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5 & 6 OCTOBER 2021

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PREFACE

Society 5.0 is a concept which was introduced by the Japanese Government as a new form of society. The concept premised on a technology-based and human-centered society that balances economic advancement with the resolution of social problems by a system that highly integrates cyberspace and physical space. In Society 4.0, people would access a database in cyberspace through Internet. Those data will then be analysed by human. In Society 5.0 however, data from physical space will be accumulated in cyberspace. This big data will then be analysed in cyberspace by Artificial Intelligence (AI). The results will be fed back to the physical world. This process is deemed to provide new values to the industry. In other words, Society 5.0 aims to overcome challenges by incorporating innovations and big data into society.

As the law is created and put into practice through societal processes, the perspective of the mutual relationship between law and society is currently extended to a different actors, institutions, processes and landscapes. New trends, issues and challenges surface whether directly or indirectly related to this development that need to be scholarly addressed. This fact motivated us to choose "Incipient Legal Issues in Society 5.0" as the theme of SOLAS V.

SOLAS V is very fortunate to receive more than fifty scholarly works that cover various aspect of daily life in the society. I am pleased to present to all of you, a compilation of those works, the SOLAS V Book of Proceedings that is divided into fourteen area of discussions. I do hope that this Book of Proceedings will be beneficial to all readers.

Finally, I wish to express my utmost appreciation and congratulate all writers for their contribution in this Book of Proceedings.

Nor Azlina Mohd Noor
Editor
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ABSTRACT

The Court Recording and Transcription (CRT) system is one of the technology applications that Malaysian courts have implemented, particularly to assist the audio and video recording of proceedings in open courts. However, its implementation has not been without hiccups. The literature has reported on issues such as a lack of legal consequences and a violation of the CRT system's security. The purpose of this study was primarily to examine the use of the theory of risks perception in detecting potential risks associated with the CRT system in Malaysian courts using the risks perception theory. The study, which took a qualitative approach, was centred on a multiple embedded case study design including two courts in Penang and Alor Star. At each court, semi-structured interviews and an open-ended survey questionnaire were administered with a judge and a lawyer. For the purpose of reporting the findings, the data were analysed using the computer-aided qualitative analysis software ATLAS.ti version 8. The study discovered that there are a variety of dangers associated with the engagement of the CRT system, consistent with the risks perception theory. These hazards include the technical limitations of CRT recordings, their security and trustworthiness, issues of privacy encroachment, and an increase in financial costs. The findings are intended to add to the body of knowledge in the fields of electronic government,

court systems, electronic courts, and electronic justice, as well as theoretical elements of hazards and risks. Hopefully, these findings can form a basis for further research on these subjects.

Keywords: Court recording and transcription, CRT system, risks perception, e-court

INTRODUCTION

In many parts of the world, courts have begun to transition away from the conventional paper-based system for documenting proceedings and evidence in the courtroom and toward an electronic system for recording hearings and transcription of the proceedings and evidence. This technology is referred to in Malaysia as Court Recording and Transcription ("CRT"). The CRT system records video and audio in open court as well as chambers hearings. At the High Court in Kuala Lumpur, the recordings will be stored in the court's database and monitored during proceedings by the interpreter. If the lawyers request a copy of the recordings for their own documentation and transcription, the court will issue them with a compact disc containing the recordings (Abdullah, 2011).

Nonetheless, the CRT system's implementation has not been without incident. Numerous concerns have been raised as a result of the CRT system's implementation, including security and privacy risks, as well as other risks. Thus, this study began by addressing the study's objective, namely: "to examine the use of the theory of risks perception in detecting potential risks associated with the CRT system in Malaysian courts using the risks perception theory". The following part outlines the methodology undertaken in the study, followed by the findings and discussion. The paper concludes by providing recommendations with regards to the risk management strategies of the risks entailing the CRT system at the Malaysian courts.

CONCEPTUALISING CRT SYSTEM AT THE MALAYSIAN COURTS AND RISKS PERCEPTION

This section provides an account of the review of literature of the key concepts engaged in this paper, being the CRT system and the risks perception theory.

CRT System at the Malaysian Courts

Hamin, Othman and Mohamad (2012) revealed that there are plenty of applications of ICT in the Courts, which involve pre-trial, during trial and post-trial applications. One of the technological adoptions is the CRT system which is intended to strategically record the court proceedings in dual modes - audio and video. Very often, these two modes would be recorded alongside one another, for the purpose

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of enriching the audio and video recording of the court proceedings (Salleh, et. al, 2020).

For the audio mode, a number of omnidirectional microphones are placed at different areas in the courtroom, particularly on the judge's bench, the lawyers' desk and the witness' stand. The way it works is that it would direct the recording of the audio from active sounds coming from different angles of the courtroom (Hassan & Mokhtar, 2011). As for the video mode, the courtrooms are equipped with cameras to record different angles of the room (Mohamed, 2011). One camera would be directed to the judge's bench, one to the lawyer's desk, and another to the witness' stand. Remaining cameras would be directed to the entire courtroom, as and when needed.

Risks Perception Theory

In a theoretical setting, the literature argues that risks are inherent in all society and technical growth. Beck's risk society theory implies that in advanced modernity, the social production of wealth is inextricably linked to the social production of hazards (Beck, 1992). In other words, while the society is actively engaged in the information and knowledge economies, risks are an unavoidable by-product of social wealth development in such a society. Thus, the outcomes of scientific and industrial development are a collection of risks and hazards that transcend time and geography (Beck, 1992).

In addressing how applicable is risks perception to the adoption of ICT in the courts, it is pertinent to first outline the concept of risks perception. It has previously been defined as ''a combination of uncertainty plus seriousness of outcome involved'', and ''the expectation of losses associated with purchase (adopt) and acts as an inhibitor to purchase (adopt) behaviour'' (Posner, 2006). Perceived risks of ICT adoption have been previously examined when circumstances of the decision lead to the following: (a) feelings of uncertainty, (b) discomfort and/or anxiety, (c) conflict aroused in the consumer, (d) concern, (e) psychological discomfort, (f) making the consumer feel uncertain, (g) pain due to anxiety, and (h) cognitive dissonance (Bettman, 1973).

Within the context of the application of the theory of risks perception in relation to the adoption of CRT at the courts, it is estimated that such adoption is largely influenced by the understanding of the risks entailing the use of CRT, along the lines of the risk's perception theory. In this regard, the perception and understanding of the risks on the part of the users of CRT at the Courts would shape the direction of the risk management strategies of the CRT implementation. For instance, if the users understand the risk of unauthorised access to the Courts' computer systems, then the preventive strategy would be to enable digital signature security systems, such as usernames and password mechanism to access the CRT system.

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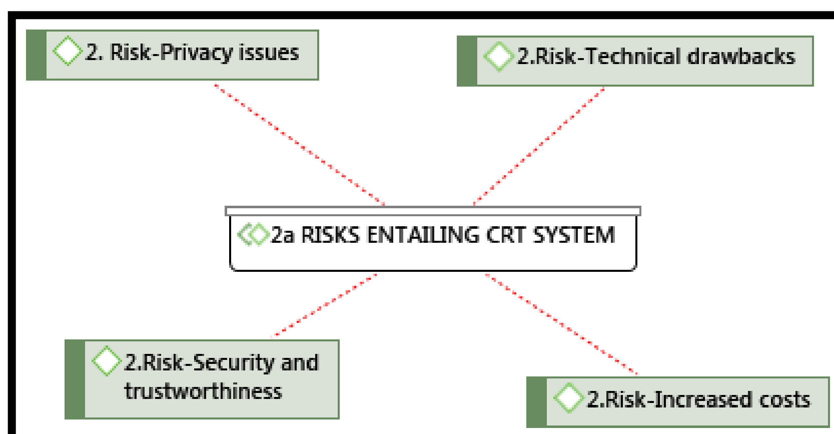
METHODOLOGY

The study engaged in purely qualitative methodology, given that it is the proper method to address the objective of the study. The chosen methodology explored a central phenomenon centred on the context of the research, i.e., the implementation of the CRT system in the Malaysian courts (Patton, 2005). The study began with library-based research to collect and review secondary data. The data sources for this stage were mostly textbooks, journal articles, newspaper reports, research papers, and related websites. The second stage of the study comprised fieldwork to collect data from research participants at the two court locations selected for the study, Alor Setar and Penang. As such, two instruments were utilised to collect data: a semi-structured interview and an open-ended survey. Two participants, one judge from each case, were interviewed in a semi-structured interview. On the other hand, an open-ended survey was provided to two respondents, each representing a different situation. The obtained interview data was transcribed and entered into ATLAS.ti version 8 - the qualitative data analysis software – for analysis (Friese, 2014; Mohamad, 2013).

FINDINGS AND DISCUSSION

Along the lines of the risks perception theory, the data revealed numerous risks which could be perceived resulting from the adoption of the CRT system, as shown in the following Figure 1. Essentially, the risks involving CRT system are four-folds: technical drawbacks, privacy issues, security and trustworthiness and increased costs.

Figure 1- Risks Associated with CRT Adoption at The Malaysian Courts



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Technical Drawbacks

The engagement of the CRT system at the Malaysian courts could well come together with its technical drawbacks of the system, as well as the recordings. In essence, adopting CRT is not free from deficiencies and drawbacks. One of the drawbacks involves technical aspects such as quality of recording which is not so good, breakdown of the IT system and broken CRT appliances.

Security and Trustworthiness

CRT systems have also been admitted as bringing with it security and trustworthiness issues involving the system as well as the recordings. In essence, this finding denotes the potential of security breach and untrustworthiness of the CRT recordings as kept in the court's database. Realising that the technology itself is a double-edged sword, at one end it provides benefits and advantages, while at the other end it provides risks and breaches.

Privacy Issues

Another issue highlighted by the respondents are privacy issues associated with the adoption of CRT at the courts. Generally, the individual right to privacy becomes significant as it would ensure that personal information about customers which is collected from the courts' electronic transactions is protected from any disclosure without their permission (Mohamad, Hamin & Othman, 2012).

Increased Costs

It was admitted that the adoption of the CRT systems by the courts have enhanced the financial costs of the courts as well as the lawyers. Although in the long run, the CRT system is admitted being beneficial as it saves cost and time, however, it would be worthwhile for the saving of costs and time to actually materialise. In essence, the enhancement of financial costs is due to the fact that the setting up of the entire CRT systems at the courtrooms already garnered huge investments by the government. Additionally, lawyers would also bear additional financial costs as they need to hire transcribers to turn the recording of the video and audio into textual formats.

CONCLUSION

The study generally found that there are various risks which could arise from the engagement of the CRT system, along the lines of the risks perception theory. Such risks include technical drawbacks of the CRT recordings, security and trustworthiness of the recordings, privacy encroachment issues and enhancement of financial costs.

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Though the CRT system has produced great potential and advantages, its implementation is not free from risks and hiccups. Nevertheless, there are still times and rooms for change and improvement, particularly in coming up with appropriate risk management strategies. Future research should be directed towards proposing such strategies in preventing or addressing the risks deliberated in this study.

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BLOCKCHAIN AS A ROBUST DISTRIBUTED LEDGER TECHNOLOGY: AN EXAMINATION OF ITS MECHANISM AND IMPLICATIONS

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ABSTRACT

As the world is increasingly developing, new technologies frequently emerge and revolutionise the way businesses operate and interact with clients. Blockchain technology represents one of the most significant technological inventions of this century. It represents a collective work that has been later presented by a person or a group of people under the name of "Satoshi Nakamoto", producing an entire ecosystem backed by a strong, secure, transparent, thrustless, distributed and decentralised unique digital ledger. This technology has attracted parties from different sectors and domains, producing many statistics and studies about its potentials and popularity. It has also attracted large-scale national and international organisations that aimed to explore and highlight the potential uses and benefits of this novel technology for businesses and other entities. This technology, however, remains a vague area to a large number of law practitioners and scholars due to its novelty and ambiguous nature. It poses a host of problems for which many attempts are made to resolve its still inexplicably complex aspects by providing in-depth studies about the multifaceted issues of this technology and highlighting its potentials and legal challenges it has been facing. This study aims to clarify the meaning and types of blockchain, identify the current practices and implications. It has been concluded that blockchain has a huge potential to be implemented in several sectors and for various domains, thanks to its high efficiency, security, transparency and trustworthiness. However, some characteristics and practices of blockchain raise some legal issues that have yet to be tackled. The study will provide some suggestions and recommendations so as to achieve a better outcome and avoid harmful uses and practices.

