقارن- عند الحاجة إليه - من خلال بيان موقف المشرع العماني من حل المنازعات في القضايا التي يتركها الأحداث الجائحون مقارنةً بأحكام الشريعة الإسلامية.

وقد خلص البحث إلى نتائج أهمها وجود قصور تشريعي في القوانين العمانية في مجال نسوبية منازعات الأحداث الجائعين يلزم منها سد هذا القصور بتشريع قوانين تلزم عرض الصلح في قضايا الأحداث من قبل القاضي كما تلزم المجني عليه (المضرور) بسلوك طريق الصلح قبل الشروع في محاكمة الحدث وإنشاء جهاز أو هيئة خاصة تُؤدي بنسوبية منازعات الأحداث الجائعين.
المقدمة

يأخذ موضوع تسوية المنازعات حيزًا جيدًا في التشريعات والقوانين الوضعية الحديثة، إذ داومت هذه التشريعات والأنظمة على سن القوانين التي تنظم عملية الصلح وتسوية المنازعات، وإن كانت هذه التشريعات لا تزال دون مستوى الطموح، غير أن وجودها يعد ذاته مبرزة بالإشارة بما والاستفادة منها، وقد تناولت هذه التشريعات موضوع تسوية المنازعات في جوانب مختلفة، سواء كانت متعلقة بنزاعات تجارية أو عمالية أو جزائي أو مدني، ولا شك أنه يشغل حيزًا واسعًا في مجال الأحوال الشخصية.

ورغم هذا الاحتفاظ القانوني بمسألة حل المنازعات بأنواعها، غير أن هناك فئة من المجتمع يحتاجون إلى مزيد عناية واهتمام، والمقصود بعمم الأحداث، فهم رجال المستقبل وأمهات الغد، ولا غرو أن يكونوا مخطئين وعناية الأممية التي تنطل إلى مستقبل زاهر وغدٍ مشرق.

وفي ظل سماوات مفتوحة من الفضاء الإلكتروني الذي يزخر بالكثير من الأفكار والثقافات التي تنتقد عن قيم المجتمع وفلكه الغليظ وديلّ يظل يظل كثيرة على وجه العقاد، فإن الأحداث يكونون عادة للجنوح وارتكاب الجرائم وبالتالي نشوء قضايا تتعلق في أروقة المحاكم، وهذه القضايا تكون في المجال الجنائي باعتبار أن هناك جريمة وقعت، كما تكون في المجال المدني لوجود عنصر التعويض وجبر الضرر الناتج عن هذه الجريمة، وهذا يدفعنا إلى البحث 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.

وتقوم إشكالية البحث في أن القوانين العمانية – الإجرائية منها والموضوعية – نظمت مسألة تسوية المنازعات بشكل عام، غير أنها في مجال حمل المنازعات في القضايا التي يرتبطها الأحداث الجناو
جاءت قاصرة عن توفيتَ بيئة للحدث يمكن أن تكفيه عناء المحاكمات ورهبة المثلول أمام الحاكم في سن

يجتاح معه إلى معالجة نفسية واجتماعية أكثر من حاجته إلى مواجهة قضائية، فقد جاءت هذه التصور

قاصرة عن تلبية حاجة الحدث الحامد إلى تسوية منازعته والوصول بما إلى بر الأمان من خلال تصور

قانونية واضحة تحدد مسار الصلح في قضيته، وإما أدخلت هذه التصور مع تسوية المنازعات لدى

البالغين رغم ما للحدث من خصوصية واضحة.

وتحملة طبيعية للقصور التشريعي فقد ظهرت مشكلات عملية أثناء مراحل المحاكمات المختلفة تمثلت في

محاكمة بطيئة لا تحقق عدالة ناجزة وسريعة الحروب الأمر الذي يضمن أمام خشية حقيقية من أن يكون هذا

القصور التشريعي والتطبيقي سبباً في صنع أحداث مجرم في المستقبل نتيجة لهذه المعاملة ، ولذلك

جاءت هذه الدراسة لتتفق على هذا القصور وتقيد الحلول والبدائل والمعالجات القانونية مستنيرة في ذلك

بأصول الشريعة الإسلامية.

والله التوفيق وعليه التكلان.
أولا: مفهوم الحدث الجانح ومحكمة الأحداث في النظام القضائي العماني:

لأجل فهم عمل نظام حل المنازعات في القانون العماني في القضايا التي يرتكبها الأحداث الجائحة 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 الصبي،
ويقصد به: كل من لم يصل إلى سن البلوغ أو الخِلَم، وتبدأ مرحلة الحداثة أو الطفولة في الفقه الإسلامي
من خروج الطفل من بطن أمه حياً لدلالة الآية القرآنية الكريمة ( هو الَّذِي خَلَقَهُمْ مِنْ نُطْفَةٍ إِنْ ثَمَّ مِنْ نُطْفَةٍ
ثَمَّ مِنْ عَلَقَةٍ ثَمَّ مُحَرَّجُهُمْ طُفْلاً ثَمَّ إِنْ تَلْبِسْهُمْ أَشْدَكَمْ ثَمَّ لَتَكُونُوا شُيوخًا ) (سورة غافر: الآية 67) فقد ذكرت
الآية المرحلة الجنينية التي تعقبها مرحلة الطفولة بخروج الإنسان من بطن أمه حياً.

وبدأ 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 وعمر، فالمعيار العضوي
يتجنب بالخصائص البيولوجية لجسم الطفل وما يظهر عليه من علامات تدل على انطلاق من مرحلة الحداثة
إلى مرحلة التكليف، ومن هذه العلامات الإحتمال وإنبات الشعر في الذكر وظهور الظهير وبدء الدورة
الشهرية عند الأنثى.
ويستند هذا المعيار بأنه واقعي يعكس التغييرات الجسمية لدى الحدث، ويعاب عليه بأنه لا يعكس دائمًا النضج العقلي فضلاً عن الصعوبة التي تعترى تحديد المرحلة الإنتقالية لهذا السن 1، ولذا فإن التشريعات الوضعية لم تعد هذا 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 العمرى فيأخذ بالسن بدلاً من الحالة الجسمية للحوار، وبالتالي يستند بالأساس إلى تحديد تاريخ ميلاد الحدث لمعرفة سن البلوغ، وقد تباينت أقوال الفقهاء في تحديد هذا السن، فذهب الشافعية والحنابلة والصاحباء من الحنفية إلى أن سن البلوغ هو خمسة عشر سنة لا فرق في ذلك بين الذكر والأثنا، ورأى أبو حنيفة أن سن البلوغ للصكي ثمانية عشر سنة وللفتاة سبع عشر سنة، وذهب جمهور المالكية إلى أن سن البلوغ ثمانية عشر سنة لا فرق بين الصبي والفتاة 2، وذهب ابن حزم الظاهري إلى أن سن البلوغ تجاوز الفتي أو الفتاة من الناسبة عشر 3، وغنى عن البيان أن اعتماد الفقهاء لهذه الأعمار إذا تكون حسابها بالأشهر القمرية.

وأما في القانون، فيعلّق الحدث بشكل عام بأنه الصغير الذي لم يبلغ سن الرشد الجنائي 0، وتتفق أغلب القوانين على أن الحدث يعتبر جائعًا إذا ارتكب جرماً يعاقب عليه القانون قبل بلوغه سن الرشد الجنائي.

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1 ضمه العلامة، قنة بعث الطلب، المواضو: دار الفكر القانوني، ط 1، 2013م، ص 20-21، وعداد، رئيسي، عدل الإجراء، (الإسكندرية: منشور المعاو، ط 1970م)، ج 1، ص 365.
2 الأنصاري، ركزى بين أحمد بن أحمد، شرح التحبير تقيق الفائض في قضاء الإمام الشافعي، (القاهرة: دار إحياء الكتب العربية، د.ت)، ج 1، ص 205، والمفاضل، عادلان بن أحمد بن فدامه، المغربي، على مختصر أبو القاسم الحربي، (مكتبة ابن تيمية لطباعة ونشر الكتب السنية، ج 1)، ج 4، ص 510، والكاساني، علاء الدين أبو بكر بن مسعود بن أحمد، بديع الصالح في دور الشريعة، (بيروت: دار الكتاب العلمي، ط 2، 1986م)، ج 7، ص 172.
3 قاضى إده أتفي، محمد الدين أحمد بن بدرود، تلخيص قле القدير، (بيروت: مطبعة دار الفكر، ط 1977م)، ج 9، ص 270.
4 الداعي، علي بن أحمد بن سعيد بن زينب، المغربي بالآثر، تحقيق: أحمد ناجي شاكر، (بيروت: مطبعة دار الفكر، د.ت)، ج 5، ص 688.
5 المهدى، أحمد والشافعي، نشرة المحاماة الجنائية للأحداث والأحكام الإجرائية الخاصة هم، (القاهرة: دار المدعية، ط 2، 2006م)، ص 1.
الذي بلوغه يصبح مسؤولاً جنائياً مسؤولية كاملة، وكثيراً ما ترتبط القوانين في تحديد مفهوم الحدث الجناحي بسنوات عمره، فمن خلال سبيّ عمره تتعدد مسؤوليته الجنائية من عدماً والتي تبدأ بالميلاد وتنتهي ببلوغ سن الرشد الجنائي.

وقد عُرف قانون مسؤولية الأحداث العماني الحدث بشكل عام أنّ "كل ذكر أو أنثى لم يكمل الثامنة عشر من العمر، خالقاً، بما وثقتاً كاملة، مسؤولية جنائية، يصبح ببلوغو الذي بلوغه سن الرشد الجنائي.

وعندئذٍ القوانين على حسابه فما بعد الثامنة عشر من عمره، وعرفت ذات المادة الحدث الحادث بأنه "كل من يبلغ الثامنة عشر ولم يكمل الثامنة عشر وارتكب فعلًا يعاقب عليه القانون"، وعلى هذا الحادث يعتبر منحضاً في نظر القانون عند بلوغه السن التي حددها للتمييز وحتى بلوغه سن الرشد الجنائي.

ومن هذا يمكن للباحث تعريف الحدث الجناحي وفقاً لمفهومه في القانون العماني بأنه: القاصر الذي بلوغ مرحلة العمرية التي تكون فيها المسؤولية الجنائية ناقصة أو مخففة، وتنتمي من بلوغه الثامنة عشر من العمر وحتى إتمامه الثامنة عشر.

ويستخلص الباحث وفقاً لتعريف قانون مسؤولية الأحداث، أنه يشتكي لاعتبار الحدث جاحزاً توفر:

شروطين:

الأول: بلوغ الحدث الثامنة عشر من العمر وعدم إتمامه سن الثامنة عشر، فلا يعتبر جاحزاً من لبَّ الناسِعة من عمره حتى لو ارتكب فعلاً معاقباً عليه قانوناً، كما يعتبر باليماً من آثم الثامنة عشر من عمره.

الثاني: أن يرتكب فعلاً يعاقب عليه القانون خلال الفترة المذكورة.

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٧- المرجع نفسه، المادة (1/د).
قضى الأحداث في سلطنة عمان:

لم تقتصر الدول الإسلامية - ومنها سلطنة عمان - على جعل التشريع الإسلامي قانوناً عاماً ينظم أوضاع الناس في تعاملاتهم وسلوكاتهم، وهذا ما كان عليه الحال في سلطنة عمان حتى عام 1970م، عندما تولى قيادة البلاد حضرة صاحب الجلالة السلطان قابوس بن سعيد الذي عيّن بوضع القوانين لتنظيم دولة عصرية حديثة تقوم على نظام مؤسسٍ يحكم القوانين المستمدة من روح الدين الإسلامي آخذاً بنواحي 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 الجنائية والعذاب) من الباب الثالث (في شروط التجريم والعقاب) على مواد تتضمن (أحكام القاصرين) تضم أربع مواد (104-107) تشتمل على قواعد تحديد سن عدم المسؤولية وسن المسؤولية الناقصة والعقوبات المخففة التي توقع على الأحداث الجناجية.

ورغم هذا التطور التشريعي إلا أن قضاء الأحداث لم يكن مستقلاً، فقد ظل القضاء الجنائي العادي يتوصل محاكمة الجناج وفق الإجراءات التي تبعتها في محاكمة الجرحين البالغين، وبدخول سلطنة عمان إلى الاتفاقات الدولية المعنية بالأحداث والعدالة الجنائية المقررة فم اقتضى الحال تطوير المنظومة القضائية بما يتفق والقواعد الدولية، فقد صدر قانون مساواة الأحداث وعلي ضوءه تم إنشاء قضاء

مستقل بالأحداث محكمة قواعد تسمى بقدر من الحماية والرعاية للتعامل مع مرتكبي الجرائم من الأحداث وقواعد إجرائية تختلف عن تلك المتبعة في قضاء البارعين.

وقد تعرفت المادة الأولى من قانون مسؤولية الأحداث العمالي في الفقرة (و) إلى تعريف المحكمة بأنها الدائرة التي تختص بالنظر في قضايا الأحداث وفقاً لأحكام هذا القانون، وتسمي محكمة الأحداث.

وألاحظ من التعريف فيد اختصاص المحكمة على قضايا الأحداث وفقاً لأحكام قانون مسؤولية الأحداث، وهي تكون في حالة ارتكاب الحدث جريمة يعاقب عليها القانون أو ارتكاب البالغ لأحد الجرائم الواردة حصرًا في قانون مسؤولية الأحداث، والتي بتطبيقها 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 الجاني لكونه لم يبلغ سن الرشد الجنائي ويحتاج إلى إبعاده عن السلكيات والإجراءات التي يحيط بها المحاكم العادية والتي يشى منها أن تتعكس سلبًاً على شخصية الحادث، كما يهم قضاء الأحداث بإعادة تكوين السلوكيات المنحرفة لدى الأحداث عن طريق إجراءات تقويمية تهدف إلى حمايته وتقويم سلوكيه حتى يعود على تحمل المسؤولية واحترام القانون.

وتقوم فلسفة محكمة الأحداث على أساس الإصلاح وليس فرض العقوبة، وأن الإجراء التوفوري يتبع اختياره بعد دراسة شاملة لحالة الحادث سواء فيما يتعلق بالظروف الاجتماعية التي تحيط به أو العوامل النفسية التي بداخله، وبالتالي فإن مظاهر الحماية تحيط بالحدث الجاني من بداية مساعده الجنائية وصولًاً إلى مرحلة عودته واندماجه في المجتمع.

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المحكمة المشرعة التي نغيها من إفراد هذا الاختصاص يكمن في بث الطمأنينة والثقة في نفوس الأحداث
مع إبعادهم عن المحاكمات التقليدية بما يتخللها من قيود السجن والحرص، يكون فيها القاضي ممثل
الأب الذي يرعى نبيه، يهمه الطفل قبل أن تحمه الجريمة، ويهتم بتكوينه وبناء المجتمع أكثر من
الاهتمام بتوقع العقاب.
وتتغيرة 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 يعود في برديد الإختصاص بهذه المحاكم
لشخص يعطي وليس لنوع الإبعرشة.
والثانية: من جهة الإجراءات التي تتبع في نظر الدعاوى التي تختص بها والتي تعتبر في مجملها استثناء من
المواضع الجزائية العامة.
وتظل هذه الطبيعة الخاصة لقضاء الأحداث فإن هناك دعوات يدعي محاكم الأحداث عن مقار
المحاكم العادية لتطبيقاتها الخاصة وما تحتاجه من أوجه تبعث على الطمأنينة في نفس الحدث، وهي
غالباً تحو بينها بعض الاعتبارات العملية والظروف الاقتصادية لكنها تبقى مطلباً طموحاً تتعلق إليه
السياسة الجنائية لتحقيق الاستقلال الكامل لتصنيف قضاة الأحداث، وهو ما يدعو إليه الباحث لأجل
تحقيق استقلالية وخصوصية تامة في قضاء الأحداث في النظام القضائي العماني.

11 - عبد العزيز، المسؤولية الجنائية للطفل، ص 179.
12 - أحمد، أليس حسب السيد، نطاق الخلافة الجنائية للأطفال، (مليان: دار الكتب القانونية، 2011م)، ص 517.
13 - الدبيسي، محتوى المنشأة والمعالجة الجنائية للأطفال، (الكونتري: المكتب الجنائي الحديث، 2011م)، ص 105.
ثانياً: أنظمة حل 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 الادعاء، كما هو الحال في التحكيم الشرعي بين الزوجين، ومن جميع هذه الأنظمة فإن هناك نظامان فجذبما 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:

اسم هذا الصلح قضائياً لأنه يتم بعد إقامة الدعوى أمام المحكمة والتصالح أثناء المحاكمة، وقد عرف بأنه "عقد يتفق عليه الخصوم بنفسهم ويطرحونه على المحكمة للمصادقة عليه أو اعتباره وجعله في قوة سند واجب التنفيذ".

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، وذلك لأن الجلسة الأولى غالباً ما تكون قابلاً للصلح فيها أكثر قبل الدخول في تفاصيل الدعوى التي.

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11 - ظلبة، أثر، موضوعات المنافع المدنية والتجارية، (مصر: دار الكتب القانونية،2003م)، ج.2، ص118.
تتعلق هذه المناقشات الكلامية والتي تنضاءل معها احتمالية الصلح، وقد وقع الخلاف في أن عرض الصلح أمر ملم للقاضي بحيث يرتب عليه البطلن إن لم يتم 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 بالبطلن، ويرى الباحث أن جعل الأمر وجوياً وترتب البطلن على تركه أمر يزيد من فرصة وقود الصلح بين الأطراف، ولذا يقترح الباحث تعديل نص المادة يجعل عرض الصلح على الأطراف وجوياً يرتب على مخالفته البطلن في إجراءات الدعوى خاصة في قضايا الأحداث.

فضاً عن قيام القاضي بعرض الصلح على الأطراف، فإن للخصوم أنفسهم أن بطلوا من المحكمة في أي حال تكون عليها الدعوى إثبات ما اتفقوا عليه في محضر الجلسة ويوقع عليه منهم أو من وكلائهم المفوضين لهم بذلك 16، فإذا كانوا قد كتبوا ما اتفقوا عليه أُخير الإتفاق المكتوب بمحضر الجلسة وثبت محتواه فيه، ويكون محضر الجلسة في الحالتين قوة السند التنفيذى ونُعطيه صوره وفقاً للقواعد المقررة لتسليم صور الأحكام القضائية 17، ويجوز للمحكمة أن تصدر حكمًا مشروعًا على الشكل المقرر للأحكام منتهية فيه إلى إثبات ما اتفق عليه الخصوم، ولكن يظل هذا الحكم خاضعاً لكافة القواعد المقررة للصلح.

ومن هذا يتتب أن الصلح القضائي يتطلب القاضي الذي ينظر الدعوى، غير أن عرض القاضي بالتصديق على الصلح وإثباته لا يكون حكماً وإنما بمثابة سند واجب التنفيذ لتصديق القاضي عليه وفقاً لسلطته الولائية وليس بصفته القضائية، وهذا يعني أن ما حصل أمامه من إتفاق الخصوم وتثبيته ليس له حجية الشيء المحكوم فيه وإن أعطي شكل الأحكام عند إثباته، لأن القاضي لم يقوم بتوظيفه القضائية.

16 - نصت المادة (78) من قانون الإجراءات المدنية والتجارية على أن هناكجمة من الأعمال يلزم فيها وجود توكيل خاص والمص عليها صراحة في عقد الوكالة حتى يصبح للوكيل القيام عن موكلته هذه الأعمال، ومن ضمنها الصلح.

17 - قانون الإجراءات المدنية والتجارية، المادة (105).
من وزن الأدلة وتقدير البيانات والترجيح بينها للوصول إلي 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 بطرق دعوى أصلية يطلب فيها إبطال الحكم الصادر بالتصديق على الصلح لنقص في الأهلية أو الغلط في الواقع أو التدليس أو لغير ذلك من أسباب البطالة.

ثانياً: يكون الصلح القضائي قابلاً للفسخ كسائر العقود، باعتبار أنه عقد تم بين أطراف الخصومة وقام القاضي بإثبات هذا العقد آخذًا الشكل المقرر للأحكام القضائية.

ثالثاً: يكون تفسير الصلح القضائي طبقياً 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 إلا ما يقوم ب مهمة الموقف، ولا يجوز توثيق عقد إلا بحضور الطرفين حتى لو كان الطرف الخاطئ قد قبل التصديق على الصلح في غيابه، كما يجب عدم التصديق على الصلح إذا تضمن ما يخالف النظام العام والأداب أو ما يضر بمصالح الغير.

ويشترك الصلح القضائي مع الأحكام القضائية في أنه يعتبر سندًا تنفيذياً يجري تنفيذه بذات الطريقة التي تنفذ فيها الأحكام القضائية، حيث أوضح قانون الإجراءات المدنية والتجارية السندات التنفيذية التي

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18 طالب، موسوعة المرافعات المدنية والتجارية، ج.2، ص104.
يجري بمنحها التنفيذ الجبري وجعل في المقام الأول الأحكام والأوامر القضائية، ثم يأتي في المرتبة الثانية

المخرّات الموثقة وعناصر الصلح التي تصدق عليها المحاكم.

ولأن المادة التي أجازت عقد الصلح القضائي واردّة في قانون الإجراءات المدنية والتجارية فإن الصلح إذاً يصح في الدعاوى المدنية والتجارية ودعاوى الأحوال الشخصية لأن القانون ينظم إجراءات النقض في هذه الدعاوى، وأما الدعاوى العملية فإن الصلح يصح فيها كذلك لإدراجها ضمن القانون شريطة أن لا يمس الصلح حقوقاً يقررها قانون العمل، وأما الصلح على شكوى جنائية مقابل مبلغ من المال فإن ذلك يعد بإطلاق لدخول ذلك ضمن الدعوى الجنائية، 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 تحدث على الصلح وتدب إليه مثل قوله تعالى: (وَالصُّلْحُ خَيْرٌ) (سورة النساء: الآية 12) وقوله: (إِمَّا أَلْمَعَمَّونَ إِحْوَةٌ أَوْ أَصَلَحُوا بِيْنَ أَخْوَيْكُمْ) (سورة الحجرات: الآية 10) وقول الرسول ﷺ: (الصلح جائز بين المسلمين إلا صلحًا أحل حراماً أو حرم حلالاً).

ويلاحظ الباحث أن هذا النوع من تسوية المنازعات لم يتضمن أحكاماً خاصة بالأحداث الجائين، فهو نظام يشمل الأحداث والبالغين على السواء.

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11 - قانون الإجراءات المدنية والتجارية، المادة (342/ب).
10 - طلحة، موسوعة المرافعات المدنية والتجارية، ج.2، ص.113.
9 - أبو داود، سلعي بن الشهاب، سنن أبو داود، (بيروت: دار الفكر، د.ت)، كتاب الأفاضل، باب: في الإصلاح، ج.3، ص.304، والتصريف، كتب: ابن عيسى، سنن الترمذي، (بيروت: دار إحياء التراث العربي، د.ت)، كتاب الأحكام، باب: ما ذكر عن الروسول ﷺ في الصلح بين الناس، ج.3، ص.626، والتصريف، كتب: ابن بويده، سنن ابن ماجة، (بيروت: دار الفكر، د.ت)، كتاب الأحكام، باب: الصلح، ج.2، ص.788.
- جان التوفيق والمصالحة:


وتتغطي لجان التوفيق والمصالحة طريق غير قضائي لحل المنازعات، ومن خلال استقراء نصوص قانون لجان التوفيق والمصالحة يستخلص الباحث عدة خصائص بسيطة هذه اللجاف كالتالي:

- أن اللجوء إلى هذه اللجاف يكون بدون رسوم مهما كان سقف طالبة الالتباس.

- اللجوء إلى اللجاف يكون اختيارياً لذوي الشأن.

- اللجان غير مقيدة بقانون المحمية في اشتراك توكيل محام إن كانت المطالبة تزيد على قيمة خمسة عشر ألف ريال عماني.

- عدم التزام هذه اللجاف بقانون الإجراءات المدنية والتجارية من حيث تسجيل الطلبات واللجوء، والاستعانة بالخبرة، وهذا يعطيها مرونة وسرعة في اتخاذ الإجراء.

14 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
15 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
16 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
17 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
18 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
19 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
20 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
21 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
22 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
23 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
24 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
25 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
26 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
27 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
28 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
29 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
30 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
31 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
32 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
33 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
34 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
35 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
36 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
37 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
38 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
39 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
40 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
41 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
42 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
43 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
44 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
45 - نشر في الجريدة الرسمية العدد (804) بتاريخ 1/12/2005م.
عدم تقيد اللجان في مكان وحيان اقتصادها بمواقع العمل الرسمية، وهو يعطيها سهولة عقد الصلح في غير أوقات العمل الرسمية.

 يوجد محترم الصلح الذي يصدر عنها سندًا تنفيذياً ويجري تنفيذه بذات الطريقة التي تنفذ بها الأحكام القضائية النهائية.

 اللجان لها طابع اجتماعي، حيث يتم عرض النزاع في جو هادئ وفي مكان مخصص مختلف عن قاعات المحاكم بعيداً عن الإرهابات الرسمية ورهبة المحاكم.

 يكون قبول الصلح فيها اختيارياً للطرفين، فلا يوجد إكراه لأحدهما في قبول الصلح.

 يؤثر للطرفين إقامة دعوى أمام القاضي الطبيعي مباشرة إن لم يصل الأطراف إلى صلح يرضيهما.

 وقد أوضحت المادة (5) من قانون لجان التوقيع والمصالحة أن اللجنة تشكل برأتى من وزير العدل، وتشكلها يأخذ الثلاثة صور وفق ما ذكرته المادة وذلك على النحو التالي:

 1) التشكيك القضائي: وذلك بأن تشكل برأتى أحد القضاة وعضوية اثنين منهم، وقد جعلت المادة المذكورة الأولوية للتشكيك بالهيئة القضائية حتى تكون أذى إلى القبول عند الناس، ما يكتم الأطراف من اعتاد للهيئة القضائية، كما أن القضية أوعى بالدعوائح التي يجوز فيها الاتفاق على الصلح، وبالتالي تكون متفقة مع صحيح القانون.

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١٨ - المرجع نفسه، المادة (3).
٢٠ - المرجع نفسه، المادة (15).
١٩ - المرجع نفسه، المادة (7).
٢٢ - المرجع نفسه، المادة (4).
٢١ - المرجع نفسه، المادة (14).
التشكيل المختلط: وذلك بأن تُشكل برئاسة أحد القضاة وعضوية اثنين من ذوي الخبرة من توافر فيهم الحكمة، فهذا التشكيل يتميز بالمجتمع بين العنصر القضائي ذو الخبرة القانونية والكفاءات القادرية على حل المنازعات.

التشكيل من ذوي الخبرة: قد تواجه اللجنة ظرف شح القضاة وندريم أو ان芨سهم بالعمل القضائي لديهم في منطقة من المناطق، وحتى لا تقع REV لجنة عاجزة عن أداء دورها؛ أجل 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 بنظر إليهم المجتمع ويقدرهم من مشائخ العلم وأهل الفضل.

ورغم ذلك تبوأتها بعاف التوفيق والملائمة غير أن اختصاصاتها بتسوية أي نقاش يكون قبل إقامة دعوى بشأن أمام القضاء، فإذا أقيمت الدعوى أمام القضاء فإن اللجنة تكون غير مختصة بنظر المنازعة.

كما أن اللجنة مختصة بنوع معين من المنازعات التي يصح قانوناً من عقد الصلح فيها وهي ثلاثة أنواع:

(1) المنازعات المدنية: والتي يكون موضوعها مدنياً ويطبق عليها قانون المعاملات المدنية.
(2) المنازعات التجارية: وهي التي يكون أحد أطرافها تاجر أو أن موضوعها تجارياً، ويحكمها قانون التجارة.
(3) المنازعات في مسائل الأحوال الشخصية: وهي القضايا الشرعية المتعلقة بقضايا الأسرة والمعاشرة والوصية والتي يحكمها قانون الأحوال الشخصية.

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٢٣ - المرجع نفسه، المادة (4).
٢١ - المرجع نفسه.
وعلى هذا فإن بقية المنازعات لا يصح للجنة أن تعقد الصلح فيها، فبالإضافة إلى محدودية نطاق اختصاصها القانوني مثل المنازعات المتعلقة بقانون الجرائم وقوانين العمل والقضايا الإدارية والمنازعات المتعلقة بملكية الأراضي.

ويظهر من العرض السابق أن هذا النظام من النسوية لم يتضمن أحكاماً خاصة للأحداث، وإنما هو عام في ولايته من البالغين في القضايا التي تدخل من اختصاصه، ويتم الباحث على المشروع العماني توسيع دائرة عمل هذه اللجنة بحيث تشمل القضيّة الجزاّية التي يصح التصالح عليها وخاصة في قضايا الأحداث التي هي في حاجة ماسة للتسوية.

ونخلص من خلاص ما سبق عرضه، أن من بين أنظمة حل المنازعات في القانون العماني يمكن الاستعانة بنظامين فقط في تسوية قضايا الأحداث الجزاّية هما: الصلح القضائي ولجنة التوفيق والمصالحة، وتمشى بالبالغين وأحداثاً على السواء، ويظهر جلياً عدم وجود نظام تسوية مستقل أو حتى هيئة أو لجنة خاصة تختص بتسويّة القضايا التي يقع فيها الأحداث رغم الحاجة الماسة لهذه اللفة من المجتمع للنسوية منازعات بجنينها لما من تعقيدات المحاكمات وربما تتعكس سلباً على شخصية الحادث، وهو لعمري قصور تشريعي يجب على المشروع العماني تداركه بإنشاء جهاز مستقل لتسويّة منازعات الأحداث الجزاّية أو إنشاء لجنة أو هيئة مخصصة بذلك تتبع محكمة الأحداث أو جهة أخرى، وهو ما يقتربه الباحث على المشروع العماني.
ثالثاً: حل المنازعات في القضايا التي يرتكبها الأحداث الجاخبون:

رأينا أن قضايا الأحداث الجاخبون تنظر أمام محكمة خاصة تسمى "محكمة الأحداث" وانضج من ذلك أن القضايا التي يرتكبها الأحداث الجاخبون تكون قضايا جزائية تنظر أمام محكمة خاصة بالأحداث غير أنه يترتب على ذلك نشوء مطالبات مدنية ناتجة عن الجريمة، ويفسضي الأمر الحديث أولاً عن حل المنازعات في القضايا الجزائية ثم الانتقال إلى حل المنازعات في القضايا المدنية.

- حل المنازعات في القضايا الجزائية:

يُعرَف قانون الجزاء بأنه مجموعة القواعد التي تسنها الدولة لتنظيم حقها في العقاب، إذ أن من واجبات الدولة أن تعمل على استبابة الأمن وحفظ السلام في داخل المجتمع، ومتى كانت الجريمة عارضاً يجب على فإن عملية الدولة أن تتخذ من الإجراءات ما يكفل مكافحتها، وبوسيلة في ذلك توقيع جزاء على المجرمين، ويشأ عن ذلك قيام الدعوى الجزائية والتي تسمى أيضاً "الدعاوى العمومية" والتي يتولاها الادعاء العام الذي يقوم بالتحقيق في الدعوى وإحالتها بعد ذلك للمحاكمة باعتباره الأمين على كيان المجتمع والموثوق بهم.

وعند ارتكاب الحادث الجانبي لجريمة من الجرائم فإن دائرة خاصة في الادعاء العام تتولى التحقيق مع الحادث وتكفل له كافة الضمانات القانونية والحماية الضرورية تمهدًا لتقديم محكمة الأحداث، ونظراً إلى أن الإجرام لدى الحادث الجاخب أمر عاري وليس غيرًا متواصلًا فيه، فإن تسوية المنازعات في القضايا

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20 - السيد، السيد مصطفى، الأحكام العامة في قانون العقوبات، (القاهرة: دار المعارف، ط 4، 1964م)، ص 1.
21 - قانون مساءلة الأحداث، المادة (7).
لا تنشأ عن ذلك أمر متحتم لما ترتيب المحاكمة من أضرار نفسية وجسدية لا تخفي فالصلح الجنائي يؤدي إلى ثلاثي المساوئ التي تكمن العقوبات السالبة للحرية لكونه لا يتضمن مساساً بالحرية أو الشرف والسمعة، كما أنه لا يخدش المكانة الاجتماعية للمحدث الجاني ويجنح مختالية معتادى الإجرام.

وينور التساؤل هنا عن مدى قابلية تنوب المنجزات في القضايا الجزائية التي يرتكبها الأحداث الجانمون؟ ووجباً على ذلك، فإن القاعدة العامة في الدعاوى الجزائية أنه لا يجوز التصالح على الجريمة لأما حق عام للمجتمع وليست لشخص محدد، كما لا يصح التصالح على تحديد المسؤولية في القضايا الجزائية باعتبار أن تحديد المسؤولية من النظام العام الذي لا يجوز الاتفاق على مختلفه.

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 المخطى عليه أو من وكيله الخاص في الجرائم التي يشترط فيها القانون تقديم شكوى، وهي جرائم معينة نص عليها القانون حصراً بأما تحتاج إلى تقديم شكوى من المخطى عليها لأجل مباشرة التحقيق فيها من جهات الاختصاص.

وفي حالة ارتكاب الحدث الجاني لأحد جرائم الشكوى فإنه من قدم الشكوى أو طلب أن يتنازل عن شكايه أو طلب في أي وقت قبل الفصل في الدعوى Gunniaً، ويصدر على إثرها القاضي حكماً بإلقاء

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التعليقات من المصدر:

17 - طبعة، موسوعة المرافعات المدنية والتجارية، ج.2، ص113.
18 - قانون الإجراءات الجزائية، المادة (5).
19 - المرجع نفسه، المادة (10).
الدعوى العمومية بتنازل الشاكي 5، وهذا التنازل يأخذ غالباً صورة تسوية تتم بين الحدث أو وليه أو وصية أو المؤمن عليه وبين المجني عليه وتكون أمام القاضي في مرحلة المحاكمة.

وفي حالة تعدد المجني عليهم، فإن التنازل لا ينتج أثراً إلا إذا صدر من جميع من قدموا الشكوى، وأما في حالة تعدد المتهمين فإن التنازل عن الشكوى بالنسبة إلى أحدهم يعتبر تناولاً 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 من أن يتنازل عن الشكوى.

ووجائر الشكوى التي نص قانون الجزاء على أن ترفع بناء على شكوى مقدمة من المجني عليه محددة حصرًا في القانون وهي على النحو التالي:

1. جريمة ارتكاب أفعال الإهانة الواقعة علناً أو بالنشر ضد رؤساء الدوّار أو بنشر رؤساء الدول الأجنبية أو ممثليها المعتمدين لدى السلطنة أو ضد أعلامها - المادة (153).

2. جريمة استيفاء الحق بالذات - المادة (190).

3. جرمي اللواط والسحاء إذا لم يؤدي الأمر إلى الفضيحة - المادة (223).

4. جريمة الزنا - المادة (227).

5. جريمة الإيذاء البسيط - المادة (247).


7. جريمة انتهاك حرمة مسكن في غير حالات تشديد العقوبة - المادة (262).

10 - المرجع نفسه، المادة (10).
11 - المرجع نفسه، المادة (15).
8. جريمة التهديد بالسلاح — المادة (264).

9. جريمة وعيد آخر بمنحها — المادة (267).

10. جريمة التهديد بإزاالة ضرر غير محق — المادة (268).

11. جريمة إهانة الكرامة — المادة (269).

12. جريمة السرقة السعيدة وسرقة الأموال ذات القيمة التافهة — المادة (281).

13. جريمة اغتصاب التوقيع أو أية كتابة تتضمن تعهدًا أو إبراء بواسطة التهديد — المادة (287).

14. جريمة إساءة الأمانة — المادة (296).

15. جريمة حبس النفقطة أو أي شيء منقول دخل في حبارته خطأ أو بصورة طارئة أو بقوة ظاهرة — المادة (297).

ويلاحظ في هذه الجرائم أن الحق الشخصي للمجني عليه أظهر من حق المجتمع، ولذلك غليت فيها مصلحته على المصلحة العامة، وجميعها واردة في قانون الجرائم، 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، وإلا رفضت الدعوى العمومية قبل صدور هذا الطلبه وقع ذلك الإجراء باطلًا ببطلانًا متعلقًا بالبرامض العام. لنظام العام لاتصاله بشرط أساسي لازم لتحريك الدعوى العمومية وصحة إنصال المحكمة بالواقعة.


والاستثناء هو وجود نص صريح بإشراك تحرير الدعوى بناء على شكوى أو طلب أو إذن.

وإلاً، في حالة حصول التسوية والتنازل قبل صدور حكم نهائي في الدعوى، ولكن التساؤل ينهض هنا ما لو حصل تنازل الشاكى عن دعواه في الجرائم التي يصح فيها ذلك بعد صدور الحكم النهائي في الدعوى العمومية؟

في هذه الحالة أوجد القانون معالجة أسمها "صفح الفريق المتضرر" ويقصد به: "العفو الذي يصدر من المتهرب الذي أصابته الجريمة بضرة خاصة المادي أو المعنوي؟!" 14، 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، فإذا صدر الصفح من المتهرب فإنه لا يُنقض ولا يصح التراجع عنه، وكذلك فإن الصفح لا يصح أن يُلعَق على شرط إذ يجب أن يكون ناجزاً، وإذا تناول الصفح أحد المحكوم عليهم فإنه يشمل الآخرين، ولا يعتبر الصفح إذا تعدد المدعوون بالحقوق الشخصية ما لم يصدر عنهم جميعاً. 15

ولم يعد القانون آلية معينة لهذه التسوية، كما لم يوضح الحاضن لها في ظل انتهاء المحاكمة وصدر الحكم، ونظرًا إلى أن عبان التوفيق والمصالحة لا تختص بالتسوية في الدعوى الجرائية، كما أن الصلح القضائي قاصر على الدعاوى المدنية والتجارية والشرعية دون الجرائية، وعليه فلا يوجد حاضن قانوني لهذا النوع من التسوية وتبقي الأعراف الاجتماعية ومؤسسات المجتمع المدني هي الحاضن لهذا النوع من

14 - عطية، طارق إبراهيم الدسوفي، "الأحكام العامة في قانون الجزاء العماني" بالإسكندرية: دار الجامعة الجديدة، ط 1، 2012، ص 999.
15 - قانون الجزاء العماني، الصادر بالمرسوم السلطاني رقم (74/16) بتاريخ 16/2/1974م نشر في ملحق الجريدة الرسمية رقم (74/1)، الصادرة بتاريخ 1/4/1974م، المادة (67).
16 - المراجع نفسه، المادة (68).
التسوية، ويقترح الباحث أن يوعس المجال لللمعان التوقيف 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.

ويتبهم الباحث غاية المشروع من عدم إتاحة مجال الصلح في الدعاوى الجزائية وذلك خشية منه أن تتخذ بجارة أو وسيلة للإشراف بلا سبب شرعي، غير أن قيد النباح على جرائم الشكوى يُقدر من ذلك، كما يمكن تقييدها أيضاً بقصر الصلح في الجرائم التي يترتبها الأحداث دون البالغين حتى تكون التسوية وسيلة لتجنب الحدث الجناحي مسؤولي المحاكمات والعقوبات المترتبة عليها.

وعليه يقترح الباحث إضافة مادة خاصة في قانون التوقيف المصالحة تحل رقم (4 مكرراً) يكون نصها:

(تختص اللجان بتسوية المنازعات الجزائية التي تأخذ صفة الادعاء الشخصي في الجرائم التي يترتبها الأحداث الجناحي، ويتبع الصلح آثر التنازل القانوني قبل صدور الحكم ويكون سبباً لأعمال التزويق بعد صدور الحكم).

- حل المنازعات في الدعاوى المدنية:

يتطلب غالباً على الجرمة حصول ضرر مادي أو معنوي لدى منجز عليه الأمر الذي ينشأ عنه قيم دعوى مدنية متعلقة بالدعاوى الجزائية للمطالبة بالتعويض لجبر الضرر الذي خلفته الجريمة، وهذا أمر يحدث في القضايا التي يترتبها الأحداث الجناحي أو البالغين على السواء.

وقد وضع قانون الجزاء العماني قاعدة عامة في ذلك نصها "كل جريمة تُل أحج بالغير ضرراً مادياً أو معنويًا يحكم على فاعله بالتعويض عند طلب المتضرر ", كما أن القواعد العامة في القانون المدني توجب رفع
الضرر عن المضروب بصرف النظر عن عجز الفاعل، فقد نص قانون المعاملات المدنية على أن "كل إضرار بالغير بلزم فاعله ولو كان غير مبرر بالتعويض"، وهذا يتفق مع قواعد الفقه الإسلامي التي تقضي أنه "لا ضرر ولا ضرار". مَنَعَ حيث الأحداث، قضايا في المصلحة الكبرى، هكذا يتفق مع قواعد الفقه الإسلامي التي تقضي أن "لا ضرر ولا ضرار" و"الضرر يزاؿ و"الضرر يدفع بقدر الإمكاني".