Keywords: Anonymity, Blockchain, distributed, Immutable, security

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INTRODUCTION

The advent of this technology occurred in the last century and transformed our world by presenting many tools and solutions that aimed to boost efficiency and performance in most aspects of life. Blockchain is one of the influential technologies of the 21st century. It presented a new ecosystem with multi-functions and the potential to transform many businesses and provide many benefits (Weking et al., 2019). Blockchain is a technology developed by Satoshi Nakamoto's whitepaper, which introduced Bitcoin as the first peer-to-peer electronic cash system powered by blockchain technology (Nakamoto, 2008). Bitcoin was the first actual implementation of blockchain technology used as a digital ledger and is employed for the transfer of assets or tokens (bitcoin) (Panda et al., 2021). It presented a new digital distributed ledger that enjoys unique characteristics such as being a transparent, anonymous, distributed, decentralised, immutable and secure tool, using cryptography science and hashing functions (Panda et al., 2021). Blockchain technology, however, has extended beyond the border of cryptocurrencies and taken hold in various sectors (Joint Research Centre, 2019). It has been used as a widely discussed topic by several national and international organisations to explore the role blockchain plays to ensure security as well as boost efficiency and performance.

Nowadays, the role and importance of blockchain cannot be denied, given its previous implementation and utility in many sectors. However, this technology remains a vague concept for the general public as to its meaning, mechanism, types, and legal challenges. This knowledge gap poses a problem, considering the growing role of blockchain in all aspects of life, especially the financial aspect that grabs the attention of many young people. Law practitioners also face a new area of law that is not yet explored by most jurisdictions, and which requires them to get to know and be familiar with the technology and the way it works so as to assess the legality of such new technology. Hence, this research aims to provide an in-depth understanding of several aspects related to Blockchain technology to raise the level of awareness among the general public and draw the attention of the law practitioners to this new area of law represented by blockchain. To achieve the objectives of the research, the research will adopt library-based research or what is referred to as awareness building research aiming to clarify and expand about this novel technology and provide some suggestions to tackle the legal issues that might face this technology in practice (Kharel, 2018).

THE CONCEPT OF BLOCKCHAIN

The word "blockchain" consists of two main words: namely block and chain. The word "block" refers to the structure of the technology, which is based on a series of Blocks that contains several bits of essential information such as the transaction data, the time stamp and the hash of the current and previous block (Zheng et al.,

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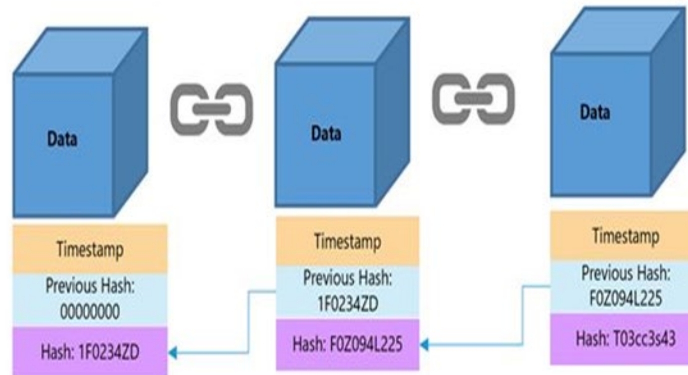
2017). These blocks are connected through cryptography and hash functions (Zheng et al., 2017).

Figure 1- Blocks in Blockchain



As seen in Figure 1, the blockchain is a series of blocks connected, shaping a chain of blocks. However, this explanation of the concept has no direct connection with its function or any of its characteristics. Many definitions have been presented by international bodies on the blockchain, such as OECD, which defined blockchain as "a shared ledger of transactions between parties in a network, not controlled by a single central authority. You can think of a ledger like a record book: it records and stores all transactions between users in chronological order. Instead of one authority controlling this ledger (like a bank), an identical copy of the ledger is held by all users on the network, called nodes" (OECD, 2018). Moreover, the European Parliament has also defined blockchain as "A mechanism that employs an encryption method known as cryptography and uses a set of specific mathematical algorithms to create and verify a continuously growing data structure to which data can only be added and from which existing data cannot be removed that takes the form of a chain of transaction blocks, which functions as a distributed ledger" (Houben & Snyers, 2018). Both definitions have thoroughly explained the components and the characteristics of blockchain, which are shared, distributed, decentralised, immutable, transparent and secure by the cryptography and hashing functions. In the real world, blockchain enjoys many characteristics that have allowed it to gain much attention over the past few years. These characteristics enabled blockchain to produce a very competitive ecosystem that can substitute the conventional system and provide benefits to the users. As can be seen in the figure below, the characteristics of the blockchain are:

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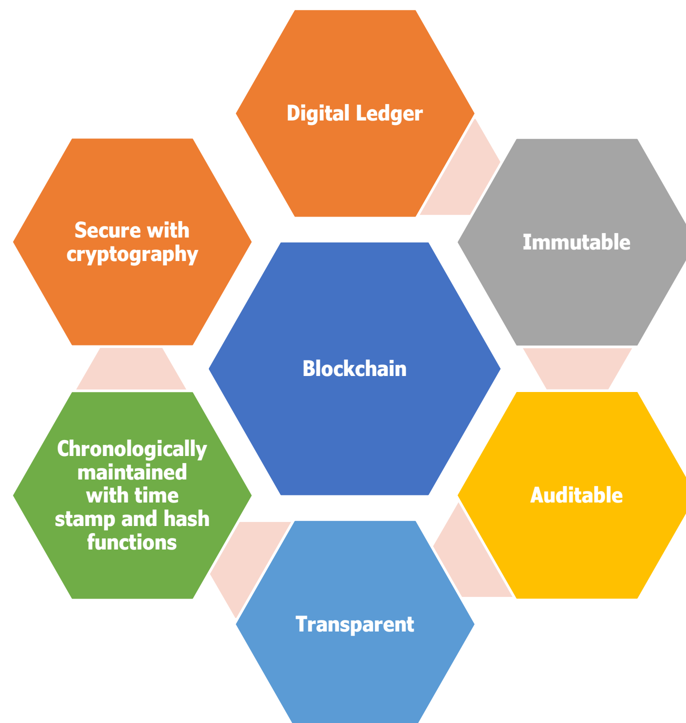
Figure 2- The Characteristics of Blockchain.



CATEGORIES OF BLOCKCHAIN

The development of blockchain is highly related to the field of cryptocurrency since it is one of its constructs (Fauzi et al., 2020). Blockchain has been first introduced by the white paper of Satoshi Nakamoto on Bitcoin, which laid out the underlying technology "Blockchain". Blockchain technology has gradually started to make a separation from cryptocurrencies to be used in other sectors and domains due to the enormous benefits provided by it. Blockchain has seen tremendous improvement and development over the last few years, which resulted in generating new categories of blockchain with different features, characteristics and uses. Blockchain can be basically divided into four main types: permissioned, permissionless, hybrid, and federated (Haque & Rahman, 2020).

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Table 1- Types of Blockchain

Blockchain	Features	Example of an Actual implementation
Permissionless	• Anyone can be part of the network. • Anyone can check the record on the ledger. • Anyone can be a node in the network. • Decentralised. • Immutable. • Transparent.	Cryptocurrency
Permissioned	• One single entity obtains authority over the network. • It is not open to everyone to be part of the network, and the nodes are restricted to a specific number who obtain the authority. • Checking the records required approval and authorisation. • It offers a high level of privacy required for certain businesses. • The process of information is faster and more efficient in power.	Supply chain
Hybrid	• It is a mix of the private and public blockchain and aims to use the best parts of both networks. • It is not open to everyone but still enjoys integrity, transparency and security of the network. • The access is controlled but still provide some freedom in the system. • The network members have the authority to decide who can take part in the network and which transactions or information are made public. • It is very suitable for companies that aim to work with the stakeholders in the best way.	Real-estate business
Federated	• It is semi-decentralised, where the network is handled by more than one entity. • Several entities can act as a full node and access all the data. • They are not open to everyone but still offers blockchain features such as integrity, transparency, and security.	Banking sector

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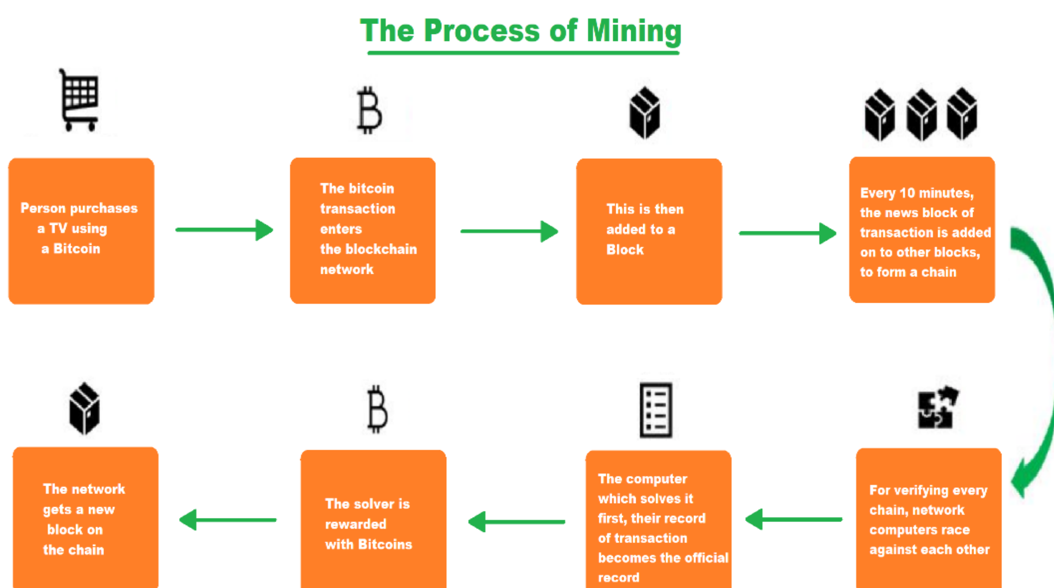
	• The hybrid blockchain members can decide who can participate in the blockchain or which transactions are made public.	

THE MECHANISM OF BLOCKCHAIN

Blockchain is a decentralised distributed ledger on which all initiated transactions are anonymously recorded (Zhang et al., 2019). This ledger is maintained and updated by several unrelated computers called nodes (Yaga et al., 2018). The blockchain's ledger comprises a complete record of all transactions made on blockchain from the genesis block until the time being (Lemieux, 2017). These transactions are stored in blocks that are connected together. A block in the blockchain is only added if the nodes in the network reach a consensus on the following valid block to be added to the blockchain (Euromoney, 2020). In the absence of a centralised body, consensus mechanisms in blockchain play a fundamental role in verifying transactions and ensuring that the records are true and honest through the process of mining (Sayeed & Marco-Gisbert, 2019). There are several types of consensus mechanisms such as proof of work, proof of stake and proof of authority (Sayeed & Marco-Gisbert, 2019). This first mechanism was the proof of work which required a lot of energy and time to verify the transaction, causing the process to delay (Sayeed & Marco-Gisbert, 2019). This has led to the emergence of a new mechanism in order to overcome some issues faced by the proof of work. The mining process will result in rewards being given to the miner who managed to verify and add the block to the blockchain (Aljabr et al., 2019).



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APPLICATION OF BLOCKCHAIN

Due to the novelty of Blockchain technology, many national and international entities are trying to explore additional blockchain possibilities to increase performance, enhance efficiency and improve shareholders' interest (Bogost, 2021). In addition, many examples can be provided for companies from different sectors and domains that have already started to implement blockchain technology, including the financial and banking sector, real-estate business, health sector, educational sector, insurance, voting, the music industry and many more. The table provided below shows the companies that are already using blockchain technology. In the table below, very few examples of companies that implement blockchain technology are given.

Table 2- Examples of some implementations of blockchain technology

Name of the company	Domain	Implementation
BURSTIQ	Healthcare	To help patients and doctors securely transferring sensitive medical information and contract the amount shared and help in facilitating a health plan for patients (BurstIQ, 2021).
MEDIACHAIN	Music Industry	Mediachain uses smart contracts to get musicians the money they deserve. Artists can agree to higher royalties and get paid in full and on time (Mediachain, 2021).
PROPY	Real Estate	The online marketplace uses blockchain to make title issuance instantaneous and even offers properties that can be purchased using cryptocurrency (Propy, 2021).
CIRCLE	Fintech and cryptocurrency	Cryptocurrency investment and exchange between friends (Circle, 2021).
CHAINALYSIS	Fintech and cryptocurrency	to help financial institutions and governments monitor the exchange of cryptocurrencies. The company's due diligence software monitors and detects fraudulent trading, laundering and compliance violations and builds trust in the blockchain (Chainalysis, 2021).
DHL	Logistics, Supply Chain	Shipping giant DHL is at the forefront of blockchain-backed logistics, using it to keep a digital ledger of shipments and maintain the integrity of transactions (DHL, 2021).

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THE ABSENCE OF A LEGAL FRAMEWORK FOR BLOCKCHAIN

One of the main issues facing blockchain is the legal part which plays a major role in determining the future of any technology or product. There is a lack of international law to regulate blockchain technology. This lack has posed a duty to the national governments to start giving legal attention to such technology as it grew over the years. However, only a few countries around the world have taken steps towards removing the legal ambiguity surrounding blockchain. The absence of a legal framework poses several legal and conceptual challenges that must be tackled to accommodate such technology within the present legal framework, such as jurisdictional issues, data protection and data privacy issues, digital inheritance, cyber security and criminal activities alongside a series of other legal issues that must be addressed. In addition to the legal issues, some technological issues are also forming a barrier against the full adoption of such technology until the moment. Many of the other related technology must also be legally addressed, such as cryptocurrency and its various uses and smart contract, which present a new era of contracting using automation and self-execution.

CONCLUSION AND RECOMMENDATIONS

Since its introduction in 2009, blockchain has proved itself as a technology that is here to stay, proving its usefulness in many domains and sectors. It offers more efficiency and security while manning the transparency and anonymity of the network. Many national, international corporations have discussed the mechanism, implementation, and financial and legal aspects of such technology. Many others have talked about the potentials that might be brought about by encouraging such technologies. They have the potential to transform not only payments but also the securities industry, investment banking, accounting and audit and so on. Blockchain has evolved over time to have more than one shape and more than one programming language, hashing algorithms and consensus mechanism. Despite all the potential and benefits generated from Blockchain technology, there are certain legal issues that must be taken into consideration by all parties and especially the legislators, to achieve the best ultimate use of such technology, ensuring at the same time compliance with the law and avoidance of any unexpected, involved risks. These legal issues arise from the unique nature and characteristics of such technology, including multidimensions such as implementation and other related actions like cryptocurrencies and smart contracts.

This paper suggests the following recommendations so as to facilitate safe and proper used of bitcoin.

(a) Raise the level of awareness through producing more research on blockchain technology, especially on the legal and conceptual parts.

(b) Countries should make some movement towards exploring such technology and form a proper legal framework for such technology, especially in the light of the absence of a proper international standard on blockchain technology. Government should also establish a specific authority that governs all the matters related to blockchain.

(c) Regarding the legal part, the researchers suggest a specific Act to provide a general regulatory umbrella for blockchain.

(d) International standard on decentralised technology must be issued in order to achieve unity as to the legal approach for such technology globally. Having a standard or guideline will allow all countries, even with no attention on blockchain, to start making steps by following such guidelines.

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THE PROSPECTS OF ELAWYERING TOWARDS EMPOWERING STRONG JUSTICE INSTITUTIONS IN NIGERIA

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ABSTRACT

The use of information and communication technologies (ICT) continue to affect all human interactions from agriculture, military to commerce, medicine, education and legal practice generally. This has brought about a number of emerging trends, innovations and inventions into legal profession all over the world, one of which is Elawyering. Through it, lawyers, judges, law teachers and even law students use ICT, internet and associated technologies to enhance their productivity and further to establish strong justice institutions, in line with United Nation's Sustainable Development Goal number 16 (SDG16). Nigeria, with the largest number of lawyers, judges and law teachers in Africa is yet to fully embrace this trend. This paper therefore explores the prospects of Elawyering in Nigeria, making case for its full implementation in rules of court, code of conduct for lawyers and law school curricula in Nigeria. It is going to establish that by the use of ICT and internet, Nigerian lawyers can effectively collaborate with their colleagues, wherever they are, to manage pending cases, to draft legal documents, to interview and counsel their clients, to conduct legal research, to deploy AI in their legal practice and many more. Nigerian judges can also use the internet and other gadgets, software and mobile apps to effectively manage their courts, conduct research and give judgements speedily. Hopefully this paper serves as an exploratory point for future researchers undertaking studies on prospects and challenges of ICT in the legal profession.

Keywords: elawyering, legal practice, legal education, strong justice institution, SDG16

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INTRODUCTION

Information and communications technology has been pointed to be a major player in achieving all SDGs, one way or the other. Undoubtedly, there is no other "domain in the recent past had such a strong influence on the development of countries and societies than information and communication technologies (Tjoa & Tjoa, 2016). As the driving force of the SDG is the obligations on all countries to strive at their own level to achieve those goals, the connectivity of all countries and communities brought about by the ICT and internet can accelerate action on the SDGs by all countries.

SDG16 main agenda is the promotion of peaceful and inclusive societies for sustainable development and to provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. Undoubtedly, ICT, internet and associated technologies can play vital role in achieving SDG16, its 12 targets and all its 24 indicators. Through ICT and internet peace can quickly and easily be promoted. Internet and ICT also have great potentials for building all-inclusive society, accountable government and improved access to justice.

ACCESS TO JUSTICE, ICT AND THE INTERNET

In terms of access to justice, ICT and the internet are a great tool in facilitating access to justice and quick dispensation of justice to all. And one very interesting and emerging ways by which ICT facilitates access to justice and fast dispensation of justice at all levels of justice delivery is elawyering.

Simply put, e-lawyering entails all the way lawyers and judges can efficiently do their work and apply their skills using the internet and associated technologies, devices, gadgets, applications and software. By the use of internet and associated gadgets and technologies it is possible to have virtual meetings with colleagues or clients; it is possible to review documents and sign them and, in some jurisdictions, it is even possible to sign, file and serve court processes (Anyim, 2019). Hundreds of trial management software, virtual trial reports, lawyers/litigants video games, informational and demonstrative animations and e-briefs are being developed every day to help lawyer's carryout their jobs with minimum stress and make willing lawyers more productive and skilful. A good example is Cogent Legal, Oakland based litigation graphics and case consulting company at http://cogentlegal.com/what-we-do.

Through elawyering, judges too can now manage their cases and control proceedings effectively. Court officials can by the use of internet and associated devices and services interact with lawyers, litigants and judges quickly and round-the-clock (Anyim, 2021). ICT and internet can be useful tools in quick and fast justice delivery

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without which the prospects of the long-term goals under SDG generally will be bleak. With elawyering the cost of filing and over dependence on paper in courts may be reduced dramatically. And with predictive coding technology and legal analytics companies in US like LexMachina (available at https://lexmachina.com) can, among other things, predict the outcome of patent litigations.

ICT, INTERNET AND COURTS IN NIGERIA

In Nigeria, for very long time, in fact unfortunately, until the COVID-19 in 2020, there wasn't any practical attempt to fully deploy ICT and internet in justice dispensation. And for years this created so many constraints, obstacles, and clogs on the wheel of the justice delivery system in Nigeria and makes SDG16 agenda points practically unachievable in Nigeria. It has been observed that some of the constraints of the conventional justice delivery system in Nigeria are difficulty of filing court processes, insecurity of court documents and lack of transparency (Adelowo, et. Al, 2015).

Nevertheless, through technology, especially by using some software, mobile apps and other gadgets there can be transparency in judicial process. And this will enable lawyers, litigants and even members of general public have online access to completed cases and even can even have access to court proceedings from the comfort of one's rooms or offices. Deploying internet can also enable court officials to quickly attend to queries and applications from lawyers and other members of the public quickly and this will consequently lead to fast justice delivery needed to be achieved under SDG16. There are also good potentials for fast and secure internal communications between court personnel and judges on administration issues which will also eventually positively affect justice delivery and bring an end to unnecessary delays in justice administration.

Nigeria, with over 45 superior courts, hundreds of inferior courts and thousands of legal practitioners, the country is yet to imbibe this new trend. There isn't any practical activity that one can do electronically in any of the courts, from filing of court processes, payments of filing fees to service of court processes, presentation of cases etc (Ani, 2018). Thousands of the Nigerian lawyers don't make use of internet in their legal practice at all. A number of law firms in Nigeria do have websites, so do some electronic law reporting companies and some courts and legislative houses as well. Nevertheless, most of these law firms' websites are mostly for publishing and 'advertising' profiles of their proprietors only – almost all do not have platform for client-lawyer interaction (intranet), interviewing, video conferencing etc, except ordinary emailing (Jimoh, 2020).

Of course, a number of courts in Nigeria also do have websites but besides downloading rules of court and some few decisions one will hardly be able to use the websites for any meaningful lawyering task or research like e-filing, e-payment of fees, eservice, not even to talk of e-conferencing or online presentation of cases

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(Jemilohun, n.d.). Unfortunately, further, the rules of court in Nigeria are yet to incorporate provisions for practical e-filing, e-payments, e-service of processes, e-appearance and etrial as well. The courts, especially the superior courts have not been proactive in making decisions on issues relating to e-service, e-law reporting, e-appearance, service by email, etc. And some of the gadgets and devices enhancing quick dispensation of justice have not been installed in our courtrooms and police stations. Majority of our judges in almost all our courts are still using their hands to take down proceedings.

ROLE OF THE NIGERIAN BAR ASSOCIATION

The Nigerian Bar Association (NBA) is yet to find it necessary and relevant to establish a section on e-lawyering or at least a task force or a committee to continually study the intersection of law, the internet and ICT generally and the practice of law in Nigeria and to recommend where necessary, for changes in our RPC, rules of court, etc. In addition, the NBA is yet to design any programs or projects for members or judges on the use, misuse and abuse of internet and other digital devices and gadgets in the practice of law and delivery of legal services.

Additionally, the National Judicial Council (NJC), which is the regulating body for all judges in Nigeria, has not designed any policy on the use of ICT and Internet by our judges during proceedings. Even with the challenges brought by the novel covid-19 in early 2020, the Nigerian Bar Association has not yet come back from its slumber and promulgate any meaningful policy on elawyering for Nigerian lawyers (Yusuf Ali, 2017). Accordingly, with the huge prospect of elawyering in Nigeria, such widespread advancements could serve as a wakeup call for the Nigerian Bar Association to formulate and put in place the appropriate policies to regulate and facilitate the proper implementation of elawyering.

THE RULES OF PROFESSIONAL CONDUCT 2007/2020

The Nigerian Rules for Professional Conduct for legal practitioners has been in operation since 2007 and has never been reviewed. The code which binds all lawyers in Nigeria, is outdated as code of practice in this digital age because it didn't take care of some of the challenges being posed to legal practice because of the use, misuse and abuse of the internet and associated gadgets and technologies.

In this digital century when the world becomes a global village, when jurisdictional collaboration and networking among lawyers becomes necessary, the code is still prohibiting multidisciplinary collaboration with other professionals, is still sanctioning private investment into the legal practice by non-lawyers and is still outlawing advertisement in this internet age. What could be concluded from this scenario is that the implementation of elawyering has been ongoing for quite some

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time, but it appears that the written rules are still lagging behind such practices. Undeniably, there is urgent need to revise the written rules of legal professional conduct and practice in Nigeria to facilitate the work changes brought about by elawyering.

CONCLUSION

Even though everyone now carries internet in his pocket by carrying any N2,000 ($11.00) worth mobile phone, many Nigerian lawyers, prosecutors, law enforcement agents, judges and other court personnel are not benefitting from the huge untapped resources of the internet (Gadzama, 2013). The justice is still being delivered in a traditional and conventional manner and that is why justice is inaccessible to millions of Nigerian people, especially in the rural area. The few ones in the urban area who can have access to courts face unnecessary delays as most courts don't imbibe ITC and internet in their administration and justice dispensation.

In tandem with the national and world aim to achieve SDG16 and all its targets especially as they relate to access to peace, justice, and strong institutions, Nigerian courts and lawyers should imbibe ICT generally and particularly elawyering. It is a truism that the technology is here to stay, its adoption might not decrease, in fact, the trend has shown that the justice system and the legal profession might further adopt technology in its work routines. Therefore, concerted and appropriate measures and strategies should be in place to facilitate and further enhance the adoption of technologies of the elawyering profession in Nigeria.

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THE SMART CONTRACT AND SMART E-ARBITRAL AGREEMENT IN MALAYSIA: AN OVERVIEW

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ABSTRACT

Modern technologies, such as smart contracts and blockchain technology, have interfered in several industries, including the dispute resolution industry. Malaysia is yet to fully grasp the prospect of using smart contracts and smart e-arbitral agreements. By using doctrinal legal research methodology, this article strives to analyse the legal validity of the smart contracts and smart e-arbitral agreements in Malaysia. The data are collected by using a library-based approach, and they are analytically and critically scrutinised and interpreted by using a content analysis approach. It is found that smart contract offers several advantages; for instance, it is accurate, secured, paper-free, and time and money-saving. Furthermore, the New York Convention 1958 is outdated and not legally sufficient to legalise the smart e-arbitral agreements. In addition, although Malaysian laws are quite developed and sophisticated to indirectly legalise smart contracts and smart e-arbitral agreements, there are several legal vacuum and dilemmas when it comes to both of them. Therefore, it is necessary that lawmakers step in and address these legal dilemmas. Doing so I would enhance the legal certainty and ensure successful use and adoption.

Keywords: E-arbitration, Smart Contract, Smart E-Arbitral Agreement, Blockchain, Dispute Resolution.

INTRODUCTION

Technological innovations and developments continue to reshape our daily lives and how we interact. Specifically, the advances in distributed computing have paved the

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way for the birth of blockchain technology and smart contracts. Both offer many new opportunities within the dispute resolution industry in general and, specifically, in the traditional arbitration industry.