والأسف العام أن لكل من أصابه ضرر شخصي مباشر بسبب ابعرشة أف يرفع دعوى بحقه المدني أمام المحكمة التي تنظّر الدعوى العمومية في أي حالة كانت عليها إلى أن يقبل باب المرافقة بوصفه مدعية منضماً في الدعوى العمومية، ويجوز للمدعى أن يطالب بحقه أثناء التحقيق الإبتدائي يطلب يقدمه إلى عضو الادعاء العام، غير أن هذا الأصل مستثنى في قضايا الأحداث، حيث مُنع قانون مساءلة الأحداث.

ولقد ثبتت المشروعة 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 بِعضاة الأحداث.

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18 - قانون المعاملات المدنية، الصادر بالرسوم السلطاني رقم (29/2013) بتاريخ 5/6/2013م، منشور في الجريدة الرسمية العدد (1012) بتاريخ 12/5/2013م، المادة (176).

19 - وهو قاعدة نصية وردت في حديث عن الرسوـ مالف قَال: (لا ضرر ولا ضرار)... باب: من بني في حق ما يضر جاره، رقم (2340) ج، 2 ص، 784، والأصحي، مالك بن ناس، موطاك ماك، (مصري: دار إحياء النواطـ ي العري دان) باب الأقضية، مالك، ابن الحسين، سنن البهيقي، (مكة البلاط، دار البلاط، 1414هـ/1994م)، كتاب الجرح، باب: لا ضرر ولا ضرار، رقم (11166) ج، 6 ص، 96، والداد قطفي، علي بن عمر، سنن الداد قطفي، (بيوت: دار المعارف، 1386هـ/1966م)، كتاب البيوع، رقم (288) ج، 3 ص، 77، وهو مويلي عن عدد من الصحابة كعبادة بن الصامت وابن عباس وأبي سعيد الخزيمة وأبي هريرة وعائشة رضي الله عنه.


21 - وزراء، أحمد بن حمد، شرح القواعد الفقهية، تحقيق: مصطفى أحمد الزرقا، (دمشق: دار القلم، ط 4، 1417هـ/1996م)، مادة (20) ص، 179.

22 - وزراء، أحمد بن حمد، شرح القواعد الفقهية، تحقيق: مصطفى أحمد الزرقا، (دمشق: دار القلم، ط 4، 1417هـ/1996م)، مادة (20) ص، 179.

23 - قانون الإجراءات الجزائية، المادة (20).

24 - قانون مساواة الأحداث، المادة (36).
الأحداث، وكذلك فإن هذا الفصل يُمكن محكمة الأحداث من التفرغ لبحث الجريمة وحالة مرتقبها وتقدير التدبير المناسب له دون أن يشغله عن ذلك بحث الدعوى المدنية، كما أن ربط الدعوى المدنية بالدعوى الجزائية يؤدي عادة إلى إطالة أمد التقاضي، وهو الأمر الذي يتناقض 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 الجينية الإجبارية للحدث الجانح.

وبناء على ما تقدم، فإن ليس للمضرر أو المتأثر في هذه أبعادها إلا اللجوء إلى أحد خيارات:

- الخيار الأول: توجه المضرر إلى لجنة التوفيق والمصالحة للمطالبة بحقه وتقديم طلب أمامها ضد الحدث الجانح ووهي أو وصي أو القائم عليه، أو أن يقدم الحدث الجانح أو أحد القائمين على شأنه يطلب أمام اللجنة لطلب المصالحة على مبلغ التعويض، وهنا تتدخل اللجنة بما لها من صلاحيات في تسوية النزاع وتقدير مبلغ التعويض الذي يستحقه المضرر نتيجة فعل الحدث الجانح، وهذا يُبدع الحدث عن رهبة المحاكمات وتعقيدها وطول الإجراءات فيها، وهو أخطاء الخيارين مترسبة على الحدث الجانح.

- الخيار الثاني: يقترح الباحث تعديل المادة (4) من قانون التوفيق والمصالحة ليكون نصها: (تختص اللجان بتسوية أي نزاع - قبل إقامة دعوى بشأنه إلى القضاء - بطرق الصلح بين أطرافه سواء كان موضوع النزاع مدنياً أو تجاريًا أو ينشأ من مسألة من مسائل الأحوال الشخصية، كما تختص بالصلح في

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1 - عبد العزيز، المسؤولية الجنائية للطفل، ص 208.
2 - عون، زهير أحمد، قضاة الأحداث دراسة مقارنة، (عمن: دار الثقافة للنشر والتوزيع، ط 1، 2009م)، ص 176، و طالب، السنية، تنظيم إجراءات محاكمة الأحداث في التشريع الجزائري، (بحث مقدم ليل درجة الماجستير في جامعة محمد خيبر ببجاية، كلية الحقوق، والعلوم السياسية، العام الجامعي 2013/2014م)، ص 92.
الحقوق المالية التي تنشأ عن الدعاوى الجزائية التي تأخذ صفة الادعاء الشخصي في أي حالة تكون عليها الدعوى.

الخيار الثاني: توجه المضرور إلى المحكمة المدنية للمطالبة بالتعويض بالتقدم بدعوى أمامها ضد الحدث الجانبي ووليه أو وصيه أو القائم عليه، وهنا تأخذ الدعوى إجراءات المحكمة أمام القضاء، غير أن يمكن تدخل القاضي بعرض الصلح على الأطراف وفقًا للمادة (99) من قانون الإجراءات المدنية والتجارية، والتي سبق تفصيلها، وهو ما يعرف بالصلح القضائي، أو عرض الحدث الجانبي أو أحد القائمين على شأنه الصلح مع المضرور وتسوية الاتهامات والدعاوى، وفي حالة عدم الصلح فإن ذلك ييجب الحدث طول الإجراءات بمجرد الدعوى في درجات التفاوض المختلفة ويجب عنا المحاكمات.

ويقترح الباحث تعديل المادة (99) من قانون الإجراءات المدنية والتجارية ليكون نصها: (تبدأ المحكمة الجلسة الأولى بعرض الصلح على الخصوم، ويكون ذلك وجبًا يرتبط على مخالفته البطلان في الدعوى التي يكون فيها المدعى عليه حديثأ...).

وفي الحالتين، تُطبق قواعد عقد الصلح الواردة في قانون المعاملات المدنية والتي أجازت للقضي المميز المأذون له في إبرام عقد الصلح إن كان نافعاً له، وكذلك الحكم في صلح الأولياء والأوصياء والقوم الذين ينوبون عن الحدث الجانبي. 66

وخلص من هذا، أن القانون العمالي أتاح للحدث الجانبي أو وليه أو وصية أو القائم عليه أن يتجنب إجراءات المحاكمات المدنية الناشئة عن الدعوى الجزائية بالتقدم إلى جنة التوفيق والمصالحة، وتسوية المنازعات أو الحضور أمامها في حالة تقديم طلب من المضرور، وكذلك عرض الصلح أمام القاضي في حالة قيام

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66 - قانون المعاملات المدنية، المادة (506).
المضرور برفع دعوى مدنية ضد الحدث، ورغم أن الطريقتين كفيلان بتسوية المنازعات التي يقع فيها الحدث في الجانين وتجنibe طول المحاكمات وإجراءاتها المعقدة، غير أن عدم النص عليها يعتبر قصوراً تشريعيًا يجب تداركه على النحو الذي اقترحه الباحث. كما يتمثم الباحث على المشروع العماني أن يجعل طريق المصالحة في القضايا التي يتركها الأحداث وجوبياً بدل أن يكون جوازياً، وذلك بإصدار تشريع يلزم المضرور والحدث الجانين 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 المشروع العماني.
الخاتمة

بعد هذا التطور بين خصائص العلم ووسيطتين المعرفة، نرجع وأيديباً ملأى بشعار بانعة من المعرفة المتعلقة بحل المنازعات في القضايا التي يربطها الأحداث الجنائية في القانون العماني، ويمكن تلخيص ذلك في عنصرين: النتائج والتوصيات.

- النتائج:

الحدث في الفقه الإسلامي هو من لسن البلوغ، وأما في القانون العماني فحدث الجاني هو من بلغ الثامنة ولم يتم الثامنة عشر وارتكب فعلًا يعاقب عليه القانون.

 محكمة الأحداث صيغة متطورة لبيئة القضاء الجنائي في المجتمع، تقوم فكرًا على إبعاد الحدث من الشكليات والإجراءات التي تضمن المحاكم العادية حماية للحدث.

 الصلح القضائي يعرضه القاضي على الأطراف أو يطلب أطراف الخصومة بأنفسهم أثناء محاكمة قايمة، ويعطي في جل إقراره قوة السند التنفيذي ويتم تنفيذه مثل الأحكام القضائية.

 جان التوقيع والمصالحة نظام جديد تميز به التشريع العماني وحده من القواعد الإجرائية التي يأخذ بها في المحاكمات القضائية، وجعل بدخل في تشكيلة أعضائه نسيج المجتمع من أهل الرأي والمحكمة ليكون أدعى لقبول الصلح، ويكون المحضر الصادر عنها سندًا تنفيذيًا شأنه شأن الأحكام القضائية.

 يمكن التنزل عن الدعوى الجنائية من المجري عليه في جرائم الشكوى، كما يكون صفح الفريق المضرور سببًا لانقضاء العقوبة المحكوم بها ضد الحدث الجاني.

 كل جريمة تُلحق ضرراً بالغير ماديًا أو معنويًا يحكم على فاعلها بالتعويض المدني عند طلب المضرور.
اتاح القانون العماني للحدث أو وليه أو وصبه أو المؤمن عليه أن يتجنب إجراءات المحاكمة المدنية الناشئة عن الدعوى الجزائية بالتقديم إلى لجنة التوفيق والمصالحة لتسوية المنازعات 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 ووجوبًا يترتب على مخالفته بطلان الإجراءات وخاصة من كان أحد طرف الدعوى حديثًا، ويقترح تعديل المادة (99) من قانون الإجراءات المدنية والتجارية ليكون نصها: (تبدأ المحكمة الأولى بالصلح على الخصوم، ويكون ذلك ووجبًا يترتب على مخالفته البطلان في الدعاوى التي يكون فيها المدعى عليه حديثًا...).

يوصي الباحث بفصل مباني محام اللجان إدارية من قبل القضاة الحاضرين في القضايا المصلكة نيابةً للصفة الخاصة لقضايا الأحداث.

يوصي الباحث بناء جهاز مستقل أو هيئة أو لجنة خاصة تتبع محكمة الأحداث أو أية جهة أخرى تكون مهمتها تسوية المنازعات الجزائية والمدنية التي يتزعمها الأحداث الجناحون.

يوصي الباحث توسيع دائرة عمل لجان التوفيق والمصالحة لتشمل القضايا الجزائية التي يصح التصالح عليها في قضايا الأحداث، وذلك بإضافة مادة خاصة في قانون التوفيق والمصالحة تكوف نصها: (تختص اللجان بتسوية المنازعات الجزائية التي تأخذ صفة الادعاء الشخصي في الجرائم التي يرتكبها الأحداث الجناحون، ويمنح الصلح أثر التنزيل القانوني قبل صدور الحكم ويكون سببًا 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

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كانتلي: (تختص اللجان بنسوية أي نزاع – قبل إقامة دعوى بشأنه إلى القضاء – بطرق 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 أي حالة تكون عليها الدعوى).

يوصي الباحث أن يكون طريق المصالحة في القضايا التي يترتبها الأحداث الجناوون وجوباً بإصدار تشريع يلزم المضرور والمحقق عليه بالمرور إجباراً على طريق المصالحة قبل إجراءات المحاكمة سواء كانت هذه المصالحة أمام لجنة التوفيق والمصالحة أو في المحكمة.
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- مجموعات المبادئ القضائية:

الاتجاهات الدولية في الآلية الفعالة لتسوية المنازعات في حضانة الأطفال بعد الطلاق

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يعرف العالم اليوم ظاهرة مجتمعية تتمثل في الوسائل البديلة لتسوية المنازعات، تطورت إلى جانب الآليات الرسمية لفضها، ويرمز بimedia مجموعة من الآليات التي يمكن إعتمادها لحل النزاعات مشاركة وموافقة أطرافها، وهي ليست بديلة بشكل كامل عن القضاء، فقط هي بديلة عن بعض الإجراءات القضائية، وبالنهاية تحري تحل إشرافه.

إن الوسائل البديلة لتسوية المنازعات ليست آلية جديدة، كإبما قد كمية منذ القدم الإنسانية، وكانت موجودة وفعالة آنذاك. لكن الجديد هو أن ظهرها في وقت يحتاج إليها الجميع على مختلف المستويات والعدالة. هذه الضرورة أفرزتها المعصلة 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 بالتدقيق، وانعدام الفعالية. كما أن معضلة تضخم وترام القضايا ليست حكراً على الدول النامية، بل تعاني منته أيضاً ويدراجات متفاوتة الدول المقدمة بدورها مع فارق في نوعية وموضوع القضايا.

إن اللجوء إلى الوسائل البديلة يزداد أهمية من تتعلق الأمر بالمنازعات الأسرية، نظراً لطبيعة العلاقة التي تربط بين مكونات الأسرة. خاصة بعد الطلاق، ويزداد أهمية إذا كان الأمر يتعلق بالحضور، وقد يتجاوز الأمر إلى بعض الجرائم التي قد تنشب بين الأصول والتوتر 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.

وفي مطلبه:

المطلب الأول: تعريف الوسائل البديلة.

عرف بعض العلماء هذه الوسائل بأنها: (مجموعة من الإجراءات التي تشكل بديلًا عن المحاكم في حسم النزاعات، وغالبًا ما تستوجب تدخل شخص ثالث نزيه وحيادي). 1 وعرف الاستاذ جوركسون (Garrosson) بأنها (مجموعة غير محدودة من الإجراءات لحل النزاعات) (2).

وعرف تم في أغلب الأحيان بواسطة تدخل شخص ثالث يهدف حل غير قضائي لهذه النزاعات) (3).

وعرف الاستاذان ماريوت وبروان (Marriott and Brown) بأنها (مجموعة من الإجراءات تهدف إلى حل النزاع بطرق غير قضائي أو غير تحكمي، ولكن ليس بالضرورة تقتضي تدخل أو مساعدة من شخص ثالث محايد يسعى إلى مساعدة الأطراف بغية تسهيل الوصول إلى حل النزاع) (4).

وعرف المركز التجاري الوسائل البديلة للنزاعات بأنها: (العمليات التي تهدف إلى تشجيع المنازل بغض الوصول إلى حل خلافاتهم بأنفسهم، وذلك بواسطة شخص ثالث حيادي لتسهيل عمليهم) (5)

فالتعريفات متقاربة، إلا أنها أصحابها اختلفوا في مسألة ضرورة التدخل من قبل طرف ثالث، حيث يرى الاستاذ جوركسون (Garrosson) التدخل من قبل طرف ثالث في أغلب الأحيان، بينما يرى الاستاذان ماريوت وبروان (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 للمتنازلين على الاتفاق باللمجوء إليها في أي مرحلة من مراحل النزاع (6).

(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.
«Alternative Dispute Resolution (ADR) means dispute Resolution by processes (a) which en courage resultant 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 البديلة لفض المنازعات في الشريعة الإسلامية

وترة الباحثة ضرورة الطرق إلى الجانب الشرعي الإسلامي للفصل في الاختلافات، وعلى موجز، وآلي ذلك كل البحث يركز على فض المنازعات قضايا الحضانة في المملكة العربية السعودية، حيث تشدد الحكومة في المملكة العربية السعودية منذ الشريعة الإسلامية ومصادرها الأصلية والفرعية، وهي كذلك من أبرز الوسائل التي أقرها الشريعة الإسلامية لتسوية المنازعات التي تنشأ بين أوساط المجتمع.

الإسلامي. تتمثل تلك الوسائل البديلة لفض المنازعات عبر الطرق التالية:

1. التحكيم
2. التوفيق
3. الصلح والمسالحة
4. الوساطة

٠ التحكيم

فالتحكيم هو أن الخصمين إذا حكما بينهما رجلاً وارتياباً، وأن يحكم بينهما (١) السبب في التحكيم هو أن في بعض الأحيان لا ينجو الخصمان إلى هيئة القضاء للفصل بينهما، وإما يلجأان إلى شخص لا يتوبي منصب القضاء أو الإمام، فيحكمان بينهما، إما لبعدها عن مكان القاضي، أو اختصاراً لإجراءات القضاي، أو لأي غرض آخر، وهذا هو الحكم أو الحكم.

وقد كان التحكيم مورفاً في الجاهلية قبل جمهور 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، كالقنص و العفو عند فريق من العلماء أيضاً، فحكم المحكم ليس مقتنعاً في كل قضية كالقاضي عند بعض العلماء.
- عموم ولاية القاضي، فيتعدى الحكم الصادر عنه، إلى غير المتخصصين، كما في القتل الخطأ وما مثال هذا، مخالف المحكم.


(٣) إِبْرَاهِيمُ بْنُ عَلِيِّ بْنُ مُحَمَّدٍ، بِرُهَانُ الْدِينِ الْبَصْرِيُّ، نِصَائِحُ الْحِكْمَةِ فِي أَصُولِ الأَفْلَاقِ وَمَنَاهِجِ الأَحْكَامِ. (القاهرة: مكتبة الكليات الأزهرية، ط١، ١٤٠٦هـ – ١٩٨٦م). ج ١ ص ٦٢.

وفي السنة: عن هاني أن الله نعه أن لها وفد إلى رسول الله ﷺ مع قومه مجتمعهم يكتونه بأبي الحكم، فدعاه رسول الله ﷺ، فقال: «إن الله هو الحكم، وإليه الحكم، فلمن تكن أبا الحكم؟» فقال: إن قومي إذا اختلوا في شيء أتوني، فحكمت بينهم فرضي كلا الفريقين ... إلى آخر الحديث) (١٢) ولو لم يكن التحكيم مشروعًا لما استحسن رسول الله ﷺ، فرسول الله ﷺ لا يستحسن شيئًا لا يجوز (١٣). والحديث في باب جواز التحكيم كثير جدا.

وأما الإجماع، فقد ثبت أن التحكيم وقع جميع من الصحابة، ولم ينكذ ذلك أحد.

وأما المعقول؛ فلا لأنه ما دام الشخصان اللذان يرضيان بالتحكيم لما ولاية على نفسهما فيكون التحكيم صحيحاً (١٤). وقد نقل أبو حيان الإجماع عن جواز التحكيم حيث قال: وأجمع أهل الحل والعقد: على أن الحكمين يجوز تحكيمهما (١٥).

(٧) ترجمة ومسألة، النظام القضائي في الفقه الإسلامي (المقاطعة: دار البيان، ط ٢، ١٤١٥هـ، ١٤٤٩م). ج ١ ص ٥١.
(٨) نصر بن أحمد بن أحمد بن يسرائيل، جغرافيا، (المدماج: دار العلم، د. ط، د. ت). ج ١ ص ٣٠١.
(٩) ترجمة ومسألة، النظام القضائي في الفقه الإسلامي (المقاطعة: دار البيان، ط ٢، ١٤١٥هـ، ١٤٤٩م). ج ١ ص ٥١.
(١٠) ناصر الدين أبو سعيد عبد الله بن عمر بن محمد الشاشكي البيضاوي، أنوار التنزيل وأسرار التأويل، (المقدمة: دار إحياء التأويل، ط ١، ١٣٨٤هـ، ١٩٦٤م). ج ١ ص ١٧٨.
(١١) ناصر الدين أبو سعيد عبد الله بن عمر بن محمد الشاشكي البيضاوي، أنوار التنزيل وأسرار النهالي، (المقدمة: دار إحياء التأويل، ط ١، ١٣٨٤هـ، ١٩٦٤م). ج ١ ص ١٧٨.
(١٢) نصر الدين أبو سعيد عبد الله بن عمر بن محمد الشاشكي البيضاوي، أنوار التنزيل وأسرار النهالي، (المقدمة: دار إحياء التأويل، ط ١، ١٣٨٤هـ، ١٩٦٤م). ج ١ ص ١٧٨.
(١٣) نصر الدين أبو سعيد عبد الله بن عمر بن محمد الشاشكي البيضاوي، أنوار التنزيل وأسرار النهالي، (المقدمة: دار إحياء التأويل، ط ١، ١٣٨٤هـ، ١٩٦٤م). ج ١ ص ١٧٨.
(١٤) المرجع نفسه.
الاتجاهات في الفقه الإسلامي

وبالنسبة لفقهاء المسلمين، فقد اختلفت الآراء في فقههم. وأقوي الآراء عندي جواز التحكيم، وهذا كما يفهم من كتبهم.

فالتحكيم جائز ويسامح في الأمور المالية سواء الإسلامية أو التقليدية. ولا يلزم بين الزوجين. ولا يحكم في قصاص أو جلد أو طلاق أو ورث أو ورثة أو ولاء. أي أن التحكيم لا يدخل في تلك المسائل. وقد استثنيت هذه المسائل من قاعدة التحكيم في أن هذه المسائل تتعلق بالاثبات أو النفي من قبل الطرفين، لا للمحكم دخلاً في إثباتهما أو نفيهما. فالعقول تتعلق بحق الولد في نفي نسبه من أبيه، فقد يحكم المحكم وهذا ليس في التحكيم في شيء. يرتقي المحكم بالنفي أو العلات، وليس للمحكم ولاية على الحكم في الولد. وكذلك النسب والولاء تجري على يد غير المحكيمين. وكذلك الطلاق والعتاد فيما حق الله تبارك وتعالى، وليس للمحكم سلطة في العلات أو النفي فيها. (1)

لا يجوز التحكيم في حقوق الله، كمحاد الزنا وحص السرقة فغير جائز. كذلك لا يجوز التحكيم على القول الصحيح في القصاص. وكذلك لا يجوز التحكيم في حق القاضي بفعل القول المختار (2).

2- التوفيق:

فالتوافق أحد وسائل المشروعة لضمان المنازعات في الشريعة الإسلامية، فالتوافق يستحب الصلح دائمًا، لذلك أجزم كما السلم جائز، لقوله تعالى: أَتَبَيَّنَ عَلَيْنَا مَا ذُيَّنَ يُضَعُّنَ ثُمَّ تَمَّ تَحْمِيلُهُمٌ ۚ فَلَتَوَافَقِيْنَ عَبْرَ عِدَّةٍ (النساء، 35) فللا يكون على التوفيق على القول.

(1) أبو حيان بن محمد بن يوسف بن علي بن يوسف بن أحمد الأندلسي، البحر المحيط في التفسير. (بيروت: دار الفكر، د. ع. ط، 1420 هـ) ج1 ص630.

(2) علاء الدين، أبو بكر بن مسعود بن أحمد الكاساني المحمدي، بدائع الصنائع في ترتيب الشرائع. (بيروت: دار الكتب العلمية، ط 2، 1406 هـ- 1986 م) ج3 ص3.

(3) الفقهي. المعصوم، الحكيم في فقه الإمام أحمد. (بيروت: دار الفكر العلمية، ط2، 1410 هـ- 1990 م) ج1 ص178.

(4) يوجد الدين، عبد الله بن أحمد بن عبد الله بن عبد الله بن عبد الله بن عبد الله بن محمد، نزاعات الجنسية من حديث السيد عبد الله بن نافع. (بيروت: دار الفكر، د. ع. ط، 1404 هـ- 1984 م) ج5 ص224.


(6) علي حيدر خواجة، سلسلة الأحكام. (بيروت: دار الفكر، د. ع. ط، 1411 هـ- 1994 م) ج4 ص695.
تقريب وجهات النظر محلية في الوصول إلى حل أو اتفاق بين المنازعين بصورة ودية، وللموفوق طرح الحلول

بما يرضيه الطرفان، ويتم اختيار الموقف أو الموقفين بإرادة الطرفين.

3-صلح والمصالحة:

وفي الجملة أن الصلح جائز، فقد ثبت في القرآن والسنة والإجماع والمعقول، وهو مصاحب لتحكيم، ثبت مشروعية الصلح بما ثبت به التحكيم، وقد ورد القرآن به في آية الشقاق لقوله تعالى: {بسم الله الرحمن الرحيم} (النساء: 35) وقال تعالى: {هُمْ نُزُرْنَ نَزُرُنَّ تَحْدِيّةً قَبْلَ ذَلِكَ نَزَعْنَا تَحْدِيّةً} (الحج: 9). وفي السنة: {فقال صاحب النبي صلى الله عليه وسلم- سهيل بن عمر (9)}: {وفي رسالة عمر إلى أبي موسى: والصلح جائز بين المسلمين إلا صلحاً حرم خلالاً أو أهل حرام} (23).

أما الإجماع: فقد انعقد إجماع الأمة على جواز الصلح (24).

أما المعقول، في ترك الصلح نازع، لأنه إذا طلب صاحب الحق جميع حقه فأنكروه المدعى عليه وأقام المدعى البينة، يكون ذلك باعثًا للنزاع ولا سيما إذا حصل ذلك في وقت الإعمار، يوجب ذلك لحصول سبب لتنهق الفتنة بين المدعى والمدعى عليه، وتردي العدوى بينهما، وهذا مما يستلزم الفساد العظيم. وفهمهم من ذلك أن في الصلح خيراً ومنفعة (25). ولأن الصلح سبب لدفع الخصومة وقطع المنازعات والمشاجرة، وتنازلة من أعدت أهد التي الصلح دفعها لسبب الفساد، ولفتات الفتن والعاد، وشيقياً لسبب الإصلاح والسداد، وهو الألفة والوافية فكان صننا مندوباً إليه شرعاً، وكتب الإيجاب والقبول؛ لأنه معارض (26).

(22) أبو عبد الله أحمد بن محمد بن حسن بن هلال بن نسد الشيباني، المندى. (بيروت: مؤسسة الرسالة، ط 1، 1421 هـ - 2001 م).

(23) علي بن ندب بن أحمد، أبو القاسم الرجلي المعروف بابن اليمني، رواية القضاة وطرق الاجتهاد. (بيروت: مؤسسة الرسالة، ومنع: دار أثر، ط 2، 1404 هـ - 1984 م) ج 2 ص 760.

(24) علي بن عبد الله، ذر الحكام في شرح مجمل الأحكام، ج 4 ص 5.

(25) المرجع نفسه.

(26) أبو الحسن، علاء الدين، علي بن حسن الطرازلي الإخوئي، معين الحكام فيما يرد بين الحضرين من الأحكام. (بيروت: دار الفكر، د. ط، د. ت) ص 521.
ويجوز الصلح عن كل مال وعن كل حق بعد الخروج عليه من سائر الحقوق وإتلاف الأموال والمنافع والقرض والمدفوعات.

4 الوساطة:

وتُعتبر الوساطة إحدى الطرق الفعالة في الشريعة الإسلامية لفض المنازعات بين أطراف النزاع، وتقوم على محاولة تقريب وجهات النظر بين الخصوم، بغية الوصول إلى توقيع لفض النزاعات، لكونها مرضية لجميع الأطراف حيث يساهم كل من فراق النزاع بالوصول إلى هذه التسوية.

وهي عبارة عن عملية التمهد للجوء إلى الحلول البديلة لفض المنازعات التي تنشأ في أطرافיין المجتمع، وأصبحت أثراً ملحاً في تنظيم مقتضيات الحياة وتتبعها داخل هذا المجتمع، وتساهم الوساطة في تسوية بعض المنازعات بصورة ودية، وتعمد على التوافر والموازنة بعبد القادر بالإجماع دينًا عن أن يكون هناك غالب أو مغلوب، ولا محتوى أو مصب، ولم يترك أثرًا في نفوس المتزعمين بشكل تراعي فيه السرعة والفعالية والمساحة المتبادلة للمنازعين.

إذن، إن الوساطة هي عبارة عن عملية مفاوضات غير ملزم بها طرف ثالث محايد بهدف إلى مساعدة أطراف النزاع للتواصل إلى حل النزاع القائم.

الأصل في الوساطة في الشريعة الإسلامية هي الإجهاز أو الاستجابة، وإذا كانت لإحقاق باطل أو إبطال حق كانت حراماً، والأصل في الوساطة الجواز، بل هي من الأمور الحبيبة التي أمر الشارع بها ورغب فيها، (١١) حيث قال: (إشعروا توجروا، وتقضي الله علي نسلة تبنيه عليه وسلماً ما نشاء) وقال: مصطفى البغا في تعليقه على أحاديث صحيح البخاري (الشعرو) توسوا في فضاء حكمة من مبناً أو مسألاً (توجروا) يكن لكم مثل أجر فضاء حكمة من مبناً أو مسألاً (توجروا) يكن لكم مثل أجر

(١) مذكر الفدية: إشهار الخصائص،حيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري أحاديث رقم (1432) ومسلم، صحيح مسلم، الحديث رقم (145).

(٢) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).

(٣) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).

(٤) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).

(٥) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).

(٦) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).

(٧) البخاري، صحيح البخاري، مع شرح وتعليق مصطفى البغا على أحاديث صحيح البخاري، صحيح مسلم، الحديث رقم (145).
المطلب الثالث: تعريف الحضانة ومشروعيتها.

تعددت التعريف عند العلماء والفقهاء في حضانة.

فجاء تعريف الحضانة بأنها (تربية الولد في حق أمه، و정책 ابتدائي). لذا تتطلب أغلب أحكام إجراءات التوفيق عملية الوساطة.

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تعددت التعريفات عند العلماء كالفقهاء في حضانة.

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وأما الحضانة عرفوها بأنها (حفظ الصغير وسمنسة، وهو المختل العقل بما يضرهم وتربيتهم مع مصاحفهم: كجلس رأس الطفل وغسل يديه وغسل ثيابه وكمشته وتطهيه في المهد وتزيينه في لينان وحوض).

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والنظر إلى هذه التعريفات نجد أنها تدور حول الحفظ والصيانة وتربيتهم من الحضانة.

وأما أقصى فقهاء القضاء السعودية في مفهوم الحضانة:

1- حضانة Deployment لدعاوى في حق الصبي وحمايته.
2- حضانة Deployment لدعاوى على من بيد المحضون، ولو كان غير الأبوين.
3- لا تسمح الدعوى من أحد الوالدين على الآخر في ضم الولد البالغ العاقل، لكن تقام الدعوى على الولد مباشرة.

(1427 ه) وزارة الأوقاف والشؤون الإسلامية، الموسوعة الفقهية الكويتية. (الكويت: وزارة الأوقاف والشؤون الإسلامية، د.ت. 1404 - 1427 ه). ج3 ص142.


(1421ه) ابن عابدين، الدختر المختار وحاشية ابن عابدين (تلميع على الدختر المختار)، (بيروت: دار الفكر، ط1، 1412ه - 1421ه).


(2007) الدختر، محمد العنزي، شرح مختصر خليل للخرشي، (بيروت: دار الفكر، ط1، 1420ه).

(2007) الدختر، محمد العنزي، شرح مختصر خليل للخرشي، (بيروت: دار الفكر، ط1، 1420ه).

(1991ه) الدختر، محمد العنزي، شرح مختصر خليل للخرشي، (بيروت: دار الفكر، ط1، 1412ه - 1413ه).

(1495ه) بهي، محمد بن يوسف، كشف الفنون عن من الفنون، (بيروت: دار الكتب العلمية، ط1، 1411ه - 1412ه).

(1495ه) بهي، محمد بن يوسف، كشف الفنون عن من الفنون، (بيروت: دار الكتب العلمية، ط1، 1411ه - 1412ه).

(1495ه) بهي، محمد بن يوسف، كشف الفنون عن من الفنون، (بيروت: دار الكتب العلمية، ط1، 1411ه - 1412ه).

(1495ه) بهي، محمد بن يوسف، كشف الفنون عن من الفنون، (بيروت: دار الكتب العلمية، ط1، 1411ه - 1412ه).
البحث الثاني: أنواع الوسائل لفض النزاعات في الحضانة.
إن الأنواع والوسائل البديلة لفض المنافع في الحضانة من أهم متطلبات العصر نظراً لمجتمع المجتمع إليها.

1- الوساطة في الحضانة:
إن الوساطة في الحضانة هي وسيلة اختيارية لتسوية النزاعات بمساعدات تبلغ ودية مساعدة ثالث، الوسيط.
تعتمد على الحوار والتشاور والتبادلة، والتوصل إلى حل ناجح منهما، للنزاع القائم في أيهما أحق بحضانة الطفل بعد فرض طلبهم، وإعفاءهما (38).

2- الصلح في الحضانة:
ويمكن بيان الصلح في الحضانة بأنه: عقد يحكم به الطرفان على وجه الزواج، وقائمة باختيار منهما في حق.

تنظيم الوساطة والصلح في باب حضانة الأطفال بعد الطلاق:
كانت النواة الأولى لقانون المصالحة في المملكة العربية السعودية على - سبيل المثال: عند ما تم إنشاء مكتب التوجيه والإصلاح ومجلس محكمة الضمان والأحكام بإصلاح مشروع قانون للرعاية، وعندهما تبين نجاح محاولات التصالح من واقع التجربة التي تم بموجب الاجتهادات الشخصية من بعض المحكمين من الموظفين، وتكليف من رئيس المحكمة. وهذه النتائج المثبتة جعلت وزارة العمل بال المملكة العربية السعودية تسعى لتسوية العمل، بما في ذلك المصالحة، ودستور الوساطة وتفصيله بما يحقق الأهداف المكملة بها، وكذلك تمت المصادقة على تنظيم مركز المصالحة، وإقراره بموجب قرار مجلس الوزراء رقم 103 وتاريخ 8/4/1434هـ، والأمر يحدد للصياغة مشروط نظام الوساطة والتوافق الذي يتضمن مكاتب حكومية بสะดวกات نظامية أولاً، وتتوصل إلى محاكم صلح، وتكون إزاءه بما لا تنظر محكمة الأحوال الشخصية أي قضية مشابهة بنظام الوساطة إلا بعد إحالة من قاضي الصلح، أو

(38) ابن قدامة، المغني، (القاهرة: مكتبة القاهرة، 1388هـ - 1968م) ج 9 ص 298.
(39) مركز القاهرة الإقليمي لمحاكمة التجارة الدولي، كيف يمكن منافع التجارة الدولية - المحكمة والوسائل البديلة ضمن
النزاعات، (د.ت.د.، د.ت.ت) ص 45.
(40) أحمد اليوس، الصلح في الخصومات، (د.ت.د.، د.ت.د) ص 17.
الإبادة الأولى: تعريف المصلحة (الوساطة) والمصلح (الوسط).

المصلحة: وسيلة ضمائية لتسوية المنازعات - تتولاه مكتب المصلحة - صلحاً كلياً أو جزئياً.

المصلح: من يتولى أعمال المصلحة بين الزوجين وفقاً لأحكام هذا النظام.

المادة الثانية: إنشاء مركز المصلحة بوزارة العدل.

ينشأ في وزارة العدل مركز يسمى (مركز المصلحة) ويكون عمله وفقاً لأحكام هذا النظام.

المادة الثالثة: المهمة الأساسية للمركز.

الإصلاح وحل النزاع بين الطرفين مع النظر في مصلحة الطفل وتسوية المنازعات حين ذلك.

المادة الرابعة: إنشاء مكاتب المصلحة وشروط المصلحين.

تشتت مكاتب المصلحة في مقرات المحاكم أو كتبات العدل وتتكون كل مكتب من مصلح أو أكثر يختارون من موظفي الوزارة أو من موظفي الدولة - بعد أخذ موافقة الجهات عملهم - أو من غيرهم.

ممن توفر فيهم الشروط التي يحددها الوزير بقرار منه.

المادة السابعة: حفظ سرية إجراءات المصالحة.

لا يجوز من يعمل في مكاتب المصالحة - ولو بعد انتهاء عمله - إفشال سر أو تمكين عليه أو عرفه عن طريق عمله في تلك المكاتب، ما لم يكن هناك مقتضى شريعي أو نظامي يوجب ذلك.

المادة الثامنة: حق إلغاء الخلاف مكفول لأطراف النزاع خارج مكتب المصلحة.

لا يخل أحكام هذا النظام بحق الأطراف في إلغاء منازعاتهم صلحاً خارج إطار مكتب المصالحة.

المادة التاسعة: قواعد العمل في مكاتب المصالحة وإجراءاته.

يصدر وزير العدل قواعد العمل في مكاتب المصالحة وإجراءاته والقرارات اللازمة لتنفيذ هذا التنظيم.

ثانية: قواعد العمل في مكاتب المصالحة وإجراءاته إعمالاً للمادة التاسعة من تنظيم مركز المصالحة، والتي تتحول لوزير العدل إصدار قواعد العمل في مكاتب المصالحة وإجراءاته والقرارات اللازمة لتنفيذ هذا التنظيم، فقد صدرت هذه القواعد وتم نشرها (41).

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(41) مسفر بن حسن القحطاني، الوساطة المهنية بالصلح ودورها في تسوية المنازعات في المملكة العربية السعودية، (د. ف، د. ط، د. ت)، ص 207.
الإجراءات النظامية للوساطة المنتهية بالصلح في حضانة الأطفال بعد الطلاق:

أولاً: أحكام عامة للمصالحة:

١. تجري مكتاب المصالحة والصلح في حضانة الطفل وفق أحكام الشريعة الإسلامية، وما يصدره

٢. يحدد الوزير بقرار منه التدريس الموضوعي للفضاء المتحاصلة بالوساطة المنتهية بالصلح في حضانة الأطفال بعد الطلاق.

٣. خصري أحكام هذه القواعد على طلبات المصالحة التي لم تخل إلى المحكمة، والتي يتقدم طرفاها

٤. يشترط في المصالحة ما يلي:

١. أن يكون سعودي الجنسية.

٢. أن يكون من المشهود لهم بالزارة والخبرة، وأن يكون حسن السيرة والسلوك.

٣. أن يجتاز المقابلة الشخصية.

٤. لا يجوز للمصلحين أن يباشروا عملًا - يدخل في حدول وظائفهم - في طلبات المصالحة الخاصة بحم، أو بأزواجهم، أو بأقاربهم، أو أصالاتهم، حتى الدرجة الرابعة، وإلا كان هذا

٥. الإجراء بإطلاق.

٥. ينظر على من يقوم بالمصالحة:

١. أن يكشف لأحد الأطراف ما أطلع عليه الطرف الآخر إلا بمواقفه.

٢. أن يفشي سرا امتين عليه أو عرفه من خلال إجراءات المصالحة، ما لم يذذ صاحب

٣. أن يفعل كمحكم أو وكيل أو محام بعد العمل كمحصل في أي نزاع قام بإجراء

٤. أن يفعل كمحكم في أي نزاع مربوط به أو ناشئ عنه.

٥. يقصد بمحل الإقامة في تطبيق أحكام هذه القواعد ما أشير إليه في نظام المرايعات

الشرعية ولوائح التنفيذية الصادرة عام 1435 هـ.

٦. يسلم الخضر صورة التبليغ حسب النموذج المعدد إلى من وجهته إليه في محل إقامتها أو عمله

إن وجد، وإلا فيملوك إلى من يوجد في محل إقامتهم من الساكنين معه من أهله، وأقاربه،

(٤٢) انظر: القرار الوزاري رقم 53792/7/27، تاريخ 1435/4/10،نشر القرار في جريدة الرياض عدد (١٦٦٦٧) بتاريخ 10/4/1435 هـ

656
وأصبح، أو من يوجد مين يعمل في خدمته، وإذا تعدد من وجه إليهم تعين تعدد التبليغ بعدهم.

وللمكتب طلب السجين أو الموقوف الجلسات المصالحة في مكتب المصالحة المختص في بلد السجين.

ومدير مكتب المصالحة إبلاغ الأطراف المعنية بالنزاع تأي من طرق التبليغ التي يراه مناسبة لحضور جلسة المصالحة.

7. في جميع الحالات المنصوص عليها في المادة السابقة، إذا امنع مراد تبليغه، أو من ينبوب عنه من التسليم، أو من التوقيع بالتسليم، فعل المخضر أن يثبت ذلك كتاباً، وعلى مكتب المصالحة إحالة المعاملة إلى المحكمة المختصة، لما لم تطلب الطرف الآخر موعدا آخر على ألا ينكر الموعد أكثر من ثلاث مرات.

ثانيا: الجهة المعنية بالمصالحة واختصاصاتها

1. خصوص مكاتب المصالحة بنظر الطلبات التي ترفع على السعودي وغير السعودي الذي له معمل في المجاهدات Records.

2. يحال طلب المصالحة للمحكمة المختصة في الحالات التالية:

-إذا تعددت المصالحة بين طرفين بعثها.
-إذا امنع المطلوب حضوره من الحضور أو تبدع تبليغه أو اعتذر عن قبول المصالحة أو لم ترد ورقة التبليغ ما لم يطلب الطرف الآخر موعدا آخر على أن لا ينكر الموعد أكثر من ثلاث مرات.
-إذا كان المدعى لا يعرف عنوان المطلوب حضوره.
-إذا كان مختصر داخل المملكة خارج نطاق اختصاص مكتب المصالحة، فنحال القضية إلى مكتب المصالحة المختص، فإن لم يوجد مكتب المصالحة في بلد المطلوب حضوره في حال طلب المصالحة للمحكمة المختصة بنظر الموضوع.

3. يجب على المدعى أن يقدم طلب المصالحة للكتب الذي يقع في نطاق اختصاصه محل إقامة المطلوب حضوره.