Blockchain appeared to the public when Satoshi Nakamoto (Unknown individual or group of individuals) published in 2008 the whitepaper which described a "purely peer-to-peer version of electronic cash" known as Bitcoin (Nakamoto, 2008). Several definitions have been offered for blockchain technology, however, most of them are too technical or too application-specific (Sultan, Ruhi & Lakhani, 2018). For example, blockchain technology is defined as "a distributed, public ledger that contains the history of every bitcoin transaction" (Coinbase, 2021). However, this definition is more appropriate for Bitcoin (a digital cryptocurrency) instead of the blockchain. Besides, Blockchain is defined as an "open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way" (Iansiti & Lakhani, 2017).

From a linguistic point of view, Merriam Webster defined blockchain as "a digital database containing information (such as records of financial transactions) that can be simultaneously used and shared within a large decentralized, publicly accessible network" (Merriam Webster, 2021).

Blockchain is divided into a private and public blockchain. Both are immutable and distributed networks that are secured by using consensus and cryptography protocols. However, the difference between them is that in the private blockchain, only trusted and pre-designated users are permitted to write and read in it, while in the public blockchain, anyone can write and read the data on it (Shehata, 2018). Furthermore, blockchain is highly secured and protected from cyber threats and breaches because it maintains data on various nodes, and for a cyber breach to occur, more than fifty-one per cent (51%) of the nodes should be hijacked and compromised (Macrinici, Cartofeanu & Gao, 2018). Therefore, blockchain technology provides more "security, transparency of record, traceability, and lower operational costs" (Bambara et al., 2018).

Smart contract is one of the blockchain applications. In 1994, Nick Szabo (an American Cryptographer) invented smart contracts. He introduced the term "smart contract" in his article (Szabo, 1994). Smart contract is defined as "a self-executing set of electronic instructions written into lines of code" (Rodsphon, 2021). In other words, it is "a software program built on the blockchain" (Tevendale & Morgan, 2018). Therefore, the main difference between smart contract and traditional contract is that smart contract is a computer code that is executed automatically and stored in the blockchain platform once the predetermined conditions are fulfilled, or the triggering event happens (it follows IF-THEN semantics). However, traditional contract is a set of agreed-upon terms described in a natural language (human language) and enforced by law (Lease Pilot, 2021). The following example illustrates

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how smart contract works. For instance, a smart contract could include the travel insurance terms, which might be automatically executed once a flight is late more than three (3) hours.

Regarding the smart e-arbitral agreement, it is worth noting that no normative and standard definition covers the term "smart e-arbitral agreement". Therefore, this article defines the term "smart e-arbitral agreement" as an "agreement by the disputed parties to recourse to arbitration specific or all disputes that arise or would arise between them in respect of a defined legal relationship, whether contractual or not. This agreement is written into lines of code and stored in the blockchain platform." So, the main difference between smart e-arbitral agreement and traditional arbitral agreement is that traditional arbitral agreement is described in a natural language (human language) instead of computer coding as used to be in the smart e-arbitral agreement.

In Malaysia, there is a growing interest in both smart contracts and blockchain technology (Zain et al., 2019). However, the legal validity of the smart contracts and smart e-arbitral agreements remains mysterious. For this reason, this article strives to examine several issues. Firstly, the advantages and disadvantages of the smart contracts. Secondly, the validity of smart contracts and smart e-arbitral arbitral agreements in Malaysia. Thirdly, the validity of smart e- arbitral agreements according to the New York Convention 1958.

THE ADVANTAGES AND DISADVANTAGES OF THE SMART CONTRACTS

Smart contract offers several advantages. The following highlights the main advantages; for instance, a smart contract is secured and accurate because it is encrypted and stored on an immutable blockchain platform (Corporate Finance Institute, 2021). This keeps it safe from infiltration and hinders unwanted alterations and modifications to the terms and conditions of the smart contract. In addition, a smart contract is paper-free because, as mentioned before, it is computer code. This would help in reducing the environmental destruction and paper-use. Besides, a smart contract is time and money-saving because it is self-enforced and executed. This would increase efficiency compared with a traditional contract that requires several stages to be enforced.

On the other hand, a smart contract has several disadvantages; for instance, it works based on the data feed. So, inaccurate coding might generate unforeseen performance problems (Rogers, Fenleigh & Sanitt, 2017). In addition, smart contract is irrevocable. This means that the parties have no power to terminate or revoke their smart contract for repudiatory breach, and they could not unwind it due to the mistake, misrepresentation, or duress.

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Furthermore, there is a difficulty in determining the applicable governing law and jurisdiction in the smart contract. This is because the smart contract is operated through a distributed nodes "computers" that might be based or located around the world. In this regard, it is argued that electronic arbitration (e-arbitration), which is one of the online dispute resolution mechanisms, would be a better option to resolve the dispute arising from smart contract than litigation because e-arbitration is flexible and enables the parties to agree, in advance, on the applicable procedural and substantive law.

THE VALIDITY OF SMART CONTRACTS AND SMART E-ARBITRAL ARBITRAL AGREEMENTS IN MALAYSIA

Smart contracts have not yet been regulated in Malaysia. However, smart contracts are legally legitimate and valid once they meet specific requirements stipulated in Electronic Commerce Act 2006 (Act 658) (hereinafter referred to as "Act 658"). In fact, the electronic message is defined under section 5 of Act 658 as "an information generated, sent, received or stored by electronic means". Furthermore, section 7 of Act 658 provides that contracts formed through electronic means are valid. It states that.

> In the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message.
>
> A contract shall not be denied legal effect, validity or enforceability on the ground that an electronic message is used in its formation.

A joint reading of the above sections shows that smart contracts could be legitimate and valid in Malaysia since it consists of a set of electronic records (ER) that are sent and stored in the blockchain platform by the parties.

Concerning the validity of the smart e-arbitral agreements, section 9 (3) of Arbitration Act 2005 (Act 646) (hereinafter referred to as "Act 646") states that "An arbitration agreement shall be in writing". Further, section 9 (4) (a) of Act 646 indicates that.

> An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

In addition, section 9 (4A) of Act 646 explains how the requirement of "in writing" can be fulfilled. It stipulates that.

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> The requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference.

Section 9 (6) of Act 646 defines a data message. It states that.

> For the purpose of this section, "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.

A joint reading of sections 9 (4A) and 9(6) shows that the smart e-arbitral agreements, which have been made by using data message, would meet the requirement of "in writing". This happens if its content is accessible so as to be useable for subsequent reference. Since the smart e-arbitral agreements are recorded and stored on the blockchain platform that is immutable and readable for subsequent reference, the smart e-arbitral agreements could be valid and legitimate in Malaysia. Regardless of the previous facts and arguments, a coherent and clear regulatory framework should be introduced to make smart contracts and smart e-arbitral agreements enforceable in Malaysia.

THE VALIDITY OF THE SMART E-ARBITRAL AGREEMENTS ACCORDING TO THE NY CONVENTION 1958

The following discusses the validity of the smart e-arbitral agreement in the context of the New York Convention 1958 (hereinafter referred to as "NY Convention 1958"). The rationale is that NY Convention 1958 has been described "as the single most important pillar on which the edifice of international arbitration rests, and perhaps it is the most effective instance of international legislation in the entire history of commercial law" (Redfern & Hunter, 2010, pp. 133).

Malaysia has signed the NY Convention 1958 on 5th November 1985 (The Contracting States, 2021). The NY Convention 1958 contains two conventions. The first convention governs the conclusion and recognition of the traditional arbitration agreements (Article II), and the second convention governs the recognition and enforcement of the foreign and non-domestic arbitral awards (Article I). Regarding the formal requirements of a valid traditional arbitral agreement, article II (1) of the NY Convention 1958 states that "Each Contracting State shall recognise an agreement in writing" (article II (1)). Article II (2) further explains the meaning of "in writing" by providing two options for fulfilling this requirement; firstly, the arbitral clause/agreement signed by the parties (option I); secondly, the arbitral clause/agreement was contained in an exchange of letters or telegrams (option II).

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Based on the earlier facts, it is clear that article II covers only the arbitral agreement in its traditional legal sense (in writing), but not the smart e-arbitral agreement. This legal vacuum has been addressed by the UNCITRAL. Specifically, in 2006, the UNCITRAL recommends the Contracting States to apply article II of the NY Convention 1958 recognising that the circumstances described therein are not exhaustive. This, in turn, means that article II should be read in a way that covers the electronic means of communication. So, this might pave the way to recognise the smart e-arbitral agreement. Nevertheless, there is a need to modernise and reform NY Convention 1958 to legalise clearly the smart e-arbitral agreements. Doing so will eliminate the uncertainty in interpreting and applying article II of the NY Convention 1958.

CONCLUSION

Modern technologies, such as smart contracts and blockchain technology, have interfered in several industries, including the dispute resolution industry, because of their advantages. For instance, it is accurate, secured, paper-free, and time and money-saving. Malaysia is yet to fully grasp the prospect of using smart contracts and smart e-arbitral agreements. At the international level, even though the recommendations issued by the UNCITRAL could provide a starting point to legalise the smart e-arbitral agreements in the context of article II of the NY Convention 1958, the international community should put more effort to reform this convention. At the domestic level, it is argued that although Malaysian laws are quite developed and sophisticated to indirectly legalise the smart contracts and smart e-arbitral agreements, there are several legal vacuum and dilemmas when it comes to both of them. Therefore, it is necessary that lawmakers step in and address these legal dilemmas. Doing so would enhance the legal certainty and ensure successful use and adoption. Finally, further research could examine whether smart contracts and smart e-arbitral agreements fulfil the substantive requirements of traditional contracts, such as consent.

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FAMILY LAW

KEGANASAN RUMAH TANGGA MENURUT PERSPEKTIF UNDANG-UNDANG JENAYAH

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THE RELEVANCY OF THE FAMILY SUPPORT DIVISION (FSD) IN IMPLEMENTING THE COURT'S ORDER DURING COVID – 19 PANDEMICS: THE PRACTICE IN THE STATE OF KEDAH

Anis Shuhaiza Md Salleh & 'Ain Husna Mohd Arshad

BABY DUMPING: ITS PUNISHMENT UNDER THE LAW AND PROTECTIONS AVAILABLE IN MALAYSIA

'Ain Husna Mohd Arshad & Anis Shuhaiza Md Salleh

KEGANASAN TERHADAP PASANGAN INTIM DARI PERSPEKTIF PERUNDANGAN MALAYSIA

Nazli Mahdzir & Asmar Abdul Rahim

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KEGANASAN RUMAH TANGGA MENURUT PERSPEKTIF UNDANG-UNDANG JENAYAH

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ABSTRAK

Keganasan rumah tangga (KRT) boleh ditakrifkan sebagai perbuatan yang menyebabkan kecederaan atau bencana kepada mangsa yang dilakukan oleh seseorang yang biasanya dikenali dan mempunyai hubungan kekeluargaan dengan mangsa. KRT merupakan salah satu masalah sosial yang serius di negara ini. Statistik daripada Polis Diraja Malaysia menunjukkan kes-kes KRT semakin membimbangkan kerana ia bukan sekadar mengakibatkan kecederaan fizikal dan mental kepada mangsa tetapi juga boleh mengakibatkan kematian. Akta Keganasan Rumah tangga 1994 (AKRT) dan Kanun Keseksaan (KK) merupakan dua akta utama yang dikuatkuasakan bagi menangani masalah KRT di negara ini. Kertas kerja ini bertujuan untuk menganalisis kesalahan-kesalahan jenayah di bawah KK yang boleh dikenakan kepada pesalah KRT. Selain daripada mengkaji peruntukan yang berkaitan di bawah KK, kertas kerja ini turut menganalisis kes-kes mahkamah dan statistik yang berkaitan dari Jabatan Kebajikan Masyarakat. Dapatan kajian menunjukkan KK menyediakan pelbagai jenis kesalahan jenayah yang boleh dikenakan ke atas pesalah KRT. Gabungan AKRT dan KK boleh dianggap sebagai rejim yang komprehensif untuk melindungi mangsa KRT dan menghukum pelakunya. Bagaimanapun, undang-undang yang ketat semata-mata tetap tidak dapat menghapuskan jenayah KRT secara total. Peranan masyarakat dan mangsa KRT sendiri amat diperlukan untuk menangani masalah KRT dengan lebih efektif. Persepsi masyarakat bahawa KRT hanyalah sekadar masalah rumah tangga perlu diubah. Paling penting, mangsa KRT perlu membuang rasa malu dan lebih berani untuk tampil ke hadapan agar pesalah dapat dihukum dengan sewajarnya dan mereka sendiri dapat keluar dari belenggu KRT dan menikmati kehidupan dengan lebih bahagia.