4. لا يحق لمكاتب المصالحة اتخاذ الإجراءات التحفظية، كما لا يحق لها المنع من السفر، مع أحكية طالب المصالحة برفق للمحكمة المختصة بطلب اتخاذ الإجراءات التحفظية وحول من السفر والطلبات المستعجلة.

ثالثا: طلب المصالحة وقيدها

1. يقدم طلب المصالحة في حضانة الأطفال من طالب المصالحة بصحبة نودع لدى المكتب، وب.timing أن تكون محررة وبعد الفيد في مكتب المصالحة قيداً لها في المحكمة المختصة بنظر الموضوع.
حجز للصلح عقد عدة جلسات للمصالحة في الحضانة، على ألا يزيد عدد الجلسات عن ثلاث، فإن تجاوزها وجب إحالة المعاملة للمحكمة المختصة، ما لم يطلب طرف المصالحة إبقاءها واستمرار عقد الجلسات.

رابعا: حضور أطراف المصالحة

١ - في اليوم المبين لنظر جلسة المصالحة بحضر طرف الصلح بأنفسهم أو من ينوب عنه، فإذا كان النائب وكيلًا، تعين كونه من له حق الصلح وما يلزم بذلك من حق الإقرار والتنازل.

٢ - كلما بيده الوكيل في حضور الموكل يكون بمثابة ما يقره الموكل نفسه، إلا إذا تنازل أثناء جلسة المصالحة نفسها، وإذا لم يحضر الموكل فلا يصح من الوكيل الصلح ما لم يكن مفوضاً تفويضاً خاصاً في الوكالة.

٣ - إذا غاب طالب المصالحة عن جلسة من جلسات المصالحة فيحتفظ طلب المصالحة، ولا بعد ذلك المطالبة بنظر جلسة أخرى من جديد، وإذا غاب المطلوب حضوره فيعمل وفقاً للقرة الثانية من المادة الحادية عشرة من هذه القواعد، ما لم تكون المعاملة قد أُهمّلت من المحكمة فتحال إليها.

خامسا: إجراءات الجلسات

١ - يقوم المصالح بتدوين وقائع المصالحة في الضبط، ويذكر تاريخ وساعة افتتاح كل جلسة، ورقم الفيد وتاريخه، واسم المصالح، وأناس طلابي الصلح، أو وكلاهم، ثم يوقع عليه المصالح ومن ذكرت أسماؤهم فيه، وإذا لم يكن المصالح من مسؤولي الولاية فيدر قرار التكليف وتاريخه الصادر من صاحب الصلح.

٢ - يجب أن تكون الوقائع المراد الصلح عليها أثناء المصالحة متعلقة بحضانة الطفل، جائزة قيوبوها شرعاً ونظاماً.

٣ - يحضر في جلسة المصالحة أن يتناقش مع الأطراف ممتحنين أو ممتحنين، مع مراعاة الأحكام الشرعية المتعلقة بالحلف بالمرأة الأجنبية أو خُرجها، ولله أن يشترح معهم في موضوع النزاع أو أن يطلب من أي منهم تقديم معلومات إضافية، وأن يتخاذ ما يراه مناسبًا لتقييم وجهات النظر بما يساعد على إتمام المصالحة في حضانة الطفل.

٤ - جلسات المصالحة سرية، إلا إذا رغب الطالب أن تكون علنية، ويعامل على قدم المساواة، ويثبت لكل منهما الفرصة الكاملة والمتكافئة لعرض رأيه في الموضوع محل المصالحة وهي حضانة الطفل.

سادسا: إعلام المصالحة وتفسيره

١ - يصدر مكتب المصالحة إعلاماً حاوياً لخلاصة طلب المصالحة والحجاب وما تم عليه الصلح في حضانة الطفل، ويوفر من المصالح يطلب عليه بخط مكتب المصالحة، ويحال للمحكمة المختصة أو القاضي المكلف للتصديق عليه.
2 على القاضي المختص بالتصديق رد الصلح المتعلق بحضانة الطفل إذا كان مخالفا لأحكام
الشريعة الإسلامية أو الأنظمة، مبينا سبب الرد في الوضوح وتخال المعاملة للمحكمة المختصة.
3 إعلان المصالحة الذي يكون التنفيذ موجبه يجب أن يذيل بالصيغة التنفيذية ولا يسلم إلا للطرف
الذي له المصلحة في التنفيذ، ويؤثر إعطاء نسخ من الإعلان لكل ذي مصلحة في حضانة
الطفل.
4 -إذا وقع في إعلان المصالحة غموض أو ليس 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.
5 - يلحق الإعلام الصادر بالتفستة بنسخة الإعلام الأصلية، ويوقعها من صادق على الإعلام، وبعد
التفسير متماماً للصلح الأصلي ويستري عليه ما يسري على إعلام المصالحة في حضانة الطفل.

سابعاً : الاعتراض
جميع الإعلامات الصادرة من مكاتب المصالحة المتعلقة 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 أندل التنفيذ.

ثامناً : أحكام ختامية المصالحة
1 -طبق أحكام أنظمة المراكز الشرعية، وإجراءات الجزائية والتنفيذ فيما لم يرد له حكم في هذه
القواعد، وما يتلاه مع طبيعة المصالحة في حضانة الطفل وإجراءاتها.
2 -جميع الخدمات ذات الصلة عن إعلام المصالحة في حضانة الطفل من اختصاص محكمة الأحوال
الشخصية.
3 -يحدد الوزير في قرار إنشاء مكاتب المصالحة المتعلقة في حضانة الطفل الجهية الإدارية التي تبع لها
المكاتب.
4 -خسري أحكام هذه القواعد اعتبارا من صدوره.

المطلب الثاني : طبيعة ومميزات الوسائل البديلة لفض النزاعات في الحضانة.
تحقيق 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 تتgrafة أقل، وإجراءات مبسطة
وبمشاركة فاعلة للزوجين مع الوسيط للوصول إلى تسوية ودية للنزاع بعد إزالة أسباب النزاع وإعادة روح
التفاعلات والعلاقات المتصلة بين الزوجين، وإصلاح الضرر بناءً على رغبة الزوجين من أجل تخفيف الأمر المقضي به، وتعد الوساطة وسيلة لإيجاد التفاهم المشترك بين الزوجين في محاولة تخفيف الخلافات، ونذكر روح التسامح والتراحم والحب بين الزوجين، الأمر الذي يؤدي إلى إعادة التأهيل الاجتماعي والتعايش فيدي.

وسيلة رضائية فعالة وسرية لحل المنازعات خاصة في مسألة حضانة الأطفال والتي يتحملونها في علاج مشكلة بطء إجراءات القاضي.

وسيلة في حضانة الأطفال ما بعد الطلاق كوسيلة بديلة لتسوية المنازعات مجموعة من الفوائد والمزايا منها:

أولاً: السرعة:

حيث يكون الوسيط غالباً خبيراً في موضوع النزاع بين الزوجين وصاحب الأحقية بذلك، ولديه الوقت الكافي لدراسة موضوع النزاع مما يساعد على تسوية النزاع في أقل وقت ممكن، وإجراءات بسيطة.

وفي أوقات مناسبة لتبادل النزاع ودون التقيد بما يتوافق مع المصالحة العملية لعقد جلسات عملية الوساطة، كما أن الوسيط يعمل جاهداً لتسوية النزاع خلال مدة الوساطة.

سرعة حسم المنازعات بالوساطة أمر منشوع في جميع المنازعات وخاصة حضانة الأطفال ما بعد الطلاق التي تتاثر بعدم استقرار الأطفال، فالثقة في الوسيط والبحث عن حل للنزاع بالوساطة خير من ضياع الوقت أمام القضاء للوصول إلى الحق بكامله.

ثانياً: قلة التكاليف:

تعتبر مصاريف الوساطة قليلة مقارنة بالتحكيم والخضوع القضائي، وأتعاب المحامين، والخبراء، والشهود، وهذه الميزا تجعل الوسيط يتعين أحد الأطراف في النزاع كأحد الزوجين مثلاً وما يراه الوسيط في ما فيه مصلحة للطفل يقدم منفاذات متبادلة وتعديل مراكز القانون للموصول إلى حل النزاع في أسرع وقت ممكن للتحيلولة على التأثيرات النفسية لدى الأطفال، ولطرفي النزاع أيضاً.

ثالثاً: استغلال الوقت والحصول على حلول سريعة:

تعتمد الوساطة على مهارات الوسيط والأسلوب المستخدمة لحل النزاع، وقدرتة العلمية والعملية في تقبل الواقع الأولي لدى الزوجين، وثقة طرف النزاع فيه، وقدرتة على إيجاد سبيل ناجحة في التفاوض في جو ودي، وذلك أن الوسيط غالباً يكون خيراً في موضوع النزاع، والوساطة تكون على درجة واحدة كما.

(44) مركز القاهرة الإقليمي للتحكيم التجاري الدولي، التحكيم والوساطة البلدة لحساسية المنازعات، ص 47.

(45) خالد عبد الطيف، الوسائل السلمية لحل منازعات العملجماعية، بحث مقدم لليلى درجة الدكتوراه في القانون - جامعة القاهرة 1987، ص 150.
أن الوساطة توفر الوقت والجهد والنزافات نظراً ملائمة مواعيد جلسات الوساطة ومكافحة الزوجين، وقصر
الوقت اللامع لعملية الوساطة(47).

رابعًا: السرية:

تعتبر المحافظة على أسرار طرفين النزاع والجو العام لدى الزوجين في عملية الوساطة في حضانة
الأطفال ما بعد الطلاق ضمانة مهمة خاصة في مجال العلاقات والنزاعات الأسرية، وإلا لما أقدم طرف
النزاع للهجرة إلى الوساطة.

فسري الوساطة تؤدي إلى التعايش السلمي ما بعد الطلاق على مستوى الزوجين عامة، ولدى
الأطفال خاصة في المستقبل، ويبقى العلاقات متصلة، والمحافظة على الأسر الأسرية لدرجة أن بعض
الأزواج يفضلون التنازل عن حقه على كشف أسرارهم الزوجية، والتي يتعين على إبقاء المشاكل والنزاع سراً.
مكتوماً(48).

وسرية الوساطة تتطلب سرية الإجراءات، فلا يحضر جلسات الوساطة إلا طرفان الزوجين مثالاً، والشهود
والخبراء ومن يؤذن لهم بالحضور في جلسات سرية لا يحضرها الجمهور، ولا وسائل الإعلام. وتشجع
السرية طرفين النزاع على حجر الخوار والإدراد مما لديهم من أقوال ومستندات وتقديم النزلات 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 ت قريب وجهات نظر الزوجين بغية
التوصول إلى تسوية مرضية.

فجميع إجراءات الوساطة ومدولاً سرية لا يجوز الكشف عنها أو الاحتجاج بها، ولا يجوز
للوسيط نظر الدعاوى كقاض أو العمل فيها كمحام أو خبير أو شاهد(49).

ونصت المادة(الخمسة والعشرون) من قواعد العمل في مكاتب المصالحة وإجازاتها (49) بالمملكة
العربية السعودية على أن "جلسات المصالحة سرية، إلا إذا طلب طرفان أن تكون علنية، ويعامل طرفان
المصالحة على قدم المساواة وعياً لكل منهما القصة الكاملة وال꒦افة لعرض دعوه أو دفاعاه".

خامساً: وسيلة ودية بديلة وغذائية اللاعب عن القضاء:

(46) المرجع نفسه، ص 151.
(47) عبد الله الساعدي، التحكيم والصلح في ضوء الفقه والقضاء، (د.ن. د.ف. د.ت) ص 21.
(48) المرجع نفسه، ص 22.
(49) المادة التاسعة من تنظيم مركز المصالحة واستناداً للقرار
وزير العدل في المملكة العربية السعودية رقم 53792 تاريخ 1435/7/27
الاتجاهات الدولية في الأدلة العلمية لتسوية المنازعات في حماية الأطفال بعد الطلاق

الوساطة والصلح نظام إرادي أساسي رضا طريقة النزاع كالزوجين مثلما وراحة واطمئنان الطفل في ما يلي استقرار عند حاضره على أن يكون هناك اتفاق في تحديد الوسيط، ويتم اختياره لتسوية النزاع في أيهما أحق في حضانة الطفل وأن تحدد الحلول بوضوح وتكون موافقة للزوجين معاً على وجه العدم، وللمتطلق على وجه الخصوص، وأن تكون هذه المصالحة وسيلة للتعايش السلمي والعلاقات المتصلة بين طرفين النزاع بديلة عن القضاء الذي يوصف بقضي والعلاقات المتصلة (0).

فالوساطة وسيلة بديلة لتسوية المنازعات بطرق ودية واقتصاد في الوقت والوقت والرسوم والأتعاب، فهي إحداث مريحة لطريق النزاع بإصلاح ذات بينين بالتراضي، فلا يكون فيها غالب أو مغلوب، فكلاهما خصمان واثنان.

وتأتي الاصدار أن في الوساطة والصلح مكاسب مشتركة لطريق النزاع على وجه العدم وللمتطلق على وجه الخصوص، وذلك أن التسوية النهائية في الوساطة تكون قائمة على حقل مرض لهم جميعاً ثم التوصل إليه بإرادة الحرة وكون قائماً على تحقيق مكاسبهما وصالحتهما المشتركة وعلاقتهم الاجتماعية مع المحافظة على العلاقة الودية بينهما. وتحقيق كذلك هدفو مهما وهو تحقيق المصالحة على المحاكم والقضاء بشكل عام.

سادساً: وسيلة اختيارية غير ملزمة:

الوساطة وسيلة بديلة لتسوية المنازعات غير ملزمة لطريق النزاع، حيث يحتفظ طرفان النزاع بتلك حقوقيا القانونية إذا فشلت عملية الوساطة، ولم يتفقوا على حل يمكن التوصل إليه، أو رفض أي منهما توقيع الوسيط، فتبقى لكل من طريقي النزاع الحرة الكاملة في اللجوء إلى القضاء كمرفق عام للمعدالة في الدولة، فالوساطة تم دون المساس بحق النقاضي (0).

كما أنه لا يجوز إجبار طريقي النزاع على اللجوء إلى الوساطة كوسيلة بديلة لتسوية المنازعات، فاتفاق الوساطة براداء طريقي النزاع هو قوم عملية الوساطة.

وتأتي البايلة أن الطبيب المنهجي الذي هي أساسية في عملية الوساطة والتي تنتهي بوصية تتضمن حلولا اختيارية غير ملزمة لطرفهما، فلا يمكن القيام بما 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:

(0) كالفانون الأردني والجزائري والمصرى والمغربي.
(01) خيري عبد الفتاح السيد، الوساطة كوسيلة بديلة لقض المنازعات المدنية والتجارية، (د، د. ط، د. ن)، ص 28.
(02) محمد نصر الدين جودة، إدارة الدعوى المدنية، (د، د. ط، د. ن)، ص 22.
‫‪ICDR 2017: Modern Trends in Effective Dispute Resolution‬‬
‫االتجاهاتىالدولوةىفيىاآللوةىالفعالةىلتسووةىالمنازعاتىفيىحضانةىاالطفالىبعدىالطالقى‬

‫‪18‬‬

‫تتم عملية الوساطة دبشاركة طريف النزاع كالوسيط غبل النزاع‪ ،‬حيث يقوـ الوسيط دبهمة تسهيل‬
‫اغبوار بُت طريف النزاع‪ ،‬كمساعدهتما بتقريب كجهات النظر بينهما كتسهيل التواصل بينهما‪ ،‬مث اقًتاح‬
‫اغبلوؿ اؼبمكنة اليت زبدـ مصاحل طريف النزاع كالتقريب بُت كجهات النظر‪ ،‬كتوفَت ملتقى للحوار قد يساىم‬
‫يف الوصوؿ إىل حل مرض لطريف النزاع بعد هتيئة جو من الثقة كاالطمئناف يف حوار من أجل اؼبصلحة‬
‫دكف ترؾ آاثر سيئة يف نفوس طريف النزاع‪ ،‬فنجاح الوساطة مرىوف دبشاركة حقيقية لطريف النزاع يف البحث‬
‫مع الوسيط عن حلوؿ عادلة كمقبولة من الطرفُت معا ليكوان خصمُت راحبُت‬

‫( )‬

‫‪.‬‬

‫دبعٌت أف الوسيط يقوـ بطرح مقًتحات لتسوية النزاع على أطرافو الختيار من بينها ما يركنو األقرب‬
‫إىل ربقيق تسوية مرضية ؽبما بعيدا عن فكرة اػبصومة‪ ،‬كىو ما يبكن الطرفاف كالزكجاف من االحتفاظ‬
‫بعالقات طيبة‪ ،‬كيكوف ٍل‬
‫لكل منهما اغبرية يف قبوؿ أك رفض كل أك بعض اقًتاحات توصية الوسيط‪.‬‬
‫كقناعة طريف النزاع حبيادية الوسيط يدعونبا يف الغالب إىل أخذ مقًتحاتو بعُت االعتبار عند اختيار‬
‫اغبل الذم يراه األكثر قبوالن فبا يزيد من مصداقية عمل الوسيط‪ ،‬ألف التوصية اؼبتمخضة عن الوساطة غَت‬
‫ملزمة لطريف النزاع إال برضانبا‪ ،‬األمر الذم يكفل تنفيذىا دكف صعوابت‪.‬‬
‫كما تتيح الوساطة لطريف النزاع فرصة التعبَت عن مصاغبهما كتقدمي مالديهما من األحق يف حضانة‬
‫مصاغبهما‬
‫الطفل الذم يكوف فيو استقراره النفسي كاؼبايل ‪ .‬كأف حل النزاع تكمن يف احملافظة على‬
‫اؼبشًتكة‪ ،‬كبقاء عالقتهما كدية يف اؼبستقبل؛ ألهنا من صنع طريف النزاع كدبساعدة الوسيط دبا يؤدم إىل‬
‫( )‬

‫سرعة التنفيذ االختيارم‬

‫‪.‬‬

‫ادلبحث الثالث ‪ :‬مباذج من الوسائل البديلة لفض اؼبنازعات كنظاـ بديل عن إجراءات‬
‫احملاكم يف تسوية منازعة اغبضانة بعد الطالؽ يف اؼبملكة العربية السعودية‬
‫األحكاـ الصادرة من القضاء السعودم يف ىذا اػبصوص ‪.‬‬

‫‪ ،‬مع بعض‬

‫( حمضر صلح )‬
‫احلمد هلل والصالة والسالم على من ال نيب بعده‬

‫وبعد‪...‬‬

‫بناء على ادلعاملة الواردة لنا من فضيلة رئيس حماكم منطقة القصيم برقم ‪ ...........‬واتريخ‬
‫ً‬

‫‪ ..................‬بشأن دعوى ‪ .............................‬مع زوجتو ‪.......................‬‬
‫بشأف حضانة االبنة عليو نفيدكم حفظكم هللا أنو بعد دراسة اؼبعاملة من قبل عبنة الصلح مت ربديد‬
‫موعد للطرفُت كجرل اعبلوس معهما عدة جلسات ؾبتمعُت كمنفردين كبعد ظباع مالديهما من أقواؿ قمنا‬
‫) ( أُتحد شرؼ الدين‪ ،‬تسوية منازعات عقود اإلنشاءات الدولية يف الدول العريبة ‪( ،‬د‪.‬ف‪ ،‬د‪.‬ط‪ ،‬د‪.‬ت) ‪ ،‬ص ‪.63‬‬
‫) ( دمحم نصر الدين جودة‪ ،‬إدارة الدعوى ادلدنية ‪ ،‬ص ‪.22‬‬
‫‪663‬‬


الاتجاهات الدولية في الأليمة تطوره تطورية أتوصى بها في عناية الأطفال بعد الطلاق

مناصحتهما ومحاولة الإصلاح بينهما وتذليل العقبات التي تواجه الزوجين من أجل استمرار حياتهم الزوجية محاولة تقريب وجهات النظر وترغيبهم في الصلح والابتعاد عن الخلاف ومسبباته ومحاولة إقناع الزوجة بالرجوع لبيت زوجها بشرط تحفظ لكل منهما حقوقه الشرعية لا سيما أن بينهما ابنة تحتاج للرعاية والعناية من الزوجين ولكن دون جدوى.

وعندئذٍ اتفقا صلحًا بينهما على أن يثقل 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 انتقا صلحًا أيضاً على أن تبقى الأبنة في حضانة والدهما ما لم تتزوج فإن تنتقل الحضانة إلى والده الزوجة وعلى الزوج أن يقوم بدفع مبلغ ثلاثمائة ريال شهري كنفقة شهريّة لابنتها تودع في حساب والده الزوجة ومن ثم أكد الطرفان قانونهما هذا الصلح واعترافهما به للفضية وعلى ذلك جرى التوقيع هذا.

وكلد الموافق والصلاة والسلام على نبينا محمد ﷺ.

الزوجة

الزوج

الشهود

رئيس مركز الصلح في محكمة بريدة

محمد بن صالح السعوي

خلاصة البحث

الوسائل البديلة لفض المنازعات هي عبارة عن تفاوض وحوار مع تقديم التنازل من قبل الطرفين للوصول إلى حل ملزم ومرضي لطيف النزاعات، ويأتي الاهتمام بالوسائل البديلة على الصعيد المحلي والدولي بعد تزايد المشاكل والنزاعات بين المجتمع، ويجادله التراكم والتكبد للملفات القضائية في الهيئة القضائية في المملكة العربية السعودية وفي أنحاء العالم، وخاصة في المسائل الحضانة التي تكبدت المحاكم الأحوال الشخصية بسببها في المملكة العربية السعودية.

ولا شك أن هذه الوسائل ستلعب دوراً كبيراً في إيجاد الحلول السريعة للبحث في المنازعات الحضانة التي هي من أهم تكبيبات المجتمع، وأن هذه الوسائل هي تمثاية أهدافاً مشتركة بين طرفين النزاع، ومكاسب كبيرة للطفل لسلامة حياته وصلاح تربيته.
الاتجاهات الدولية في الأحكام الوصائية السعودية في حل منازعات الأطفال بعد الطلاق

ومن خلال هذا البحث استطاعت الباحثة الوصول على نتائج والتوصيات التالية:

أولاً: النتائج

1. وجود طباعي اختياري مُحمَّد من قبل طرف في النزاع في استخدام الوسائل البديلة لفض منازعات الحضانة سواء في الحضانة أو غيرها.

2. لا يكون قرار الصادر في عملية فض منازعات الحضانة ملزماً إلا بعد مصادفته من المحكمة المختصة.

3. 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.

4. إمكانية استخدام هذه الوسائل البديلة لفض منازعات الحضانة بدون التدخل من قبل طرف ثالث.

ثانياً: التوصيات:

1. توصي الباحثة في إعطاء الاهتمام الزائد في استخدام الوسائل البديلة لفض منازعات الحضانة في المملكة العربية السعودية، كما أن هناك نظام خاص ينظم هذه العملية، وكذلك وجود هيئة مراكز ومكاتب بشكل كثيف لأعمالية فض منازعات الحضانة.

2. توصي الباحث يمجتمع السعودي الحر في اللجوء إلى الوسائل البديلة لفض منازعات الحضانة، والحصر على نجاح العملية للوصول إلى الحلول، كما يقدم التنازلات وقبول الحكم والقرار، وذلك لاكتساب المصالح للأطفال.

3. توصي اللجوء إلى الوسائل البديل في فض منازعات الحضانة يخفف العبء عن القضاء وعن المحاكم الأحوال الشخصية في المملكة العربية السعودية.
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نشرت على الموقع الإلكتروني لوزارة العدل، علماً أن هذه القواعد معمول بها في النظام السعودي في مكاتب القضاة والصلح. (تاريخ الاسترجاع 17 يوليو 2017).
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التحكيم كوسيلة حل النزاعات في القانون الليبي والموريتاني: دراسة مقارنة

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يعتبر التحكيم من أهم الوسائل التي يلجأ إليها حل النزاعات الواقعة أو المحتمل وقوعها في المستقبل. والتحكيم نظام قديم قد عرفته البشرية منذ أمد بعيد، وفي العصر الحديث ازدادت أهمية التحكيم وكثر اللجوء إليه وأصبحت له مؤسسات وعوامل متخصصة تمارسه على المستوىين الدولي والوطني وتوجد اتفاقيات دولية حول التحكيم وأيضا قوانين وطنية تنظم التحكيم في كثير من الدول ومن هذه الدول ليبيا وموريتانيا اللتان انضمتا إلى الركب فقننتا التحكيم ونظمتها حيث أصبح جزءا من المنظومة القانونية في هاتين الدولتين. ففي ليبيا مثلا خصص قانون المرافعات التجارية والتجارية الليبي لسنة 1953 باب الرابع للتحكيم مبينا الأحكام المرتبطة بنزاعات الخلافات الزوجية. أما في موريتانيا فيوجد قانون خاص بالتحكيم هو القانون رقم 2000-06 المنضم مدونة الحكيم. تتناول هذه الورقة قراءة قانون التحكيم الموريتاني حسب ما ورد في مدونة التحكيم المذكورة آنفا وقانون التحكيم الليبي اتفاقا من ناحية من قانون المرافعات الليبية ثم تقارن بين القانونين مبرزة مظاهر الاتفاق والاختلاف، وينتجت -إن وجدت- ببعض مكتوبة المنهج التحليلي حيث تقوم بتحليل نصوص القانونين ومناقشتها ومقارنة بعضها بعضًا والتاريخ عليها. ودراسة لكهذ هذه عتقد أنها مفيدة على المستوى النظري والعملي.

الكلمات المفتاحية: التحكيم، حل النزاعات، القانون الليبي والموريتاني.
المقدمة:

التحكيم من أهم الوسائل التي يلجأ إليها خل النزاعات الواقعة أو المحتملة وقوعها في المستقبل. وتحكيم نظام قديم عرفه البشرية منذ أمد بعيد، وفي العصر الحديث ازدادت أهميته وكثر اللجوء إليه وأصبحت له مؤسسات ومراكز متخصصة تمارسه على المستوى الدولي والوطني وتوجد اتفاقيات دولية حول التحكيم وآيضاً قوانين وطنية تنظمته في كثير من الدول. ولibia وموريتانيا قد انضمتا إلى الركب فقنتا التحكيم ونظمتهما حيث أصبح جزءاً من المنظومة القانونية في هاتين الدولتين. ففي ليبيا مثلاً خصص قانون المرافعات المدنية والتجارية الليبية بابا كاملاً للتحكيم وهو الباب الرابع منه (م المادة 739 -777). وقد صدر هذا القانون في 28-11-1953 ونشر في الجريدة الرسمية (عدد خاص) بتاريخ 20-2-1954م إلا أنه اقتصر على التحكيم الداخلي. وقد قسم الباب الرابع إلى فصولين الفصل الأول ذكرت فيه أحكام عامة عن التحكيم (771-739) أما الفصل الثاني فقدتناول التحكيم بين الزوجين في حالة وجود خلاف (777-772). وبهذا تاريخ إعداد هذه الورقة لم يتم التصديق على مسودة قانون تحكيم شامل تم إعدادها سنة 2010 وبناء على ذلك بقت ليبيا معمدمة على قانون المرافعات المدنية والتجارية لسنة 1953. وهكذا محاولة جديدة في الوقت الحالي لسن قانون جديد للتحكيم وقد أعتمد المشرع الليبي التحكيم كوسيلة لنسبية النزاع في عقود النفط لورد في نص المادة 20 فقرة 1 من قانون النفط الليبي تجري تسوية النزاع بين اللجنة وطرف العقد الممنح عن طريق التحكيم وفقاً لأحكام هذا القانون. 3 كذلك أيضاً في عقود الاستثمار فقد قانون تشجيع الاستثمار رقم 9 لسنة 2010 في المادة 24 على عرض أي نزاع بين ليبيا والمستثمر الأجنبي على المحاكم المختلفة وبرد أستثناء على هذا النص في حال وجود اتفاقيات ثنائية أو متعددة الأطراف بين الدولة المضيفة ودولة المستثمر فيها تتضمن نصوصاً متعلقة بالصلح أو التحكيم أو اتفاق خاص بين المستثمر والدولة بنص على شرط التحكيم. 4

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1 على الصادق القناعي وعبدالرحمن أبو القاسم الحريمي: "اتفاقيات التحكيم بين الركاب والشركات،_OUTPUT-LIBYAN-LAW-08-2016،" 206.
2 قانون المرافعات المدنية والتجارية الليبي لسنة 1953.
3 الفقرة 1 المادة 20 من قانون النفط الليبي رقم 25 لسنة 1954.
4 المادة 24 قانون تشجيع الاستثمار رقم 9 لسنة 2010.
أما في موريتانيا فيوجد قانون خاص بالتحكيم وهو القانون رقم 2000-06 المتضمن مدونة التحكيم. وتشمل مدونة التحكيم الموريتانية على ثلاثة فصول في أربع وستين مادة. الفصل الأول "أحكام عامة" يتضمن أحكاما عامة مثل تعريف التحكيم وموضوعه والأطراف المشاركة فيه. أما الفصل الثاني والثالث فقد خصصا للتحكيم الداخلي والدولي على التوالي. لكن الحديث عن التحكيم في موريتانيا يتطلب الرجوع إلى قوانين موريتانية أخرى أخذت لها مدونة التحكيم إتماما أو تفصيلا ومن أهمها قانون الأئتماتات والعقود الموريتاني -الأمر القانوني رقم 89-126 الصادر بتاريخ 14 سبتمبر 1989 المتعلقة بالمتضمن قانون الأئتماتات والعقود المعدل بالقانون رقم 2001-31 الصادر بتاريخ 7 فبراير 2001- الذي تسري أحكامه على الأئتماتات والعقود في موريتانيا بصفة عامة. ومن هذه القوانين أيضا قانون المراجعت المدنية التجارية الإدارية الموريتاني (قانون رقم 99-035) والذي يرجع إليه في المسائل الإجراءات.

تحاول هذه الورقة قراءة قانون التحكيم الموريتاني حسب ما ورد في مدونة التحكيم المذكورة أعلاه وقانون التحكيم الليبي.

انطلاقا من الباب الرابع من قانون المراجعت المدنية والتجارية الإدارية الموريتاني -قانون رقم 99-035- الذي يرجع إليه في المسائل الإجراءات، نتظر من الباب الرابع من قانون المراجعت المدنية والتجارية الإدارية الموريتاني -قانون رقم 99-035- الذي يرجع إليه في المسائل الإجراءات.

يعتبر هذه الورقة قراءة قانون التحكيم الليبي حسب ما ورد في مدونة التحكيم المذكورة أعلاه وقانون التحكيم الليبي نتظر من الباب الرابع من قانون المراجعت المدنية والتجارية الإدارية الموريتاني -قانون رقم 99-035- الذي يرجع إليه في المسائل الإجراءات.

البحث الأول: مدخل عام إلى التحكيم.
 هذا المدخل العام تعريف التحكيم لغة واصطلاحا وتمييزه عن النظم المشابهة له، وتعريف عقد التحكيم وطرق إثباته، والأشياء التي يجوز فيها التحكيم والتي لا يجوز فيها.

الفرع الأول: تعريف التحكيم وتمييزه عن النظم المشابهة له

التحكيم لغة قال فيه صاحب القاموس "حَكَّمَ، حَكَّمَهُ" في الأمر تحكيمًا: "أَمَرَ أن يَحْكِم، و"الحاكِم، مِنْفِذُ الحَكِم، كالحُكَمَ. فيما يتعلق بتعريف التحكيم في اصطلاح القانونيين يلاحظ أن بعض القوانين تعريف تفاوت عن بعض آخر ومن ذلك البعض القانون الليبي لسنة 1953 الذي ورد بالتحكيم في نظريات الشريعة وقواعد المحاكمات، ودعوى الرفع لمحكمة الفنادق وتكليف المبرم وفتح الحالة وتشديد الكاف المفتوحة. ويبين هذا التعريف أن التحكيم تلاقى إرادتي الخصمين بال يوجد من طرفين، ويتم إبرام التحكيم عن طريق اتفاق بين الأطراف.

وتعريف مدونة التحكيم الموريتانية الذي جاء في الدادة الأولى: "التحكيم هو طريقة خاصة لفض بعض أصناف النزاعات من قبل هيئة تحكيم يسند إليها الأطراف مهمة التب عمل تفاوت التحكيم". حسب هذا التعريف التحكيم هو طريق خاص يسند إليها تفاوت التحكيم، إضافة إلى ذلك، يتم إبرام التحكيم عن طريق اتفاق بين الأطراف.

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6 محمد الدين أبو طاهر محمد بن يعقوب الغيور(Zaid) القاموس المحيط، (بيروت: مؤسسة الرسالة للطباعة والنشر والتوزيع، ط 8، 1426 هـ - 2005 م.

(نسخة المكتبة الشاملة).

2 عيدالباس عند عبد الواسع الضرابي، النظام القانوني للفاتن التحكيم (القاهرة: ط 2 دار الفتح، 2008)، ص. 63.

4 نفس المراجع السابق.
الأطراف يشترط لصحته والأعتداد به - حسب قانون الالتزامات والعقود الموريتاني. أن تكون في أطراف كل الأركان اللازمة لصحة الالتزامات الناشئة عن الإرادة وهي: (1) أهلية الالتزام؛ (2) تعبير صحيح عن الإرادة يشتمل على العناصر الأساسية للالتزام؛ (3) شيء محقق يصحح لأن يكون محاولا للالتزام؛ (4) سبب مشروع للالتزام. وهيئة التحكيم التي يسود إليها الأطراف مهمة البت في النزاع قد تكون فردًا واحدًا أو مجموعة من الأفراد، ويقسم المحكم من ناحية السلطة المخولة له إلى محكم عادي ومحكم مفوض للصلح وهو "الذي يبيح له اتفاق التحكيم أن بيت في موضوع النزاع بروح العدل والانصاف لا بحسب القواعد القانونية".1

ولتمييز نظام التحكيم بصفة أكثر وضوحا نذكر - باختصار - بعض النظم التي تتشكل معا في محاولة حل النزاعات مثل نظام الصلح والتوافق والحبرة والقضاء. 11. فهذه النظم وإن اتفقت مع التحكيم في محاولة حل النزاع إلا أنها تختلف معه في السلطة المخولة لكل واحد منهم، فسلطة المحك في نظام الوفاق -الذي هو "التوقيع الأطراف على محاولة إجراء تسوية ودية عن طريق الموافق أو الموقفين"- لا تخول لإخضاع أطراف النزاع لأحكامه لأنه لا يصدر قرارات بل يقدم مقترحات قد تكون وقد ترفض.12 من النظم أو العقود التي تتبع التحكيم عند الصلح وقد عرفه المادة (1030) من قانون الالتزامات والعقود الموريتاني بأنه "عقد بمقتضى يحسه الطرفان نزاعا قائما أو يتوقعان قيامه، وذلك بتنازل كل منهما للآخر عن جزء مما يدعوه لنفسه أو بإعطائه مالا معينا أو حقا". يتفق الصلح مع التحكيم من حيث أن كلما مثلاثار للآخر عن جزء مما يدعوه لنفسه أو بإعطائه مالا معينا أو حقا. فمثلا قرار الصلح ينشأ عن انفاق مباشر منهما ينهي النزاع ولا يجوز الرجوع عنه مثلا ولكنهما يختلفان في أمور أخرى. فمثلا قرار الصلح ينشأ عن انفاق مباشر


المادة 2 (ج) من القانون رقم 2000-06 المتضمن مدونة التحكيم الموريتانية.

المادة 2 (د) من المرجع السابق.


د. محمد سامى الشوا مرجع سابق، ص 32.
بين أطراف النزاع أما التحكيم فيأتي قراره من هيئة التحكيم التي عينت بموجب اتفاق التحكيم. وهذه النقطة تقوى
للكلام على اتفاق التحكيم والطرق التي بنيت بها وذلك ما يتعرض له الفرع الثاني من هذا البحث.

الفرع الثاني: اتفاق التحكيم وطرق إثباته:

اتفاق التحكيم عرفته المادة الثالثة من مدونة التحكيم بقولها "اتفاق التحكيم هو التزام أطراف على أن يفصلوا
التحكيم كل أو بعض النزاعات القائمة أو التي قد تقوم بينهم بشأن علاقة قانونية معينة تعقدية كانت أو غير تعقدية.
ويكتسب الاتفاق صيغة شرط التحكيم أو صيغة عقد التحكيم. "أشمل تعريف اتفاق التحكيم على أركانه الأساسية
والنزام متبادل بين طرفين أو أكثر، علاقة قانونية معينة، نزاع حالي أو مستقبلي. وما أن اتفاق التحكيم هو النزام
ومن شروط الاتفاق أن يقع على " شيء محقق يصح لأن يكون محايا الاتفاق" 12 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 في أشخاصهم وإلا كان العقد باطل". والفرق بين صيغة شرط التحكيم وصيغة عقد التحكيم -حسب الماده
4و5 من المدونة- هو أن " شرط التحكيم هو التزام أطراف عقد بإخضاع النزاعات البً قد تتولد عن ذلك العقد
للتحكيم. " فشرط التحكيم إذن ينصب على ما قد ينشأ من النزاعات في المستقبل. وأما عقد التحكيم -"هو
الالتزاماتي بمقتضىه أطراف نزاع قائم عرض هذا النزاع على هيئة تحكيم"- فيتعلق بنزاع معين موجود في الوقت الحاضر.
وأما أن التحكيم اتفاق خاص تولدها أمور مهمة نص قانون المرافعات المدنية والتجارية الليبي على إثبات مشارطة
التحكيم لا تثبت المشاركة إلا بالكتابية 14. وكذلك أيضا مدونة التحكيم على ضرورة إثباتها بالكتابة فقط حيث جاء
في المادة 23 منها " لا يثبت اتفاق التحكيم إلا بمكتوب سواء كان رسميًا أو عرفيا أو محضر جلسة أو محضر محاولة لدى
هيئة التحكيم التي وقع اختيارها". والكتابية هي إحدى وسائل الإثبات الخمس التي يقررها القانون الموريتاني، وهي:

12 الفقرة (3) من المادة 23 من قانون الالتزامات والعقود الموريتاني.
14 المادة 742 من قانون المرافعات المدنية والتجارية الليبي.
إقرار الخصم؛ الحجة الكتابية؛ شهادة الشهود؛ القرينات؛ اليمين والنكول عنها. وانطلاقاً مما قرره المادة 399 من قانون الالتزامات والعقود التي تصرح بأنه "لا يطلب أي شكل خاص لإثبات الالتزامات إلا في الحالة التي فيها يقرر القانون بشكل معين" وأنه "إذا قرر القانون شكل معين، لم يسع إجراء إثبات الالتزام أو التصرف بشكل آخر مماثل له" 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 في الشكل والقوة مثل وثيقة الرسمية والعريقة أو وثيقة "موضعية من الأطراف أو تبادل رسائل أو تلسكوسات أو برقات أو غيرها من وسائل الاتصال التي تثبت وجود الاتفاق".

بعد معرفة اتفاق التحكيم وطرق إثباته حان الوقت للكلام على الأشياء التي يجوز أن يتم اللجوء إلى اتفاق التحكيم فيها والتي لا يصح فيها ذلك. ذلك ما سيبحث في الفرع التالي.

الفرع الثالث: موضوع التحكيم:

معينة موضوع التحكيم أو بعبارة أخرى الأشياء التي يجوز فيها والتي لا يجوز مسألة مهمة من الناحية النظرية والقانونية لأن أنواع المعاملات والعقود التي قد يقع فيها نزاع كبير وتعددها من مثل التجارة والمدنية ومنها ما قد يكون موضوعه الأحوال الشخصية أو المسائل المتعلقة بالنظام العام. فوفقًا لنص المادة (740) من القانون الليبي لا يجوز التحكيم في: (1) الأمور المتعلقة بالنظام العام؛ (2) المنازعات بين العمال وأرباب العمل بشأن تطبيق الاحكام الخاصة بالنظام الاجتماعي وأعمال العمل وأمراض الملهة; (3) المنازعات المتعلقة بالشخصية أو حالات الشخصية بما في ذلك التفريق البدني. ويجوز التحكيم بين الزوجين فيما تجرح أحكام الشريعة الإسلامية؛ (4) لا يصح التحكيم في

المادة 402 قانون الالتزامات والعقود الموريتاني.

المادة 8 من مدونة التحكيم والمادة 414 وما بعده من قانون الالتزامات والعقود الموريتاني.

المادة 740 مساقون المواقع المدنية والتجارية الليبية.
المستند: "المستند: ICDR 2017: Modern Trends in Effective Dispute Resolution"

المسائل التي لا يجوز فيها الصلح: (5) ولا يصح التحكيم إلا من له أهلية التصرف في حقوقه. أجاز المشرع الليبي وفقا لنص المادة 769 سنة 3 رفع دعوى بطلان ضد الحكم التحكيمي الصادر إذا كان موضوع النزاع خاصا بالأحوال التي لا يجوز فيها التحكيم. أيضا نصت مدونة التحكيم الموريتانية على أشياء مشابهة في الجملة؛ لكن المتأمل لنص المدونة بلاحظ أنهما أعطت للظروف حريات حرية اللجوء إلى التحكيم في "كل أو بعض النزاعات القائمة أو التي قد تقوم بينهم بشأن علاقة قانونية معينة تعاقدية كانت أو غير تعاقدية" ثم استثنت في المادة 8 منها أشياء لا يجوز التحكيم فيها وعنونتها ب" المجال الحظر " وهي: (1) المسائل المتعلقة بالنظام العام؛ (2) المسائل المتعلقة بالنزاعات القائمة باستثناء الخلافات المالية الناشئة عنها؛ (4) المسائل التي لا يجوز فيها الصلح؛ (5) النزاعات المتعلقة بالدولة والمؤسسات العامة والمجموعات المحلية إلا إذا كانت هذه النزاعات ناتجة عن علاقات دولية ذات طابع اقتصادي أو تجاري أو طEATURE المنظمة بالفصل الثالث من هذه المدونة.