Kata kunci: undang-undang jenayah, keganasan rumah tangga, perlindungan

PENGENALAN

Keganasan rumah tangga (KRT) boleh ditakrifkan sebagai perbuatan yang menyebabkan kecederaan atau bencana kepada mangsa yang dilakukan oleh seseorang yang biasanya dikenali dan mempunyai hubungan kekeluargaan dengan mangsa (Randawar & Jayabalan, 2018). Terdapat tiga bentuk KRT yang sering berlaku iaitu keganasan secara fizikal, tekanan mental, dan keganasan secara seksual (Women Aid Organisation, 2017). KRT merupakan salah satu masalah sosial yang serius di negara ini yang sering menjadikan golongan wanita sebagai mangsa utama. KRT boleh berlaku kepada sesiapa sahaja tanpa mengira taraf hidup, agama, budaya dan tahap pendidikan (Bernama, 2020). Menurut

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Jabatan Kebajikan Masyarakat (2018), terdapat enam faktor utama berlakunya KRT iaitu perselisihan faham, panas baran, masalah kewangan, cemburu, penagihan dadah dan campur tangan pihak ketiga.

Statistik daripada Polis Diraja Malaysia menunjukkan kes-kes KRT semakin membimbangkan kerana ia bukan sekadar mengakibatkan kecederaan fizikal dan mental kepada mangsa tetapi juga boleh mengakibatkan kematian (Rahman, A.A. et al, 2020). Peningkatan kes KRT saban hari telah memberi isyarat penting bahawa masalah sosial ini harus ditangani dengan segera dan sebaik mungkin. Akta Keganasan Rumah tangga 1994 (AKRT) dan Kanun Keseksaan (KK) merupakan dua akta utama yang digunakan bagi menangani masalah KRT. AKRT memperuntukkan pelbagai mekanisme perlindungan kepada mangsa KRT, manakala pelaku KRT boleh dihadapkan ke mahkamah berdasarkan kesalahan-kesalahan jenayah di bawah KK.

Kertas kerja ini bertujuan untuk menganalisis kesalahan-kesalahan jenayah di bawah KK yang boleh dikenakan kepada pesalah KRT. Dengan menggunakan metodologi kajian perundangan, melalui pendekatan secara deskriptif dan kajian perpustakaan, peruntukan KK yang berkaitan telah dianalisis secara kritikal. Selain itu kertas kerja ini turut menganalisis kes-kes mahkamah dan statistik yang berkaitan dari Jabatan Kebajikan Masyarakat.

KESALAHAN-KESALAHAN KRT DI BAWAH KANUN KESEKSAAN

Kebanyakan kes KRT yang berlaku melibatkan kesalahan jenayah yang boleh dihukum di bawah KK. Pelaku boleh didakwa atas kesalahan-kesalahan terhadapi tubuh badan, termasuk membunuh di bawah seksyen 300. Kesalahan yang lebih kecil biasanya melibatkan kesalahan mencederakan (seksyen 319), mendatangkan kecederaan parah (Seksyen 320) dan melakukan kekerasan jenayah (seksyen 350).

Seksyen 321 KK memperuntukkan kesalahan dengan sengaja menyebabkan kecederaan dan sekiranya didapati bersalah, tertuduh berhadapan dengan hukuman penjara bagi tempoh setahun maksima, atau denda dua ribu ringgit, atau dengan kedua-duanya sekali. Seksyen 324 pula membincangkan tentang kesalahan menyebabkan kecederaan dengan menggunakan senjata atau benda-benda lain yang merbahaya. Untuk menentukan sama ada sesuatu kesalahan boleh dikenakan di bawah seksyen ini, mahkamah hanya perlu melihat kepada sifat senjata yang digunakan sama ada boleh menyebabkan kematian atau pun tidak. Dalam kes Mat Alias bin Mat Jusoh [2000] MLJU 119, mahkamah perlu memutuskan sama ada kayu golf adalah senjata yang boleh disabitkan dengan kesalahan di bawah seksyen 324. Mahkamah berpendapat bahawa kayu golf boleh bertukar menjadi senjata yang menyebabkan kecederaan mengikut seksyen 324 apabila digunakan sebagai senjata. Sementara dalam kes Ng Ah Taik [1959] MLJ 19, mahkamah memutuskan bahawa asid juga merupakan sesuatu yang boleh dikategorikan sebagai senjata mengikut seksyen 324. Bagi kesalahan sebegini, mahkamah berpendapat perlu dikenakan hukuman yang berat terhadap tertuduh yang didapati bersalah. Penggunaan pistol, kapak, keris, tukul atau pisau merupakan benda yang boleh terjatuh di bawah maksud senjata mengikut

seksyen 324. Barang siapa dengan sengaja menyebabkan cedera parah, hendaklah dihukum penjara selama tempoh tujuh tahun maksima dan boleh juga dikenakan denda.

Selain daripada kesalahan berkaitan mendatangkan kecederaan, mangsa KRT juga boleh membuat dakwaan di bawah seksyen 350 bagi kesalahan melakukan kekerasan jenayah. Ia ditakrifkan sebagai kekerasan yang dilakukan oleh seseorang dengan niat atau pengetahuan untuk melakukan sesuatu yang menyalahi undang-undang yang menyebabkan bencana, ketakutan atau kegusaran kepada seorang yang lain. Seksyen ini memerlukan mangsa dan tertuduh berada bersama semasa kekerasan ini dilakukan. Sekiranya didapati bersalah tertuduh boleh dikenakan hukuman penjara selama tiga bulan atau didenda sebanyak seribu ringgit atau kedua-keduanya.

Seksyen 326 pula memperuntukkan tentang kesalahan menyebabkan cedera parah menggunakan senjata atau lain-lain benda yang merbahaya. Penggunaan senjata seperti pisau, parang, pistol atau senjata lain boleh disabitkan dengan kesalahan di bawah seksyen ini. Dalam kes Chan Ah Moi lwn Phang Wai Ann [1994] 3 MLJ 130, plaintif (isteri) telah diserang oleh defendan (suami) dengan sebilah pisau panjang dan mengakibatkan kecederaan serius kepada plaintif. Defendan telah ditangkap dan disabit atas kesalahan di bawah seksyen 326 KK. Plaintif seterusnya memohon perintah untuk tidak dicabul oleh suami dan perintah menghalang suami dari memasuki mana-mana bahagian rumah tempat tinggal plaintif. Mahkamah telah membenarkan perintah tersebut.

Seksyen 354 pula memperuntukkan tentang kesalahan kekerasan jenayah dengan niat untuk mencabul kehormatan. Untuk disabitkan dengan kesalahan ini, tertuduh hendaklah dibuktikan mempunyai niat atau pengetahuan untuk mencabul kehormatan seseorang itu. Dalam kes Rupan Deol Bajaj lwn KPS Gill [1996] Cri LJ 381, mahkamah memutuskan bahawa kehormatan bermaksud maruah seorang wanita yang harus dihormati. Dalam kes Pendakwa Raya lwn Razali Hamzah [2003] 3CLJ 177, tudung mangsa telah ditarik hingga tercabut, mangsa ditolak hingga terjatuh dan berlaku pergelutan sebelum tertuduh menyelak kain dan menyentuh bahagian sulit mangsa. Kecederaan yang dialami mangsa telah disokong oleh keterangan perubatan dan rayuan tertuduh terhadap sabitan bagi kesalahan di bawah seksyen 354 telah ditolak.

Seksyen 503 membincangkan kesalahan menakutkan secara jenayah. Elemen-elemen yang penting dalam ugutan jenayah di bawah seksyen ini ialah mengancam mangsa dengan apa-apa kecederaan dan niat untuk menyebabkan ketakutan kepada mangsa. Dalam kes Sinnasamy A / L Kaliappan lwn Pendakwaraya [2005] MLJU 199, perayu telah melakukan kesalahan menakutkan secara jenayah iaitu dengan menggunakan sebilah parang terhadap Sellamah a / p Nalli. Menurut fakta kes, semasa mangsa keluar dari rumah, beliau melihat tertuduh memegang parang yang dibawa keluar dari sebuah kereta. Tertuduh mengugut mangsa dengan meminta beliau untuk membayar sejumlah RM50,000 dalam tempoh lima hari, jika tidak, tertuduh akan membunuh mangsa dan keluarganya. Tertuduh juga menuntut kembali isterinya, iaitu anak perempuan mangsa yang ketika itu di dalam rumah mangsa untuk pulang ke Masai Johor. Mahkamah memutuskan perayu telah melakukan kesalahan di bawah seksyen 503 KK.

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Selain kesalahan terhadap tubuh badan, kesalahan berkaitan seksual seperti rogol (seksyen 375) dan melakukan persetubuhan yang bertentangan dengan aturan tabii (seksyen 377A) boleh dikenakan terhadap pelaku. Walaupun seksyen 375 KK menganggap persetubuhan oleh seorang suami dengan isterinya yang sah di sisi undang-undang bukanlah rogol, Huraian 1 menyatakan seorang perempuan yang tinggal berasingan dari suaminya di bawah dekri pemisahan kehakiman atau suatu dekri tidak dibuat mutlak; atau yang memperoleh injunksi menyekat suaminya dari melakukan persetubuhan dengannya, hendaklah disifatkan sebagai bukan isteri bagi maksud seksyen ini. Manakala Huraian 2 menyatakan seorang perempuan Islam yang tinggal berasingan dari suaminya dalam tempoh iddah, yang mana akan dihitung mengikut Hukum Syarak, hendaklah disifatkan sebagai bukan isteri suaminya bagi maksud seksyen 375. Oleh itu suami boleh dianggap merogol isterinya dalam keadaan-keadaan tersebut.

Selanjutnya di bawah seksyen 375A, jika suami mencederakan isterinya atau meletakkan isterinya atau orang lain dalam ketakutan, kematian atau kecederaan dengan tujuan mengadakan hubungan seks, suami boleh dihukum penjara tidak melebihi lima tahun jika sabit kesalahan. Peruntukan-peruntukan ini secara tidak langsung telah menerima pakai undang-undang rogol dalam perkahwinan di Malaysia.

Jadual 1- Kes Keganasan Rumah Tangga Mengikut Jenis Keganasan 2019

No	Jenis Keganasan	Jumlah
1	Sengaja atau cuba meletakkan mangsa dalam keadaan ketakutan kecederaan fizikal	220
2	Menyebabkan kecederaan atau mencederakan mangsa secara fizikal	363
3	Memaksa atau mengancam untuk melakukan perbuatan berbentuk seksual atau selainnya yang mana mangsa itu berhak untuk tidak melakukannya	29
4	Mengurung atau menahan mangsa tanpa kerelaan mangsa	1
5	Melakukan khianat atau memusnahkan atau merosakkan harta dengan niat untuk menyebabkan kesedihan atau kegusaran kepada mangsa	15
6	Melakukan penderaan secara psikologi dan emosi terhadap mangsa	42
7	Menyebabkan mangsa mengalami delusi dengan menggunakan bahan memabukkan tanpa kerelaan mangsa	3
8	Menyebabkan kanak-kanak mengalami delusi dengan menggunakan bahan yang memabukkan	0
	Jumlah	673

(Sumber: Laporan Statistik JKM 2019)

Jadual 1 menunjukkan statistik jenis kesalahan yang dilaporkan kepada JKM sepanjang tahun 2019. Daripada 673 kes yang dilaporkan, lebih daripada 50 peratus iaitu sebanyak 363 kes adalah berkenaan kesalahan mendatangkan kecederaan kepada mangsa, diikuti oleh kesalahan meletakkan mangsa dalam keadaan ketakutan dicederakan secara fizikal sebanyak 220 kes. Penderaan secara psikologi dan emosi turut dilaporkan iaitu sebanyak

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42 kes, manakala kesalahan seksual ialah sebanyak 29 kes dan 15 kes melakukan khianat. Hanya 3 kes menyebabkan mangsa mengalami delusi dan 1 kes mengurung mangsa.

Statistik di atas jelas menunjukkan kebanyakan kes KRT adalah berkaitan kesalahan ke atas tubuh badan yang boleh dikenakan ke atas pelaku di bawah KK. Ramai yang berpendapat kebanyakan pelaku kes KRT hanya didakwa atas kesalahan kecil dan dikenakan hukuman yang tidak setimpal dengan penderitaan yang dialami oleh mangsa KRT. Pandangan ini tidak semestinya benar kerana terdapat kes pelaku yang didakwa atas kesalahan membunuh. Dalam kes T. Paramasparan A/L Thanigajalam lwn Pendakwa Raya [2012] 2 MLJ 545, tertuduh telah didapati bersalah membunuh isterinya yang sarat mengandung. Laporan perubatan menunjukkan si isteri telah dipukul bertubi-tubi dengan senjata tumpul yang menyebabkan kematiannya. Sebelum kejadian, jiran-jiran sering mendengar pasangan suami isteri tersebut bergaduh disebabkan si suami menuduh isterinya mempunyai hubungan sulit dengan abangnya sendiri. Kes ini mendedahkan betapa masalah rumah tangga boleh berakhir dengan tragedi yang boleh meragut nyawa. Si suami akhirnya dijatuhi hukuman gantung sampai mati.

Jelaslah pelaku KRT boleh didakwa di bawah KK berdasarkan kepada pelbagai kesalahan jenayah ke atas tubuh badan, seksual atau harta benda mangsa. Kes akan dibicarakan sepenuhnya di bawah undang-undang jenayah. Sehubungan itu juga, beban pembuktian juga adalah mengikut undang-undang jenayah iaitu melebihi keraguan yang munasabah (beyond reasonable doubt). Mahkamah akan menghukum pelaku sekiranya semua elemen yang ada dalam KK dipenuhi dan dibuktikan.

Sebagaimana yang telah dinyatakan, selain KK, AKRT turut menyediakan pelbagai bentuk perlindungan kepada mangsa KRT. Ia dapat dilihat menerusi Jadual 2 seperti berikut:

Jadual 2- Kes Keganasan Rumah Tangga Mengikut Jenis Tindakan 2019

No	Jenis Tindakan	Jumlah
1	Diberi Perintah Perlindungan Sementara	227
2	Diberi Perintah Perlindungan	49
3	Diberi kaunseling di Pejabat Kebajikan Masyarakat	71
4	Dirujuk ke Badan Pendamai	16
5	Diberi perlindungan di tempat selamat	34
6	Dirujuk ke agensi lain (Mahkamah Syariah, Mahkamah Sivil dan Biro Bantuan Guaman)	70
7	Pindah tinggal berasingan	61
8	Lain-lain	145
	Jumlah	673

(Sumber: Laporan Statistik JKM 2019)

Daripada 673 kes yang dilaporkan sebanyak 227 perintah perlindungan sementara dan 49 perintah perlindungan telah dikeluarkan bagi melindungi mangsa KRT daripada terus

diganggu oleh pelaku. AKRT turut menyediakan khidmat kaunseling di mana 71 kes telah dirujuk ke JKM untuk tujuan tersebut. 16 kes telah dirujuk ke Badan Pendamai manakala 34 kes diberikan perlindungan di tempat selamat yang digazet di bawah JKM. Selain itu sebanyak 70 kes telah dirujuk ke Mahkamah Syariah, Mahkamah Sivil dan Biro Bantuan Guaman, manakala sebanyak 61 kes memilih untuk tinggal berasingan daripada pelaku sama ada pindah ke rumah ibu bapa, saudara mara atau rakan baik.

KESIMPULAN

Malaysia mempunyai undang-undang yang komprehensif untuk menangani jenayah KRT. AKRT melalui pindaan pada tahun 2017 telah menyelesaikan banyak masalah perundangan yang membelenggu mangsa KRT selama ini. Ia telah menambah baik kelemahan sebelum ini bagi memastikan AKRT kekal relevan dengan situasi semasa. Hak dan perlindungan kepada mangsa KRT adalah lebih terjamin. Manakala KK pula menyediakan pelbagai bentuk kesalahan jenayah yang boleh dikenakan kepada pelaku KRT. Bagi memastikan undang-undang ini boleh dikuatkuasakan dengan lebih efektif kerjasama mangsa KRT sendiri adalah sangat diperlukan. Mereka perlu membuang rasa malu dan lebih berani untuk tampil ke hadapan agar pesalah dapat dihukum dengan sewajarnya dan mereka sendiri dapat keluar dari belenggu KRT bagi menikmati kehidupan dengan lebih bahagia. KRT bukanlah semata-mata masalah rumah tangga antara pasangan suami isteri, sebaliknya ia ialah masalah sosial yang mempunyai pelbagai impak negatif kepada institusi keluarga khasnya dan negara amnya.

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THE RELEVANCY OF THE FAMILY SUPPORT DIVISION (FSD) IN IMPLEMENTING THE COURT'S ORDER DURING COVID – 19 PANDEMICS: THE PRACTICE IN THE STATE OF KEDAH

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ABSTRACT

The issue of implementing the Syariah court's order has been taken seriously by the Syariah courts itself. Thus, upholding the principle that the court is not only delivering the order but also ensuring its order is being implemented, the Family Support Division (FSD) was established in 2009. The functions of it are undeniable in assisting parties particularly wives (or former wives) and children to get the order early made by the court is being followed by the husband (former husband) or father. The paper seeks to highlight the significant roles played by the FSD particularly in the era of covid - 19 pandemic in general and focus is made to its operation in the state of Kedah. The research found that the FSD is still relevant even during pandemic but due to Movement Control Order (MCO), where adjustment and adaptability to a new norm need to be made, the registered cases seemed to decrease. Nevertheless, continuous effort and initiative taken by the FSD helps those in need of assistance accordingly. By adopting qualitative research, the data is gathered through library-based research and interview with two prominent figures to the FSD, the Director General / Syariah Chief Justice of JKSM, who is also the former Director of Family Support Division, Department of Syariah Judiciary Malaysia and the Senior Deputy Director of Kedah FSD. Hence, a clearer picture is gained theoretically and practically.

Keywords: Family Support Division, Department of Syariah Judiciary, Covid–19 Pandemic, Syariah court's, maintenance

INTRODUCTION

The existence of the Family Support Division (FSD) under the Department of Syariah Judiciary of Malaysia (DSJM) is a way-out to many in order to get the court's order implemented through involvement of the court itself. The establishment of it is only found in the Syariah justice system and not in its civil counterpart. Notably, there is no corresponding division in the civil court to carry out a similar function as the FSD. This is due to a long-accepted principle in civil law that the court's function is to decide on the dispute based on evidence brought before it. Precisely, the court provides a mechanism

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for the resolution of disputes. (Ali Mohamed, A. A., 2014). Specifically, it was mentioned that a court is functus officio by merely delivers a decision, and it is not within the court's duty to enforce its order (Mokhtar, M. N. (personal communication, December 30, 2014).

On top of that the Syariah court operates on a separate concept than the one practised in a civil court (Mokhtar, M. N., 2015). Therefore, until and unless that accepted principle in the civil court changes, in the sense that the civil court is ready to enforce its own orders, a similar division may also be created for non-Muslims under the civil court. Since the FSD is established under the DSJM, its initial aim is to enforce the Syariah court's order particularly on maintenance of a wife and children. Through the establishment of it, the FSD is seen to effectively play its role in eliminating family related problems. Evidently, it has been mentioned that the FSD has succeeded in settling many maintenance cases for wives and children in many states, such as Selangor, Penang, Johore, Kuala Lumpur, Negeri Sembilan, Terengganu and Perlis.

Since its establishment, the respective FSDs managed to recover funds and maintenance arrears from the husbands or fathers. To highlight the success of the FSD in its early days, it had been reported to disburse funds from Majlis Agama Islam Wilayah Persekutuan (MAWIP) totalling RM150, 000.00, to qualified single mothers in the Federal Territories of Kuala Lumpur and Putrajaya between June 2009 to March 2011 (Mokhtar, M. N., 2012). Meanwhile, in September 2010, 70 single mothers received FSD maintenance funds totalling RM200, 000.00 from the federal fund (Mokhtar, M. N., 2012). Nevertheless, in 2020, when the unprecedented pandemic Covid -19 started to hit around the country, government had to announce the Movement Control Order 1.0 (MCO) and subsequent orders as one of strategies to avoid the spread, many sectors and economic activities were affected. Consequently, operation of services including legal and judicial services were temporarily stopped. Hence, impacted the operation of the FSD including those in the state.

Together with discussion about FSD in general, this paper attempts to highlight the operation of it in the state of Kedah during pandemic.

THE ESTABLISHMENT OF THE FSD

The establishment of the FSD also known as Bahagian Sokongan Keluarga Jabatan Kehakiman Syariah Malaysia (BSK JKSM) on 22 October 2008 is an initiative taken by the Department of Syariah Judiciary Malaysia (DSJM) to overcome problems with implementations of the Syariah courts' orders. It is a unit in the DSJM, which also becomes part of the court's role in ensuring that the court's order is followed and executed accordingly.

Initially, the division was created due to numerous complaints concerning the implementation and enforcement of maintenance orders. The FSD commenced operation in April 2009 with the objective to protect the interest of those who have the right to receive maintenance after the order has been made by the court. The FSD provides

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advance maintenance to the qualified individuals after due inquiry and consideration made by the Jawatankuasa Akaun Amanah.

The Functions of the FSD

The role of the FSD could probably be effectively seen to be played particularly in assisting Muslims' families as its objectives of establishment among others are to enforce maintenance orders that have been ordered by the Syariah Courts; ensure no wife or children faced the alimony problems; ensure that the Syariah Court's order are respected and implemented and to provide support services to Muslim families in all matters involving the Syariah Court. More specifically, the FSD renders legal advice to Muslims on alimony in a Syariah court, provide living assistance to wives and children, who are in need of maintenance, collect from parties ordered to pay alimony, distribute maintenance to those who are entitled to maintenance and find funds for payments of insufficient maintenance (Department of Syariah Judiciary Malaysia, n.d.).

Thus, the FSD is seen as a proactive step taken by the government to have the Syariah court's order respected and implemented by all parties. It is worth noting that as maintenance is one of religious obligations on part of husband / father and as a right of wife and children. The obligation remains on him even for working wife. Thus, the court in its capacity would try to ensure that the parties perform this obligation, and the rights are given appropriately. Even though the focus of the FSD is to enforce maintenance orders, its functions are wide enough to provide support services to Muslim families in all matters involving the Syariah court. Reasonably, this may extend to issues such as custody and access of a child and matters arising therein. However, such extension is yet carried out. By doing so, the court may be said to completely serve its function, as the court's function is not only to decide on a matter but also to ensure execution of its order (Mokhtar, M. N. (personal communication, December 30, 2014).

It is important to highlight that the function of the FSD is to be extended not only to ensure that a maintenance order is properly executed, but it also covers other orders of the court, especially matters which need urgent and strict compliance, such as the custody of the court. With its extension, the court's functions are also extended to not only decide on a child's custodian, but also to ensure that the custody order and its conditions are fulfilled.

The Operation of the FSD

Basically, the FSD has three units, namely, Consultation and Legal Advice (Unit Khidmat Nasihat Perundangan / UKNP), Enforcement and Implementation of Order (Unit Penguatkuasaan dan Pelaksanaan Perintah / UPPP) and Fund Management (Unit Pengurusan Dana / UPD). A wife or complainant who wishes to make a complaint regarding maintenance may get some advice from the UKNP, which is responsible to hear complaints and give advice to the complainant whose husband/former husband failed to comply with the child maintenance order. Upon receiving the complaint, the Unit will issue a notice of attendance to the husband/father, for the purpose of investigation. If the investigation

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reveals that he has failed to comply with the maintenance order, the FSD officer will conduct a discussion session, known as mediation, between the parties. If the father is absent at the session, the case will be forwarded to the UPPP for the enforcement process (Department of Syariah Judiciary Malaysia, 2013).

During mediation, the FSD officer will help the parties to communicate effectively, so that a settlement can be reached. Upon reaching a settlement, both parties will sign a settlement agreement, which is attached together with the pleading that will be filed at the Syariah Court by the FSD officer from the UPPP. Then, the Court will record it as a consent judgment, binding on both parties. In the situation where settlement fails, the execution and enforcement will be made by the UPPP. While waiting for the whole process of execution and enforcement to be completed, the officer at the UKNP shall make a recommendation to the UPD to give advance maintenance particularly to children, according to the amount stated in the maintenance order (Department of Syariah Judiciary Malaysia, 2013).

In addition to that, FSD -Transit has been launched in 2010, to provide services in terms of accommodation, transport and food without any charge, to any parties attending court proceedings in the Federal Territory of Kuala Lumpur. Priority is given to those in need and lack of financial means to come to the Syariah court. The existence of these services will contribute to the smooth running of court proceedings and reduce backlog of cases which are caused by the absence of parties claiming the distance and cost as excuses. In implementing this plan, FSD receives support from the Property and Land Management Division of the Prime Minister's Department which contributes two units of apartment in Putrajaya, and other cooperation given by Tunes Hotel in Kuala Lumpur, Johor, Sarawak, Penang and Sabah (Department of Syariah Judiciary Malaysia, 2013).

The relevancy of the Kedah FSD during pandemic

Correspondingly, the involvement of the Kedah FSD is traceable in cases of maintenance of wife, children and iddah. Recently, the implementation of order on mut'ah is also among the matters dealt with by the FSD (Ahmad, J., personal communication, July 29, 2021). Practically, three main units under the FSD as above mentioned are also there for Kedah FSD, of which the functions of each unit are less or more similar to one that exists at federal level. Summarily, when a complaint is brought to the UKNP, there is yet involvement of the court. During this stage, the FSD will investigate the complaint by identifying the party complaint against, his financial ability to commit with the court's order and if relevant, providing schedule of payment upon agreement of parties (Ahmad, J., personal communication, July 29, 2021). However, there are number of complainants who initially have no information or even unaware of the existence of the FSD, leaving them without any redress (Md Abdul Salam, N. Z. & Mohd Khatib, N. S. 2020). According to the Senior Deputy Director of the FSD, he said that…

> "The complaint can either be brought by the party herself, usually the wife/mother of a child who has awareness and information what to do and

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> where to seek for redress in case of default on part of Defendant. After being approached by the FSD, only then the complaint was lodged. In departing information and creating awareness on part of public, the FSD used the official website of Kedah Syariah Judiciary Department or social media such as the Facebook of the FSD particularly during pandemic. Alternatively, the FSD through its initiative visited the District Syariah court or sent letter to the Registrar of the court to get data/information about those who have obtained the court's order on maintenance / mut'ah order to ensure that the order has been implemented accordingly". (Ahmad, J., personal communication, July 29, 2021).