فمن المسائل التي لا يجوز فيها التحكيم -حسب القانون- المسائل المتعلقة بالنظام العام الذي قد عرف بأنه "مجموعة النظم والقواعد التي قد تحدد نواحي حكما أو حسب سير المصالح العامة في الدولة، وضمان الأمن والأمان في العلاقات بين الأفراد، بحيث لا يجوز للأفراد أن يمدواها في اتفاقاتهم". ومنها كذلك المسائل التي لا يجوز فيها الصلح وتشمل حسب قانون الأالتمامات المسائل المتعلقة بالخلافات الشخصية أو بالنظام العام أو بالحقوق الشخصية الأخرى الخارجة عن دائرة التعامل وما لا يجوز التعاقد عليه شرعا وحق النفقة.

المبحث الثاني: أهلية أطراف التحكيم:

المادة 740 من قانون المرافعات المدنية والتجارية الليبي.

المادة 769 من قانون المرافعات المدنية والتجارية الليبي.

"عبد الباسط محمد، مرجع: ص 133.

(1) لمزيد من التفاصيل نظر المادة 1030 وعدد من قانون الأالتمامات والعقود.
كل النصائح القانونية المحددة أتفاق التحكيم يتطلب أن يكون أطرافه يتمتعون بالأهلية الكاملة ومتمنين بحقهم المدنية

وإلا كان التحكيم غير معتمد به. هذا المبكل على الشروط الواجب توفرها في كل من المحكمين بكسر الكاف

أي من يعين هيئة التحكيم المحكمين يفتحه أي هيئة التحكيم.

الفرع الأول: الشروط المشتركة في من يبرم اتفاق التحكيم:

نص القانون التحكيم الليبي على أنه "لا يصح التحكيم إلا بموجب إجراء التصرف في حقوقهم".

وإما يتطلب أهلية التصرف في حقوق و التي قد حدد把她 بعض من فقهاء القانون "بأهلية أجارة التصرف فيما يملكه الشخص نفسه" فلا يملك القاصر أو المحجور عليه ولاملك الوالي أو الوصي أو الوكيل قبله بالإنابة عنهم في التحكيم لأنه لاملك التصرف ولكنه يملك الحق في تمثيل القاصر أمام القضاء 24 ولكن لكل قاعدة استثناء والاستثناء هنا جاء في نص المادة 2 من قانون المرافعات المدنية والتجارية الليبي

"لا يصح التحكيم إلا بموجب إجراء التصرف في حقوقهم".

وهو تفويض خاص ومن دونه لا يصح عقد التحكيم أبوي في حال مختلفة ذلك من أحد أطراف النزاع وأيام أتفاق التحكيم فقد نصت المادة 69 من قانون المرافعات المدنية والتجارية الليبي من "المحروق عليه أو محروق من حقوقهم المدنية أو كان الخصم أو أحدهم من لا يجوز له التصرف...

ونصت المادة 7 من مدونة التحكيم المرجعية على أن "لا يمكن أن يبرم اتفاق التحكيم إلا شخص طبيعي أو معنوي يتمتع بأهلية التصرف في حقوقهم". من هذه النصوص يتبيين أن أطراف اتفاق التحكيم يشترط فيهم أن يكونون متمتعين بأهلية

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10 الفقرة 2 من المادة 70 من قانون المرافعات المدنية والتجارية الليبي.  
11 مسعود عثمان حيات التاريخ،التحكم في الشريعة الإسلامية والقانون،النشر،الباص (بيروت دار البحار الإسلامية، ط1994)ص155.
12 أحمد أبوالفوا، التحكيم الشرعي والاجباري (إكيدري) (دار المطبوعات العلمية، طبريا 2007) ص50.51.
13 المادة 732 من قانون المرافعات المدنية والتجارية الليبي.
14 المادة 769 من قانون المرافعات المدنية والتجارية الليبي.
الصرف في حقوقهم حتى يتمكنوا من تعيين هيئة التحكيم. ما هي إذن أهلية التصرف في الحقوق وما هي مستقلة؟

يقسم الفقهاء الأهلية إلى قسمين. القسم الأول أهلية الوجوب وهي "صلاحية الإنسان لوجوب الحقوق المشروعة له وعليه" وقد أشارت لها المادة 12 من قانون الالتزامات الموريتاني بقولها: "يبدأ شخصية الإنسان بمثام ولادته حيا وتنتهي موتاه، ويتمتع الجنين بحقوقه المدنية بشرط أن يولد حيا". ومن الواضح أن هذه ليست هي الأهلية المادرة في التحكيم وإنما المادرة في التحكيم القسم الثاني أهلية الأداء التي "هي صلاحية الشخص لاستعمال الحق" وأشارت لها المادة 15 من قانون الالتزامات الموريتاني بقولها: "كل شخص بلغ سن الرشد متمتع بجميع حقوقه المدنية ولم يجر عليه يرغم كاهل الأهلية لباشرة حقوقه المدنية. وسن الرشد هي ثمانية عشر سنة". وهذه المادة تكتمل على الشخص الطبيعي وأما الشخص المعوني -الذي له هو الآخر الحق في إبرام اتفاق التحكيم- فذكرت أهليته المادة 19 من نفس القانون بقولها: "يتمتع الشخص الاعتباري بجميع الحقوق إلا ما كان منها ملزما لصفة الإنسان وذلك في الحدود التي يقرها القانون. مما سبق يثبت أن الشخص المعوني أو الطبيعي المتمتع بأهلية التصرف في حقوقه يمكن أن يبرم اتفاق تحكيم معند به ولمزم 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 خصميه.

الفرع الثاني: الشروط المشتركة في من يكون حكما:

من يعين محكما في قضية يلزم أن يكون متمتعا بأهلية كاملة وقدرا على القيام بالمهمة على أحسن وجه لأن المحكمة يقوم مقام القاضي في الفصل وإعطاء كل ذي حق حقه. ولذا نصت المادة 10 من مدونة التحكيم الموريتانية تحت عنوان تعيين المحكمة وأهليةهم أنه "يجب أن يكون المحكم شخصا طبيعيا متمتعا بكامل حقوقه المدنية والاستقلالية والحياد إزاء الأطراف". وفي ما يتعلق بالجانب الليبي لم يتداول قانون المرافعات المدنية والتجارية.

11"عبد الرؤف أحمد السباعي، الوسيط في شرح القانون المدني الجديد. ج 1 دار إحياء التراث العربي بيروت لبنان. ص 266.

12 المرجع السابق ص 268.
مسألة الكفاءة أو الخصائص التي على ضوئها يتم اختيار المحكم، بل ترك الباب مفتوحاً للأطراف وليلزمهم بحكم أو عدد محكمين ولكن عند التعداد يجب أن يكون العد وتراً ولكن هناك استثناء على هذه القاعدة وهو عند التحكيم بين الزوجين كما نصت عليها الشريعة الإسلامية والمادة (744) من قانون التحكيم الليبي لسنة 1953. 09 08

وفقًا لنص المادة 741 من قانون المرافعات المدنية والتجارية الليبية حددت شروط معينة في المحكم كباقي التشريعات الأخرى فلا يصبح التحكيم قاصراً أو محجوز عليه ولإحراز حقوقه المدنية بسبع عقوبة جنائية أو مفسسابلة إلهامعه تعتبر(2)، تلك الشروط ضرورية فيمكن بين محكمًا لأحماً تمكن المتصرف بما من النظر في النزاع المروع أمامه عينين تزيد تعقيد العدالة لا فين من يزيد الحكم لزونه. وينظر إلى "استقلالية المحكم بأنها عصب مهمة القضاية، لأن المحكم بمجرد تعيينه يدخل في نظام القضاة الحالي من أي أرباطة لابسية مع أطراف النزاع". (2) ولذا نصت المادة 22 من المدونة أن على الشخص الذي يعرض عليه احتمال تعيينه محكماً أن يصرح بكل الأسباب التي من شأنها أن تثير شكوكاً حول حياده سواء القدوً منها أو الجديد، ويجوز للأطراف رد المحكمين المعنيين من طرفهم إذا تبينت أسباب الرد بعد التعيين. ويجوز كذلك رد المحكم بمثل ما يرد به القاضي أو أمور مذكورة في قانون الإجراءات المدنية والتجارية والإدارية المرتقبتين وتشمل على سبيل المثال لا الحصر القرابة والصداق أو العداوة المشهورة النبوية الذين الح. يجب أن يكون الحكم راشداً وتمتعا بكامل حقوقه المدنية. وحسب قانون الالتزامات والعقود المرتقبتين فإن كل شهيد بلغ سن الرشد (وهي ثمانية عشر سنة) تمتعا بقواه العقلية ولم يحجر عليه يكون كاملاً الأهلية مباشرة حقوقه المدنية.

المادة 741 من قانون المرافعات المدنية والتجارية الليبية لسنة 1953.

19 الكوفي أعود، "المادية"، المجلة العربية للفقه والقضاء، الأمانة العامة لجامعة الدول العربية، عدد 25، أبريل 2001، ص. 13.

20 الكوفي أعود، "المادية"، المجلة العربية للفقه والقضاء، الأمانة العامة لجامعة الدول العربية، عدد 25، أبريل 2001، ص. 13.

21 عبد الحميد الحدهب، موسوعة التحكيم: المحكم الدول (الكتاب الثاني) مشاركون الحقوقية، بيروت لبنان، ط الناول 2008، ص 326.

22 قانون 262 (المواد 1 إلى 11) من القانون رقم 99-035.
يتحصل مما سبق أن كل شخص تتوفر فيه الشروط المذكورة آنفاً وانتفت عنه الوانع يمكن أن يعين حكماً. ويخبر أن يكون الحكم شخصًا معنويًا أو طبيعياً متعدداً أو منفرًا. لكن إذا تعدد المحكمون وجب أن يكون عددهم ورا حسب المادة 18 من المدونة الموريتانية. وإذا عين أطراف التحكيم شخصًا معنويًا كمحكم فإن مهمته تنحصر في تعيين هيئة التحكيم. وبعد تعيين المحكمة المستوي الشروط وقبوله مهمته لا يجوز له التخلي عنها دون مبرر مقبول وأيضاً لا تقبل طلبات عزله أو رده عندما تقدم بعد ختم المراقبة.

بعد أن عرفنا الشروط المتعلقة بالمحكم والمحكم ومن يجوز لو لشارسة مهمة التحكيم بقي أن نتكلم على إجراءات التحكيم ونظمها وهو ما نحاول البحث لأثنى الكلام عليه.

المبحث الثالث: إجراءات التحكيم ونظمها:

إجراءات إذا تم تعيين هيئة التحكيم على الصفة التي نحن بحاجة إليها تباشر مهمتها وفق نظام محدد فما هي إجراءات التحكيم التي تتبعها هيئة التحكيم وما هي النظم التي تسلكها؟ الإجابة على هذين السؤالين ستتم في فرعين الفرع الأول يتكلم على إجراءات التحكيم والثاني سيخصص لنظم التحكيم.

الفرع الأول: إجراءات التحكيم:

نصت المادة 754 من المدونة الليبية تحت عنوان إجراءات التحكيم - على أن "للخصوم أن يضمنوا عقد التحكيم أو أي شرط أو اتفاق أو اتفاق لاحق يجرؤونه قبل أن يثبت المحكمون في نظر القضية قواعد معينة وإجراءات يسير عليها المحكمون. وفي حالة عدم قيامهم بذلك فЛЕلمتحكمين أن يضعوا القواعد التي يرونها صالحة وإلا وجب مراجعة الأصول والمواقع المتعارضة أمام المحكمة "ـ وأيضاً نصت المادة 9 من مدونة التحكيم الموريتانية على أن

14 المادة 11 و12 من مدونة التحكيم الموريتانية.

15 المادة 754، قانون المراقبة المدنية والتجارية الليبي.
إجراءات التحكيم في نزاع معين تبدأ في اليوم الذي يتسلم فيه المدعى عليه طلبًا 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 ما أن يتحدد اتفاق التحكيم أو يكون ثلاثة أشهر تبدأ من تاريخ قبول آخر المحكمة، حسب المادة 24 من المدونة الموريتانية. ونصت هذه المادة على أن أجل التحكيم الشرعي أو الاتفاقي يجوز تمديدته بإتفاق الأطراف أو بطلب من أحد أهم أو يقرر من هيئة التحكيم.

الفرع الثاني: نظم التحكيم:

يمكن تقسيم التحكيم إلى أقسام نظرا للزاوية التي ننظر إليها منها. فمنه مثلًا تحكيم داخلي وتحكيم دولي وتحكيم فردي وآخر مؤسسي. وقد أشارت المدونة الموريتانية إلى التحكيم الحر والمؤسسي بقولها "يمكن أن يكون التحكيم خاصًا أو مؤسسياً." وحلف سلطة المحكمة تبعا لنوع التحكيم، ففي حالة التحكيم المؤسسي تتولى تلك المؤسسة تنظيمها طبقا لنظامها. أما في 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. وبالنظر إلى السلطة الممنوحة إلى المحكم إلى محكم عادي ملزم بتطبيق القانون والمحكم مفوض للصلح وهو غير ملزم بتطبيق القواعد القانونية وإما بيت في النزاع حسب قواعد العدل والإنصاف. وفي الجانب الليبي نظم قانون المراقبات الليبية "نظم التحكيم من شرط التحكيم ثم إجراءاته وتنفيذها وطرق الطعن فيه وتسري هذه القواعد على كل تحكيم لانظمة قواعد خاصة أو قواعد

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علماء الدين المحمد، "التحكيم الداخلي والتحكيم الدولى:

جمعات الإمارات العربية المتحدة- كتب القانون، ص 1028

المادة 13 مدونة التحكيم الموريتانية.

المادة 14 مدونة التحكيم الموريتانية.

قانون المراقبات المدنية والتجارية الليبية لسنة 1953م.
اتفاقية يضعها أصحاب النزاع أو قواعد يحددها نظام مؤسسة تكمنية. ومن الواضح من خلال درستنا للفواعد التنظيمية لقانون التحكيم الليبي أنما تنظر في التحكيم الحر بشكل عام ولن تتناول التحكم المؤسستي في مواده والمادة 754 من قانون المرافعات أكدت بذلك قاطعة وقد جاء في نص هذه المادة أنه "الخصوم أن يضمنوا عقد التحكيم أو ما مشكلة أخرى للتوصيف أو أي اتفاق لاحق جروره قبل أن يبدؤ المحكمون في نظام قضية قواعد معينة وإجراءات يسير عليه المحكمون. وفي حالة عدم قيامهم بذلك فلمحكمين أن يضعوا القواعد التي يرونها صحة ولا وجب مراعاة الإصول والقواعد المتبعة أمام المحاكم" 41 ومن هنا يبدو لنا وعلى ضوء ماسبق أن المشروع الليبي أخذ بالنظام الحر للتحكيم.

المبحث الرابع: إصدار حكم التحكيم وتنفيذه

المحكمون مهمتهم تتحصل في الوصول إلى حل عادل للنزاع يرضي الأطراف ويمكن النزاع بينهم وذلك من خلال إصدار حكم التحكيم وتنفيذه وفقاً لألفندية القضية طبيعاً. 18811994 المكون أعطنا في هذا المبحث في فرعين الفرع الأول ببحث إصدار حكم التحكيم والفرع الثاني يلقي الضوء على كيفية تنفيذه.

الفرع الأول: إصدار حكم التحكيم

وفقاً لنص المادة 760 من قانون المرافعات التجارية والدنية الليبية بعد مداخلة المحكمين مجتمعين يصدر حكم التحكيم بأغلبية الأراء 11 أما فيما يتعلق بالحكم الفرد أو معيتي أصيح الوتر هنا يصدر الحكم بعد الاستماع إلى أطراف النزاع.

11 عيدالحمد أحمد مرجع سابق ذكره ص 1994 م
12 المكون أعطنا في هذا المربع سابقاً ذكره ص 4
13 المادة 760 من قانون المرافعات التجارية والدنية الليبية

14
ودرسة ما قد قدمه من وثائق وبراهين 14 وليس من المستغرب هنا اشتراط القانون الليبي لشكلية الكتابة عند صدور

حكم التحكيم، أسوة بالحكم القضائي، فلا وجود للحكم شفوي والكتابة تعتمد على المرتب في سلم القوة الثبوتية.15 وق ما يتعلق بالجانب الموروني: نصت المادة 28 من المدونة على أنه عندما تنتهي القضية للمحكمة تعلم هيئة التحكيم أطراف النزاع بتاريخ ختم الإجراءات. وتكوين مداولات هيئة التحكيم سرية وتصدر قراراتها بأغلبية الأصوات ما لم يتفق الأطراف على خلاف ذلك، وتبقي حسم المسائل الإجرائية من الرئيس إذا أذن له في ذلك ويفعّل جميع أعضاء هيئة التحكيم على القرار أو أكثرهم إذا رفضت أقلية منهم التوقيع عليه وينص على ذلك ويكون لقرار التحكيم، بمجرد صدوره، سلطة الشيء الم قضى به بالنسبة لموضوع النزاع الذي بت فيه.16 ومن خلال دراستنا لنص المادة 28 من مدونة التحكيم الموروني فقد ورد بالنص "تكون مداولات هيئة التحكيم سرية "17 ومن الملاحظ هنا أخذ المشرع الموروني ببدأ سرية المداولات وعلى خلاف من ذلك في القانون الليبي لا يوجد أي نص حري. واضح متعلق بالسرية في المداولات و هي تعتبر من أهم الأمور التي تميز التحكيم عن قضاء المحاكم.18

بما أن قرار هيئة التحكيم - ككل الأعمال البشرية - قد يكون صدر مشتبها على خطأ يتطلب التحصيح أو طعن فيه في الحالات التي يجوز فيها ذلك. فقد فتحت مدونة التحكيم المورونية بباب التصحيح للخطأ والطعن في قرار هيئة التحكيم قبل التنفيذ. فتصحيح قرار التحكيم المعيب ذكرته المدونة أنه يجوز هيئة التحكيم أو لرئيس المحكمة التي صدر بدأتما قرار التحكيم عند تعذر اجتماع الهيئة أن يصلح الغلط في الكتابة أو في الحساب أو أي غلط مادي آخر

14. الكوكي أيوب، مرجع سابق، ص 19.
15. حمد فال الدين ولد الأمين، التحكيم الإلكتروني والقانون الليبي، المؤتمر المغربي الأول حول المعلوماتية والقانون، طرابلس أكاديمية الدراسات العليا، 2009، ص16.
16. المادة 29 من مدونة التحكيم.
17. المادة 28 من مدونة التحكيم المورونية.
18. إسلام عمرو، إلغاء الورقية تنفيذ أحكام التحكيم التجاري الأجنبية (المغرب، 2009), ص 41.
تسرب إلى القرار وحُددت لذلك آجالًا وطرقًا تتم الإصلاح من خلالها. وأما الطعن فقد ذكرت المدونة الحالات التي يجوز فيها وذكرت أيضًا أنه يقدم طبق أحكام قانون الإجراءات المدنية والتجارية والإدارية إلى محكمة الاستئناف إلى صدر بدارًا قرار التحكيم. وكذلك أيضًا بالنسبة لقانون الليبي. ومن خلال نص المادة 763 أجاز التشريع الليبي الاستئناف في أحكام التحكيم ولكن بعد صدور الحكم والتصديق عليه من قاضي الأمور الوقتية وبعد تأكده من حكم التحكيم وشرط التحكيم والتثبت من عدم وجود ما يمنع تنفيذ حكم التحكيم وطبقًا للقواعد المقررة قانونا لأستئناف الصادرة من المحاكم ومن الملاحظ هنا أن المشرع أعطي حكم التحكيم نفس القواعد المقررة للاستئناف أحكام المحاكم ولكن أشرطة لكي يتم قبول الاستئناف الأ يكون قد تم تقويض المحكمين بالصلح أو كانوا محكمين في استئناف أو قد تنازلوا صراحة عن حق الاستئناف أو أن تكون قيمة الدعوى لتجاوز النصائي للمحكمة المختصة اصلاً لنظره ويُرفع الاستئناف إلى المحكمة المختصة بنظره فيما لو كان النزاع قد صدر فيه حكم ابتدائي من المحكمة المختصة، وكذلك أيضًا أجاز التماس إعادة النظر في أحكام المحكمة بإعادة النظر فيما عدا الحالة الخاصة المنصوص عليها في المادة 328 وطبقًا للقواعد المقررة ذلك فيما يتعلق بأحكام المحاكم ـ ورفع الالتماس إلى المحكمة التي كان من اختصاصها أصلاً ظن الدعوى إذا فيما يتعلق بالبطلان فقد نصت المادة 769 من قانون المرافعات المدنية والتجارية الليبي أحال البطلان وأجاز رفع دعوي البطلان ضد أحكام المحكمة النهائية ولو أشرطة الخصوم على خلاف ذلك وعددت المادة 769 تلك الأحوال.

الفرع الثاني: تنفيذ قرار التحكيم

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1) أطر المواد من 32-36 من المدونة.
2) أطر المواد من 37-39 من المدونة.
3) المادة 769 من قانون المرافعات المدنية والتجارية الليبي.
4) المادة 768 من قانون المرافعات المدنية والتجارية الليبي.
5) أطر المادة 768 من قانون المرافعات المدنية والتجارية الليبي.
إذا صدر قرار التحكيم بشكل صحيح أو معيب وتتم صحيحه أو الطعن فيه في الحالات التي تستوجب ذلك فإنه- طبقا لمدونة التحكيم الموريتانية- يصبح قابلا للتنفيذ طوعا من قبل الأطراف أو بصفة إجبارية بإذن من رئيس محكمة الولاية التي صدر باديئها القرار وإذا كان قرار التحكيم صدر في قضية منشورة أمام محكمة استئناف فإن رئيس تلك المحكمة هيا جلالة الوعدة التي لها الحق في إصدار الأذن بالتنفيذ. وفيما يتعلق بالجانب الليبي فقد قيد القانون الليبي أحكام تنفيذ حكم التحكيم بضوابط معينة حيث نص على أنه "لايصبر حكم المحكمين واجب التنفيذ إلا بأمر يصدره قاضي الأمور الوقتية بمحكمة التحكيم التي أودع أصل الحكم قلم كتابها بناء على طلب ذوي الشأن بعد الاطلاع على الحكم ومشارطة التحكيم والثبت من عدم وجود مانعين من تنفيذه، ووضوح أمر التنفيذ بذيل أصل الحكم". باستقراء النص نلاحظ أن الدشرع الليبي قد قيد حكم التحكيم الداخلي أو الوطني عن تنفيده إلا بامر صادر من قاضي الأمور الوقتية بعد أودع أصل الحكم عند قلم كتابها وهنا اشترط المشرع الليبي الحكم الأصلي وطلب مقدم من أحد الطرفين وأيض علي قاضي الأمور الوقتية التأكد من حكم التحكيم وشرط التنفيذ والثبت من عدم وجود مانع تنفيذ حكم التحكيم ومهر بأمر التنفيذ بذيل أصل الحكم. ويقوم قلم الكتاب للمحكمة بالإيداع وإعلام طرفي النزاع، وتتصديق المحكمة بالطرق المقررة قانونًا لإعلان الأحكام، وفي حالة أراد أحد الخصوم رفع تظلم ضد رفض التصديق على حكم المحكمين يرفع الي المحكمة. الابتدائية إذا صدر الرفض من القاضي الجمهي أما في حال جاء رفض التصديق من المحكمة الإبتدائية يرفع التظلم الي المحكمة الأستئناف ومرحلة تنفيذ حكم التحكيم تعتبر من أهم مراحل التحكيم لتحقيق النتائج المرجوة من التحكيم وأعطاه كل ذي حقه من خلال تنفيذ حكم التحكيم أما في حال تنفيذ حكم التحكيم الأجنبي فقد نصت المادة 408 من قانون المرايا للمدنية والتجارية الليبي علي تنفيذ أحكام المحكمين

المادة 31 من المدونة.
المادة 76.3 من قانون المرايا للمدنية والتجارية الليبي.
الأجنبية إذا كانت نهائية وقابلة للتنفيذ في البلد الذي صدرت فيه مع التقيد بالقواعد الواردة في المواد السابقة، والتي نصت على أنه لا يكون الحكم التحكيمى مخالفاً لقواعد النظام العام والأداب وأن يكون الحكم قدم ملائماً صحيحاً ولا يكون قد يتعرض مع حكم أو أمر صدر من المحاكم الليبية حكم سابق وأن يكون حائز على قوة الشئ الدضائي 405 من نفس القانون على أن "الأحكام والأوامر الصادرة في بلاد أجنبية أو في الولايات المتحدة الأمريكية أو في الدول الأخرى إذا كانت نهائية وقابلة للتنفيذ في البلد الذي صدرت فيه، بمقتضى القواعد المذكورة في المادة 405 من نفس القانون، فإنها تعتبر أملاك للمحكمة الليبية يجوز تنفيذها في البلد الذي صدرت فيه" 405 من نفس القانون.

وقد نصت المادة 764 من قانون الدرافعات التجارية والدنية الليبية على أن الأحكام والأوامر الصادرة في بلد أجنبية تطبيقها بالطرق المذكورة في المادة 405 من قانون ذلك البلد، في التنفيذ الأحكام الأجنبية.

وبهذا يظهر من هذا النص أن المشرع الليبي قد سلك مبدأ المعاملة بالمثل في تنفيذ الأحكام الأجنبية.

ويفسر بتطبيق الإخطاء المطلق في الحكم وفقاً للقواعد الواردة في حكم التحكيم للمحكمة الليبية، على أن الجهه المخولة في اختصاص تطبيق الإخطاء المطلق في حكم التحكيم للمحكمة الليبية قد أوعي الحكم قلم كتبتها بناء على طلب أحد ذوي الشأن بالطريقة المذكورة في المادة 764 من قانون الدرافعات التجارية والدنية الليبية. ومن الملاحظ هنا من خلال النص أن المشرع الليبي قد ظهر الحكم قلم كتبتها صفة تصحيح الحكم التحكيمى بناءً على طلب أحد الخصوم. وفقا لتطرق المقررة قانوناً للتحكم في الأحكام، وعلى النقض بالنسبة للمذونه التحكيم الليبية، وفقاً لنص المادة 32 فقد خول المشرع الليبييات الهيئة التحكيمية من تصحيح الأحكام من أي خطأ في الكاتبة والحساب، من أي عدة.

وقد يكون سبب القرار، وتقوم الهيئة التحكيمية من تلقاؤ نفسها من ذلك في غضون عشرين يوماً، من صدور الحكم التحكيمى 407 من قانون الدرافعات التجارية والدنية الليبية. وفقاً لنص المادة 33 من المذونه المتناينية فقد أجاز ذلك أيضاً في الأطراف وبناءً على طلب مقدم منهم خلال نفس المدة الزمنية التي أعطت للهيئة وهي عشرون يوماً وجب تبليغ الطرف الآخر يمكنه من

المادة 405 من قانون المرافعات المدنية والتجارية الليبية.
المادة 407 من قانون المرافعات المدنية والتجارية الليبية.
المادة 408 من قانون المرافعات المدنية والتجارية الليبية.
المادة 764 من قانون الدرافعات التجارية والدنية الليبية.
المادة 32 من مدونة التحكيم المتناينية.
تقدم ملاحظاتة عند الاقتضاء خلال 15 يوماً من تاريخ إبلاغة "إصلاح الغلط" وتأويل القرار التحكيم إصدار قرار تكميلي في جزء معين وفقاً من صدور الحكم من طلب الأصلي ويعتبر الحكم التأويلي الصادر جزءاً من من الحكم الإصلي الصادر، وتصدر الحكم في غضون ثلاثون يوماً بالنسبة إلى الإصلاح والتأويل أما في القرار التكميلي
هنا تكون المدة ستون يوماً ويجوز قانوناً للهيئة التحكيمية التمديد سواً في حال القرار التأويلي أوالتمكيمي وعند الحاجة يسمح بممطلي الأجال لأصدار القرار. أما في حال تعذر القيام بذلك من قبل الهيئة التحكيمية فإنها المشرع الموريتاني أعطى رئيس المحكمة التي وقع التحكيم في دائرة اختصاصها من أصدار قرار التصحيف والتاويل أو التكميل وفي غضون ثلاثين يوماً. ومن الواضح من خلال دراستنا لهذا النص أنه المشرع الليبي قد حصر مهمة تصحيف الأخطاء الودية في متن الحكم التحكيم للقضاء أي المحكمة التي أوقع الحكم في قلم كتابها الحكم بينما المشرع الموريتاني فقد سمح للهيئة التحكيمية بتصحيح القرار التحكيمية محددة من تلقاؤها نفسها أوطلب من أطراف النزاع وفي كلا الجوانب محدد برمم معين وعند تإذر الهيئة التحكيمية عن تصحيف الخطأ في هذه الحالة تولى المحكمة التي صدر الحكم في حدود ولايتها ولايجوز التصحيف إذا تم تنفيذ الحكم طوعياً من قبل الأطراف وتبين لنا من خلال النصوص أن القانون الموريتاني هو أكثر مرونة حيث أنه قد أعطى صلاحيات كبيرة للهيئة التحكيمية في تصوب الأخطاء بينما المشرع الليبي أوكل هذه المهمة حصرياً للقضاء.

مادة 33 من مدونة التحكيم الموريتاني.
مادة 34 من مدونة التحكيم الموريتاني.
مادة 35 من مدونة التحكيم الموريتاني.
الخاتمة:

بعد دراستنا الأحكام التحكيم في القانون الليبي والقانون الموريتاني نخلص إلى 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 في 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 لا يمكن إثبات اتفاق التحكيم إلا بالكتابة أيضا.

- يوجد اتفاق تام في الأشياء التي لا يجوز فيها التحكيم بين القانونين.

- مدونة التحكيم الموريتانية تعتبر حديثة نسبيا عند المقارنة بالقانون الليبي للتحكيم الوارد في الباب الرابع من قانون المرافعات المدنية والتجارية والفرق حوالي 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 التحكيمى فالجانب الليبي حصريا للقضاء فقط بينما في الجانب الموريتاني فالأمر متروك للم الهيئة التحكيمية الا في حال فشلها في ذلك تخال إلى القضاء الذي صدر الحكم في ولايته.

- أحد المشروع الموريتاني يبدأ سرية المدولات وعلي خلاف من ذلك في القانون الليبي لا يوجد أي نص حري 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 التي صدر بها القرار أما بالنسبة للقانون الليبي فقد أشرط القانون الليبي ضوابط معينة عند تنفيذ أحكام التحكيم "لاصير حكم المحكمين واجب التنفيذ إلا بأمر يصدر قاضي الأمور الوقتية بمحكمة التي أدع أصل الحكم قلم كتابة بناء على طلب ذوي الشأن بعد الإطلاع على الحكم ومشارطة التحكيم والتنبؤ من عدم وجود ما يمنع 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 المتزايد من الدعوى الجنائية المنظورة أمام القضاء الفلسطيني، بالإضافة إلى إشكاليات عديدة في تطبيق العقوبات على الجنيء، أدّى بدوره وجود مراكز إصلاح وتأفيح "سجون" ملائمة لإصلاح الجنيءين، ولذا كان لا بد من العمل على تطبيق وسائل بديلة لحل المنازعات الجنائية، والتي تعرف ببدائل الدعوى الجنائية، ومن أهمها
الصلح الجنائي. ويد探讨 هذا البحث ماهية الصلح الجنائي وطبيعته ونطاقه وموقعه، ولذا كاف لا بد من العمل على تطبيق وسائل بديلة لحل المنازعات الجنائية، والتي تعرف ببدائل الدعوى الجنائية، ومن أهمها
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العمل على تطبيق وسائل بديلة لحل المنازعات الجنائية، والتي تعرف ببدائل الدعوى الجنائية، ومن أهمها
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المصطلحات المفتاحية:
الصلح الجنائي، الدعوى الجزائية، القانون الفلسطيني.
إن ارتفاع نسبة ارتكاب الجرائم انعكس على تزايد القضايا المنظورة أمام المحاكم الجزائية، ناهيك عن تعقيد إجراءات الدعوى الجزائية وطول أمدتها، بما حدا بالكثير من التشريعات التي تبحث عن بدائل للدعوى الجزائية بحيث تخفف على أجهزة العدالة وتوفير النفقات على الدولة من جهة، ومن جهة أخرى تخفف حقوق المجني عليه وتتكفل بإصلاح المجني وحماه من المجتمع من جهة أخرى. وقد كان أحد أهم هذه البدائل نظام الصلح الجنائي الذي يتم بين المجني عليه أو من يقوم مقامه قانوناً وبين المجني 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 المجني والمجني عليه كبدائل للدعوى الجزائية، وأكثفت 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 ومجهلة 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 وأثاره وموقف المشرع والقضاء الفلسطيني منه، ويقدم مقترحاً لتطبيق نظام الصلح الجنائي في فلسطين مع مسواة 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.
المخور الأول

ماية الصلح الجنائي

يقتضى الحديث عن ماية الصلح الجنائي بيان مفهومه لغة وشرعًا وفرق بينه وبين التصالح

الجنائي، وكذلك توضيح طبيعته القانونية، وهذا ما سيتم تناوله على النحو التالي:

أولاً: مفهوم الصلح الجنائي:

أ - الصلح لغة: الصلح لغة من الفعل صلَّح وتصالح صمَلحاً وصلحاً ومصالحة، والصلاح ضد

الفساد، والصلح: تصالح القٰوم بينهم مصالحة: أصلح السلم، وأصلح ما بينهم وصالحهم مصالحة

وصلاحًا.

والصلح بمعنى إزالة الفساد وإحياء الخصومة وتسوية الخلاف، فإنّ الفلاح الشيء: أي أزال

فساده، ويقال أصلح ذات بينهم: أي أزال ما بينهما من عداوة وشغاف وأفى خصومتهما وسوى

الخلاف بينهما، ومنه قوله تعالى: "وإن طائفتان من المؤمنين أصلحوا فأصلحوا بَينَهُمَا".

ب - الصلح الجنائي اصطلاحًا: لم يُعرَف المشرع الفلسطيني والقضاء الفلسطيني الصلح الجنائي، ولا بعد

هذا عيبًا لأن وضع التعريفات ليس من عمل المشرع ولا القاضي، ولكن من اختصاص الفقهاء.

ويُعرَف بعض الفقه القانوني الصلح الجنائي بأنه: "تنزل من الهيئة الاجتماعية عن حقها في

الدعوى الجنائية مقابل دفع الجزاء للمبلغ الذي حدده القانون، أو لتصالحه مع المجني عليه في الأحوال

1. نظيف بن مكرم بن منصور، لسان العرب (بيروت: دار صادر، ج. 2، ط 3، 1414هـ) ص 517،518،1416هـ؛ وأحمد بن محمد البوذي،
المصاحيب المرجع في غريب الشرح الكبير (بيروت: المكتبة العلمية، ج. 1، د. ت) ص 345.
2. إبراهيم مصطفى، أحمد الزيات، وحمّاد عبد القادر، معجم البحار، المعجم الوسيط (المكتبة الإسلامية للطباعة والنشر والتوزيع،
ج. 1، ط: 1972م)، ص 520؛ وجمع اللغة العربية، المعجم الوسيط (القاهرة: دار التحرير للطباعة والنشر، 1989م)، ص 368.
3. سورة الحجرات: من الآية (9)
الذي سمح المشروع فيها بذلك.  

وللاحظ على هذا التعريف أنه اعتبر أثر الصلح متماثل في تنزل الدولة عن الدعوى الجنائية، والصحيح أن الأثر الأساسي للصلح تنزل الدولة عن حقها في العقاب وليس عن حقها في الدعوى الجنائية.  

ویرى الباحثان أن هذا التعريف لا يصلح تعريفًا للصلح؛ كونه جمع بين تعريف التصالح والصلح وخلط بينهما مع العلم أن لكل منهما نطاق وطبيعة وأثر.

ويعرّفه آخرون بأنه: "نقيض إرادته المنهم ونحذى عليه".  

ويؤخذ على هذا التعريف أنه قاصرًا، فلم يشمل إلا على أطراف الخصوم، ولم يوضح مدى جواز حدوثه بين وكلاء أطراف الخصوم، كما أنه لم يبين نطاق وآثار الصلح الجنائي.

ويعرّفه غيرهم بأنه: "عقد يتم بين كل من المجرم والجاني، يعبر كل منهما بإرادته عن رغبته في إلغاء النزاع، ويجبر عرضه على المحكمة الجنائية، وذلك في جرائم محددة".  

ويليه على هذا التعريف تمسكه بالطبيعة التعاقدية للصلح، ومقدّم له أنه أشار إلى نطاق الصلح؛ حيث ذكر أنه يكون في جرائم محددة، ويوخذ عليه أن لم يبين أن الصلح قد يقع من قبل وكلاء طرفين الخصوم الجنائية، كما أنه أوجب عرض الصلح على المحكمة الجنائية، على الرغم من أنه قد يتم أمام مأمورٍ الضبط القضائي أو النيابة العامة، وبالتالي لا يجب عرضه على المحكمة الجنائية في جميع الأحوال.

ويعرّف أيضاً بأنه: "اتفاق بين صاحب السلطة الإجرائية في ملاحة الجاني وبين هذا الأخير يترتب عليه إلغاء سير الدعوى الجنائية شريطة قيامه بتدابير معينة".  

ويؤخذ على هذا التعريف أنه أعطى للمجني عليه وصفًا غير دقيق؛ حيث اعتبره صاحب السلطة الإجرائية في ملاحة الجاني،  

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١ حسن دعيب، "الإجراءات الجنائية في التشريع المصري" (القاهرة: دار النهضة العربية، ط.1، 2000-2001م)، ص.236.  
٢ طه عبد العليم، "الصلح في الدعوى الجنائية" (القاهرة: دار النهضة العربية، ط.2، 2009م)، ص.12.  
٣ عوض محمد عوض، "المبادئ العامة في قانون الإجراءات الجنائية" (الإسكندرية: دار المطبوعات الجامعية، 1999م)، ص.131.  
٤ أمين مصطفى شاه، "الصلح في قانون الإجراءات الجنائية بالصلح" (القاهرة: دار النهضة العربية، 2002م)، ص.20.  
٥ أسامة عبد، "الصلح في قانون الإجراءات الجنائية ماهيه وللمشترط به" (القاهرة: دار النهضة العربية، ط.1، 2005م)، ص.15.
وهذا الوصف يصدق في جرائم الشكوى فقط، وعلى أيّة حال النيابة العامة هي صاحبة السلطة الإجرائية في ملاحقة الجاني باعتبارها ممثلة المجتمع.

ويعزّي الباحثان الصلح الجنائي بأنه: انفاق قانوني إجرائي بين الجاني أو من يقوم مقامه قانوناً والمجني عليه أو من يقوم مقامه قانوناً في جرائم حربية قانوناً، لإفادة الخصومية الجرائية في أي مرحلة من مراحل الدعوى، ويتطلب عليه النيابة الدفاع الذري للدعاوى الجرائية دون التأثير على الدعوى المدنية.

ثانياً: الفرق بين الصلح الجنائي والتصالح الجنائي: قرر المشروع الفلسطيني أنه يجوز التصالح في مواد المخالفات والجنح المعنوي عليها بالغرامة فقط، وعلى مأموري الضبط القضائي المختص عند تحرير المحضر أن يعرض التصالح على المتهم أو وكيله في المخالفات وثبت ذلك في محضره، ويفضل عرض التصالح في النيابة العامة، ويتوجب على المتهم الذي يقبل التصالح أن يدفع خلال خمسة عشر يوماً من اليوم التالي للقبول التصالح مبلغًا يعادل ربع الحد الأقصى للغرامة المقررة للجريمة أو قيمة الحد الأدنى المقرر لها -إن وجد- أيهما أقل، ويتطلب على التصالح انقضاء الدعاوى الجرائية بدفغ مبلغ التصالح ولا يكون لذلك تأثير على الدعوى المدنية.

باستقراء نصوص قانون الإجراءات الجزائية الفلسطيني يمكن تعريف التصالح الجنائي بأنه: بسبب من أسباب انقضاء الدعاوى الجنائية تحت النيابة العامة ومأموري الضبط القضائي برضيه على المتهم أو وكيله في جرائم الجنح والمخالفات وفقًا للقانون، حيث يدفع المتهم مبلغًا معيناً في موعد محدد قانوناً، مما يتطلب عليه النيابة الدعاوى الجنائية دون أن يؤثر ذلك على الدعوى المدنية.

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١ ليلى قايد، الصلح في جرائم الإعداء على الأفراد (الإسكندرية: دار الجامعة الجديدة، 2011م)، ص 29.
٢ راجع: المواد (16-18) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م وتعديلاته.
ويتضح مما سبق أوجه اتفاق الصلح الجنائي والتصالح الجنائي في القضاء الدعوى الجزائي دون التأثير على سير الدعوى المدنية.

أما أوجه الاختلاف بينهما، فهي على النحو التالي:

1. أطراف الصلح الجنائي هما: المتهم والضحية، أو من يقوم مقامه قانونًا في الجاني، أو من يقوم مقامه قانونًا.

2. الصلح الجنائي صادر عن إرادة منتقابلتين هما: إرادة المتهم والضحية، أو من يقوم مقامه قانونًا ورادة الجاني أو من يقوم مقامه قانونًا، في حين أن التصالح الجنائي صادر عن إرادة المتهم وحده.

3. الصلح الجنائي يجوز في أي مرحلة من مراحل الدعوى الجزائية، بينما يكون التصالح خلال مدة محددة قانونًا.

4. لا يشترط لصحة الصلح الجنائي أن يكون مقابل مادي، بينما لا يرتبط التصالح الجنائي آثاره إلا بعد دفع مبلغ معين.

ثالثًا: الطبيعة القانونية للصلح الجنائي:

أثار 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:

11 آenis حسب اللخاوقي، الصلح وأثره في العقوبة والخصومة الجنائية (الإسكندرية: دار الفكر الجامعي، ط1، 2011م)، ص57.
12 عوض، المبادئ العامة في قانون الإجراءات الجنائية، ص134.
13 إسماعيل الجبوري، الصلح كسبب ونقضاء الدعوى الجنائية (الإسكندرية: دار الجامعة الجديدة، 2011م)، ص34.
14 إسماعيل الجبوري، الصلح وأثره في العقوبة والخصومة الجنائية، ص57.
15 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 إرادي الجاني أو من يقوم مقامه قانوناً ومجتهديه عليه أو من يقوم مقامه قانوناً على إلغاء الخصومات الجنائية، وبالتالي فهو بمثابة عقد لا ينتج آثاره إلا باتفاق الطرفين، وحال رفض أحدهما يكون هذا الاتفاق والعدم سواء. وعليه فإن الصلح الجنائي يشبه إلى حد كبير الصلح المدني في طبيعته القانونية، ولا بد أن تحقق فيه آرائ العقد: الراضي والمحال والسبب.

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.

ويدعم هذا القول أن المشرع الفلسطيني في قانون العقوبات اعتبار التعويض أحد أنواع العقوبات.

ويعارض الباحثون 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 بالتبني، أضاف إلى ذلك أن التعويض في الصلح قد يكون في مرحلة سابقة على مرحلة المحاكمة، وقد يتم في مرحلة التحقيق أمام مأمورى القضائي أو النبابة العامة، والتعويض كعقوبة لا يكون إلا بحكم قضائي.

ولا تتفق الدراسة مع القول بالطبيعة العقابية للصلح الجنائي؛ لأنه لا يشترط أن يتم هذا الصلح بدفع الجاني مقابلً مالياً، بل قد يعفو المجري عليه أو من يقوم مقامه قانوناً ولا يطلب بأي حقوق أو

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16 على المبيد، الصلح الجنائي وأثره في الدعوى العامة (عمان: دار الثقافة للنشر والتوزيع، ط1، 2010م)، ص44.43.
17 الجوهري، الصلح كسبب لاقضاء الدعوى الجنائية، ص26.
18 sque, الصلح في جرائم الأعداء على الآف، ص113 وما بعدها؛ المبيد، الصلح الجنائي، ص44.45.
19 راجع: المادة (43.37) من قانون العقوبات الإنجليزي رقم (74) لسنة 1936م وتعديلاته المت隈 في قطاع غزة.
تعويضات مالية، وبالتالي لا يمكن القول بأن الصلح الجنائي عقوبة مالية. وبناءً عليه يُرجح الباحثان الطبيعة التعاقدية للصلح الجنائي، غير أن هذه الصفة العقدية هي جنائية ولست مدنية، وبالتالي فإن الصلح هو عقد جنائي يحكمه القانون وينظم أحكامه وإجراءاته.

المبحث الثاني

نطاق الصلح الجنائي وآثاره

وسيتناول هذا البحث الحديث عن نطاق الصلح الجنائي وآثاره القانونية، وذلك على نحو ما هو ذا:

أولاً: نطاق الصلح الجنائي:
إن من الأهمية بمكان بيان نطاق الصلح الجنائي من حيث الجرائم التي يجوز فيها الصلح، ومراجعة نصوص التشريعات الفلسطينية؛ يتضح أن المشرع الفلسطيني لم ينشر 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: "لمسمحي عليه ووكيله الخاص في الجرائم المنصوص عليها في هذه المادة - أي جرائم الشيك - أن يطلب من النيابة العامة أو المحكمة بحسب الأحوال، وفي أي حالة كانت عليها الدعوى إلغاء صلحو مع المتهم، ويتزامن على الصلح القضاء الدعوى الجنائية، ولما كانت مرفوعة بطرق الإدعاء المباشر، وتأمر النيابة العامة بوقف تنفيذ العقوبة إذا تم الصلح أثناء تنفيذها، ولما بعد صدور الحكم".

راجع:
المادة (566/4) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة.
ومن الجدير بالذكر أن هذا القانون صدر عن مجلس التشريع بغزة بناءً على خطة 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.
الجرائم في النطاق الجنائي، ينصح أن يُخفق الصلح أن يكون في الجرائم المتعلقة بالحقوق الشخصية وليس الجرائم المتعلقة بالنظام العام والحق العام للمدينة، فمعدو العقوبة.

وبالإطلاق على نصوص التشريعات المجاورة خصوصاً القانون المصري، يتضح أن نطاق الصلح الجنائي يكون في مجموعة من الجرائم المتعلقة بحقوق شخصية بين الأفراد، أهمها:

1. جرائم الاعتداء على الأشخاص: مثل بعض صور جرائم القتل الخطأ، وجرائم الإيذاء.
2. جرائم الاعتداء على الشرف والاعتبار: مثل جرائم السب والقذف والتشهير.
3. جرائم الاعتداء على الأموال: مثل جرائم السرقة والنصب وخبث الأمانة والإتلاف.
4. بعض جرائم المخالفات التي تلحق ضرراً بشخص المعني عليه أو ماله، مثل: الإبادة الحقيقية، وإتلاف منقول الغير بإجهاز، والسب غير العلني.
5. جرائم الشيك.

ثانياً: الآثار القانونية للصلح الجنائي: لكي يحقق الصلح آثاره لا بد أن يكون في جريمة أجاز فيها القانون الصلح، وأن يتم الاتفاق بين طرفيه ووقفاً للإجراءات المحددة قانوناً بحيث يتم إثباته أمام النبابة العامة أو المحكمة، وأن لا يكون مقتراً أو معلقاً على شريط واقف أو فاسخ.

أما بخصوص آثار الصلح على الدعوى الجزائية والمدنية، فسماها بياناً على النحو التالي:

راجع: المادة (18 مكرر – 1) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.
راجع: المادة (4-3) من قانون التجارة المصري رقم (17) لسنة 1999م وتعديلاته.
راجع: أحمد خلف، الصلح وثروته في انقضاء الدعوى الجنائية وأحوال بطلانه (الإسكندرية: دار الجامعة الجديدة، 2008م)، ص98-104.
آثار الصلح الجنائي على الدعوى الجزائية: يتغير آثار الصلح الجنائي على الدعوى الجزائية بحسب الحالة التي عليها هذه الأخيرة، لأن الصلح الجنائي يجوز أن يتم في أي مرحلة من مراحل الدعوى الجزائية.

فإن تم الصلح الجنائي قبل بدء الدعوى الجزائية، فإنه في هذه الحالة تقوم الجهات المختصة بمطابقة الأوراق. وإذا تم الصلح والدعاوى لا تزال في مرحلة التحقيق من قبل النيابة العامة، فتصدر النيابة العامة قراراً بتوقيف الدعوى. وإذا ما أهالت النيابة العامة الدعوى للمحكمة على الرغم من تحقيق الصلح الجنائي فيها، فإن المحكمة تقضي بعدم قبول الدعوى.

أما إذا تم الصلح في مرحلة المحاكمة فتنقضي الدعوى الجزائية، وإذا تم الصلح بعد صدور الحكم يوقف تنفيذ العقوبة بسبباً يئن تحت جريمة في الصلح الجنائي، فالصلح، نسبية، قاعدة، من الضرورة وتعين بأطرافهم، لجنيهات، يتعدى، وأثره، فيوء. فيحق لمن تضرر من جراء الجريمة أن يقدِّم بشكوى للجهات المختصة حتى لو كانت الدعوى الجنائية انقضت نتيجة لصلح تم بين أطرافها.

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11 تامر القاضي، "دور الصلح في الدعوى الجزائية في التشريع الفلسطيني"، (بحث تحليق مقدم للي لدرجة الدكتوراه في القانون العام، كلية الحقوق، جامعة الأزهر، غزة، 2012م)، ص 161-166.
12 راجع: المادة (4/566) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المتعلق في قطاع غزة، والمادة (18 مكرر –أ–) من قانون الإجراءات الجنائية الممصري رقم (150) لسنة 1950م وتعديلاته.
13 ميسيوس، الصلح الجنائي، ص 130-134.
ب- آثار الصلح الجنائي على الدعوى المدنية: لم يبين التشريع الفلسطيني آثار الصلح الجنائي على الدعوى المدنية لا في قانون الإجراءات الجزائية، ولا حتى في قانون التجارة الذي أجاز فيه الصلح في جرائم الش بك.

لكن التشريع المصري نص صراحة على أن الصلح الجنائي لا يؤثر على الدعوى المدنية، حيث قرر في قانون الإجراءات الجنائية أنه: "... لا أثر للصلح على حقوق المضرر من الجريمة ".

وقد يتم الصلح قبل إحالة الدعوى الجزائية للمحكمة، ففي هذه الحالة تقضي الدعوى الجنائية قبل إحالتها، وبالتالي لا يجوز للمتضرر من الجريمة رفع دعوى المدنية أمام القضاء الجنائي، ويكون الاختصاص للقضاء المدني.

وإذا تم الصلح بعد إحالة الدعوى الجزائية للمحكمة، فتتقضي الدعوى الجنائية دون أن يؤثر ذلك على سير الدعوى المدنية المرفوعة معها.

ويعتبر الباحثان أنه حال تم الصلح بعد أن أصدرت المحكمة الجنائية حكماً باتاً فيها، يكون للمضرر أن يرفع دعوى أمام القضاء المدني؛ لعدم وجود دعوى جزائية منظورة أمام القضاء الجنائي، تتبع له رفع الدعوى المدنية بالتبعية أمام ذات القضاء.

المؤشر الثالث

موقف التشريع والقضاء الفلسطيني من نظام الصلح الجنائي

ويبين هذا البحث موقف التشريع والقضاء الفلسطيني من نظام الصلح الجنائي، وذلك على النحو التالي:

مراجع:
- المادة (13 مكرر -أ-) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.
- المادة (181) من قانون الإجراءات الجنائية في التشريع الفلسطيني.
- المادة (259) من قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.
أولاً: موقف المشروع الفلسطيني من نظام الصلح الجنائي: اقتصر المشروع الفلسطيني في قانون الإجراءات الجزائية على الحديث عن التصالح الذي يتم بين مأموري القضائي أو النيابة مع المتهم أو وكله في جرائم محددة ونص على إجراءات خاصة بذلك.

20 أما الصلح الذي يتم بين المحتش على أو من يقوم مقامه قانوناً -الذي يُطلق فيه المشروع 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 المشروع الفلسطيني في قانون الإجراءات الجزائية.

غير أن المشروع الفلسطيني ذكر الصلح الجنائي فقط في جرائم الشيك بموجب قانون التجارة المطبق في قطاع غزة دون الضفة الغربية.

21 وهذا يعد قصوراً تشريعاً إذ يوجب على المشروع الفلسطيني أن يتناول موضوع الصلح الجنائي ويجعله أحد أسباب القضاء الدعوي الجزائية؛ لما له أثر إيجابي على طريقة الخصوم ومجتمع وأجهزة التفاوض كما سيتم بيانه في البحث الأخير.

ثانياً: موقف القضاء الفلسطيني من نظام الصلح الجنائي: على الرغم من أن المشروع 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 الجنائي والمحقق على أو عائلتهما كسبب من أسباب تخفيف العقوبة.

22 وبعد نظام التراضي بين طرفين الخصومة الجزائية من خلال ما يعرف بـ(ورقة المصالحة أو سند المصالحة) والذي غالباً ما يتم بشكل عرفي من خلال إصلاح وتوفيق بين الخصوم أو بشكل قلي.

راجع: المواد (16-18) من قانون الإجراءات الجزائية الفلسطيني رقم (3) لسنة 2001م وتعديلاته.
راجع: المادة (4/5) من قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة.
راجع: المادة (3) من قانون الفصل الجنائي رقم (9) لسنة 1950م، و(131/1954م)، والحكم (3) من أحكام المحكمة الاستئناف العليا الفلسطينية منها: الحكم رقم (9) لسنة 1950م، والحكم (2) من أحكام المحكمة الاستئناف العليا الفلسطينية منها: الحكم رقم (31953/1955م), والحكم رقم (50/1960م)، و(1) من أحكام المحكمة الاستئناف العليا الفلسطينية، و(1/171997-1998م).

راجع: المادة (3) من قانون رقم (3) لسنة 2009م المعدل لقانون العقوبات الانتقذابي رقم (74) لسنة 1936م المطبق في قطاع غزة.

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وعشائري معمولاً به في فلسطين، وإن إبراز ورقية أو سند المصالحة أمام المحكمة يؤدي إلى تخفيف العقوبة، ولكن لا يؤدي إلى انقضاء الدعوى الجزائية.

كما يعد الصلح الجنائي سبب من أسباب الإفراج بكفالة عن المتهم تمهيداً للحكم عليه بعد ذلك بحكم مخفيف، وقد حصلت واقعة مع الباحث إيان تدريبي في المحكمة عام 2011م، حيث رافع في قضية اعتداء، وحين إبراز سند المصالحة أمام قاضي محكمة الصلح، أصدر القاضي قرارات بقبول طلب الإفراج بكشفة عن المتهم.

المؤشر 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 مسؤوليات تطبيق هذا النظام وأهميته وفوائده بالنسبة لأطراف الخصومة والمجتمع وأجهزة العدالة، وهذا ما سيتم بيانه على النحو التالي:

أولاً: مسؤوليات 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، وتمثل المصالح التي يحققها نظام الصلح الجنائي فيما يلي:

أ- مصلحة الجاني: يجيب نظام الصلح الجنائي المحاكمة الجنائية، ومصاريف المحاماة والرسوم وغير ذلك من مصاريف التقاضي، ويجيب المعاكش النفسية التي ستتعرض لها سواء خلال مراحل المحاكمة أو بعد صدور حكم عليه، تأهيلاً احتمالية فقد وظيفته وتعذر صيانته وسماحة عائلته، وأن يفقد صفة حسن السيرة

23 أحمد صلاح عطا الله، محامي نظامي وشرعي في المحاكم الفلسطينية بغزة، مقابلة عبر الإنترنت، السبت 8/7/2017م.
والسلوك بحيث توضع نقطة سوداء في صحيفة سوابقو، ىذا بالإضافة إلى الضرر الدالي والاجتماعي
الذي يصيب عائلة المجتٍ عليه حال تم تنفيذ العقوبة بحقه، فيكون نظام الصلح أفضل بكثير من الآثار
السلبية للنقاضي التي تسبب المجتٍ وذويه كذلك ۹.4. ومن جهة أخرى فإن الصلح يؤدي إلى إصلاح المجتٍ؛ حيث يكشف خلال حوارات الصلح
عن أسباب ودوفاع ارتكابه لفعالته؛ وبالتالي فإن ذلك يساعد المجتٍ في معرفة الخلل الذي لديه. كما أنه
حالة واجهة المجتٍ بجريمة ومطالبة بإصلاح الضرر الناتج عنها يضعه تحت وطأة المسؤولية. وإن طلب
المجتٍ العفو من المجتٍ عليه يشعه بالندم والمحبل من فعلته؛ وكل ذلك يحق إصلاح المجتٍ ويشكل
رداعاً يمنعه من العودة لارتكاب الجريمة ۹.5.

ب- مصلحة المجتٍ عليه: إن تطبيق نظام الصلح الجنائي يشعر المجتٍ عليه بالرضا؛ حيث يسهّل تعابيره
في العدالة الجنائية، ويجد نفسه صاحب حق وله النسبة الأكبر من قرار تطبيق الصلح الجنائي، هذا
من جانب. ومن جانب ثان فإن الصلح يضفي غيض المجتٍ عليه، فентلأى الأحقاد بينه وبين المجتٍ،
وبتخليص من الآثار السلبية التي لحقت به جراء الجريمة المرتكبة ضده. ومن جانب ثالث يضمن
الصلح تعويضاً مناسبًا للمجتٍ عليه بدون إجراءات النقاضي الطويلة ۹.6.

ج- مصلحة أجهزة العدالة: إن تطبيق نظام الصلح يخفف العبء عن كاهل المحاكم وأجهزة العدالة؛
وهذا أمر ينح برجة بالغة إليه في فلسطين؛ نظرًا لتراكم القضياء المنظورة أمام القضاء، وأكثرها جرائم
تقبل تطبيق الصلح الجنائي حال النص عليه في القانون الفلسطيني. وإن تراكم القضياء أمام القضاء
يؤدي إلى إزالة القضياء ومعاونيهم والنيابة العامة ومأمور الضبط القضائي، مما يعكس على بسط

۹.۴ الجابري، الصلح كسبب للفتاحة الدعوى الجنائية، ص ۲۲.
۹.۵ عبيد، الصلح في جرائم الاعدادة على الأفراد، ص ۱۸۳-۱۸۵.
۹.۶ عبيد، الصلح في قانون الإجراءات الجنائية، ص ۱۸۹؛ وإعلامي، الصلح وأثرو في العقوبة والحصومة الجنائية، ص ۵۴۰، ۵۳۹.
الفصل في القضايا، فتفتقد العقوبات قيمتها بعد صدور الحكم فيها بعد وقت طويل، قد يكون سنوات في بعض الأحيان.

د. مصلحة المجتمع والدولة: يساهم تطبيق نظام الصلح الجنائي في نشر الأمن والسلام الاجتماعي; فهو يجسّد حركة الخلاف بين المجني عليه والقاني ويعيد المودة بينهما، مما يعكس على أمن المجتمع بأسلوب.

كما يراعي الصلح صلات القرابة التي قد يؤدي تفكيكها نتيجة وقوع جريمة بين الأقارب إلى إحداث قلاقل في المجتمع.

كما أن الصلح يُنشِب الدولة نفقات مالية باهظة لإدارة الدعاوى الجنائية، وكذلك يجهب الدولة نفقات إنشاء مراكز الإصلاح والتأهيل (السجون) ونفقات حراساتها والقيام عليها ونفقات رعاية نزلاء السجون الاجتماعية وصحياً وغير ذلك; مما يجعلها تصب تكبد تأثيرها على إصلاح المجرمين الخطئيين وتأخيرهم.

ثانياً: النصوص المرتبطة بتطبيق نظام الصلح الجنائي في فلسطين:

بناءً على ما سبق، يقترح الباحثان على المشترع الفلسطيني تعديل قانون الإجراءات الجنائية الفلسطيني رقم (3) سنة 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 الخلافات والجروح المعاقب بالغرامة أو الخسارة مدة لا تزيد عن سنتين، وفي الأحوال الأخرى المنصوص عليها قانوناً.

17 مالك حكمي الحكيم، النظرية العامة للصلح وتطبيقها في المواد الجنائية (القاهرة: دار النهضة العربية، 2002م)، ص 178، 177، 177.

18 النعماني، "مبادئ الدعوى الجنائية ودورها في تحقيق العدالة في فلسطين"، (بحث مقدم لابن درجة الماجستير في القانون العام، كلية الشرعية والقانون، الجامعة الإسلامية، غزة 2013م)، ص 144.

19 قيد، الصلح في جرائم الإعدام على الأفراد، ص 195، 196.

20 الديلاوي، الصلح وأثره في العقوبة والخصومة الجنائية، ص 538، 539.
المادة (18 مكرر ب)

1. يجوز الصلح في أي مرحلة من مراحل الدعوى الجزائية، حتى بعد صدور الحكم الانتهائى فيها.

2. إذا تم الصلح خلال مرحلة التحقيق، يثبت المتهم أو من يقوم مقامه قانوناً الصلح أمام مأموري
الضبط القضائي في المخالفات، وأمام النيابة العامة في الجنح، ويترتب على الصلح حفظ الدعوى
الجزائية.

3. يستثني من الفقرة السابقة جريمة القتل الخطأ، حيث يتوجب التصديق على الصلح فيها من المحكمة
المختصة.

4. إذا تم الصلح خلال مرحلة المحاكمة، يثبت المتهم أو من يقوم مقامه قانوناً الصلح أمام المحكمة،
ويترتب عليه الحكم بالقضاء الدعوى الجزائية، حتى لو رفعت الدعوى بطريق الادعاء المباشر.

5. إذا تم الصلح بعد صدور الحكم الانتهائى 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 للدعاوى الجزائية في القانون الفلسطيني، توصل الباحثان إلى
أن الصلح الجنائي من أبرز الوسائل البديلة للمنازعات الجنائية بشكل يحافظ حقوق طرفين الحسمة
الجنائية، ويحمي كيان المجتمع وأمنه، ويتوفر على الدولة الكثير من النفقات، ويسير عمل أجهزة التقاضي
خصوصاً في فلسطين.
وخلص هذا البحث أيضاً إلى أن المشروع 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 الجنائية.

وتبين من خلال هذا البحث أن القضاء الفلسطيني يأخذ بالمصالحة بين المتهم والمختفي عليه كسبب مخفف للعقوبة وكموسوعة للقبول طلبات الإفراج عن المتهم بكفالة؛ بحكم السلطة التنفيذية 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 افتتاحه في البحث الرابع) وتفعيله من قبل جهات الاختصاص.

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ثالثاً: القوانين والتشريعات:

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قانون العقوبات الانتدابي رقم (74) لسنة 1936م ومعدلاته المطبق في قطاع غزة.

قانون التجارة الفلسطيني رقم (2) لسنة 2014م المطبق في قطاع غزة.

قانون الإجراءات الجنائية المصري رقم (150) لسنة 1950م وتعديلاته.

قانون التجارة المصري رقم (17) لسنة 1999م وتعديلاته.
الوساطة القضائية في تسوية المنازعات في القانون الأردني

دراسة تحليلية نقدية

د. حليمة بوكرشة

أستاذة مساعدة بكلية إبراهيم للحقوق الجامعة الإسلامية العالمية ماليزيا

غيث ذياب

طالب دكتوراه بكلية إبراهيم للحقوق الجامعة الإسلامية العالمية ماليزيا
المستخلص

تعد الوساطة القضائية إحدى الوسائل البديلة الفاعلة في تسوية المنازعات، إذ أنها تقلل إحدى مقدمات إجراءات الصلح قبل رفع النزاع إلى القضاء وإأشاء الخصومة بين المتخصصين، كما أنها تمتاز بالسرعة في حسم النزاع وتوفير الوقت والجهد والمال على المتخصصين. ولقد تناول القانون الأردني المسمى ب "قانون الوساطة لتسوية النزاعات المدنية رقم (12) لسنة 2006" الوساطة القضائية وذلک عن طريق استحداث إدارة قضائية تسمى إدارة الوساطة والتي تتشكل من عدد من قضاة البداية والصلح ويسمون قضية النسوية. إلا أن تلبی نصوص هذا القانون بالعديد من الثغرات قلّست من فاعلیته في تسوية النزاعات. من هنا جاءت هذه الورقة البحثیة لمناقشة هذه الثغرات والتي على رأسها اختصار قانون الوساطة بالنزاعات المدنیة دون غيرها من النزاعات وقصر مهمة إیاحالة النزاع الى إدارة الوساطة على قاضی، إدارة الدعوى وقاضی الصلح دون قاضی الموضوع الذي لم يعط هذا الحق، إضافة الى فرض غرامات في حال فشل النسوية. وذلک من خلال استقراء وتحليل نصوص قانون الوساطة لتسوية النزاعات
المدنية رقم 12 لسنة 2006 ونصوص القانونية الأخرى ذات العلاقة

الهدف تقديم مقتراحات لتعديل القانون أو إضافة مواد من شأنها علاج القصور الذي بدأ واضحًا في نصوص القانون.
الوساطة القضائية في تسوية المنازعات في القانون الأردني

دراسة تحليلية تقدية

مقدمة

الحمد لله القائل في مصحف التنزيل " فاتقوا الله و أصلحوا ذات بينكم
و أطيعوا الله و رسوله إن كنتم مؤمنين " والصلاة والسلام على أشرف الخلق
والرسلين سيدينا ونبيا محمد صلى الله عليه وسلم وعلى آله وصحبه أجمعين.

تعد الوسائط البديلة تسويته المنازعات من المو ضويعات التي شاع
تداؤломها في الحقيقة الراهنة واكتسبت أهمية بالغة خاصة في ظل تسارع وتيرة
التطورات في مجالات الحياة المختلفة وتحديدا في مجال التجارة والمعاملات
المالية. فقد ظهرت عدة حلول بديلة لغز المنازعات مثل التحكيم
والوساطة وغيرها من الوسائط التي تمتاز بتوفر الوقت والجهد والمال على
المتخاصمين.

وقد استوعبت هذه الورقة البحثية فيروسية الوساطة القضائية كحل بديل
لقضايا المنازعات في القانون الأردني، وذلك بعد أن استحدث المشروع العربي

قانون الوساطة 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.

فمن هنا تبرز إشكالية هذا البحث في بيان مدى قدرة قانون الوساطة القضائية في صورته الحالية على فض النزاعات، وما التعددات الممكن إدخالها في هذا القانون للخروج بنصوص قانونية متكاملة تضمن جذب المتخاصمين لفض نزاعاتهم عن طريق الوساطة القضائية.

ويتمثل الهدف من هذه الورقة في التعرف على أهم المعوقات والثغرات في قانون الوساطة القضائية الأردني وتقديم مقترحات لتعديل مواده أو إضافة مواد أخرى لإصلاح هذا القصور، وذلك من خلال الاعتماد على المنهج الاستقرائي لتبني المواد القانونية المتعلقة بالوساطة القضائية في القانون الأردني، والمنهج التحليلي محاولة فهم مضمون نصوص هذه المواد وتحديد طبيعة علاقتها ببعضها البعض واكتشاف نقاط القصور فيها وما ترتيب عليها من ثغرات وفجاعات تشريعي.
القسم الأول: مفهوم الوساطة القضائية ومشروعيتها

المبحث الأول: مفهوم الوساطة القضائية

لم يُضمن التشريع الأردني تعريف للوساطة القضائية في قانون الوساطة لتسوية النزاعات المدنية رقم 12 لسنة 2006 حيث اكتفى بيان من هم الأشخاص المكلفون 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 استمر تعريفها في الفقه القانوني هي:
عملية تقوـ فيها جهة ثالثة محايدة بتسهيل حل النزاع من خلال تشجيع الوساطة إلى اتفاقية طوعية من قبل أطراف النزاع "1

كما عُرِّفت بأها: " هي عملية مرتة غير ملزمة ومكتومة بتولى أدائها وسيط محايد لمساعدة في مفاوضات النسوية" 2

ولا أن هذه التعريفات للوساطة لم تكن جامعة للكافئة عنصر الوساطة من حيث كيفية اختيار الوسطاء وأنواع النزاعات التي تصلح محلها للوسطاء.

من هنا جاء تعريف بسام الجبور على أنها "عملية إجرائية تتضمن تدخل طرف بين أطراف النزاع يطلبهما أو مواقفهما للتوصل إلى حل الخصومة صلحا في محا قابلًا له " 3

والوسطاء ثلاثة أنواع، وهي:

الوساطة الخاصة: وهي التي تعهدت إلى أصحاب المهن مثل المحامين والأطباء والمهندسين وغيرهم من أصحاب الاختصاص والخبرة وإلى الرجوع إلى:

1 الصليبي ، بشير ، مرجع سابق / ص 62.
2 الفطاوي ، محمد ، الوساطة في نسوية النزاعات المدنية ، مطبوعات دائرة الملكية الوطنية ، ط 1 ، عمان ، ص 8 ، 2008.
3 الجبور ، بسام ، الوساطة القضائية في الشريعة الإسلامية القانون دراسة مقارنة ، دار الثقافة للنشر والتوزيع ، عمان ، ط 1 ، 2015، عمان، ص 29.
نص المادة الثانية يفرقها الثالثة من قانون الوساطة بتبين لنا من هم الأشخاص المعينين (وسطاء خصوصيين).

1. الوساطة الاتفاقية: وهي التي يتم مواقفتها طرف النزاع على إقلاع النزاع إلى وسيط من أجل حل النزاع بينهما، و ذلك وفقا لأحكام الفقرة الثانية من المادة الثالثة من قانون الوساطة الأردني.

2. الوساطة القضائية: وهي التي يتم تحت إشراف القضاء و معرفة أحد القضاة العاملين في إدارة الوساطة و يتم اختيارهم من قبل رئيس المحكمة من قضاة البداية و الصلح بصفتهم الوظيفية، بحيث يكون دور القاضي دور مستهل للنزاع.

فالوساطة القضائية تعتبر وسيلة من الوسائل البديلة لتسوية النزاعات وذلك عن طريق إقلاع النزاع الى القاضي الوسيط الذي يكون طرفًا محايداً لحسم النزاع ومساعدة المتخصصين في الوصول إلى تسويته.

1 المادة 2/ج من قانون الوساطة الأردني: "رئيس المجلس القضائي يعين من وزير العدل نسبياً (وسطاء خصوصيين) يختارهم من بين القضاة المحترفين و المحامين و المهندسين و غيرهم من دوام الخبرة المحترفة في حيزة و النزاع.

2 المادة الثالثة / ب من قانون الوساطة الأردني: "الأطراف الدعوى يوافق قاضي إدارة الدعوى أو قاضي الصلح الاتفاق على حل النزاع بالوساطة و ذلك بإحالتها إلى أي شخص بروته مناسبًا. "

ICDR 2017: Modern Trends in Effective Dispute Resolution

8
تم سابقاً يمكن تعريف الوساطة القضائية بأنها: هيئة قضائية مشكلة من وسيط واحد أو أكثر للفصل في النزاع المحال إلى الوساطة وفقاً لأحكام القانون.

ومن خلال التعريفات السابقة يمكننا القول بأن الغاية من الوساطة هو الوصول إلى نتيجة ترضي جميع الأطراف لحل النزاعات فيما بينهم، فال وسيط يسعى إلى تقرير وجهات النظر بين المتناصمين من حيث الاتفاق والاختلاف في مسألة النزاع.

وعليه، ففكرة الوساطة تعتبر أفضل وسيلة لحل النزاع كون أن عدالة الفرقاء المبينة على الاتفاق يخلاف العدالة التي يطبقها القاضي بالاستناد إلى نصوص قانونية بحثة.

المطلب الثاني: مشروعية الوساطة القضائية

9

نص المادة 1/أ من قانون الوساطة الأردني.

القانون، مرجع سابق، 10.
تعتبر الوساطة القضائية وسيلة من الوسائل الحديثة لتسوية النزاعات بين المتخصّصين، وقد أخذ المشرع الأردني بالوساطة في عدة مواقف في القانون الأردني، يجعلها في الآتي:

أولاً: حالة الشقاق والنزاع 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 حسبا كإذا بالفعل أو بالقول أو معنوي، ويعتبر ضررا معنوي أي تصرف أو سلوك مشين أو مخل بالأخلاق الحميدة يلحق بالطرف الآخر إساءة أدبية، وكذلك إصرار الطرف الآخر على الإخلال بالواجبات والحقوقي الزوجية المنشورة إليها في الفصل الثالث من الباب الثالث من هذا القانون بحيث:

أ. إذا كان طلب التفريق من الزوجة وتحقيق القاضي من ادعائها بذلت المحكمة جهدها في الإصلاح بينما فإما لم يحقق الإصلاح أتدر القاضي الزوج بأن يصلح حاله معها وأجل الدعوى مدة لا تقل عن
فإذا لم يتم الصلح بينهما وأصر الزوجة على دعوها أحوال القاضي الأمر إلى حكمتهم.

ب. إذا كان المدعى هو الزوج وثبت وجود الشقاق والنزاع بذلك المحكمة جهدها في الإصلاح بينهما فإذا لم يمكن الإصلاح أجل القاضي الدعوى مدة لا تقل عن شهر أملا بالمصالحة وبعد انتهاء الأجل إذا لم يتم الصلح وأصر الزوجة على دعوها أحوال القاضي الأمر إلى حكمتهم.

ج. يشترط في الحكمتين أن يكونا عددين قادرين على الإصلاح وأن يكون أحدهما من أهل الزوجة والآخر من أهل الزوج إن أمكن وإن لم يتسير ذلك حكم القاضي الثني من ذوي الخبرة والعدلة والقدرة على الإصلاح.

د. يبحث الحكمان أسباب الخلاف والنزاع بين الزوجين معهما أو مع أي شخص يرى الحكمان فائدة في بيئتها معه وعليهما أن يدونا تحقيقهما محضر يوقع عليه ، فإذا رأى إمكان التوفيق والإصلاح على طريقة مرضية أقرها ودونا ذلك في محضر يقدم إلى المحكمة.
ه. إذا عجز الحكمان عن الإصلاح وظهر لما أن الإساءة جميعها من الزوجة قررا التفريق بينهما على العوض الذي يريانو على أن لا يزيد على المهر وتواجهة وإذا كانت الإساءة كلها من الزوجة قررا التفريق بينهما بطلقة فائدة على أن للمروجة أن تطبه بغير المقبول من مهرها وتواجهة ونفقه عدفاً.

و. إذا ظهر للحكمان 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 يريانو بأنهما بشرط أن لا يزيد على مقدار المهر وتواجهة.

ز. إذا حكم على الزوجة بأن عوض كانت طالب التفريق عليها أن تؤمن دفعه قبل قرار الحكمان بالتفريق ما لم يرض الزوج بتأجيله وفي حال موافقة الزوج على التأجيل يقرر الحكمان التفريق على البديل ويجيب القضاه بذلك أما إن كان الزوج هو طالب التفريق وقرر الحكمان أن تدفع الزوجة عوضاً فيحكم القضاه بالتفريق والعوض وفق قرار الحكمان.
ثالثاً: حالات النزاعات العمالية الجماعية:

حيث نص المشريع الأردني في المادتين 120 و121 من قانون العمل الأردني على الوساطة، حيث أجازت المادة 120 للوزير أن يعين وسيطاً من موظفي الوزارة للقيام بالتسوية في النزاعات العمالية الجماعية ، كما أجازت المادة 121 في فقرة الأولى للوسيط في حالة وقوع نزاع عمالي جماعي أن يبدأ بإجراءات الوساطة بين الطرفين لتسوية النزاعات فإذا تم الاتفاق بين الأطراف يقوم الوسيط بالاحتفاظ بنسخة من الاتفاق مصادق عليه من الطرفين.

المادة 120، 121 / من قانون العمل الأردني رقم 8 لسنة 1996.

المادة 126 / قانون الأحوال الشخصية الأردني رقم 36 لسنة 2010.
أما في فقرة الثالثة فقد نصّت على أنه في حال عدم الوصول إلى تسوية النزاع بين الأطراف يقوم الوسيط بإعداد تقرير يحتوي على الأسباب التي حالت دون إقامة الوساطة، أما في فقرة الثالثة فقد أشارت إلى أنه في حالة أن الوزير لم يتمكن من الوصول إلى تسوية بين أطراف النزاع فله أن يحيل التسوية إلى مجلس توافق يشكل من قبله.

ثالثا: مرحلة الدعوى الصلحية:

حيث نص المشرع الأردني في المادة السابعة في فقرة الثانية من قانون محاكم الصلح رقم 30 لسنة 2008 وتعديلاته والتي أجازت للفلسطيني اعتداءً أن يحيل النزاع إلى إدارة الوساطة إذا تبين له أن النزاع يمكن تسويته بالوساطة ومواقف الخصوم أو أن يبذل الجهد في إقامة مساعد المصالحة بين الأطراف.

فإذا تم تسوية النزاع بمواقف الخصوم يقوم بثبت ما اتفق عليه الخصوم في محضر الجلسة ويوقع عليه الخصوم أو وكلائهم، أما في حالة إذا تم الاتفاق بين الأطراف خارج محضر الجلسة يصدق القضائي على الاتفاق ويلحق
الاتفاق المكتب بمحضر الجلسة وثبت بما جاء فيه ويجبر بمثابة حكماً قطعياً صادراً عن المحكمة ولا يقبل أي طريق من طرق الطعن.

رابعاً: مرحلة الادعوى البدائية:

حيث نصّ المشرع الأردني في المادة 59 مكرر ب الفقرة الثانية /1/ وفقاً القانون الرابع من قانون أصول المحاكمات المدنية الأردني، والتي أجاز المشرع للقاضي بحصر نقاط الاتفاق والأختلاف بين الخصوم وحثهم على تسويته النزاع القائم بينهم ودلّه في حالة الاتفاق على التسوية بثبت بالصلح بين الخصوم وإصدار القرار وفقاً تقتضيه أحكام المادة 78 من ذات القانون والتي تنص على أنه "للخصوم أن يطلبوا إلى المحكمة في أي حالة تكون عليها الدعوى إثبات ما اتفقوا عليه من صلح أو أي اتفاق آخر في محضر الجلسة ويوقع عليه منهم أو من وكلاءهم. فإذا كانوا قد كتبوا ما اتفقوا عليه، الحق الاتفاق المكتب بمحضر الجلسة وهو يثبت محتواه فيه ويكون للمحاكم في هذه الحالة قوة الحكم الصادر عن المحكمة وتعطي صورته وفقاً للمواعد المقررة وفقاً للأحكام 2/.

1 المادة السابعة الفقرة الثانية من قانون محامين الصلح رقم 30 لسنة 2008 وتعديلاته.

2 المادة 78 من قانون أصول المحاكمات المدنية الأردني.
وبالرجوع إلى نص المادة الثالثة، في فقرها الأول، 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 القانونيين لحصر نقاط الاتفاق والاختلاف فيما بينهم وذالك 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) وكان الهدف من هذا القانون تنظيم الوساطة كوسيلة من الوسائل البديلة لحل النزاعات ليتماشى مع التعديلات التي أحدثت على قانون أصول المحاكمات المدنية الأردني المعدل رقم (26) لسنة (2002)، بحيث أضاف المشرع الأردني نص المادة (59) مكرر والتي نص 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.

16
ب. يسمى رئيس المحكمة قاضٍ أو أكثر للعمل في إدارة الدعوى المدنية واللائقة التي يحددها ويختار من بين موظفي المحكمة العدد المحدد لهذه الإدارة.

2. يتولى قاضٍ إدارة الدعوى المهام والصلاحيات التالية:
   
a. الإشراف على ملف الدعوى عند وروده مباشرة إلى المحكمة وتسجيله في سجلات المحكمة، ماريا بذلك أحكام المواد (56) و(57) و(58) و(59) و(109) من هذا القانون.

ب. اتخاذ الإجراءات اللازمة لتلبية أطراف الدعوى بالسرعة الممكنة.

ج. تعيين جلسة لأطراف الدعوى وتلبيتهم بموعدها وفق الأصول المقررة خلال مدة لا تتجاوز سبعة أيام بعد انتهاء المدة المحددة في المادة (59) من هذا القانون.

د. الاجتماع بالخصوص أو وكلاهم 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 تعذر إحضار المستند ضمن المدة المحددة وفقاً لأحكام هذه المادة تعال الدعوى إلى قاضٍ الموضوع.

17
7. حصر نقاط الاتفاقد الاختلاف بين الفرقاء وحثهم على تسوية النزاع
القائم بينهم ودية.

3. يمارس قاضي إدارة الدعوى الصلحية المقررة لقضيتي الموضوع في
ثبت التصلح أو أي اتفاق آخر، وإصدار القرار وفق ما تقضيه أحكام
المادة (78) من هذا القانون وفرض الغرامات المنصوص عليها في المادة
(14) وفي المادة (72) منه.

4. إذا تخلف أحد الأطراف عن حضور الجلسة التي حددها قاضي إدارة
الدعاوى أو رفض حضورها أو انتهت المدة المنصوص عليها في هذه المادة
بخيل الدعوى إلى قاضي الموضوع مرفقاً بما المحضر المذكور إليه في الفقرة (5)
من هذه المادة.

5. ينظم قاضي إدارة الدعوى محضاً بما قام به من إجراءات متضمناً الوقائع
المتفق ومتنازع عليها بين الطرفين ويجيل الدعوى إلى قاضي الموضوع خلال
ثلاثين يوماً من تاريخ أول جلسة يعقدها.