Furthermore, if the procedure at UKNP fails to be settled, the case will then be brought to the UPPP. At this stage, the action taken by the Unit is based on the statutory provision of the Enakmen Tatacara Mal Mahkamah Syariah (Kedah Darul Aman) 2014, particularly on section 175, The section provides for third party claim, which its procedure is to be made in conformity with Chapter XXIV of the Enactment. Specifically, the section states that …

> Seksyen 175. Tuntutan oleh pihak ketiga.
>
> Mana-mana tuntutan oleh pihak ketiga terhadap harta yang dirampas sebelum hukuman hendaklah dijalankan mengikut aturcara yang diperuntukkan di bawah Bahagian XXIV.

Frequently, even a case is forwarded to UPPP for court proceeding, the negotiation, arrangement and agreement between parties are still taking place for them to reach an amicable settlement (Ahmad, J., personal communication, July 29, 2021). Failure of which a Judgment Debtor Summon may be filed against the debtor in accordance with section 165 of the Enactment which provides that…

> Seksyen 165. Saman si berhutang hukuman.
>
> (1) Tertakluk kepada seksyen kecil (2) seorang si piutang-hukuman boleh memanggil mana-mana orang yang boleh diperiksa melalui satu saman yang di dalam Bahagian ini disebut sebagai saman si berhutang-hukuman mengikut borang yang ditetapkan. Saman itu hendaklah diserahkan ke atas dirinya tidak kurang daripada 5 hari genap sebelum hari yang ditetapkan untuk pembicaraan kecuali jika Mahkamah memerintah sebaliknya.
>
> (2) Dalam mana-mana kes di bawah seksyen 136 tiada saman si berhutang-hukuman boleh dikeluarkan kecuali dengan izin yang diberi mengikut seksyen itu.

With regards to the UPD, a sum of RM300,000-00 has been allocated for the Unit to operate (Kedah Syariah Judiciary Department, n.d.). In practice, the money will be advanced to the

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applicant who is having financial difficulty for life support before she successfully gets the money from the Defendant. Nevertheless, the applicant must first satisfy the FSD on her ability to re pay the advanced money to the FSD without having recourse to the Defendant (Ahmad, J., personal communication, July 29, 2021). Likewise, as for FSD transit, Kedah FSD offers accommodation, meal and travelling to attend hearing for that applicant who is staying outside Kedah and need to attend hearing or proceeding in the Syariah court in the state of Kedah. Importantly, the applicant's income per month must be RM3,000.00 and below who may be categorised as miskin and fakir (Kedah Syariah Judiciary Department, n.d.).

Undeniably, the FSD plays an important role to ensure that the court's order is accordingly implemented. Prior to covid - 19 pandemic, there were 170 cases registered through e-nafkah and manual registration in 2019 brought to UKNP together with 61 old cases, making the total numbers to be 231 cases (Kedah Syariah Judiciary Department, n.d.). Among them, cases which were still undergoing the mediation process, with some succeeded while some failed. Apart of that, there were cases, which have been forwarded to FSD in other states, and some have been registered and referred to UPPP for further action. Categorically, there were maintenance cases for child, wife, iddah and mut'ah.

In 2020, when covid - 19 pandemic has impacted the country, registered new cases were only 71 and 48 being remaining unsettled cases brought forward to year 2020. Thus, making all cases to be 119 (Kedah Syariah Judiciary Department, n.d.). Meanwhile, from January to May 2021 there are 36 new cases registered to UKNP and 28 old cases. Hence, the number of cases as of May 2021 is 64. Perhaps, the drop in numbers as can be seen in 2020 as compared to 2019 was due to restriction on movement and the closure of government sectors and institutions including the court. The typical excuse given by the defaulters during investigation by UKNP or UPPP was covid- 19 outbreak which affected them badly (Ahmad, J., personal communication, July 29, 2021). Usually, such reason will be accepted and re arrangement to the schedule of payment will be made accordingly.

CONCLUSION

It can be concluded that FSD has played significant roles in matters relating to enforcement of maintenance orders of wife and children. In brief, the functions of FSD are twofold, to provide assistance to the wife and children who do not receive maintenance from the husband, and at the same time to enforce the maintenance order against stubborn husbands who are still neglecting even after a maintenance order has been pronounced by the Syariah court. During this process, FSD also conducted investigation, provide advice and mediation services to the parties. During the time of covid-19 pandemic, FSD, particularly Kedah FSD, continues to provide its services even though the process was quite slow when the MCO was initially implemented. In terms of dissemination of knowledge about the existence of this unit to the public, the FSD is keeping abreast with the technology by utilising its social media to create awareness. Covid-19 pandemic has impacted many areas of life. There are many husbands who have become unemployed. Nevertheless, the functions of FSD remains relevant or perhaps more crucial in ensuring that no wife or

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children are neglected due to inability of husband to give maintenance. For future research, perhaps a study can be conducted to suggest collaboration between FSD with other relevant government agencies that can help the unemployed husbands to generate income and fulfil their obligations towards the families.

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BABY DUMPING: ITS PUNISHMENT UNDER THE LAW AND PROTECTIONS AVAILABLE IN MALAYSIA

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ABSTRACT

Child abandonment in the context of this paper refers to the situation where the baby is abandoned with an intention to leave him or her permanently. This situation is commonly called as baby dumping, and the baby is called foundlings. This issue needs to be discussed openly and extensively due to the worrying cases of baby dumping cases recorded every year. Adopting library-based approach, this paper discusses the laws on child abandonment, which can be found in the Penal Code and also Child Act 2001. It is found that, even though both provisions mention the word 'child abandonment', the more appropriate provision in the context of baby dumping is the one under the Penal Code. This paper further examines the protections that are available for the abandoned babies, including one initiative called as 'baby hatch'. The protection for the mothers is also important to be discussed, particularly if the cases involve young and unmarried mothers. Finally, this paper addresses the need to treat the root cause of the problem. A holistic approach that emphasizes on preventive mechanisms must be adopted if we want to eradicate and eventually solve this problem.

Keywords: baby dumping, child abandonment, baby hatches, foundlings

INTRODUCTION

Baby dumping is a crime, involving an act of abandoning a new-born with an intention to leave the infant permanently. This problem is getting rampant in Malaysia, as newspaper reports revealed alarming statistic of cases and babies found in many places such as garbage bin, public toilet, bushes and mosque. This situation is heart-breaking because it should not happen at all, at the first place. Between 2010 to May 2019, there were 1010 cases of baby dumping have been recorded, in which 64% of those cases, the babies were found dead (Yahya, 2020). According to Termizi, Abdullah and Jaafar (2016), even though the statistic of the crime is difficult to obtain and mostly under-reported, the issue has attracted much attention as it is considered by the society as a heartless crime. There is a view that says the severity of punishment for this offence might have positive impact on reducing the crime. Therefore, the present paper aims to explore the punishment

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stipulated for baby dumping, the protections available and preventive mechanisms to curb this social illness.

CHILD ABANDONMENT AND ITS PUNISMENT

Baby dumping is a crime punishable under the Malaysian Penal Code. The exposure and abandonment of a child under twelve years by parent or person having care of it has been sanctioned under section 317 of the Penal Code. The section states that, "Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, exposes or leaves such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both." The explanation to this section says that this section is not intended to prevent the trial of the offender for murder or culpable homicide, if the child dies in consequence of the exposure or abandonment.

The above section does not provide for the definition of 'abandonment'. However, it is clear that 'abandonment' here not only refers to the act of leaving a child or discarding it, but it must be accompanied with an intention of totally abandoning the child. The abandonment must be done with the intention of entirely leaving or exposing the child.

In PP v Norhayati binti Hashim & Anor [2020] MLJU 1010, the first and second respondents who were the grandmother and mother of the abandoned infant were convicted for an offence under section 317 of the Penal Code resulting from a plea of guilty before a Magistrate Court. The infant was abandoned at a mosque in Tasek Gelugor, Pulau Pinang. After considering the mitigation by both respondents and submission by the Public Prosecutor, the Magistrate sentenced both of them to one month imprisonment and fine of RM3,500 in default 7 months imprisonment from the date of sentence. In passing this sentence, the Magistrate took into account these factors: (i) the respondents' plea of guilty, (ii) that the baby was adopted and therefore was in a safe environment, (iii) that both respondents are single mothers with limited financial resources, (iv) the effect on the second respondent's child of 6 years old; and (v) that both respondents are first offenders. The Public Prosecutor dissatisfied with this sentence and appealed to the High Court. On the issue of adequacy of sentence, the High Court viewed that the Magistrate had insufficiently addressed the seriousness of the offence. Whilst the Magistrate had correctly taken into account the mitigating factors in accordance with the law, she had failed to apply her judicial mind to the proportionality of the sentence to the offence committed. The High Court found that the sentence passed against both respondents were manifestly inadequate and disproportionate to the offence committed. It is the High Court's view that the younger the child is, the greater is the gravity of the offence. In this appeal, the child was a new-born baby who was completely helpless and vulnerable. By nature, a new-born baby places himself in a position of complete surrender and trust to the person that gave birth to him to care, protect and nurture him within an environment that offers unconditional love, care and safety. The High Court allowed the appeal and sentenced both respondents to 8 months imprisonment to run from the date of the decision. The fine of RM3,500 paid by each respondent is ordered to be refunded.

In a different circumstance in PP v Norlizawati Sapar [2012] 5 LNS 170, the accused was charged of abandoning her new-born infant at a petrol station toilet in Kuching, an offence punishable under section 317 of the Penal Code. However, the accused in this case was a youthful offender. Section 293 of the Criminal Procedure Code gives the court the discretion in circumstances where a youthful offender has been convicted of a criminal offence punishable by fine or imprisonment, to make several other alternative punishments instead of meting down an imprisonment sentence or in the case of a fine to impose an alternative rather than a default imprisonment sentence. One of such alternative orders is a community service order not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to such conditions as may be specified by the court. In this case, the Magistrate asked a social report to be submitted to him. The social report revealed a number of factors that the Magistrate viewed must be taken into consideration in passing the maximum sentence of community service, namely, 240 hours in aggregate for a period of two years. First, this is the accused's first offence, and she is a young offender at the age of 18 years and nine months. An imprisonment sentence would totally tarnish her future. It would make it difficult for her to make a living in future and society could shun her aside. Second, that even though the offence committed is a serious one, the accused is indeed remorseful. The court was also told that the accused had returned to the petrol station to take the baby back but hesitated when she found a crowd there. Further, by undergoing community service, it would teach the accused more about society-living and that, by itself would bring greater remorse to the accused. Third, the support that she receives from her family to perform community service is also overwhelming and would make the accused realize the importance of family. In the event she is given an imprisonment sentence, she would be exposed to other criminals, and this could affect her course of life. Lastly, it was also stated that there are some positive attributes in the accused such as her responsibility towards herself and her household by working and helping out with the household monthly expenses and chores. Such attributes can be enhanced through social service and help shape the accused into a better person. Nevertheless, the Magistrate stressed that he would not pass such sentences if the offender were above 21 years old and it is not a matter of general application.

There is another legal provision on child abandonment which can be found in the Child Act 2001. Section 31(1) provides that, "any person who, being a person having the care of a child (a) abuses, neglects, abandons or exposes the child or acts negligently in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned or exposed; or (b) sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both."

However, the scope of this provision is different from the provision under the Penal Code. The difference is that section 317 of the Penal Code is specifically provided for child abandonment with an intention to leave the child permanently, whereas section 31(1) of the Child Act 2001 provides for the situations that involve abuse and neglect while the child is still living with the parent. Example of cases that comes under the scope of section 31(1)

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of the Child Act 2001 are PP v Asmarani Ghazali [2020] 2 CLJ 319 and PP v Rahayu binti Hassan [2019] 1 LNS 1049, but it is beyond the scope of discussion under this paper.

PROTECTIONS

The protection aspect shall be looked from two different perspectives, namely, protection for the child and protection for the mother. The rights of abandoned children are protected under the law. This can be seen under the international instrument such as the Convention on the Rights of the Child ("the Convention"), whereby Article 7 of the Convention mentions about the right of child to know and be cared for by his or her parents. Further, Article 19 of the Convention provides for the obligations and responsibilities of the state parties take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardian or any other person who has the care of the child. In the Malaysian context, Child Act 2001 was promulgated based on the principles of the Convention. The Child Act 2001 provides for the law relating to care, protection and rehabilitation of children for the purpose of ensuring that the best interest of the child is given primary consideration (Murugesu, 2010).