6. لا يجوز لقاضي إدارة الدعوى تحت طائلة البطلاق النظر في موضوع
الدعاوى التي سبق له واجز قراراً باحالتها إلى قاضي الموضوع " التي مفادها
استحداث إدارة قضائية تحت مسمى إدارة الدعوى المدني والغاية من هذه
الإدارة إعداد ملف الدعوى لتتصور معدة للفصل من خلال الإشراف على ملف الدعوى بجميع مراحله، وغالبًا منها أيضًا عرض الصلح بين الخصوم من خلال تقريب وجهات النظر وحصر نقاط الاتفاق والاختلاف لتسوية النزاع عن طريق الوساطة 1.

ولقد وجهت اقتراحات إلى قانون الوساطة المؤقت وتحديدا إلى نص المادة (59) مكرر من الأصول المدنية. ومن هذه الاقتراحات حصر تسمية الوسطاء الخصوصيين لوزير العدل فقط، وقيد إحالة النزاع إلى الإدارة الوساطة لقاضي إدارة الدعوى وقاضي الصلح من تلقاء نفسه دون اتفاق الأطراف وأيضاً حصر صلاحية الإحالة إلى إدارة الوساطة لقاضي إدارة الدعوى وقاضي الصلح فقط. وبناءً على هذه الاقتراحات قام المشروع الأردني بإصدار قانون الوساطة لتسوية النزاعات المدنية رقم (12) لسنة (2006) إلا أن هذا القانون كذلك لم يسلم من بعض الإشكاليات والثغرات التي قلصت من فاعليته في تسوية النزاعات.

و في مايلي عرض الإشكاليات والثغرات بشكل تفصيلي مع تقديم مقتراحات للخروج بقانون وساطة فاعل ومتكامل.

1 الفقرة 17، مرجع سابق، ص 71.
المطلب الأول: النصائح الموضوعية التي تواجه الوساطة وعلاجها:

أولاً: حصر المشرع الأردني الوساطة في النزاعات المدنية دون غيرها

حيث نص المشرع الأردني في قانون الوساطة لتسوية النزاعات المدنية في

مادة الأولى على أن النزاعات القابلة للتسوية عن طريق الوساطة هي

النزاعات المدنية دون سواها من النزاعات الأخرى التي يرغب الخصم

بعرضها على إدارة الوساطة، وبالتالي فقد حرم الخصم من اللجوء إلى

إدارة الوساطة. ومن أمثلة النزاعات التي أخرجها المشرع من قانون الوساطة:

أ - النزاعات الإدارية، وهي النزاعات المتعلقة بشؤون الموظفين وطلبات

التعويض عن القرارات الإدارية المتصلة بالموظفين، فقد أخرج المشرع الأردني

النزاعات الإدارية من دائرة النزاعات التي تعرض على إدارة الوساطة وجعلها

من اختصاص المحاكم الإدارية حسب أحكام المادتين الخامسة والسادسة

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 الخير بناء على اتفاق الأطراف، وضع
حد و تخاية لحالة الاضطراب التي أحدثها الجريمة عن طريق حصول المجني عليه على تعويض كاف عن الضرر الذي حدث له، فضلا عن إعادة تأهيل الجاني "، فالوساطة الجنائية تقوم على رضا أطراف النزاع بتدخل شخص محبا لتسوية النزاع و ذلك قبل تدخل النيابة العامة بالدعوى أو الحكم فيها.

و بالتالي فقد أخرج المشروع الأردني للوساطة الجنائية من دائرة النزاعات التي تعرض على إدارة الوساطة، بالرغم من وجود النصوص القانونية في القوانين الجنائية التي تعترف بالوساطة الجنائية، و من هذه النصوص القانونية نص الفقرة ب / 1 و 2 الفقرة ج / 2 المادة التاسعة من قانون الجرائم الاقتصادية الأردني رقم 11 لسنة 1993 و التي تنص على:

"ب. يحق للنائب العام التوقف عن ملاحقة من يرتكب جريمة معاكيا عليها بمقتضى أحكام هذا القانون وإجراء الصلح معه إذا أعاد كلما الأموال التي حصل عليها نتيجة ارتكاب الجريمة أو جرية تسوية عليها، ولا

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1 كعنان، نواي، القضاء الإداري في الأردن 1999، ط1، ص 96 و ما بعدها.
2 عبدالمجيد، اشرف، الوساطة الجنائية و دورها في إلغاء الدعوى العمومية، دراسة مقارنة، دار المهدية العربية، ط1، 2004، ص 19.
3 القطاينة، نجاة، مرجع سابق، ص 91.
يعتبر قرار النائب العام في أي مرحلة من مراحل التحقيق أو المحاكمة نافذاً إلا بعد الموافقة عليه من قبل لجنة قضائية برئاسة رئيس النائب العام والمدني وذلك بعد سماع رأي النائب العام.

2. لا تسري أحكام البند (1) من هذه الفقرة على الموظفين العموميين العاملين في السلوك الإداري أو القضائي أو البلدي، وضباط الأجهزة الأمنية أو العسكرية أو أي من أفرادها، وكل عامل أو مستخدم في الدولة أو في إداره عامة.

ج. 2. يحق للنائب العام إجراء المصالحة مع حائط المال في حال رد المال محل الجريمة والمنافع المرتبطة به، كلما أو اجتى تسوية عليها، ولا يعتبر هذا القرار نافذاً إلا بعد موافقة اللجنة القضائية المنصوص عليها في الفقرة (ب) من هذه المادة.

ونص الفقرة الأولى من المادة 212 من قانون الجمارك الأردني رقم 20 لسنة 1998 التي تنص على أنه "لوزير أو من يفوضه عقد النسومة 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
مع بعضهم عن كامل الجرم وضمن الشروط الواردة في عقد المصالحة "و نص المادة 214 و التي تنص على أنه " نسقط الدعوى عند إجراء المصالحة على" 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 لإحالة الفرصة لحلها مصالحة على أن لا يزيد مجموع مدة التأجيل في جميع الحالات على ستين يوما". و بالرجوع إلى هذه المواد نجد أن المشرع الأردني أخذ بمبدأ الوساطة الجنائية ولم يضمن له قانون الوساطة الحالي. و كان على المشترع الأردني إلغاء عبارة النزاعات المدنية و تسميته "قانون الوساطة لنسوية النزاعات" و بموجب التسمية يتيح القانون للخصوم في جميع النزاعات القابلة للوساطة أن يعرضوا نزاعهم على إدارة الوساطة لتسويتهم.

ثانيا: فرض غرامات في حال فشل التسوية.

حيث نص المشرع الأردني في قانون الوساطة لنسوية النزاعات المدنية في فقرته الرابعة من مادته السابعة الذي 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 الذي
الطرف أو وكيله لا تقل عن مائة دينار ولا تزيد على خمسة 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 متمثلًا بترتب غرامة مالية لا تقل عن مائة دينار ولا تزيد عن خمسة دينار إذا كانت الدعاوى صلحية أما إذا كانت الدعاوى بدائية فإن الغرامة لا تقل عن مائتين دينار ولا تزيد عن ألف دينار وذلك بسبب تخلف أحد أطراف النزاع أو وكيله عن حضور جلسات التسوية.

كان على المشرع الأردني عدم فرض غرامة بالتي تعتبر بمثابة عقوبة على أطراف النزاع، وذلك حتى يشجع الخصوم على اللجوء إلى الوساطة. فالغالبية من الوساطة التي تعتبر وسيلة من الوسائل البديلة لتسوية النزاعات هو تلافي الإشكاليات و التعقيدات التي تواجه النظام القضائي، و بالتالي فإن فرض الغرامة غير مناسب. وحتى بعد فرض الغرامة لم يبين المشرع الأردني طريقة التظلم من الغرامة.
المطلب الثاني: التغيرات الإجرائية التي تواجه الوساطة وسبل علاجها:

أولا: عدم تعميم إدارة الوساطة على كافة محاكم الأردن

حيث نص المشروع الأردني في قانون الوساطة لتسوية النزاعات المدنية في فقرته الأولى من مادته الثانية على إنشاء إدارة قضائية مقرها محكمة البداية تعني بالوساطة وتشكل من عدد من قضاة البداية وصلح ويسمون قضاة الوساطة ويعتبرهم رئيس محكمة البداية للمدة التي يحددها لهم، ويعقد وزير العدل المحاكم البدائية التي تنشأ فيها هذه الإدارة إلا أن فكرة الوساطة لم تعتم على جميع محاكم الأردن فهي مقتصرة على محكمة البداية عمان ومحكمة البداية إربد بالرغم من وجود أكثر من خمس عشرة محكمة بداية في الأردن، وبالتالي في حالة إذا ما أراد المتخصصون إحالة النزاع لتسويته على إدارة الوساطة فإن عرض النزاعات على إدارة الوساطة في تلك المحاكم يشكل عائقاً أمام المتخصصين 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
قرنه الثالثة من مادته الثانية على أنه “الرئيس المجلس القضائي و يتسبب
من وزير العدل تسمية (وسطاء خصوصين) يختارهم من بين القضاة
المتقاعدين و المحامين و غيرهم من ذوي الخبرة المشهود لهم بالخضرة و النزاهة”

يتمح من خلال هذا النص أن المشرع أوجد نوعا ثانيا من الوسطاء بعد
الوساطة القضائية وهو وسطي خاص ، و بالتالي فإن قاضي الوساطة يخضع
لقانون استقلال القضاء و لمدونة السلوك القضائي أما بالنسبة للوسطاء
الخصوصين فإنه لا يخضعون لأي قانون أو مدونة لضبط سلوكهم أو حتى
مساءلاتهم 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
и منشارة على أعمال الوساطة بكافة أنواعها و يكون لها الصلاحية في
تحديد الشروط الواجب توافدها في الوسيط و إعداد مدونة لسلوك 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 "قاضي إدارة الدعوى أو قاضي الصلح و بعد الاجتماع بالخصوم أو وكلاً من القانونيين إحالة النزاع بناء على طلب أطراف الدعوى أو بعد موافقتهم إلى قاضي الوساطة أو إلى وسيط خاص لتسوية النزاع ودياً في جميع الأحوال، يراعي القاضي عند تسمية الوسيط اتفاق الطرفين ما أمكن. " فمن خلال هذا النص يتبص 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 فيحسب هذا النص لا يملك قاضي الموضوع الحق في إحالة النزاع إلى إدارة الوساطة الأمر الذي يؤدي إلى عزوف أطراف النزاع عن اللجوء إلى الوساطة. و أيضاً هناك إشكالية أخرى بخصوص إدارة الدعوى المدنية (قاضي إدارة الدعوى المدنية ) فإن هذه الإدارة ليست مطبقة في جميع محاكم البداية المنتشرة في الأردن، والسؤال الذي يطرح في حالة إذا رغب الخصوم في إحالة النزاع إلى إدارة الوساطة كيف يمكن حل هذه الإشكالية في المحاكم التي تخلو من إدارة الدعوى المدنية؟ وبالتالي كان على المشرع
الأردني عدم حصر حق الإحالة لقاضي إدارة الدعوى وقاضي الصلح و
إذا الواجب أن يمنح قاضي الموضوع أيضا حق الصلحية في إحالة النزاع
عندما تتولد عند الخصوم الرغبة في حل النزاع ودببا عن طريق إدارة الوساطة،
وبحذا التغيير يمكن ثلاثي أية إشكالية يمكن أن تحدث . على الرغم من أن
من الناحية العملية هناك قضاة موضوع في محاكم البداية يقومون بإحالة
النزاع إلى إدارة الوساطة و في هذا مثال صريحة لنص القانون .
رابعا : خلو القانون من آلية كيفية استرداد الرسوم القضائية
لقد عاالج المشرع الأردني موضوع الرسوم في الفقرة الثانية من المادة الثالثة من
قانون الوساطة و التي تنص على أنه " لأطراف الدعوى موافقة قاضي إدارة
الدعوى أو قاضي الصلح الاتفاق على حل النزاع بالوسادة وذلك بإحالتاه
إلى أي شخص برونو مناصبا ، و في هذه الحالة يحدد الوسيط أتعابه
بالاتفاق مع أطراف النزاع ، و في حالة تسوية النزاع ودببا يسترد المدعي
الرسوم القضائية التي دفعها " و كذلك الفقرة الأولى من المادة التاسعة من
ذات القانون و التي تنص على أنه : " أ . إذا تم تسوية النزاع كلبا بطرق
الوسادة القضائية فللمدعي استرداد نصف الرسوم القضائية التي دفعها "
28
و كان هدف من إعادة الرسوم التي دفعها المدعى إذا تم تسوية النزاع وديًا أو عن طريق الوساطة القضائية هو تخفيض أطراف النزاع إلى اللجوء إلى الوساطة. و لكن من الناحية العملية كما ذكرنا سابقاً، تكون الإحالة عن طريق قضائي الموضوع و الجبري العمل فيه - مخالفًا صريحة لنص المادة 3/ أ -  انها في حالة إحالة النزاع عن طريق قضائي الموضوع و تمت التسوية بين الخصوم عن طريق الوساطة فانه لا يتم استرداد الرسوم و السبب في ذلك أن صلاحية إعادة الرسوم من صلاحيات قضائي إدارة الدعوى أو قضائي الصلح.

خامساً: خلو القانون من كيفية تحديد أجور الوسيط بما يلائم مع متطلباته.

حيث أشار المشروع الأردني إلى أنواع الوسيط في الفقرة الثانية من المادة الثالثة التي تنص على أنه "لأطراف الدعوى موافقة قضائي إدارة الدعوى أو قضائي الصلح الافتاء على حل النزاع بوساطة و ذلك بإحالته إلى أي شخص يرون مناسبًا و في هذه الحالة يحدد الوسيط أتعابه بالاتفاق مع أطراف النزاع، و في حالة تسوية النزاع وديا يسترد المدعى الرسوم القضائية

الطريقة، 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 إلى تسوية النزاع كليا فلمدعي استفاد

نصف الرسوم القضائية التي دفعها و يصرف النصف الآخر كتعاب 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 المؤرور 2. إذا لم يتوصل الوسيط الخاص لتسويه النزاع فيجد قاضي إدارة الدعوى أتعابهما بما لا يتجاوز مبلغ مائي دينار ، يلتزم المدعي بدفعها له ، و يعتبر 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 إلى تسوية النزاع ، فمن الناحية العملية إن الأتعاب التي يتقاضاها المحامون تتجاوز الرسوم القضائية فهل من المعقول أن يطلب المحامي إحالة النزاع إلى إدارة الوساطة و يتقاضى أتعابه المتمثلة بنصف الرسوم القضائية ؟ حتما الإجابة ستكون بالنفي لأن نصف الرسوم القضائية حسب أحكام نظام رسم المحاكمة لا تتجاوز سبعمائة دينار تقريبا بالحد الأعلى إذا كانت الدعوى بدائية . و بالتالي كان على المشروع الأردني أن يعد النظر في أتعاب الوساطة و أسس
توزيعها و ذلك عن طريق إصدار نظام يحدد أتعاب الوسطاء بموجب قانون الوساطة الأردني بما يتلاءم مع متطلبات الشخصية للموستاء.
مع العلم أن قاضي الوساطة لا يتقاضى أي 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 المدنيّة رقم (12) لسنة 2006 نؤلة نوعية في محاولة التقليل من النزاعات المعرضة على القضاء.
- أن القانون يتميز بالصيغة القضائية حيث أنه يتم من خلال إنشاء إدارة قضائية و بإشراف قضاة مقرها محاكم البداية تعنى بالوساطة، وتشكل من عدد من قضاة البداية و الصلح و يسمى قضاة الوساطة، ويهدف هذا القانون إلى إغلاق الخصومة بين المتخصصين بطريقة التسوية القضائية.
كالثغرات أف القانوف شابو بعض الإشكاليات. 

الفاعل في توسيع دائرة الوساطة القضائية.

التوصيات

1. تعديل قانون الوساطة الأردني بحيث يسمح للخصوم في الدعاوى الإدارية والجنائية اللجوء إلى الوساطة لما لها من أثر في تخفيف العبء على المحاكم والقضاء وتقليل أعداد القضايا.

2. تعديل قانون الوساطة الأردني بإضافة نص بين الشروط الواجبة توافرها في الوسيط وسلوكه أو بموجب نظام خاص بعد لهذه الغاية، كما يمكن إضافة الأحكام الخاصة برد الوسيط وتنحيته وعمد صلاحته.

3. تعديل نص الفقرة الأولى من المادة الثالثة من قانون الوساطة الأردني بحيث يسمح لقضاة الموضوع الصلاحي بإحالة النزاع على إدارة الوساطة و عدم حصر هذه الصلاحيات لقضاي التسوية وقضي الصلح.

4. تعديل نص الفقرة الثانية من المادة الثالثة من قانون الوساطة الأردني على ضوء تعديل الفقرة الأولى بحيث يسمح لفضاة 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 والمتعلقة بتعاب الوسيط أو إعداد ملحق لأنعاب الوسيط أو أسس توزيعها بما يتوافق مع متطلبات الوسيط.

6. شطب نص الفقرة الرابعة من المادة السابعة من قانون الوساطة الأردني والمتعلقة بفرض غرامات في حالة فشل التسوية، ويعتبر فرض الغرامة غير مبرر كما ذكرنا سابقاً.

7. تعديل الفقرة الأولى من المادة الثانية وذلك باستحداث إدارة الوساطة في مقر محكمة البداية والموافقات التابعة لها وذلك لتوسيع الاختصاص المكاني لإدارة الوساطة القضائية أو منح رئيس محكمة البداية سلطة إنشاء أدارة الوساطة القضائية في الموافقات التابعة لمحكمة البداية.

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التحكيم الإلكتروني والقانون الواجب التطبيق

في مجال المعاملات الإلكترونية

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الاستخلاص:

بعد 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 تحول التحكيم إلى الشكل الإلكتروني، ببرزت إشكالية القانون الواجب التطبيق في عملية التحكيم في مجال المعاملات الدولية وكيفية إعمال القواعد التقليدية لتناسق القوانين والتي تعمد غالباً على التنوطيق المكاني أو الجغرافي، وهو ما يعارض مع الفضاء الذي يمارس التحكيم الإلكتروني أعماله. من هنا جاءت هذه الورقة محاولة 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 الطرق 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 بمهبات التحكيم الإلكتروني، وبيان مدى استيعابها أو قصرها بشأن تنظيم التحكيم الإلكتروني، أضاف إلى ذلك مناقشة بعض القضايا التي استعملت فيها آلة 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 تناسق القوانين التقليدية وحدها على تحديد القانون الواجب التطبيق على التحكيم الإلكتروني، وضرورة إدخال بعض التعديلات على التشريعات المنظمة للتحكيم التقليدي لتشمل التحكيم الإلكتروني وتسهيم في حل إشكالاته، لاسيما ما يتعلق منها بالنواحي الإجرائية والشاملية، وكذا أهمية اعتماد معايير جديدة في مجال القانون الواجب التطبيق لمختلف المعايير الجغرافية والمكانية وذلك بصفة 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 متناماً ومتزايداً في مجالات الحياة وخاصة في المجال التجاري، وإزاى ذلك ومع انتشارها أصبح واقعاً وجود منازعات ناجمة عن هذه الممارسات بين أطرافها، وهو ما يتطلب وجود آليات تتصدى للحل هذه المشكلات والمنازعات.

وتعد الآلية الرسمية لحل المنازعات هي القضاء، إلا أنه أوّل إشكاليات القضاء وجد ما يعرف بالوسائل البديلة لحل المنازعات (كالتحكيم والوساطة والتفاوض والصلح ... إلخ)، والتي تنتشر انتشاراً متزايداً في الأونة الأخيرة وتلقى اهتماماً من المعاملين والباحثين على حد سواء.

ومع انتشار التكنولوجيا المتزايد في شتى المجالات كأماّvalor حل النزاعات البديلة نصيب من ذلك، حتى ظهر التحكيم الإلكتروني، والوساطة الإلكترونية، والتفاوضات الإلكترونية ... إلخ، وقد كانت تنظم هذه الوسائل البديلة قوانين وتشريعات تناسب مع الاستخدام التقليدي لا الإلكتروني في حقل إطار عالمي يعتمد على الجغرافيا والحدود الإقليمية لا القضاء الإلكتروني، وهو ما برأته معه إشكاليات قانونية تحتاج إلى دراستها.

ومن هذه الأشكاليات 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 وإجراءاتها وموافقتها للتطبيق على التحكيم الإلكتروني، وكذا دراسة القواعد واللوائح الخاصة بنيان التحكيم الإلكتروني، وبيان مدى استيعابها أو قصورها بشأن ذلك.

وتتضمن خطة البحث مبحثاً تمهيدياً وأربع مباحث أخرى؛ يشمل البحث التمهيدي على تعريف التحكيم الإلكتروني، وخصائصه وإشكالياته، والبحث الأول يتضمن اتفاق التحكيم الإلكتروني والقانون الواجب التطبيق عليه، وخصوص
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.

البحث المبكر: التحكيم الإلكتروني: تعريفه وخصائصه وإشكالياته

المطلب الأول: تعريف التحكيم الإلكتروني

يتطلب تعريف التحكيم الإلكتروني أن نبحث أولًا عن تعريف معيّن للتحكيم كمصطلح حيث يقصد بالتحكيم اتفاق أطراف النزاع على طرح نزاعهم خارج إطار التنظيمي الرسمي للدولة وعرضه على أشخاص أو هياكل خاصة بغية الفصل في النزاع بحكم ملزم للأطراف، فيجانب تحقيق العدل يرغب الأطراف الحفاظ على السلام بينهم رغبة في المصالحة وتفاديًا للتأز الخاص.

وأما وصف التحكيم بالكتروني فيعنى تدخل الوسائل الإلكترونية في التحكيم، وقد عرفت بعض التشريعات مصطلح "الكياني" 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.

فالتحكيم الإلكتروني هو الذي يتم من خلال وسائل إلكترونية وشبكات الاتصال كالإنترنت دون الحاجة للتواجد في مكان مادي واحد.

ويدير التساؤل هل يشترط قيام جميع مراحل التحكيم الإلكتروني حتى تعتبره كذلك أم يكفي أن تتم بعض مراحله إلكترونيًا وبعضها تقليديًا؟'

1. رضوان، 1995، ص. 19.
2. من هذه التشريعات قانون المعاملات الأمريكية الموحد لعام 1999 المادة (2/5)، وكذلك قانون المعاملات الإلكترونية الأردني رقم 85 لسنة 2001 في المادة الثانية منه.
وخذل في الرواء، يذهب إلى ضرورة قيام جميع مراحله إلكترونياً حتى يعتبر كذلك، مستنداً إلى أن القول بغير ذلك يجعل جميع عمليات التحكيم تحكيمًا إلكترونياً حيث لا يخلو تحكيم من استخدام وسائل الاتصال الحديثة في تسير أعماله.

والحقيقة أن وصف التحكيم بكونه إلكترونياً أم تقليدياً ليس غاية حتى تنشيط الإلكترونية في جميع مراحله، إما الهدف وضع حلول تناسب مع استخدام التكنولوجيا والاستفادة منها في أدوات العدالة أيا كان شكلها تقليدياً أم إلكترونياً، ولست كل القواعد القانونية للتحكيم التقليدي تتنافى مع التحكيم الإلكتروني، وهذا ما أكدته ملاحظات الأونيسترال التقنية بشأن تسويه المنازعات بالاتصال الحاسوبي المباشر في الملاحظة (50) منها.

المطلب الثاني: خصائص التحكيم الإلكتروني وشكايله

مميزات التحكيم الإلكتروني:

1 - ميزة السرعة والإجابة: يتميز التحكيم عموماً بالسرعة، وتزايد هذه الميزة في التحكيم الإلكتروني، إذ أن الإبلاغ بالخصوصية والمراسلات وتسليم المستندات التي تتم بالوسائل التكنولوجيا وتستغرق أياماً فإنها تنبهر في دقائق من خلال الوسائل الإلكترونية، ويؤكد ذلك أن التحكيم التقليدي قد يصل إلى 18 شهرًا كما قانون التحكيم المصري، بينما يستغرق التحكيم الإلكتروني حوالي 3 أشهر كما في منصة الاتحاد الأوروبي لحل النزاعات عبر الإنترنت.

2 - قلة التكلفة: يعتبر التحكيم الإلكتروني أقل تكلفة من التحكيم التقليدي، إذ أن إجراء الجلسات من خلال الإنترنت يوفر تكلفة الانتقال والسفر من وإلى مقر انتعقاد جلسات التحكيم.
3 - 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 المنازعات.

4 - النزاع 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 نظمها، في حين أن المحكمة يتمثل مرونة في تطبيق القانون الواجب التطبيق لأنه لا توجد قواعد تنازع أو إسناد توجه كنافسي، فيستطيع البحث عن القانون الأسبق لحل النزاع من بين القوانين المتنازلة، كما يمكنه إعمال القواعد الموضوعية الدولية.

5 - السرية: يمكن أن يكون التحكيم الإلكتروني عن غيره من أنواع التحكيم التقليدي والقضاء بالسرية خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون في الحفاظ على سرية أسرارهم التجارية والقضية والأسرة خاصة وأن أطرافه قد يرغبون.

بينما ثمة رأي يذهب عكس ذلك حيث يرى أن موضوع السرية هو أحد عيوب أو مخاطر التحكيم الإلكتروني 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 تتسرع دائرة الإطلاع 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:

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١ - عدم ملاءمة التشريعات الوطنية للتحكيم الإلكتروني: قد لا تتوائم بعض التشريعات الوطنية مع آلية التحكيم الإلكتروني وخاصة فيما يتعلق بالأهلية والمواقيتية الشكلية كالكتابة وغيرها، وإن كان القانون النموذجي للتحكيم الصادر عن الأمم المتحدة في عام 1985 قد تناول لاحقا هذا الإشكال في تعديل هذا القانون عام 2006، إلا أن هذه الإشكالية لا زالت تتمثل إحدى الإشكالات القانونية وخاصة في العديد من القوانين الوطنية.

٢ - إشكالية مكان التحكيم الإلكتروني: من الأشياء المهمة والضرورية في التحكيم التقليدي تحديد مكان التحكيم لما يتطلب عليه من آثار قانونية هامة من حيث القانون الواجب التنفيذ، والمحكمة المختصة ببطلان التحكيم، وغيره من إشكالات قانونية أخرى، في حين أن تحديد المكان في التحكيم الإلكتروني قد تتعثر صعوبة في تحديده.

٣ - إشكالية عدم تنفيذ حكم التحكيم الإلكتروني: تشتهر بعض التشريعات الوطنية برواجاً شكلية معينة في حكم التحكيم كالكتابة وغيرها قد لا توفر في التحكيم الإلكتروني وهو ما قد يؤدي إلى رفض تنفيذ الحكم.

وستتناول ما سبق من إشكالات تفصيلاً في موضعها من البحث.

البحث الأول: اتفاق التحكيم الإلكتروني والقانون الواجب التنفيذ عليه

المطلب الأول: اتفاق التحكيم الإلكتروني وصوره

اتفاق التحكيم هو ذلك الاتفاق الذي يتم بين الأطراف لإخفاع ما قد ينشأ بينهم من منازعات ليتم الفصل فيها عن طريق التحكيم، سواء أكان هذا الاتفاق سابقًا للنزاع أم لاحقاً له، وبالنسبة إلى النزاع استناداً لعلاقة قانونية عقدية أو غير عقدية.

صور اتفاق التحكيم الإلكتروني:

١ - شرط التحكيم الإلكتروني: يقصد به الشرط الذي ينص عليه في العقد الأساسي بين الطرفين، ومن ثم فإن

شرط التحكيم يكون قبل حصول النزاع، وقد يكون عن طريق البريد الإلكتروني أو من خلال مواقع التسوقي الإلكترونية التي تضع هذا الشرط ضمن شروط التعاقد.

2 - مشاركة التحكيم الإلكتروني: هي اتفاق مستقل يحصل عند حصول النزاع وعدم وجود شرط تحكيم في العقد الأصلي، حيث يتم الاتفاق الإلكتروني على اللجوء للتحكيم الإلكتروني حل هذا النزاع، ويجب أن يتضمن الاتفاق الأمور التي يشملها التحكيم وإلا أصبحت مشاركة التحكيم باطلة.

ثمة رأي يذهب إلى أن الفرق بين شرط التحكيم ومشاركة التحكيم هو أن الأول لا يكون إلا قبل إثارة النزاع، أما مشاركة التحكيم فيمكن إبرامها قبل حصول النزاع أو بعده، بينما يذهب رأي آخر إلى أن مشاركة التحكيم لا تكون إلا بعد حدوث النزاع.

3 - التحكيم الإلكتروني بالإحالة: ويفسر بالتحكيم بالإحالة وجود إشارة بالعقد الأصلي إلى وثيقة أخرى يرد بها بنود التحكيم، ويستغرق لصحة ذلك أن تكون هذه الإشارة مشار إليها صراحة بأنها أحد بنود العقد، وهو ما أشار إليه قانون الأونيسترال النموذجي للتحكيم 1985 المعدل في 2006.

ويجب أن يؤخذ التحكيم بالإحالة في المعاملات الإلكترونية بنوع من الحذر إذ أن المعاهدين عبر الإنترنت غالباً لا يطلعون على بنود التعاقد الواردة في صفحات أخرى، وهو ما أثبتته إحدى الدراسات من حيث عدم قراءة الغالبية العظمى من المعاملين عبر الإنترنت للشروط، كما قد تكون بلاغة 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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18 إبراهيم، إ.، 1997، ص 85.
19 عباس، 2011، ص 493.
20 إبراهيم، إ.، 1997، ص 86.
21 حسني، 2012، ص 266.
22 حيث نص قانون الأونيسترال النموذجي للتحكيم في المادة (7/6) اختيار الأول المعلنة في 2006 على "تشكل الإشارة في العقد لأي مستند يتضمن بدأ تحقيقاً أتفاق تحكيم مكتوب، شرطة أن تكون الإشارة على نحو يجعل ذلك النص جزءاً من العقد".

ومما يأتي يذهب إلى أنه لكي يعتد باتفاق التحكيم الإلكتروني بالإحالة يجب أن يتضمن العقد الأصلي شرط التحكيم المشار إليه في الراي أو الملف صراحة، وأن يكون متاحاً وممكن الاطلاع عليه في أي وقت وأن يمكن تحميله على جهاز الكمبيوتر الخاص بالتعاقد، ولا 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.

ومما يأتي يذهب إلى أنه لا يشترط قيام التعاقد 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 بتقبيه.

والحقيقة أنه قد يكون ذلك مقبولًا إذا كان الطرف الآخر تأرضاً بهم الوقوف على جميع شروط الصفقة، إلا أنه يجب التحيز في ذلك وخاصة إذا كان الطرف الآخر مستهلكاً غايهه الحصول على السلعة ومعرفة الثمن فقط، إذ قد لا يهم بأي شروط أخرى يصعب الوصول إليها من خلال الإحالة إلى صفحات أخرى ليختبر بما عند حدوث النزاع، فيجب التأكد من الاطلاع الفعلي عليه، لما قد يترتب عليه من إضرار بالمستهلك.

شروط الكتابة واتفاق التحكيم الإلكتروني:

لقي شرط كتابة اتفاق التحكيم جدلاً فقهيًا حول مكافحة الكتابة الإلكترونية للتقليدية. وهو ما نبينه فيما يلي:

مرحلة ما قبل الاعتراف التشريعي بوسائل الإعلام الإلكترونية في اتفاق التحكيم:
ذهب الاتجاه الغالب في تشريعات التحكيم الوطنية إلى اشترط كتابة اتفاق التحكيم الإلكترونية بالإمكان بالشاشة، والقانون الدولي حيث نصت المادة (2) من اتفاقية نيويورك (1958) من اشترط كتابة اتفاق التحكيم، والقانون التحكيم النموذجي الصادر في 1985 في المادة (2/7) اشترط أن يكون اتفاق التحكيم مكتوباً، وهو ما كان يمثل إشكالية لاتفاق التحكيم الإلكتروني، وذهب التفسيرات إلى مكافحة الكتابة الإلكترونية للتقليدية وفقاً للقانون النموذجي للمعاملات الإلكترونية، واتفاقية الخطابات الإلكترونية.

\[24\] CACHARD, 2003, p18.

\[26\] CACHARD, 2003, p19.

\[28\] CACHARD, 2003, p18.

\[29\] CACHARD, 2003, p19.

\[31\] CACHARD, 2003, p18.
 المرحلة الاعتراف التشريعي بالوسائل الإلكترونية في اتفاق التحكيم: سعت لجنة الأكنسيات بالأمم المتحدة في دورتها (39) عام 2006 لإدخال تعديلات على الوثائق التحكيم للاعتراف بالكتابة الإلكترونية في مجال التحكيم.  


الخيار الأول: اتفاق التحكيم في الشكل الإلكتروني: اعتبرت المادة 7 -الخيار الأول- كما جاء في الفقرة 4 منهما ورود اتفاق التحكيم في شكل خطاب إلكتروني أو رسالة بيانات مستوفياً لشروط الكتابة ما دام أنه يمكن الرجوع لاحقاً إلى ما به من معلومات مبينة بماذا على سبيل المثال لا الحصر كتبادل البيانات الإلكترونية والبريد الإلكتروني.

الخيار الثاني: تحول الكتابة من شرط انعقاد إلى دليل إثبات: وقد ذهبت الفقرة 3 من المادة 7 إلى أوضع من ذلك حين اعتبرت أن الاتفاق يعتبر مكتوباً ما دام أن محتوى مدون في أي شكل حتى ولو تم الاتفاق على التحكيم أو العقد الذي أشار إليه شفويًا أو بأي وسيلة أخرى، ويعتبر ذلك تقولاً كبيراً في شرط الكتابة في اتفاق التحكيم من اعتبارها شرطاً شكلياً لإبرام الاتفاق إلى اعتبارها أداة إثبات.

الإقرار الضمني بوجود اتفاق التحكيم: وزنادت 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 تقليديًا أو كترونيًا مالم ينكرها الطرف الآخر بمثابة اتفاق تحكيم موجود حتى ولو لم يصرح الطرف الآخر بذلك وهو ما يعتبر إقراراً ضمنياً بوجود اتفاق


التحكيم.

- الخيار الثاني للمادة (7) من تعديل قانون التحكيم النموذجي: جاء الخيار الثاني المعدل للمادة (7) في 2006

بصيغة عامة مستقلاً شرط الكتابة بالردة ليفتح المجال أمام اتفاق التحكيم ليكون بأي طريقة كانت، حيث نصت على "اتفاق التحكيم هو اتفاق بينطرفين على أن يُحَيِّل إلى التحكيم جميع أو بعض ما نشا أو ما قد بُنِشِّأ بينهما من نزاعات" بشأن علاقة قانونية محددة، سواء أكانت تعاقدية أم غير تعاقدية.

وقد أخذت بعض القواعدين الوطنية بتعديلات القانون النموذجي للتحكيم بعد تعديله في 2006 لتمكين اتفاق التحكيم الذي يتم بوسائل إلكترونية، ومنها قانون التحكيم القطرم حيث احترم في المادة (7/3) منه أن يكون اتفاق التحكيم مكتوبًا إلكترونيًا، وافق على استعمال رسائل إلكترونية، ومن ثم أن يكون اتفاق التحكيم مكتوبًا إلكترونيًا، وافق على استعمال رسائل إلكترونية.

المطلب الثاني: القانون الواجب التطبيق على اتفاق التحكيم الإلكتروني

استقر الرأي على مبدأ استقلالية اتفاق التحكيم عن العقد الأصلي -الذي ترتبت عليه المنزارة– حتى ولو كان شرطًا فيه، فلا يتأثر اتفاق التحكيم بما يعترف العقد الأصلي من بطلان إذ يبقى شرط التحكيم صحيحاً ما لم يصبح بطلان متعلق به، وهو ما يعني أصله واستقلاله بذاته، ويتطلب على ذلك إمكانية أن يُحَيَّل كلاً من العقد الأصلي وأتفاق التحكيم قانون مختلف.

ويعمد اتفاق التحكيم بالأساس على رضا طرفين وما يرتبط بذلك من ضرورة وجود الرضا وصحته، وتوافر الأهلية المتطلبة لإبرام هذا الاتفاق، ومدى قابلية محل اتفاق التحكيم موضوع النزاع للطرح أمام التحكيم.

القانون الواجب التطبيق على الرضا في اتفاق التحكيم:

*المادة (6/1) من قانون الأمم المتحدة النموذجي للتحكيم 1985، المادة (23) من قانون التحكيم المصري:
*أرضوان، 1995، ص 37
*حسن، 2012، ص 271
*العمي، 2009، ص 222


القانون رقم (2) لسنة 2017 الصادر في 16/2/2017 والنشر بالجريدة الرسمية بتاريخ 13/3/2017/2017-نشر على الموقع التالي:
أول ما يتوجب على المحكمة عمله التحقق من وجود اتفاق التحكيم وصحته وفقاً للاتفاق الواجب التطبيق، فاتفاق التحكيم الباطل لا يعطيه الحق في مباشرة التحكيم، كما أن القاضي الذي يطلب منه تنفيذ حكم التحكيم قام على اتفاق تحكيم باطل يمنع عليه إصدار قرار تنفيذه.

أولاً: قانون الإرادة: الأصل خصوصي اتفاق التحكيم إلى القانون المختار من قبل الأطراف إجمالاً، فعلى سبيل المثال، ف أنه بعد البث عن وجود الرضا الخاص باتفاق التحكيم أو صحته أو ما قد يعتريه من عيب، يتم الرجوع إلى القانون المختار من قبل الأطراف صراحة أو ضمناً.

ثانياً: قانون مكان التحكيم: يعتبر القانون البديل لعدم اختيار الأطراف للاتفاق الواجب التطبيق على اتفاق التحكيم هو قانون مكان التحكيم وفق ما أقرت اتفاقية نيويورك، ووفق ما نص عليه القانون النموذجي للتحكيم.

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 للإفادة السائدة في القانون الدولي الخاص سواء أكان هذا القانون قانون الجنسية أو الموطن. وتذهب أغلب التشريعات والاتفاقيات الدولية إلى تطبيق القانون الشخصي للتعهد على الأهلية في اتفاق التحكيم، وترتب على عدم اكتمال أهلية بطلان حكم التحكيم.

وتتمثل معرفة أهلية المعاهدين في اتفاق التحكيم الإلكتروني صعوبة لأن المعاملات تم عن بعد، وهو ما قد يؤدي إلى بطلان اتفاق التحكيم وحل الطلبية التحكيمية سواء إذا تبين عدم أهلية المعاهدين، إلا أنه يمكن التغلب على هذه

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19 إبراهيم إ.، 1997، ص 63.
20 إبراهيم إ.، 2008، ص 175.
21 المادة (5-1) من اتفاقية الاعتراف بقرارات التحكيم الأجنبية وتنفيذها نيويورك.
22 المادة (34-2-1) من قانون الأورستال النموذجي للتحكيم.
23 علوش، 1989، ص 13.
24 المادة (53-1-ب) من قانون التحكيم المصري، المادة (33-2-1) من قانون التحكيم القطرى، مادة (5-1) من اتفاقية نيويورك 1958.
الإشكالية من خلال مقدمي خدمات التصديق للتأكد من شخصية المعاق وقدره.  
وفي سعي لجنة الأمم المتحدة لقانون التجارة 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 والمدعي على ما يفيد تحديد الهوية والتوقف عنها والذي يؤدي بدوره إلى التأكد من أهلية الأطراف، وهو ما أقره أيضاً "ملاحظات الأمين العام التقنية بشأن التنسيق الحاسوبي 2016" في الملاحظتين (33،35) منها.

القانون الواجب التطبيق على إقعاس النزاع الإلكتروني:

يقصد بمحل اتفاق التحكيم موضوع النزاع المطلوب حله والذي يشترط إمكانية حله عن طريق التحكيم وهو ما يسمى بقابلية موضوع النزاع للتحكيم، حيث تشتمل بعض التشريعات بعض الموضوعات من خضوعها للتحكيم، ومن الأهمية مكان أن يراعى بالنسبة للتحكيم قابلية خضوع للتحكيم لدى الدولة التي يراد تنفيذ حكم التحكيم لديها، وكذلك بالنسبة لدولة مكان التحكيم، ومن ذلك منع المستهلك أو وضع قيود على إبرام اتفاق تمح لء غير لابرى للمعاملات الإلكترونية -حماية له- من ممارسات الناجر.

ومن ثم فإن القانون الواجب التطبيق على محل اتفاق التحكيم هو القانون الواجب التطبيق على إقعاس النزاع بصفة عامة سواء أكان قانون الإرادة أو قانون محل التحكيم، إلا أنه مراة لأن يكون التحكيم منتجًا لأثره وقابلًا للتنفيذ فإن ذلك مشروط مراجعة قانون البلد الذي سيتم التنفيذ فيه بأن يكون موضوع التحكيم قابلًا للتنسيق بوجوب التحكيم وفقًا لقانون

المادة (2) من قانون التحكيم السعودي. حيث استثنى مسائل الأحوال الشخصية والأمور التي لا يجوز فيها الصلح.

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بلد التنفيذ، ولا يتعارض مع النظام العام أو السياسة العامة لجهة الدولة، وهو ما أكدته قانون التحكيم النموذجي، واتفاقية نيويورك.

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 ويدعوب وضع معيار محدد للتفرقة بينهما، فمن القواعد القانونية ما قد يفسر الإجراءات والموضوع في آن واحد، وللتفرقة بينهما يرجع في ذلك إلى عملية التكيف في قانون القاضي الذي يعرض عليه النزاع، والواضح الإجرائية لا ترتبط بمرحلة معينة، فقد تسقب النزاع وقد تكون أثناء نظره أو حتى بعد صدور الحكم وعند تنفيذه.

ويدخل في الإجراءات كييفية بدء الخصومة، وتبادل الخطابات الإلكترونية بين الأطراف، وتحديد مكان التحكيم، واللغة المستخدمة، وكيفية اختيار المحكمة والضوابط الخاصة بهم، وكيفية اتخاذ الجلسة، وتقديم مذكرات الدفاع، وأدلة الأطراف، وضوابطها، وما يتعلق بالشهود والخبراء، والمدل والمواعيد المقررة بصورة عامة، وما يتعلق بالإجراءات التحفظية والوقتية، وكيفية إصدار الأحكام وطلب تصحيحها أو تفسيرها أو الاعتراف عليها....إلخ.

وتبدو أهمية تحديد الأطراف للقانون الواجب التطبيق على الإجراءات الخاصة بالتحكيم لما يحقق من تحديد كيفية سير المنازعات وضمان حقوق كل الأطراف، وتحديد الوسائل الفنية التي تضمن احترام المبادئ الأساسية للنقضي وحل النزاعات كاحتياج حق الدفاع ومبدأ المواجهة، وما يتعلق بالنازحية الإلكترونية الخاصة بالمنازعة وضوابطها.

الإجراءات بين التحكيم الحر وتحكيم المؤسسات:

قد تختلف الإجراءات المتبعة في التحكيم بحسب نوعه، ففي التحكيم الحر والذي يلجأ فيه الأطراف لاختيار محكمين مادة (34-2-ب) من قانون الأونيسنان النموذجي للتحكيم 1985.

مادة (5-2) الاتفاقية الأعتزاز بقرارات التحكيم الأجنبية وتنفيذها نيويورك 1958. 

بلاحة، 2013، ص 11.

فصل، 2011، ص 332.
يعتبر أحد مراكز التحكيم م mData (6-1) قواعد غرفة التجارة الدولية 2017، مادة (1-1) قواعد مجمع التحكيم الأمريكي 2014.


55. مشرف الدين، 2003، ص. 57.
لا يذهب رأي إلى أن مفهوم مقر التحكيم مفهوم قانوني بحت يختاره الأطراف أو هيئة التحكيم، وليس مكان مادي محدد مثل مكان المرافعات أو مكان توقيع الحكم، بل هيئة التحكيم الاجتماعية في غير المكان المحدد كمقر للتحكيم.

الإجراءات التحفظية والوقتية في التحكيم الإلكتروني:

تعتبر الإجراءات التحفظية والوقتية من الأمور الضرورية عند نظر النزاعات فقد يتطلب الأمر اتخاذ بعض الإجراءات السريعة المؤقتة للحفاظ على الحق الحقيقي حكم نهائي، فلو لم يتم اتخاذ هذه التدابير لتصبح 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 أحيانًا على هيئة التحكيم القيام بذلك، فيتم اللجوء إلى المحكمة المختصة من قبل أحد الأطراف، أو بناء على طلب هيئة التحكيم ذاتيًا لإصدار قرار وقتي، ومن ثم فإن المستحق عليه لا يمنح اختصاص التحكيم بنظر منازعة ما من اللجوء إلى القضاء بشأن نظر إجراء تحفظي أو وقتي متعلق موضوع التحكيم، ولا يعني ذلك خلايا عن التحكيم.

جامع الشهود والخبراء في التحكيم الإلكتروني:

تنعقد جلسات التحكيم الإلكتروني غالباً بوسائل إلكترونية بطرق مشفرة وآمنة، ويمكن سماع الشهود والخبراء مناقشتهم من خلال هذه الوسائل الإلكترونية دون حاجة لحضورهم الشخصي، إلا أنه لا يوجد ما يمنع من الحضر الشخصي إذا ارتأت هيئة التحكيم ذلك لأن شهادة الشهود والخبراء تضع لتقدير القاضي، من خلال المناورة الشخصية ومتابعة الاتصالات، والتي تظهر بوضوح في المقابلات الحية أكثر منها في اللقاءات الإلكترونية، وهو ما يمثل دورًا في تشكيل قناعة هيئة التحكيم.

بهذه الشهادة ويكون أوقع في الاطمئنان إلى تحقيق العدل.

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11. نقض فرنسي 28/10/1997/10. 111.
12. مادة (28) قانون التحكيم المصري.
13. مادة (22) قانون التحكيم السعودي.
15. شرف الدين، 2003، ص. 56.
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 فإن فتافين الأطراف صراحة على تطبيق قانون بلد معين بدون تحديد مكان التحكيم يعين تفسيره على أن إرادتهم المشتركة قد أخذت إلى اختيار مكان التحكيم في البلد الذي تم اختياره 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 يجري موجه الإجراءات باختيار ذلك اختياراً سلبياً للأطراف،33 إلا أن هذه القرينة ليست قاطعة ولا تعني عدم إمكانية إثبات عكسها أو استبعاداً بقرائن أخرى.44

وتسنت أخرى أن أغلب التشريعات على إخضاع إجراءات التحكيم -حسب الأصل- لا اختيار الأطراف،50 الذي يمكن أن يكون اختيارهم اختياراً حرًا للقواعد الإجرائية لا يرتبط بقانون محدد، أو اختياراً لقانون وطني معين أو قواعد دولية أو قواعد إحدى مراكز التحكيم، وقد تشتهر بعض التشريعات عدم مخالفته هذه الإجراءات لبعض المبادئ أو الأحكام كالشريعة الإسلامية مثلاً.67

وتسنت الاتفاقات الدولية والقوانين النموذجية77 على ذات النهج في ترك إجراءات التحكيم لاختيار الأطراف بحسب الأصل، فقانون مكان التحكيم في حال عدم الاختيار وفق ما قررت اتفاقية نيويورك.88

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77 رضوان، 1995، ص 94.
75 التلافية، 2013، ص 34.
58 مادة (25) من قانون التحكيم المصري، مادة (19) من قانون التحكيم القطري، مادة (104) من قانون الإجراءات المدنية والإدارية الجزائري الذي ينظم التحكيم.
25 مادة (25) من قانون التحكيم السعودي.
19 مادة (9-1) قانون التحكيم النموذجي 1985، مادة (35-1) قواعد الأوليستزار للتحكيم 2013.
18 مادة (5-1) اتفاقية نيويورك 1958.
اختيار هيئة التحكيم لإجراءات التحكيم وضوابطه:

تناول القانون النموذجي للتحكيم إلى إعطاء هيئة التحكيم مكما واسعة في اختيار القانون الواجب التطبيق حال عدم اختيار الأطراف للقانون الواجب التطبيق على الإجراءات صراحة أو ضمنا، وهو ذات النهج الذي سارت عليه أغلب تشريعات التحكيم، فهل سلطة هيئة التحكيم في اختيار القوانين أو القانون الواجب التطبيق على إجراءات التحكيم سلطة مطلقة من كل قيد، ودون ضوابط.

يتزاوح اتجاهات التشريعات في ذلك حيث يذهب اتجاها إلى إطلاق بيد المحكمين كقانون التحكيم المصري الذي يعني هيئة التحكيم اختيار الإجراءات التي ترى أنها مناسبة إلا من قيد مراعاة أحكام القانون، وهو ما ذهب له القانون القطري للتحكيم.

وبعض التشريعات تقيد اختيار المحكمين وفق ضجها العام في تشريعاتها كنظام (قانون) التحكيم السعودي الذي يعني الحرية المطلقة للمحكمين في تنظيم إجراءات التحكيم حال عدم اختيار الأطراف شريطة مراعاة أحكام الشريعة الإسلامية، وقد تكون هذه القوانين من اجتهاد المحكمين لا ترتبط بقانون معين أو أغا تستند إلى قانون معين أو نظام تحكيم محدد.

ويرى البعض أن إطلاق الحرية للمحكم في تحديد الإجراءات لا يعني قدرته على اتباع أو اتخاذ أي إجراء أثناء التحكيم، بل المقصود إطلاق سلطته في تحديد هذه الإجراءات قبل البدء فيها، كما تضع هذه الحرية للمراقبة من السلطات المختصة في دولة مقر التحكيم حيث يتعين على المحكم الالتزام بالنصوص الإجرائية الأمة في قانون دولة مقر التحكيم، واحترام

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مادة (19-2) قانون التحكيم النموذجي 1985.

"مادة (25) من قانون التحكيم المصري.

"مادة (19-2) قانون التحكيم القطري.

"مادة (25-2) من نظام التحكيم السعودي.

"مادة (1043) من قانون الإجراءات المدنية والإدارية الجزائي.

"إبراهيم إ.، 1997، ص 133.
حدود السلطة المخولة له في اتفاق التحكيم ذاته بالنسبة لمسألة تنظيم الإجراءات. 

فضلاً عن ضرورة الالتزام بالمبادئ الأساسية للتقاضي كالمساواة والمواجه بين الخصوم وكفاءة حق الدفاع، وتعدد ذلك يرف النطق، فضلاً عن رفض التنفيذ. 

والحقيقة أن إعطاء هيئة التحكيم الحرية في اختيار القواعد واجبة التطبيق على الإجراءات وتمكينة النقض في القواعد الإجرائية عند عدم اختيار الأطراف لها أمر محموم 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 تناسب مع ذلك.

المبحث الثالث: القانون الواجب التطبيق على الموضوع في التحكيم الإلكتروني

المطلب الأول: النواحي الموضوعية في منازعة التحكيم الإلكتروني

تناول في هذا المطلب بيان ما هي النواحي الموضوعية في منازعة التحكيم الإلكتروني، حيث يعتبر من النواحي الموضوعية في التحكيم كل نزاع يتعلق بالموضوعانون الموضوعة في العقد الإلكتروني موضوع النزاع، كالمشاكلات التي تنشأ عن تكوين العقد الإلكتروني ووجوده من حيث مدى توافر الإرادة وصحتها وعيوبها، والتعبير عنها، واقتران الإجبار بالقبول، وأحكام مجلس العقد. 

ومن المسائل الموضوعية في التحكيم النزاعات المتعلقة بمحل العقد وما يرتبط بشروطه من حيث وجوده أو إمكانية وجوده، وما إذا كان معيناً أو قابلاً للتعويض، ومدى قابلية للتعامل فيه. 

وذلك النزاعات المتعلقة بسبب العقد الإلكتروني ومدى مشروعية، والنزاعات المتعلقة بالالتزامات المتبادلة ومدى تنفيذ كل

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المادة (26) قانون التحكيم المصري.

المادة (5-1-ب) الإتفاقية نيويورك 1958.

المادة (14-4) من قواعد محكمة لندن للتحكيم 2014.

طرف لالتزاماته سواء أكان تنفيذ إلكترونياً أو ماديًا، وقضاء العقد الإلكتروني وصوله.

ومن ضمن الوضعية الممنحية الإحلال بالالتزامات المرتبطة على العقد وما يتبع عليها من مسئولية عقدية وتوفر عناصرها وآثارها في المنازعه، وكذلك الفعل غير المشروع الذي ينتج عن طريق الخطأ الإلكتروني غير المشروع وما يسببه من أضرار وما يتبع عليه من مسئولية والتزام.

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، وإعمالاً للقانون الإرادة، وقد تأتي إرادة الأطراف صريحخة في الاختيار، وقد تكون ضمنية تستفاد من ملابسات العقد.

ويستظهرها الحكم، أو مفترضة يفترضها الحكم عند غياب الإرادة الصريحة أو ضمنية من خلال تحديد القانون الأكثر صلة بالنزاع أو الأنسب لحكم العلاقة.

اختيار الأطراف للقانون الواجب التطبيق على موضوع النزاع:

استمر الرأي على أن لأطراف النزاع حرية اختيار القانون الواجب التطبيق على موضوع النزاع، فهل حرية الأطراف في ذلك مطلقة، أي هل تم أن اختياروا 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 فواعد التنافع الموجودة به أم القواعد الموضوعية، وهل يمكن لأطراف النزاع أن يخطئ القوانين الوطنية أم يمكن أن ينتص اختيارهم على قانون دولي أو عقود نموذجية أو أعراف دولية لا ترتبط بقانون وطني.

ولقد ذهبت إحدى الآراء إلى أن لأطراف الحرية المطلقة في اختيار القانون الواجب التطبيق على موضوع النزاع دون اشتراك صلة بين القانون المختار والعقد موضوع النزاع ما دام أن هذا الاختيار قد تم بحسن نية، ولا يتضمن غشًا خو

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12 في رضوان، 1995، ص 130.
القانون الذي كان من المفترض أن يحكم النزاع من منظومة العدالة الأصلية، فإن هذا القانون ليس له صلة بالعقد المختبر في الاتفاق، ويرفعه من مضمونه، وينفي عنه وصفة قانون الإجراء.  

وهذا الرأي يتناسب مع المعاملات الإلكترونية، فقد يؤدي اقتصاد ورود صلة بين القانون المختار ومشكلة النزاع إلى تطبيق قانون يقتصر على تنظيم المعاملات الإلكترونية أو التحكيم الإلكتروني، فضلاً عن صعوبة إمكانية وجود هذه الصلة في المعاملات الإلكترونية التي يصعب في الغالب تحديد صلاحيتها الجغرافية.

ويحق لأطراف النزاع الاختيار من بين قواعد مستقلة من قواعد وردية أو دولية أو أي قواعد موجودة، إلا أنه يعتبر اختيار الأطراف لأحد القواعد الوطنية لحكم موضوع النزاع هو بمثابة اختيار للقواعد الموضوعية بذل القانون لا قواعد النزاعية، إذ القول يعرقل ذلك قد يؤدي إلى تطبيق حلول وقوف العالم ممكن لعذارتها عند اختيارهم للقانون المختار. وذلوق قانون التحكيم المعمد إلى إعطاء الحرية للأطراف في اختيار القواعد والقوالب التي تحكم موضوع النزاع، وأن اختيار الأطراف لأحد القواعد الوطنية يعني اختيار القواعد الموضوعية فيه لا قواعد النزاع الموجودة بما ما يتم الاتفاق على خلاف ذلك صراحة، وسارت على ذات النهج أغلب القواعد والتشريعات الوطنية، كما تسير على ذلك قواعد مراكز التحكيم ومعها قواعد تحكم غرفة التجارة الدولية، وقواعد جمعية التحكيم الأمريكية.

اختيار القانون المختار التطبيق على موضوع النزاع بواسطة المحكمين وضوابطه: 

1- إطلاق يد المحكمين في اختيار القانون المختار التطبيق: يذهب إتجاه إلى إطلاق يد المحكمين في اختيار القانون

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19 سلامة، 2008، ص 191.  
20 صادق، 2001، ص 439.  
21 مادة (28-1) قانون الأونستيرال للتحكيم النموذجي.  
22 مادة (39) قانون التحكيم المصري، مادة (28-1) قانون التحكيم القطري، مادة (38-1-1) قانون التحكيم السعودي، مادة (1050) من القانون الجزائري.  
23 مادة (121) من قواعد محكمة التحكيم الدولية التابعة لغرفة التجارة الدولية (ICDR الصادرة في 2017.  
24 مادة (31-1) من إجراءات تسوية المنازعات الدولية الصادرة عن المركز الدولي لحل المنازعات (AAA الصادرة في ICDR 2017: Modern Trends in Effective Dispute Resolution.  
25 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.

فهى فنون قوانين دولية أو شروطًا وعقود نموذجية، وقد أخذت هذا النهج الذي يطلق عليه محكم في اختيار القانون واجب التطبيق، أغلب مراكز ومؤسسات التحكيم.

- تقيد المحكمان باتباع قواعد تنازع القوانين: ويذهب اتجاه إلى عدم إطلاق يد المحكم في اختيار القانون إما تقييده باتباع قواعد النزاع من حيث تطبيق القانون التي تقل عليه قواعد تنازع القوانين التي ترى أنها واجبة التطبيق، فهذا الاتجاه لم يعطي المحكم حرية اختيار القوانين القانونية مباشرة إذا أوجب عليه أن يعمل قواعد تنازع القوانين لاختيار القواعد تنازع القوانين في اختيار القانون، إلا أن المحاكم تقييدهrepresented in Arabic.

- تطبيق القواعد الموضوعية بالقانون الأكثر اتصالًا بالنزاع: ويذهب هذا الاتجاه والذي أخذ به التشريع المصري.

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"مادة (31-1) من قواعد جمعية التحكيم الأمريكية، مادة (22/3) من قواعد محكمة تجارة لندن، مادة (21/1) قواعد تحكيم غرفة التجارة الدولية."

"مادة (28-2) من قانون الأوليسراز النموذجي للتحكيم."

"مادة (35-1) من قواعد الأوليسراز الخاصة بالتحكيم."
والسعودي 55 وسطاً وسكةً حيث لم يطلق به المحكم للاختيار أي قوانين سواء وطنية أو غير وطنية، وفي ذات الوقت لم يقيد باتباع طرق تناغم القواعد، إنما يقدير المحكم عن البحث في غرو القواعد الوطنية وجعل حريته محررة في الاختيار من بين القواعد الوطنية الأكثر اتصالاً بالنزاع، وفي ذات الوقت وجهه لإعمال القواعد الموضوعية في هذه القواعد الوطنية، ولا تنتظر قواعد التناغم كما في الاتجاه المفيد.

وتكاد تجمِّع جميع الأنظمة التشريعية السابقة على أمين وهما: ضرورة مراجعة المحكم لشروط العقد والأعراف التجارية التي ترتبط بدوام المعاملة، وفي ذات الوقت حظر المحكم في اختياره عن تطبيق القواعد سواء الوطنية أو الدولية تحت مسمى قواعد العدل والإنصاف إلا إذا اتفق الأطراف صراحة على ذلك، 66 فمراجع الأعراف التجارية أمر قد تقضيه طبيعة المعاملات الدولية، والمعاملات الحديثة حيث يعطي ذلك مكينة للمحكم حال مواجهته لأمور مستحدثة لم تنظم قانونياً أن يراعى الأعراف التجارية المرتبطة بذلك.

المبحث الرابع: حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه

يمثل حكم التحكيم نهراً العملية التحكيمية، ويصدوره من المحترس أثناء النزاع، باعتبار أن حكم التحكيم عدائي، لا يجوز الطعن عليه، إلا بموجب إقامة دعوى بطلان حكم التحكيم، 67 إذا ما شابو لسالفة تستوجب إلغاءه.99

المطلب الأول: شكل حكم التحكيم الإلكتروني والقانون الواجب التطبيق عليه

شرط كتابة حكم التحكيم وتوقعه: نص قانون التحكيم النموذجي، 99 وقواعد الأونيسانت للتحكيم، 100 على وجه

كتابة حكم التحكيم، وأن يكون مهولاً بتوقع أغلبية المحكمين، مع بيان سبب عدم توقيع باقي هيئة التحكيم.

مادَةٌ (38-1-ب) من نظام التحكيم السعودي.

مادَةٌ (28-3،3-3) من قانون الأونيسانت للتحكيم النموذجي، مادة (35-2،3) من قواعد الأونيسانت للتحكيم النموذجي، مادة (21،2،3) من قواعد التعليم:

غرفة التجارة الدولية: مادة (31،3،2) من قواعد التعليم: جمعية التحكيم الأمريكية، مادة (39،3،3،3) من قانون التعليم: مادة (28-2،3،3) من قانون التعليم.

تحكيم الفضي: مادة (38،1،2) من قانون التحكيم السعودي.

مادةٌ (52) من قانون التحكيم المصري.

الإيرادات، 2012، ص: 415.

مادةٌ (31،1) من قانون التحكيم النموذجي.

مادةٌ (34) من قواعد الأونيسانت للتحكيم.

23

773
وقد اشترطتاتفاقية نيويورك أن يتم تقديم قرار التحكيم الأصلي مصدقاً عليه حسب الأصول المعتمدة أو نسخة منه معتمدة حسب الأصول.

ويثير التساؤل هل يعني الشكل الإلكتروني للحكم الإلكتروني عن الشكل الكتابي التقليدي، وهل معنى تقديم الأصل مهوراً بالتوقع يعني أصل الحكم فيشكل التقليدي، وعلى توقعات حية للمحكمين، خاصة وأن التقنية الإلكترونية حالياً تمكن الأفراد من التوقع الحي الإلكتروني على المستندات الإلكترونية من خلال القلم الإلكتروني، فهل يعني ذلك عن الشكل التقليدي؟

يمكن القول بأن القانون النموذجي واتفاقية نيويورك صدر الحكم وتوقيعه بالشكل التقليدي. يمكن القول بأن القانون النموذجي للتجارة الإلكترونية، والقانون النموذجي بشأن التوقيعات الإلكترونية، واتفاقية الخطابات الإلكترونية، 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 بالذكر 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 للحكم التحكيم.

كما صدرت توصية من الأمم المتحدة باتفاقية نيويورك 1958 بشأن تفسير نص المادة (2) منها والخاصة بشرط الكتابة في اتفاق التحكيم لتوسع تحديداً في تفسيره وعدم الاقتصر 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.

"مادة (4-1-أ) من الاتفاقية بخصوص التوقيعات الإلكترونية والحرية في الترجمة للمحكمة".

"مادة (5) من قانون الأونيسات-du النموذجي بشأن التجارة الإلكترونية 1996.

"مادة (3) من قانون الأونيسات-du النموذجي بشأن التوقيعات الإلكترونية 2001.

"مادة (8) من الاتفاقية العامة المتعلقة باستخدام الخطابات الإلكترونية 2006.

علي: 2009، ص. 147.
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 نفسه عند المداولة والمسودة، وتشتمل على الأسباب الحكماء كالتوقيع الحاصل السابع، ودعاوى التحقيق.

- **نسخة الحكم الأصلية**: ويقصد بها نسخة الحكم بعد إتمام النص والوقوع توقيعاً حياً من القاضي، وتودع أيضاً ملف الدعوى خلال مدة معينة من تاريخ صدور الحكم.

- **نسخة الحكم التنفيذية**: ويقصد بها صورة الحكم التي توضع عليها الصيغة التنفيذية المرتبطة تنفيذ الأحكام، ولا تطعن إلا نسخة واحدة منها لصاحب الشافع، وفي حال فقدانها لا يجوز استخراج نسخة أخرى إلا بعد رفع دعوى جديدة بطلب نسخة تنفيذية من الحكم.

- **نسخة حكم رسمية**: أو ما يطلق عليها نسخة بسيطة من الحكم، ويقصد بها صورة من نسخة الحكم الأصلية عليها خام الدولة بما يفيد رمزيتها وصحتها يعطو من يطلبها ولو لم يكن من ذوي الشأن ويوجد أن تسدر منها أكثر من نسخة، ويمكن استخدامها في الإثبات ولكن لا يجوز استخدامها في التنفيذ.

وتمتابعة 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 يمكن 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 الإلكتروني للرجوع إليها من دعت

- مادة (175، 177) من قانون المراجعات المصري.
- مادة (179) من قانون المراجعات المصري.
- مادة (181، 183) من قانون المراجعات المصري.
- مادة (180) من قانون المراجعات 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 المتبوع في الأحكام القضائية- حتى لا يتم إساءة استغلالها بمحاولة التنفيذ في أكثر من مكان أو أكثر من مرة ورهان الفرد ضده أو الإضرار به، فضلاً عن التأكد من صحة هذه النسخة التنفيذية في شكلها الإلكتروني، أظن أنه يصعب ذلك إلا إذا وجدت إمكانية مثلا بان تنفيذ النافذة التنفيذ في الدول الدخول على مواقع مؤسسات التحكيم بطريقة آمنة ومشروعة تحت مراقبة سريعة للمعلومات للتأكد من صحة الحكم من خلال الحصول وتطبيق النسخة الإلكترونية المقدمة للتنفيذ مع نسخة الحكم الإلكترونية الموحدة بملف الدعوى الإلكتروني على موقع مؤسسة أو منصة التحكيم الإلكتروني، إلا أن الأمر قد يختلف بالنسبة للأحكام الصادرة عن التحكيم الحر حيث يصعب ذلك.

و يبدو أنه لا مانع من إصدار حكم التحكيم الإلكتروني من ناحية تكنولوجيا، لكن الاعتراف به تنفيذه بموجب شكله الإلكتروني من ناحية قانونية تعترضه بعض الصعوبات تفرق فيها بين حالتين:

الحالة الأولى: حالة إمكانية تنفيذ الحكم الإلكتروني دون الحاجة لتدخل مادي في التنفيذ، وحالته الواضحة المنازعات المتعلقة بعناوين الموافقات الإلكترونية والتي يتم تسويتها من خلال منظمة الأيكاف المسؤولة عن عناوين المواقع الإلكترونية، حيث يتم التنفيذ من خلال مقدمي خدمة تسوي المنازعات المحترم لهم من الأيكاف والتي قد تجربة إلكترونياً، ويتم تنفيذها إلكترونياً من قبل مؤسسة الأيكاف. 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 المنطقات 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
البيانات الأساسية في حكم التحكيم الإلكتروني:

1. يجب أن يشتمل حكم التحكيم الإلكتروني على بيانات أساسية منها:

- تاريخ إصدار الحكم ومكانه: فالتاريخ يترتب عليه معرفة الدواعي والإجراءات القانونية، والمحكمة يترتب عليه معرفة مدى التزام الحكم بالقواعد الإجرائية وقواعد إصدار الأحكام وفقاً لقانون مكان التحكيم.

- بيانات المحكمين والأطراف:
  - ومن البيانات الجوية أسماء المحكمين وبياناتهم. وعلى الرغم من عدم نص القانون النموذجي للتحكيم عليها إلا أنه يستفاد من اشتراط توقيع المحكمين، فضلاً عن عدوانية، كما الحالات ووجود مصلحة أو ارتباط للمحكم بموضوع النزاع قد يترتب عليه بطلان حكم التحكيم، وكذلك أسماء الأطراف وبياناتهم بخصوصة العناوين، مما يترتب عليه من معرفة مكان التنفيذ الذي يتوجه إليه لتنفيذ الحكم جبرًا على المحكوم ضده.

2. تسبب الحكم وإعلامه:
- تقوم الأحكام القضائية على النسبية والعلانية وفقًا لذلك يبطلها، إلا أن الأمر يختلف بالنسبة لأحكام التحكيم، فقد يترتب النزاع بأسرار تجارية أو صعوبة متعلقة بنشاطهم أو بسمعتهم التجارية ولا يرغب
الأطراف في أن تكون معلنة فيبعدون إلى إكتمال هذا النزاع، إلا أن الأصل في أحكام التحكيم أن يتم تسيبها إلا أنه يجوز للأطراف الاتفاق على عدم بيان الأسباب، 

وتتم 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 حماية حقوقه أو المطلوبة بما.

القانون الواجب التطبيق على شكل حكم التحكيم:

الأصل في حكم التحكيم أنه يصدر وفقاً للفوائد الإجرائية والشكلية الواجب التطبيق على نزاع التحكيم سواء المخترقة من قبل الأطراف أو وفقاً لقانون مقر التحكيم في حال عدم احترام الأطراف لقانون الواجب التطبيق، لا يكون ضريحاً للجهاز 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 المحتضض ضده: وهي محكمة باشراوات وردت على سبيل الحصر تنتمي في:

أ) فقدان طرف اتفاق التحكيم للأهلية ممتنع القانون التي تخضع له أهلية كل منهما، ويشترط النص صياغته- أن يكون الطرفان فاقي الأهلية، في حين أن المفترض أن فقد أهلية أحد المعاقدين يربت البطلان ولا يشترط

اجتماع ذلك في الطرفين، وهو ما يمكن أن يكون -من وجهة نظرنا- خطأ في الصياغة، وليس المقصود من قبل وضعي الاتفاقية.

ب) عدم الإخطار الصحيح بتعمين المحكم أو إجراءات التحكيم، أو لأي سبب آخر تربت على عدم إمكانية عرض قضيته ودفاعه على الوجه الصحيح، ورغم ألا يكون هذا السبب راجعاً إلى رفض التنفيذ

مادة (31-2) قانون التحكيم النموذجي.

" مادة (36-4) قانون التحكيم النموذجي.

مادة (5-1) الاتفاقية نيويورك 1958.

" مادة (31-2) قانون التحكيم النموذجي.

" مادة (5-1) الاتفاقية نيويورك 1958.
ج) خول الحكم أمور لم تنفق عليها الطرفان في اتفاق التحكيم، ولهذه الحالة يقتصر رفض طلب التنفيذ على الأمور التي تجاوز فيها الحكم اتفاق الأطراف على التحكيم ما دام ذلك ممكنًا، وليس له تأثير على باقي نواحي الحكم.

5) خلافة تشكيل هيئة التحكيم أو الإجراءات المتبعة في التحكيم لقانون الواجب التطبيق سواء آكنا القانون المختار من قبل الأطراف أم قانون مكان التحكيم.

ه) لا يكون قد اكتسب حكم التحكيم صفة النهائية أو أن يكون قد أبطل أو ألغى أو أوقف تنفيذه من قبل الجهات المختصة سواء في بلد قانون التحكيم، أو بلد التنفيذ.

وذهب رأي أن هذه الحالات الخصبة لم تشمل حالة ما إذا تم الحصول على حكم التحكيم بالتدليس أو الغش أو التحالف أو التزوير. ۱۲۲

ثانية: رفض التنفيذ تلقائيًا من الجهات المختصة بدولة التنفيذ:

هذه الحالات نصت عليها الفقرة الثانية من المادة الخامسة من الاتفاقية وحصرًا بها:

- أن يكون موضوع التحكيم غير قابل للموضوع للتصويت، 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 سندًا لرفض أحكام التحكيم الأجنبية التي تتضمن ما يخالف الشريعة الإسلامية إذا كانت السياسة التشريعية لبلد التنفيذ ترفض خلافة أحكامها للشريعة الإسلامية.

كما أن الاتفاقية قد تجاهلت إمكانية طلب رفض التنفيذ من الغير الذي قد لا يكون طرفًا في التنفيذ وليس محترجًا ضده بالتنفيذ لكن قد يسبب له التنفيذ ضررًا مباشرًا أو غير مباشرًا، وهو ما نرى معه ضرورة أن تكون أسباب طلب وقف التنفيذ مرة أثر من ذلك.

١٢٢ إبراهيم إِ، ۱۹۹۷، ص ۲۳۱.
القانون الواجب التطبيق على تنفيذ حكم التحكيم:

يعتبر الحكم الواجب التطبيق على تنفيذ حكم التحكيم بطبيعة الحال هو قانون دولة التنفيذ، وهي التي يناظرها التنفيذ والمعبأ به، وهو ما نصت عليه اتفاقية نيويورك في المادة (3) منها بقولها "أن تقوم بتنفيذها وفق القواعد الإجرائية المتبعة في الإقليم الذي ينتج فيه القرار.

الخاتمة:

في ختام هذا البحث نورد أهم النتائج والتوصيات التي توصل إليها البحث:

النتائج:

1- أن الاهتمام بتفعيل ووسائل التقنية الحديثة في مجال التسوية البديلية وخاصة التحكيم الذكي يتطلب على الفصل في النزاع لم يعد ترفقاً يخفى على التراخي بل هو ضرورة من ضرورات المجتمع لتحقيق الأمان القانوني للمعاملات الإلكترونية.

2- أن قواعد التنافع الوطنية، والقواعد الموضوعية الدولية (القوانين النموذجية والاتفاقيات) لا غنى لأحدها عن الآخر، لأن كلاهما يكمل بعضه بعضاً، فقواعد التنافع مستقلة فيما بقيت الدول متمسكة بمبادئ التشريعي، والقواعد الموضوعية ستظل مطلوبة لمواجهة مستجدات الحياة ومستحدثاتها، وكلاهما يكمل نقص الآخر.

3- 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.

4- أن منصات التحكيم الإلكتروني ما زالت تحتاج لتحقيق الأمان التقني والقانوني، وتوسيع النصف فيها، وفرض الرقابة عليها ووضع الآليات التقنية والقانونية لمنع ما قد ينتج من تلاعب أو تزوير يؤدي إلى ضياع الحقوق وفقدان الثقة في هذه الوسائل.
5. أن ما أدخل من تعديلات على قانون التحكيم النموذجي وتفسير اتفاقية نيويورك في عام 2006 بالعثور بإتفاق

التحكيم الإلكتروني أمر جيد إلا أنه يتطلب متابعة ذلك خطوات أخرى منها وضع ضوابط خاصة بالمحاكم الإلكترونية

تضمن الاعتراف بما وتنفيذها.

النصوصات:

1- ضرورة إنشاء منصات إلكترونية لتسوية المنازعات الناتجة عن التعاملات الإلكترونية دوليا وإقليمية ومحليا تتبع جهات رسمية أو جهات موثوقة بما بحيث يقتصر دورها على الإدارة والرقابة، وتترك تقديم خدمات النسوب إلى القطاع الخاص أو الحر.

2- ضرورة الاهتمام على جميع المستويات تأهيل قوانين تكنية تقوم بتقديم خدمات تسوية الممازات إلكترونية على الوجه الصحيح والكفاءة المطلوبة.

3- تعديل القانون النموذجي للتحكيم بحيث يسمح بالعثور بحكم التحكيم الإلكتروني وتنفيذه وضع ضوابط لذلك، وملحق لاتفاقية نيويورك 1958 الخاصة بالاعتراف بأحكام المحكمة الأجنبية وتنفيذها لتشمل الاعتراف بأحكام التحكيم الإلكتروني وضع الضوابط الخاصة بها.

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المؤتمر العالمي عن تسوية المنازعات

9-10 أغسطس 2017

عنوان البحث:

تسوية نزاعات البناء

إعداد

الباحث/ عبد الحنان العيسى

الدكتورة / أسماً أكلي

محاضر في كلية أحمد إبراهيم للحقوق

باحث دكتوراه في كلية أحمد إبراهيم للحقوق
مقدمة: نظراً للأهمية المنتمية في قطع البناء والتشييد، ظهرت العديد من المبادرات الدولية لتوحيد القواعد المنظمة لعقود المقاولات، لتحقيق قدر من الاستقرار في هذا القطاع، وتوحيد القواعد المتطلبة 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 التشريحة والبناء، حيث صدرت عدة أنواع من هذه العقود: وتم تسميتها بفن العلاف الصادرة به، ويعتبر الفيديك من أوسع العقود انتشاراً في قطاع التشريحة والبناء (المقاولات)، وأصبح عقداً دولياً تعامل مع معظم الشركات في المشاريع الكبرى، وبنوك التنمية والبنك الدولي، وتمتير 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، وما السبب على العلاقة بين أطراف العقد، مما يؤثر على إنجاز 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، وأثيوسية المنازعات الناشئة عن عقود الفيديك، ودور المهندس الاستشاري ومجلس فض النزاعات، والتسويات الودية للنزاع (المفاوضات والوساطة)، وإجراءات التحكيم وفق غرفة التجارة الدولية في باريس.

المبحث الأول: الاتفاقات الدولية للمهندسين الاستشاريين ونماذج عقود الفيديك

يتناسب هذا البحث نشأة الاتحاد الدولي للمهندسين الاستشاريين، والطبيعة القانونية لعقود الفيديك، واستعراض العقود الصادرة عن الفيديك منذ نشأته، حيث تم تقسيم هذا البحث لمطلبين، تضمن المطلب الأول الاتفاقات الدولية 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 للترسيم الفرنسية

FEDERATION INTERNATIONAL DES INGENIEURS

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ويضمن الاتحاد جماعات المهندسين الاستشاريين في غالبية دول العالم، حيث نشأ هذا الاتحاد

من خلال مساهمة ثلاث جماعات أوروبية للمهندسين الاستشاريين، وهي:

1- الجمعية السويسرية للمهندسين الاستشاريين (ASIC).
2- وجمعية الفرنسية للمهندسين الاستشاريين (CICF).
3- جمعية المهندسين الاستشاريين البلجيكية (CICB).

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 جماعة في كل دولة تولى تمثل المهندسين الاستشاريين

في تلك الدولة بالفيديك، وهو غير حكومي، حيث لا يسمح بعضية أي دولة أو جهة حكومية في الاتحاد، حيث

تقتصر عضويته على جماعات مهنية، وقد حدد النظام الأساسي للأتحاد الذي تم تطوير نسخته الأخيرة في المؤتمر

1 انظر: جمال الدين نصار ومجيد ماجد خلوصي، عقود الاتحاد الدولي للمهندسين الاستشاريين (فيديك) (القاهرة: دار الفكر، ط1، 2002)، ص22.
المصادر: "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 وسمي بالكتاب (الأحمر):

حيث صدرت الطبعة الأولى من نموذج "شروط عقد مقاولات أعمال الهندسة المدنية" في عام 1957، واختير له الغلاف الأحمر الذي تميز به، وهو يعتبر أشهر عقود الفيديك انتشاراً وتطبيقاً على المستوى الدولي، وفي عام 1987 أصدرت الطبعة الرابعة، وفي عام 1995 قام الفيديك بإصدار ملحقاً للطبعة الرابعة حيث تضمن نظاماً جديداً لتسوية المنازعات.

2- عقد مقاولات الأعمال الميكانيكية والكهربائية وسمي بالكتاب (الأصفر):


3- عقد العميل (رب العمل) والاستشاري (المهندس الاستشاري):

في عام 1991م، قام الفيديك بإصدار الطبعة الأولى من نموذج تعاوني تحت اسم العميل / الاستشاري، نموذج اتفاقية خدمات، والطبعة الثالثة عام 1998م، واختير لغلافه اللون الأبيض، لذلك تم تسمية بالكتاب الأبيض.

4- عقد التصميم والتشييد وتسليم المفتاح وسمي بالكتاب (البرتقالي):

انظر: جمال الدين نصار ومجاهد خميس، عقود الاتحاد الدولي للمهندسين الاستشاريين (فيديك)، ص 28.
صدرت الطبعة الأولى من هذا العقد في عام 1995 شاملة لنموذج "شروط عقد التصميم والتشييد وتسليم المفتوح" ليشمل الأعمال المتكاملة المدنية والميكانيكية والكهربائية وختصر لغلاف اللون البرتقالي.1

وسوف نستعرض الشروط العامة لعقد أعمال الهندسة المدنية الفيديك نسخة 1987م (الكتاب الأحم) لأخنا تضمن قواعد شاملة لكل أنواع العقود الصادرة عن فيديك، حيث تضمنت هذه الشروط: اثنان وسبعون بناً ضمن خمسة وعشرين عنوانًا لهذه البنود، وتشمل هذه البنود جميع التفاصيل التي يعد بها مشروع التشبيه منذ بدء تنفيذه وحتى إكماله، وتناول البنود (1) التعريف للأشخاص المشتركين في مشروع التشبيه، والمستندات الخاصة بعقد التشبيه، والأعمال والمواد التي يتم التعاقد عليها، وتناول البنود (2) التزامات المهندس وصلاحياته، ووجوب تصرفه بجديد، أما البنودين (3 و 4) فقد حظرنا على المقاول أن يحيل العقد إلى مقاول آخر، أو أن يتعاقد من الباطن على كامل العقد دون موافقة رب العمل، وحدد البنود (5) مستندات العقد، وحدد البددان (6 و 7) الرسومات ووجوب احتفاظ المقاول بنسخة منها في موقع المشروع، وكذلك الاشتراطات الخاصة بتقديم المقاول أية تصاميم خاصة بموجب العقد، أما البنود من (8 وحتى 33) فتضمنت الالتزامات العامة لطريق العقد: رب العمل والمقاول، وتشير هذه البنود الحقوق والواجبات لطريق العقد أثناء تنفيذ المشروع، والبنود من (34 وحتى 36) تضمنت الشروط الخاصة بالعقد العامة، ومواقع ومواد التشبيه، والاحتياطات الخاصة ببعض المواد، أما البنود (38) فتناول النتفشي على الأعمال، مع إثابة الفرصة للمهندس لمعاينة الأعمال قبل ردمها أو تغطيتها، والبنود (39) نص على ضرورة إصلاح المقاول للأعمال غير المطابقة للعقد، وكذلك كيفية معالجة إخلال المقاول وعدم إتباعه لتعليمات

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1 نظر: أسامة مصطفى عطعوط، النظام القانوني لعقود الفيديك FIDIC، الاستراتيج بتاريخ 4-4-2017 من http://aleyarbitration.blogspot.my
المهندس، والبند (40) تتناول إيقاف المقاول على العمل، وتعليم الأعمال بناءً على تعليمات المهندس، وتحديد مستحقات المقاول نتيجة هذا الإيقاف، والبند (41) تضمن مواقيع بدء الأعمال، واشتراط عدم تأخير المقاول في المبادرة بالتنفيذ، والبند (42) على ضرورة تمكن المقاول من حيارة موقع العمل، وكذلك تمكينه من الوصول إلى الموقع، وحدد البند من (43 وحتى 46) وقت انتهاء العمل، وكي总的 التعامل مع القيود الخاصة بتحديد ساعات العمل، ومعدل تقدم الأعمال، وتناول البند (47) التعويض الاتفاقي (غرامات التأخير)، وضرورة تخفيف هذا التعويض في حالة استلام رب العمل لقسم من الأعمال المنفذة من المقاول، والبند (48) تتناول شهادة التسلم والإجراءات اللازمة إتمامها قبل تسليم المهندس للأعمال، وتناول البند (49) مسؤولية المقاول عن العيوب ومدة هذه المسؤولية، وإصلاح العيوب في حالة حدوثها، وكي总的 معالجة خلاف المفاوضات الصادرة له من قبل المهندس، والبند (50) أزمة المقاول البحث عن مصدر العيوب، أما البندان (51 و52) فقد منحًا المهندس حق إجراء التعديلات والتغييرات، التي براها ضرورية لتنفيذ العقد، وتحديده الأسس لهذه التعديلات، أما البند (53) فتناول الإجراءات الخاصة بتقديم المقاول للمطالبات إلى المهندس التي يجب الالتزام بها، وتضمن البند (54) معدات المقاول، وإجراءات التحليل الجمركي لها وإجراءات إعادة التصدير، وتناول البند من (55 وحتى 57) كيفية قياس الأعمال المتغرية والبند (58) تتناول طرق محاسبة المقاول، أما البند (59) فتناول المقاول من الباطن، والبند (60) تتناول كيفية إصدار كشف الحساب بانتهاء المسؤولية من العيوب، ونص البندان (64-63) على حالات حق رب العمل إلغاء العقد بإرادته المنفردة، وتتناول البند (65) المخاطر الخاصة غير المتوقعة، والتي يتحملها رب العمل مثل الحرب والتمرد والإشعارات الذرية، وتتناول البند (66) حالات الإعفاء من أداء الالتزامات، عند استجابة تنفيذ هذه الالتزامات لأي من الطرفين، وتتناول البند (67) طريقة تسوية النزاعات الناجمة عن تنفيذ العقد، وتشترط في البداية إجابة النزاع إلى المهندس، ليصدر قراره خلال (84) يوماً من طلب إحالة النزاع إلى، وفي حالة عدم صدور القرار خلال هذه المدة أو في حالة صدور القرار وتم الاعتراض عليه من قبل أحد
الأطراف، يجب إرسال إشعار للطرف الآخر بالرغبة باللجوء إلى التحكيم، خلال (70) يومًا، ولا بدًا للتحكيم قبل انتهاء (70) يومًا على إرسال هذا الإشعار، علماً أن يجب إجراء محاولة للتفاوض الوديّ للمزيد من النزاع، فإذا فشلت، يبدأ التحكيم، وتتضمن البند (68) طريقة توجيه المراسل instantiation المتبادلة بين طرفين العقد، والإتفاق على العناوين المعتمدة بين الطرفين، وتتضمن البنود (69) حالات حق المقاول إلغاء العقد، وتناول البنود (70) أثر التعديلات في الأسعار وفي التشريعات، التي تحدث بعد توقيع العقد، والتي تؤثر في قيمة العقد، وما ينبغي أن يستمر عليه المقاول عند حدوث هذه التغييرات، وتناول البنود (71 و 72) قيود العملة، وكيفية تحديد سعر الصرف في حالة الدفع بعملات مختلفة.

الفرع الثاني: أنواع عقود فيديك الصادرة بعد عام 1999

قامت فيديك بتطوير النسخ السابقة من العقود، أصبح العقد شاملًا لشروط واحدة، وجل الأطراف إجراء التعديلات عليها، والتوزيع العادل للمخاطر في العقد، وتوحيد أرقام البنود المتداولة في جميع العقود، بما في ذلك خدها ولغتها وأسلوب صياغتها، بالإضافة إلى ذلك 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"، والذي يقوم فيها رب العمل بإعداد التصميمات والمستندات بمعرفته أو بواسطة تابعيه، يغطي العقد تأثير تحديد الأعمدة التي يشملها العقد، فيمكن أن يشمل العقد أعمال كهربائية أو ميكانيكية أو غيرها من الأعمال، وتتضمن هذا العقد 20 بنداً رئيسياً و159 فرعيًا و58 بنداً تفصيلياً، وبلغ إجمالي البنود الفرعية والتفصيلية 217 بنداً.

*انظر: جمال الدين أحمد نصار ومهندسة نجم ماجد خلصي، م. داوود خلف، م. نبيل محمد عباس، عقود الاتحاد الدولي للمهندسين الاستشاريين (فيديك) فقه وتفصيل (المراكز العربي للتحكيم، الطبعة الأولى 2008).
١- الكتب الأصفر الجديد: عقد مفاوضات 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 أيضًا استخدامه في العقود التي يقوم فيها رب العمل، بإعداد التصميمات والمستندات بمعرفته أو بواسطة تابعه، يضاف النظر عن نوعية الأعمال التي يشملها العقد، بحيث يقوم المقاول في هذا النوع من المشاريع، بأعمال التصميمات والتوريدات وفقًا متطلبات رب العمل، كما يقوم بتجهيز الآلات والمواد اللازمة لإتمام العملية موضوع التعاقد،

٢- الكتاب الفضي: عقد مفاوضات الأعمال المتكاملة:

في عام 1999 أصدر الفيديك عقدًا جديداً سمى بالكتاب الفضي "عقد مفاوضات أعمال متكاملة، أو مشروعات، ووضعت قواعد هذا العقد ليكون مناسبًا للمشروعات التي تنشأ على أساس تسليمه المفتوح 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 ب.و.ت ب.O.T

٣- الكتاب الأخضر: عقد الأعمال المختصر:

عقد البوت: هو عقد يتولى فيه المزود (شركة المشروع) فرقًا كأنه شركة مبتدأ، وعلى مستوى، بتصميم وبناء، وملك، تدشين وإدارة مرفق عام أو مشروع استثمار، مقابل رسوم بنفاضة، من المنتفعين خلال مدة الالتزام، تكون كافية للسدد الشركة تكاليف المشروع واستغلاله تجارياً، مع خضوع المقاوع الأساسية الضابطة لسير المراقب العامة.
كذلك من العقود الجديدة التي استحدثها فيديكفي عام 1999 والتي تتاسب مع المشاريع صغيرة القيمة وقصيره المدة، عقد المقاولة الموغر، ويمكن ملاحظة ذلك من خلال تقصير مدة الإشعارات والدفعات، وأطلق عليه: الكتاب الأخضر، وهو عقد نموذجي يسمى "عقد الأعمال المختصر" وتمت صياغة الكتاب الأخضر، استجابةً للانتقادات التي وجهت للمعاهد 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.

5- الكتاب الذهبي:

في عام 2008 أصدر فيديك عنداً مطولاً سمى Golden book ويعد هذا الكتاب امتداد للكتاب الأصفر، ويهدف إلى توفير نماذج للمعاهد الدولية، بشأن تصميم وتنفيذ وتشغيل المشاريع الإنشائية 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 للمهام القياسية المتعارف عليها في هذا النوع من المشاريع، ويقوم كذلك المقاول بتجهيز الآلات والمعدات اللازمة لإتمام العملية وموضوع 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 بالمستشار، ويستخدم هذا النموذج لإجöz الأدوات السابقة للتعاون في مجال المشروعات الاستثمارية ودراسات الجدوى، والتصميمات وإدارة التنفيذ وإدارة المشروع.

٧- عقد التشبيه النسخة التوافقية لنبك التنمية متعددة الأطراف ، بعد أن صدرت النسخة الأخيرة من عقود فيديك النموذجية في عام (١٩٩٩) ، توافقت غالبية بنوك التنمية على تطوير عقد الانتشارات الصادر عن الفيديك، وذلك من خلال إضافة شروط مولوية ضمن أحكامه، وتم التوافق مع فيديك، لإصدار نسخة توافقية خاصة بنبك التنمية، ساهم في مراجعتها فريق العقود العام لدى فيديك، وقد تم إصدار هذه النسخة التوافقية خلال عام (٢٠٠٥) ، وأجريت عليها بعض التعديلات في عام ٢٠٠٦، وأصبحت نسخة تفاقمة على الجهات المفترضة للاستخدام هذه العقود النموذجية كشرط لمنعها فروضاً.

يلاحظ أن النسخ الصادرة بعد عام ١٩٨٧ تميز بأنها أدخلت تعديلات جوهرياً على نظام تسوية النزاعات، حيث أن النزاعات، تسوية نظم على جوهرية تعديلاً أدخلت بأنها تتميز بالتجريد شبو التحكيمي quasi-arbiter وتم تشكيله واستبداله 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 متفردة من قبل رب العمل، ويفضل أرجو منه، وبالتالي هو تابع له، مما يعكس حياده أثناء قيامه بتسوية أي نزاع ينشأ بين رب العمل والمقاول.

وتتضمن الشروط العامة للفيديك لعام ١٩٩٩م الكتاب الأخير عشرون فصل كألي:
الفصل الأول: أحكام عامة تتضمن بالمادة الأولى: التعريف والتفسيرات والاتصالات والقانون والمادة، وأولوية الوثائق، واتفاقية العقد، والتنازل عن العقد، والعناية بالوثائق والتزود بما والتأخير بإصدار المخططات أو التعليمات،
الفصل الثاني: تناول الأحكام الخاصة بصاحب العمل، حيث تضمنت المادة الثانوية حق دخول المقاول للموقع، وقيام صاحب العمل بتقديم المساعدة بالحصول على التصريح أو التراخيص أو الموافقات، ومسؤولية صاحب العمل عن أفراده، ومستخدمي المقاول الذين يعملون معه في الموقع، وملاليات 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، ومثل المقاول، والمقاولون الفرعون، والتنازل عن المقاولة الفرعية، وإجراءات السلامة، وتوكيد الجودة، وحق المرور والتسهيلات، وتجنب التدخل، والطرق الموصولة، ونقل اللوازم، ومعدات المقاول، وحماية البيئة، وتقارير تقدم العمل الشهرية، وحصر العمليات في الموقع، والأربيات التي يعتبر عليها المقاول في الموقع.

الفصل الخامس: تضمن المقاولون الفرعون المسمون، حيث تضمنت المادة الخامسة تعريف المقاول الفرعي المسمى، وحق المقاول بالاعتراض على التسمية، والدفعات للمقاولين الفرعيين المسميين، وثبات الدفعات.

الفصل السادس: تناول أحكام المستخدمون والعمال، ففي المادة السادسة تم النص على كيفية تعين المستخدمين والعمال، ومعدلات الأجور وشروط العمل، وقوانين العمل، وساعات العمل والمرافق للعمال، وشروط الصحة والسلامة، وأحكام مستخدمو المقاول، وسجلات مفصلة عن الأعمال والمعدات التي يستخدمها المقاول، وضبط السلوكي غير المتضمن 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 بالإجاز وتعليق العمل، حيث تضمنت المادة الثامنة شروط مباشرة العمل، ومدة الإجاز وبرنامج العمل، وتمديد مدة الإجاز، وتأخر الإجاز بسبب السلطات، ونسبة تقدم العمل، وغرامات التأخير، وتعليق العمل وتعويضات تعليق العمل، والدفع مقابل التجهيزات الآلية والمواد في حالة تعليق العمل، والتعليق المطلوب، واستئنافه.

الفصل التاسع: تناول موضوع الاختبارات عند الإنجاز، حيث تناولت المادة التاسعة التزامات التزامات المقاول بإجراء الاختبارات، وإعادة الاختبارات، والإخفاق في اجتياز الاختبارات عند الإنجاز.

الفصل العاشر: تناول مسألة تسلم الأعمال من قبل صاحب العمل، حيث تضمنت المادة العاشرة، مسألة تسلم الأعمال وجزء من الأعمال.

الفصل الحادي عشر: تناول مسألة تسلم المسؤولية عن العيوب. فنصت المادة الحادية عشر إنجاز الأعمال المتبقية وإصلاح العيوب، وتكلفة إصلاح العيوب، وتمديد مدة الإشعار بإصلاح العيوب، ومسألة الإخفاق في إصلاح العيوب، وإزالة الأعمال المبقية التي لا يمكن إصلاحها، الاختبارات اللاحقة، وإجابة المقاول في البحث عن أسباب العيوب في الأعمال، وإصدار شهادة الأداء 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 المجزأة، وتقدير القيمة، وإلغاء الأعمال.
الفصل الثالث عشر تناول التغييرات والتعديلات

بإحداث التغييرات في الأعمال، وإجراءات التغيير ونوع العمليات الواجب الدفع بها، والمبادئ الاحتياطية، واستخدام نظام الأعمال بالمبادرة للأعمال الصغيرة، وذات الطبيعة الطارئة، وتعديلات قيمة العقد بسبب تغير التشريعات، وسبب التكاليف.

الفصل الرابع عشر تناول مسألة قيمة العقد والدفعات المقدمة، وتقدم طلبات شهادات الدفع المقدمة، وجدول الدفعات، وإصدار شهادات الدفع المقدمة، والدفع من صاحب العمل للمقاول، ودفعات المتأخرة، ورد المتأخرات بعد إصدار شهادة تسلم الأعمال وشهادة الصيانة، وطلب شهادة الدفع الختامية، مع إقرار المخالفة النهائي، وإصدار شهادة الدفع الختامية، وانتهاء مسؤولية صاحب العمل.

الفصل الخامس عشر تناول 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 إنتهاء العقد.

الفصل السابع عشر تناول المخاطر والمسؤولية، حيث نصت المادة السابعة عشر عن التعويضات الواجب على المقاول دفعها لصاحب العمل عن أي ضرر، وعن مسؤولية المقاول عن الاعتداء بالأعمال من تاريخ المباشرة وحتى صدور شهادة تسليم الأعمال، وعن مخاطر صاحب العمل وتعبات هذه المخاطر، وعن حقوق الملكية الفكرية والصناعية، وتحديد المسؤولية.
الفصل الثامن عشر، تناول موضوع التأمين، حيث نصت هذه المادة على 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، ورسال إشعار بتذرذ أداء الالتزامات بسبب القوة القاهرة، والإجراءات المرتبطة على قيام القوة القاهرة، وواجب التقليل من المخاطر، والقوة القاهرة التي تؤثر على المقاول الفرعي، وإلغاء العقد اختيارياً، والدفع، والإخلاء من مسؤولية الأداء.

الفصل العشرون والأخير، تناول موضوع المطالبات والخلافات والتحكيم، حيث حددت المادة عشرون مطالبات الدقاول التي يرسلها للمهندس، وتعيين لرلس فض الخلافات، وحالات الإخفاق في الاتفاق على تعيين المجلس، القرار الذي يتخذه مجلس فض النزاعات، ثم النسوية الودية، ثم التحكيم، وعدم الامتثال لقرار مجلس فض النزاعات، والقضاء فترة تعيين المجلس.

يرى الباحث أن عقود الفيديك تمتاز عن باقي عقود الإنشاءات، بأنها عقود متوافقة حافظ على حقوق جميع أطراف العقد، تلافت الكثير من المشكلات والنزاعات، وتحديدها الإطار العام لتنفيذ المشروع، ومن مزاياها أيضاً توقيع عادل للمخاطر والمسؤوليات بين أطراف العقد، ويسمح بترجمة عقود الفيديك لأي لغة، كما يسمح بالتعديل وإضافة، والحذف على الصيغة النموذجة المعتمدة من فيديك شريطة أنها تعليق التعدل نسبة 5% من إجمالي العقد، ويسمح بإجراء تعديلات على العقد إلى نسبة 15% شريطة أن يضاف اسم آخر إلى عقد فيديك، وتحقيقها لمبدأ الكفاية الذاتية للعقد، جعلها تحظى بالقبول والاعتماد من قبل جهات دولية وإقليمية يأتي في مقدمتها البنك.

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المبحث الثاني: آلية تسوية المنازعات الناشئة عن عقود الفيديك

إن عقود الفيديك خاصة عقد أعمال الإنشاءات الهندسية (الكتاب الأحمر)، تأتي بمقدمة العقود النموذجية التي اعتمدت بتنظيم آلية تسوية المنازعات، حيث نظمت قواعد عقود الفيديك لعام 1987م، آلية تسوية المنازعات في المادة (67)، أما قواعد عقود الفيديك لعام 1999م، فقد نظمت آلية 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 بالدطالبات، وإذا تحولت هذه المطالبات إلى نزعات فتكون من اختصاص مجلس فض المنازعات، واختار عقود الفيديك الوسائل البدائل 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 آلية ودور كل من هذه الوسائل لفض النزاعات التي تنشأ أثناء تنفيذ عقود الفيديك، حيث سوف يتم البحث في نسختي عقود الفيديك (الكتاب الأول) نسخة عام 1987م ونسخة عام 1999 كونه الأكثر تفصيلاً وشيوعاً، وذلك لأن كلا النسختين يتم التعامل بهما على نطاق الدولي حتى الآن، حيث تم تقسيم هذا المبحث لمطلبين: المطلب الأول المهندس وجلس فض النزاعات، والمطلب الثاني: التسوية الودية للنزاع والتحكيم.

انظر: الجليدي، مصطفى عبد المحسن، النزاع العالمي 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 يتولى فض النزاع 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 المحوري الرئيسي لتنفيذ العقد، يقوم بالنظر بالخلافات التي تنشأ بين رب العمل والمقاول نتيجة تنفيذ عقد القواعد، فتعتبر نسخة نزاع بين المقاول وصاحب العمل وفق ما هو منصوص عليه في المادة (67) من الشروط العامة لعام 1987م، فلأنه يأبى محاولة تسوية النزاع عن طريق المهندس، وذلك بموجب خطاب (خطي) موجه للمهندس، يعرض له فيه وقائع النزاع وحججه ومعطقه، مع صورة من هذا الكتاب للمطاف الآخر، وطلب من المهندس أن يبتكر رأيه في النزاع، خلال (84) يوماً من اليوم التالي لتسليم الكتاب المطاف الشخص، كما يمكن له الامتناع عن الرد، ويجب أن يتم الإشارة في الكتاب إلى المادة (67) من الشروط العامة، والتي تمت بموجبها إحالة النزاع للمهندس، فإذا أصدر قراره ولم يعتض أي من الطرفين خلال الـ 70 يوماً التالية لاستلام الرد، فإن قرار المهندس يكون نافذاً وملزم وملزم لكل من المقاول وصاحب 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 يلجأ إلى المحكمة لتسوية النزاع، مع إرسال صورة عن الإخطار للمهندس، ويجب إرسال الإخطار قبل اليوم السبعين، من اليوم التالي لتسليم قرار المهندس، أو اليوم التالي لانتقضية مدة الـ (84) يوماً المشار إليها أعلاه،

(1) انظر: الكتاب الأحمر، الشروط العامة لعقد المشاريع الإنشائية (فيديك 1987م)، المادة (67/1-6).
وإن قرار الدهندس النهائي في حالة عدم تنفيذه من قبل المقاول أو من رب العمل، فيمكن للطرف الآخر اللجوء للتحكيم من أجل صدور حكم تحكيمي فيه. كما أنه يجوز إحالة النزاع مباشرة للتحكيم في حالة عدم تعيين مهندس مشرف على المشروع، وهذا النهج تم تبنيه من خلال حكم صادر عن غرفة التجارة الدولية في باريس، علماً أنه إذا كان معينًا للمشروع مهندساً استشارياً، وحدث أي نزاع فيجب عرضه أولاً على المهندس الاستشاري، وإلا عند اللجوء للتحكيم سابقاً لأوائه. وفي هذه الحالة على هيئة التحكيم إعلان عدم اختصاصها بالنظر بالنزاع.

فإذا المهندس المهني والمتحايد هو الأساس في تسوية مطالبات المقاول، لأن المهندس هو السلطة العليا في المشروع الذي تقييم الحقوق والمطالبات وفقاً لشروط العقد، فالمهندس يقوم بالإشراف على المشروع وإصدار التعليمات للمقاول، يصفه ممثل لرب العمل هذه القرارات التي يصدرها ملزمة لرب العمل، أما القرارات التيصدرها أثناء فصله بالمطالبات المقدمة من أطراف العقد، فإنه في هذه الحالة يصدر قراراته بحجة واستقلال عن الأطراف وما يفرضه عليه واجبه المهني، وبالتالي فقراراته هذه غير ملزمة لرب العمل وبالتالي لرب العمل الاعتراض عليها.

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، وكشببه محكم تكون مهمة فض المنازعات التي تنشأ عن تنفيذ


11. أنظر: حزمة حداد، دور المهندس في تحكيم العقود الإنشائية، المؤتمر الثالث للتحكيم الهندسي، الهيئة السعودية للمهندسين (21/10/2007).

12. أنظر: حكم التحكيم رقم (6230) صادر عن غرفة التجارة الدولية، حكم التحكيم رقم (6230) صادر عن غرفة التجارة الدولية.


العقد، إجمالاً لأحكام البنود / 67 من الشروط العامة لعقود الفيديك (1987)، هذا الدور الذي كان يلعبه المهندس لا يسبقه عليه صفة المحك، لأن المحكم يجب أن يتمتع بالحياد والاستقلال، ولا يكون مثالاً لأحد الأطراف، كما أن قرار يجب أن يكون ثقتاً ومليماً، وهذا لا ينطبق على القرار الذي يصدره المهندس، ووفقًا 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، وتمثل هذا البديل في مجلس فض المنازعات، حيث أنشئت هذه المهمة وفق لتعديل الصادر بالملحق لعام 1996م مجلس فض المنازعات، وفي التعديل الذي تضمنته قواعد عقود الفيديك الصادرة بتاريخ (1999م) حددت المادة (20/1) من الكتاب الأخير، مطالبات المقاول والحالات تقديمها فهي تتناول إما تمديد مدة الإنجاز أو بدفعات إضافية، أو بكلاهما معاً، حيث يكون سبب هذه المطالبات طرفاً طارئاً قد تعترض تنفيذ العقد، تلحق بالمفاوضات خسائر كبيرة، أو تكون ناجمة عن أومير تغيير،

الفرع الثاني: آلية عمل مجلس فض المنازعات

تمتاز عقود الإنشاءات (المقاولات) المرتبطة بتنفيذ المشاريع الضخمة، مما يتطلب وجود سلطة تعمل على حل النزاعات التي تنشأ أثناء تنفيذ العقد مباشرةً كي لا يتأخر أو يوقف التنفيذ، وأن تكون هذه السلطة متمتعة بالإمام بكافة جوانب العقد والأعمال المبذولة في المشروع، ورغبته 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 ( gdzie تتم تعديل البند 67 من ملحق الطبعة الرابعة 1996 ) "Board "DAB disputes Adjudication

14 أومير تغيير: وهي سلطة إجراء تعديلات أو إضافات غير منصوص عليها في العقد الأصلية بموجب تحقيق مصلحة المشروع.
حيث أُعدّ 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 فتح الصلة بالعقد أو تنفيذ الأعمال، وذلك أي منازعة تتعلق برأي أو أمر أو قرار أو شهادة أو تقدير من المهندس، يتم إحداث موضع الخلاف كتابياً أولاً للجهاز مسوية المنازعات، لإصدار قرار بشأنه، ويعين النص على أن الإحالة قد تمت وقتياً للمادة (67).

2- في حال لم يتم أطراف العقد بالاتفاق مسبقاً، على تحديد شخص أو أشخاص أعضاء للمجلس في العقد؛ فأنه يتعين 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 بالمهمتهم، وعدهم ما بين واحد وثلاثة أعضاء، وإذا كان المجلس مكون من ثلاثة أعضاء فيجب أن يرشح كل طرف عضو يوافق عليه strftime(28) من أجل الاستخدام في الطرف الآخر، وعلى الأطراف الاتفاق فيما بينهم على تعيين العضو الثالث، ويكون رئيساً للمجلس.

4- يكون تعيين الأعضاء وفقاً لشروط عقد الفيديك، كما براها الأطراف، كما يجب أن يكون كل عضو مستقلًا ومحايداً عن أطراف العقد طوال مدة تعيينه.

ولا يجوز فصل أي عضو من أعضاء المجلس، إلا بموجب كل من صاحب العمل والمقاول، ويجب استبدال عضو المجلس بدلاً من الطريقة التي تم تعيينه فيها.

5- في حالة لم يستطع الأطراف تعيين عضو أو أعضاء المجلس وذلك خلال (28) يوماً من تاريخ البدء، يجب على جهة التعيين المحددة في ملحق العقد، بعد التشاور مع الأطراف القيام بالتعيين ويعين هذا التعيين مسؤولًا.

ويتملك مجلس فض النزاعات الصلحية والسلطة التالية:

"انظر: محمد محمد بدري، عقد الإنشاءات في القانون المصري - دراسة في المشكلات العملية لعقود الفيديك الأخاد الدولي للمهندسين الاستشاريين، ص 271."
1- تعديل الإجراءات الوافدة تطبيقها.
2- تحديد اختصاص، وتحديد نطاق المنازعات المحالة إليه.
3- تحديد المسائل والوقائع اللازمة لاختيار القرار.
4- اتخاذ إجراءات محفزة.
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 الآخر والمهندس، وفي هذه الحالة يجب على الأطراف العمل على تسوية النزاع بالطرق الودية (المفاوضات، الوساطة)، علمًا أنه يجوز البعد بإجراءات التحكيم، في أو بعد اليوم (56) من تاريخ الاعتراض، ولو لم يجري أي محاولة للتسليمية الودية، أما إذا إن انتهت مدة (28 يومًا) ولم يقدم أحد الأطراف اعتراضًا على قرار المجلس، فإنه يصبح غالبًا ويجب على الأطراف تنفيذه، لكن إذا لم يتم تنفيذه فإنه يبدأ للتحكيم، وتطبق قواعد غرفة التجارة الدولية باريس للتحكيم على النزاع، مالم يتفق الأطراف على خلاف ذلك.

أما تشكيل المجلس وفق الطبعة الأخيرة 1999 تضمنه البند (20/2)، حيث نص على أنه يتم إنشاء هذا المجلس ضمن التاريخ المحدد في ملحق عرض المناقصة - مما يميز عقود الفيديك أن الملحق المشار إليه وفقًا مع الشروط يتضمن كل التفاصيل المتعلقة ب"مجلس تسوية النزاع" فيما بين الأطراف وتهتم عضوياً المجلس ودورهم التفصيلي في تسوية النزاع، وذلك لتوفير بديل مناسب وسريع لحسم أي نزاع يطرأ أثناء تنفيذ العقد

16 انظر: عصام عبد الفتاح مطر، عقود الفيديك لمقاولات وأعمال الهندسة المدنية ووسائل فض المنازعات الناشئة عنها (الإسكندرية: دار الجامعة الجديدة،2009م) ص398.
همة المجلس: هي حل الخلافات بين صاحب العمل والمقاول فقط، الناشئة عن تنفيذ عقد المقاولة، ولا تمتد صلاحية هذا المجلس لفس النزاعات التي تنشأ بين المقاول الأصلي والمقاول الفرعي، وكذلك يمكن لأطراف النزاع مجتمعين أخذ رأي المجلس في واقعة معينة، ويكون عدد أعضاء المجلس الواحد أو ثلاثة وفق ما يحدد ملحق العطاء (المناقشة) من الأشخاص المؤهلين، وفي حال عدم تحدد عدد أعضاء المجلس، ولم يتم الاتفاق على العدد، يعتبر عددهم ثلاثة، يتم تعيينهم باتفاق طرفي العقد إذا كان عضوًا واحدًا، وإذا كانوا ثلاثة أعضاء، فكل طرف يعين عضو، والأطراف مع العضويين يتوافقوا على تعيين العضو الثالث (رئيس المجلس)، حيث تم صياغة الاتفاقية بين الأطراف وأعضاء المجلس، بالإضافة للشروط العامة المتعلقة باتفاقية فض الخلافات المرفقة كملحق للشروط العامة للعقد، مع إمكانية إدخال أي تعديلات يتفق عليها الأطراف، وتم تحديد أناع أعضاء المجلس فيها، حيث يتولى الطرفان الأعان مناصفة، وفي حال امتلاك أحد الأطراف أو أصبح غير قادر على العمل؛ نتيجة الوفاة أو العجز أو الاستقالة أو إخدر التعيين، فإنه يتم تعيين البديل بنفس الطريق 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، وتهيئته مهمة المجلس عند اعتبار قرار المخالصة بين أطراف العقد نافذاً، وفق المادة (14/12) من الشروط العامة لعقد القياديك (الكتاب الأحمر).17

وأليكية عمل المجلس وفق المادة (20/4) هي أن أي نزاع بين الطرفين فيما يتعلق بالعقد، بما في ذلك أي خلاف حول ما يصدر عن المهندس من شهادات أو تقديرات أو تعلقيات أو رأي أو تحديد قيمة، يحال خصياً لمجلس فض الخلافات، للحصول على قرار بشأنه، مع إرسال نسخة من الطلبات إلى الطرف الآخر والمهندس، وفي سبيل ذلك على

17 انظر: الكتاب الأحمر، الشروط العامة لعقد المشاريع الإنشائية (فيديك 1999م)، المادة (20).
كلا الطرفين، أن يقدمما على الفور للمجلس كافة المعلومات وإمكانية الوصول إلى الموقع، والتسهيلات المناسبة.
وفق ما يطلبه المجلس، لأغراض إتخاذ 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 ملزمًا
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، والأغلبية قرار، ويتلمسهما للأطراف.
وفي حال لم يرضى أي طرف بقرار المجلس، فعليه خلال (28) يوماً من بعد تسلمه للقرار، أن يرسل إشعاراً للطرف
الأخر 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 انتهاء فترة (84) يوماً، أن يعلم الطرف الآخر
بعدم رضاه من خلال إشعار، يتضمن موضوع الخلاف وأسباب عدم الرضا، مع التنويه أنه تم إصداره وفق أحكام
هذه المادة، أما إذا أصدر المجلس قراره، ولم يرد على هذا القرار إشعار بعدم الرضا من قبل أحد الطرفين خلال مدة
(28) يوماً من بعد تسلمه قرار المجلس، فإن هذا القرار يصبح غالبًا وملزم لكلا الطرفين.
ويمكن اللجوء للقضاء للحصول على حكم مستعجل لتنفيذ هذا القرار، أو من خلال اللجوء للتحكيم، وهذا ما
أكدته الأحكام الصادرة عن غرفة التجارة الدولية.

يرى الباحث أنه كان من الأفضل 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 تجمع بين الخبرة الفنية والوساطة، ولا يعتبر ملزمًا إلا بعد قبوله من الأطراف.

المطلب الثاني: النسوية الودية للنزاع - التحكيم

الفرع الأول: استخدام أنواع النسوية الودية حل النزاع

وفق البند (67) من الكتاب الأحمر الطبعة الرابعة الصادرة عام 1987، للطرف المتضرر من القرار الصادر عن المهندس، يلبغ الطرف الآخر خطاب بعمه على اللجوء للتحكيمي، ولالأطراف الحق خلال 56 يومًا من تاريخ استلام خطاب اللجوء للتحكيمي، العمل على تسويتها الودية وديًا، أما وفق البند (20/5) من الكتاب الأحمر الصادرة عام 1999 م، فإنه إذا صدر إشعار بعدم الرضى من قبل أحد الطرفين خلال مدة (28) يومًا من بعد تسليمه قرار المجلس، فإنه وقبل المباشرة بإجراءات التحكيم، يتعين على الأطراف تسوية الخلاف بينهما بشكل ودي، قبل الذهاب إلى التحكيم، وأهم وسائل التسوية الودية هي:
المفاوضات: تقوم على تلاقي ممثليين من الجهتين المتنازعتين لبحث أسباب النزاع وعناصره، بقصد التوصل إلى تسوية له.

الوساطة: بآية واورنا: لفض النزاع، تطلّب تدخل طرف ثالث محايذ، للعمل مع الأطراف الذين عجزوا عن حل نزاعهم بالمفاوضات، لإيجاد مساعدته تسوية يرضي عنها الطرفان المتنازعان.

الفرع الثاني: إجراءات التحكيم لفض النزاعات

إذاً إن إجراءات التحكيم لا تختلف بين قواعد عقود الفيديك لعام 1987م، وقواعد عقود الفيديك لعام 1999م، إنما الاختلاف ينتج في الإجراءات التي تسبيح إحالة النزاع على التحكيم، حيث أنّ 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 المتعلق إليه، فيتم بعد ذلك وخلال المدة المقررة، أن يقوم الطرف الراقب بترحيل التحكيم، بإرسال خطاب للطرف الآخر يبلغ فيه بملجوته للتحكيم.

أما إجراءات الإحالة للتحكيم وفق قواعد عقود الفيديك لعام 1999م، فإنه لا يجوز لأي من طرف النزاع المباشرة بإجراءات التحكيم، حول الخلاف الباشبيه بينهما، إلا إذا تم إصدار الإشعار بعدم الرضا على قرار مجلس فض الخلافات، على النحو المحدد في المادة (20/4)، ومما يتفق الأطراف على خلاف ذلك، فإنه يجوز البدء بإجراءات التحكيم في أو بعد اليوم (56) من تاريخ إرسال الإشعار بعدم الرضا، حتى ولو لم يتم محاولة تسوية الخلافات بينهما ودياً، وذلك فق المادة (20/5).

كما إن لم يكن قد تم تسوية الخلاف ودياً، فإن أي نزاع يكون حول قرار المجلس، (إن وجد) ولم يصبح محاولاً ولم يلزم، يتم تسويته بواسطة التحكيم الدولي، وفق المادة (20/6) وما لم يتفق الطرفان على خلاف ذلك، يتم تسوية النزاع غالباً بموجب قواعد التحكيم لغرفة التجارة الدولية، حيث يتم تسوية النزاع بواسطة هيئة تحكيم 25
مكونة من ثلاثة محكمين يعينون وفقاً لهذه القواعد، وتتم إجراءات التحكيم بلغة الممارسات المحددة في المادة 4/1.

وتتمتع هيئة التحكيم بصلاحية كاملة في مراجعة وتعديل أي شهادات أو تقييمات أو رأى 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 (20/6) دون تطبيق المادة (20/4) المتعلقة بقرار المجلس، ولا المادة (20/5) المتعلقة بالتسوية الودية، في الحالات التالية:

1- حالة صدور قرار عن مجلس فض الخلافات، ولم يقم أي من الطرفين بإرسال إشعار عدم الرضى عنه، وأصبح القرار نهائياً وملزماً، لكن لم يمثل أي طرف هذا القرار، فيتم إحالة موضوع عدم الامتثال إلى التحكيم.

2- حالة عدم وجود مجلس فض الخلافات لأي سبب كان.

- إجراءات التحكيم وفق قواعد التحكيم لغرفة التجارة الدولية في باريس:

محكمة التحكيم الدولية، المبتكرة عن غرفة التجارة الدولية، هي جهاز التحكيم المستقل التابع لغرفة التجارة الدولية، لا تفقس "المحكمة" بنفسها في المنازعات، ولكنها تعني وتستبدل المحكمة، وتقرر بشأن طلبات ردهم (الطعن فيهم)، وتراقب وتتابع عملية التحكيم، لضمان تنفيذها بسرعة وكفاءة والأساليب الصحيحة، وتدقيق وتعتمد قرارات هيبات التحكيم، والأمانة العامة تدعم المحكمة، وهي الرابطة الرئيسية بين الأطراف والمحكمين المحكمة.

1ُأَظَرَ: الكتّاب الأحمر، الشروط العامة لعقد المشاريع الإنشائية (فيدك 1999م)، المادة (20/8).
ويعمل كلاً من المحكمة والأمانة العامة، على تسهيل الإجراءات وتقديم المساعدة الجوهرية وضمان الجودة العالية في كل خطوة.

وفق ما تم بيانه آنفاً، فإن الطرف الراغب بالتحكيم، يقوم بإرسال خطاب للطرف الآخر يبلغه فيه بلجنه للمحكمة، ثم يقوم بتقديم طلب تحكيم إلى الأمانة العامة بمحكمة التحكيم الدولية، التي تبلغ المدعى والمدعى عليه بتسليمها الطلب، حيث يعتبر في جميع الحالات تاريخ تسلم الأمانة العامة للطلب هو تاريخ بداية التحكيم.

وفي المدعى عليه خلال ثلاثين يوماً من يوم تسلمه طلب التحكيم المرسل من الأمانة العامة؛ أن يقدم رداً على طلب التحكيم.

وعمجرد تشكيل هيئة التحكيم فعلى الأمانة العامة إرسال ملف إلى هيئة التحكيم، بشرط تسديد الدفعة المقدمة من المصاريف التي طلبها الأمانة العامة في هذه المرحلة، وتقوم المحكمة بتحديد مكان التحكيم بما 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 الدبرم بينهم، وعند تلقي الملف من الأمانة العامة، تقوم هيئة التحكيم بإعداد وثيقة المهنة الخاصة بها، ويوقع وثيقة المهنة كل من الأطراف وهيئة التحكيم، وترسل هيئة التحكيم إلى المحكمة وثيقة المهنة، موجودة منها ومن

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**12** انظر: خدمات تسوية المنازعات، الاسترجاع بتاريخ 9-5-2017 من

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**13** انظر: غرفة التجارة الدولية - المادة الرابعة من قواعد التحكيم لعام 2012م، نشرة عدد 865-978-92-842-0211-3

www.storeiccwbo.org

**14** انظر: غرفة التجارة الدولية - المادة الخامسة من قواعد التحكيم لعام 2012م. (فرنسا: مطبعة بور روائل، تراث، 2016)
الأطراف خلال شهرين من تاريخ إحالة الملف إليها، ثم تعقد هيئة التحكيم جلسة لإدارة الدعوى ووضع الجدول الزمني للإجراءات الذي تعزم إتباعه لإدارة التحكيم، وبعد دراسة المذكرات الكتابية المقدمة من الأطراف وكافة المستندات المعتمدة 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 مراقبة متعلقة بالمسائل التي سيفصل فيها بحكم التحكيم، أو بعد تقديم آخر مذكرات مسموح بها بخصوص تلك المسائل، أيهما لاحقاً، تقوم هيئة التحكيم بإلانغ باب المفاوضات الخاص بالمسائل التي سيتم الفصل فيها بحكم تحكيم؛ والإخطار الأمانة العامة والأطراف بالتاريخ الذي تتوقع فيه تقديم مشروع حكمها إلى المحكمة، لاعتماده وفقاً للمادة الثالثة والعشرين، وعلى هيئة التحكيم إصدار حكمها النهائي خلال سنة أخر، فإذا كانت هيئة التحكيم مكونة من أكثر من محكم، يصدر حكم التحكيم بالأغلبية، وإذا لم تتوفر الأغلبية، يصدر الحكم رئيس هيئة التحكيم وحده، يجب أن يذكر حكم التحكيم الأسباب التي استند إليها، ومصارف التحكيم ويُعتبر حكم التحكيم قد صدر في مكان التحكيم وفي التاريخ المذكور فيه، ويتعين على هيئة التحكيم، قبل توقيع أي حكم تحكيم، أن تقدم مشروعه إلى المحكمة، وللمحكمة أن تدخل تعديلات تتعلق بشكل الحكم، وله أيضاً دون المساس بما تم تحكيمه من حريات الفصل في المنازعات، أن تلقى انتهاز الهيئة إلى مسائل تتعلق بالموضوع، ولا يجوز أن يصدر أي حكم تحكيم من هيئة التحكيم حتى تعتمد المحكمة من حيث الشكل، وتخطئ الأمانة العامة الأطراف بنص حكم التحكيم الموقع من هيئة التحكيم بمجرد صدوره، ويكون كل حكم تحكيم ملزمًا للأطراف، ويعتبر الأطراف عند إحالتهم المنازعات إلى التحكيم بموجب

**NOTE:** لمزيد من التفاصيل، طالع قاعدة التحكيم عام 2012.
هذه القواعد؛ ينفي أي حكم تحكيم دون تأخير، ويعتبر قد تنازلوا عن أي شكل من أشكال للطعن، وذلك إلى الحد الذي يكون فيه هذا التنازل صحيحاً.  

الخاتمة: يرى الباحث، أن الطبعات الحديثة من عقود الفيديك، تميزت بالنص على أليّة محددة بدقة لفض النزاعات التي تنشأ خلال تنفيذ العقد، حيث تبدأ مع مجلس فض النزاعات الذي يعايش المشروع منذ بداية 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 كوسيلة لتسوية النزاع، وفي حال لم تفضي الوسائل السابقة لتسوية النزاع، يتم اللجوء إلى التحكيم، وإن اختيار إجراءات تحكيم عقود التجارة الدولية، من قبل واضح عقود الفيديك يعود إلى أن هذا الإجراءات تتسم بالدقة والشمولية، وتحسس للتطور المستمر، إلا أن النص على الاعتماد هذه الإجراءات ليس ملزماً، بل يمكن للإطراف اختيار أي قواعد تحكيم بروفاً مناسبة لفض نزاعاتهم، مما يجعلها أفضل العقود الدولية النموذجية، المتعلقة بصناعة البناء والتشييد، بما تضمنه من بنود تنظم بدقة وتوازن العلاقة بين أطراف العقد، وتوزيع عادل لتحمل المخاطر، ولأليّة لتسوية النزاعات تتسم بالتسلسل والوضوح.

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32