In 2019, Organisation for the Management and Protection of Orphan (OrphanCare), an NGO, has launched an initiative called 'baby hatch' to protect the innocent babies. The baby hatch facility aims to provide hope for the lives of abandoned babies through provision of a safe haven, whereby the baby can be placed inside the hatch instead of being abandoned at dangerous places that threatens his or her life. It is the first facility of its kind in Malaysia, and it operates 24 hours a day, every day of the year. The facility also affords opportunities for mothers or guardians considering abandonment to have informal discussions with nurses or social care staff (Cochrane & Ming, 2013). The establishment of this baby hatch has been extensively studied by Salleh, Ahmad & Zahalan (2018), which confirmed that despite its controversy, this initiative is in line with the concept of maqasid Syariah under Islamic law because, among others, it protects the life of the abandoned babies. According to a newspaper report (Desi, 2021), a supervisor at an Orphan Care Foundation disclosed that a total of 437 infants had been rescued from 2012 until 2020. 45 of them were rescued between March until December 2020 during the Movement Control Order. 267 of them had been adopted, while 12 babies were referred to the Welfare Department. The remaining 158 infants were taken by their mothers, who had sought shelter at the baby hatch centre during their pregnancy and eventually went home with the baby.

Another aspect is protection for the mother. To discuss protection for the mother is a bit ironic because normally she is the main perpetrator in this case and shall be subject to punishment stipulated under the law. However, it must be noted that there are cases where the mothers are actually unmarried adolescents or underage mothers. Such cases involve young mothers who lack support, sex education and awareness. More tragically if the so-called biological father of the child had left the mother to face the consequences all by

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herself. In such circumstances, the perpetrators are ordered to undergo a rehabilitation process at a rehabilitation centre and are given training so that they can acquire necessary skills to sustain their life in the future (Salleh, Ahmad & Zahalan, 2018).

A quantitative study has been conducted by Jana, Ghazinour and Richter (2016) to investigate the prediction of mental health through coping mechanism, social support, and resilience among unwed young Malaysian pregnant women and mothers during residential periods in shelter homes. One of the findings is that there were no significant changes in social support, resilience and coping between the first and second assessments even if the respondents had been in the shelter homes for a period of time. Therefore, the effectiveness of rehabilitation program and social support for this group need to be improved to ensure positive impact for the residents.

PREVENTIVE MECHANISMS

As discussed above, the laws are already there to punish the offenders involved in baby dumping. Several efforts have also been taken to give protection to the children and the mothers. However, we still see these cases being reported every year. It shows that the existing mechanisms are still not sufficient to eradicate this issue. Even though the offender "shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both" as stipulated under section 317 of the Penal Code, the Court will take into consideration the overall facts and circumstances of the case before imposing a judgment. In order to prevent the case of baby dumping, it is very important to address the root causes of this problem. For this purpose, we must know the factors that cause the problem to arise.

According to Hashim, Yusuf and Kusrin (2019), there are several factors that lead to baby dumping or child abandonment, among others, failure of parents to function which normally related to economic and social factor. It could also happen due to the status of the child itself, such as illegitimate, handicapped, or hyper-active. Other than that, lack of comprehensive laws that can act as deterrence from such action being committed. In another study on baby dumping in Malaysia from the perspective of university students, it was found that the most common causes of baby dumping are lack of religious upbringing and poor application of religious knowledge (Osman & Attalla, 2018). Several other factors include lack of parental care and supervision, family break up, peer influence and media influence (Chio, n.d.).

It is viewed that this issue must be treated holistically. It is not sufficient to treat the consequences without addressing the root causes of the problem. The factors listed above include religious, social, economic, education and health aspects. Most importantly is to educate our children and teenagers to differentiate between right and wrong and to be aware of the implications on choices that they make. They must be nurtured to have an inner strength to control themselves and to say no even when they are alone without parental supervision. It is also important to raise awareness on the sanctity of marriage, reproductive health, and consequences of sexual misconduct outside marriage. In the

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situations where unfortunate circumstances happen, the role of parents is very important in helping and guiding the children to make the right decision, and not to exacerbate the situation. The role of Welfare Department and social service agencies are also crucial in providing protections for the infants and the mothers, especially young mothers.

CONCLUSION

The act of abandoning a baby is a heartless crime. In some cases, it had caused horrifying death to the babies, or they become impaired. This is a tragedy that cannot be taken lightly. The numbers that we can see is only the reported ones. Most probably there are more cases that go unreported. The Court in PP v Norhayati binti Hashim & Anor and PP v Asmarani Ghazali cited above had reminded us that children are vulnerable and defenceless, and thus require society and the law to safeguard their interests, which cannot be trampled upon or simply be ignored at the expense of a mistake or misjudgement by some adult. Therefore, this paper would like to call all relevant parties to put serious effort in overcoming this issue.

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KEGANASAN TERHADAP PASANGAN INTIM DARI PERSPEKTIF PERUNDANGAN MALAYSIA

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ABSTRAK

Keganasan rumah tangga (KRT) bukanlah satu fenomena baharu di Malaysia. Walaupun kes yang dilaporkan di media banyak merujuk kepada keganasan yang melibatkan suami isteri dan ahli keluarga, ia juga boleh berlaku kepada pasangan yang belum berkahwin tetapi mempunyai hubungan intim (pasangan intim). Ini kerana KTR tidak membezakan sama ada pelaku dan mangsa mempunyai hubungan yang sah atau tidak. Walaupun Akta Keganasan Rumah Tangga 1994 (AKRT 1994) telah ditambah baik bagi memberi perlindungan yang lebih luas kepada mangsa KRT di Malaysia, namun begitu, Akta ini dilihat tidak dapat membantu mangsa KRT yang bukan berstatus 'suami isteri' atau 'bekas suami isteri' yang sah. Ini kerana definisi KRT dalam seksyen 2 AKRT 1994 hanya terbatas kepada keganasan yang dilakukan terhadap suami isteri atau bekas suami isteri. Kertas kerja ini bertujuan untuk membincangkan perlindungan yang diberikan kepada pasangan intim yang menjadi mangsa KRT di Malaysia. Dengan menggunakan pendekatan secara deskriptif dan kajian perpustakaan, peruntukan AKRT 1994 di analisa secara kritikal. Dapatan kajian menunjukkan pindaan kepada AKRT 1994 pada tahun 2017 telah menambah baik akta sedia ada. Namun begitu, penambahbaikan ini tidak meliputi perlindungan kepada pasangan intim. Mangsa masih perlu bergantung kepada Kanun Keseksaan bagi mendapatkan perlindungan dan keadilan. Penambahbaikan perlu dibuat kepada AKRT 1994 bagi memasukkan pasangan intim sebagai sebahagian daripada definisi KRT seperti mana yang terdapat dalam undang-undang berkaitan KRT di beberapa buah negara maju yang lain seperti Amerika Syarikat, New Zealand dan England.

Kata kunci: Keganasan Rumah Tangga, Pasangan Intim, Akta Keganasan Rumah Tangga 1994

PENGENALAN

Keganasan rumah tangga (KRT) terutamanya kepada wanita merupakan masalah global yang serius sehingga Pertubuhan Kesihatan Sedunia (WHO) telah mengklasifikasikan ia sebagai 'masalah kesihatan global' (WHO, 2013). Gerakan memperjuangkan keadilan bagi mangsa KRT bermula di seluruh dunia sejak tahun 1970 (Erez, 2002) bagi mendesak penggubal undang-undang di setiap negara menggubal undang-undang khas yang mampu

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untuk bukan sahaja untuk menghukum pelaku KRT malah untuk melindungi mangsa KRT. Hasilnya, banyak negara termasuk Malaysia telah menggubal undang-undang khas berkaitan KRT.

Di Malaysia Akta Keganasan Rumah Tangga 1994 (AKRT 1994) diluluskan oleh Parlimen pada 19 Mei 1994, diwartakan sebagai undang-undang pada 7 Julai 1994 dan mula dikuatkuasakan pada 1 Jun 1996. Ia telah ditambah baik pada tahun 2012 dan 2017. AKRT terpakai ke atas semua orang di Malaysia termasuklah bagi yang beragama Islam dan bukan Islam (Mahdzir, N., et.al, 2020). Walaupun pada asalnya undang-undang keganasan rumah tangga disasarkan untuk melindungi wanita, namun AKRT 1994 telah meluaskan skop perlindungan kepada pasangan (suami isteri) bekas pasangan, anak, orang kurang upaya atau ahli keluarga yang lain. Ini dinyatakan dengan jelas dalam seksyen 2 AKRT 1994. Skop perlindungan ini walaupun agak komprehensif, tetapi ia masih terhad kepada mangsa yang mempunyai hubungan kekeluargaan dan bekas pasangan sahaja.

Kertas kerja ini bertujuan untuk menganalisis secara kritis sama ada perlindungan melalui AKRT 1994 boleh diberikan kepada pasangan intim sama seperti mangsa yang dinyatakan dalam seksyen 2 AKRT 1994. Sehubungan dengan itu, menggunakan pendekatan secara deskriptif dan kajian perpustakaan, peruntukan dalam AKRT 1994 dan beberapa akta berkaitan KRT di Brunei, India, Pakistan, Thailand, England, New Zealand dan Amerika Syarikat analisa secara kritis. Analisis ini diharapkan agar dapat digunakan untuk menambah baik AKRT 1994 supaya ia boleh menjadi akta yang lebih komprehensif.

KEGANASAN TERHADAP PASANGAN INTIM

Di peringkat antarabangsa, KRT sering dirujuk sebagai keganasan terhadap pasangan intim (Clark, 2013). Pertubuhan Kesihatan Sedunia (2010) mendefinisikan keganasan terhadap pasangan intim sebagai "tingkah laku dalam hubungan intim yang menyebabkan bahaya secara fizikal, seksual atau psikologi, termasuk pencerobohan fizikal, pemaksaan seksual, penderaan psikologi dan kawalan tingkah laku. " Definisi ini menunjukkan bahawa KRT berlaku dalam hubungan intim termasuk pasangan suami isteri, bekas pasangan suami isteri dan pasangan intim (Modi, M.N. et al, 2014).

Pasangan intim adalah orang yang mempunyai hubungan rapat atas dasar hubungan emosi, hubungan biasa, hubungan fizikal yang berterusan dan tingkah laku seksual, identiti sebagai pasangan, dengan keakraban dan pengetahuan tentang kehidupan antara satu sama lain. Ia boleh merangkumi pasangan suami isteri, bekas pasangan suami isteri, teman lelaki atau teman wanita dan pasangan seksual yang berterusan. Ini termasuklah individu yang sedang atau tidak bersekedudukan tanpa mengira jantina (Kadir Shahar, H., 2020). Manakala keganasan terhadap pasangan intim ditakrifkan sebagai "apa-apa tingkah laku dalam hubungan intim sama ada berkahwin, belum berkahwin, dan bersekedudukan yang menyebabkan bahaya fizikal, psikologi, atau seksual bagi mereka yang berada dalam hubungan itu." (Patra, P., 2018).

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Jika dilihat daripada takrifan pasangan intim di atas, ia definisi pasangan intim adalah sebahagian daripada definisi KRT kerana KRT bukan sahaja merujuk kepada keganasan terhadap pasangan intim malah ia mencakupi semua keganasan terhadap ahli dalam sesebuah rumah tangga termasuk kanak-kanak dan orang tua. (Kadir Shahar, H., 2020 and Hawcroft, C. et al., 2019). Malangnya, keganasan terhadap pasangan intim tidak diiktiraf sebagai sebahagian daripada KRT dalam AKRT 1994. Menurut seksyen 2 AKRT 1994, terma "mangsa" merujuk kepada seseorang yang menjadi mangsa KRT. Terma KRT pula hanya terhad kepada keganasan yang dilakukan terhadap suami atau isteri, bekas suami atau isteri, kanak-kanak, orang dewasa yang tidak berkeupayaan atau mana-mana anggota lain keluarga sahaja. Terma "anggota lain keluarga" di sini juga hanya mencakupi anak lelaki atau perempuan, atau ibu bapa, abang, kakak atau adik atau mana-mana saudara lain yang pada pendapat mahkamah merujuk kepada keluarga itu patut dikira sebagai salah seorang anggota keluarga itu. Malah terma "saudara" dalam AKRT 1994 juga hanya meliputi seseorang yang mempunyai hubungan persaudaraan melalui pertalian darah seibu sebapa, pertalian darah seibu atau sebapa, atau melalui perkahwinan atau pengangkatan, termasuk de facto.

Daripada takrifan dalam seksyen 2 AKRT 1994 di atas, jelas menunjukkan bahawa perlindungan di bawah AKRT 1994 hanya diberikan kepada ahli keluarga yang mempunyai pertalian sama ada pertalian darah atau melalui perkahwinan sahaja. Ia tidak meliputi pasangan intim yang tidak mempunyai hubungan perkahwinan dengan pelaku. Ini dikukuhkan lagi dengan takrifan "isteri atau suami" yang hanya meliputi isteri atau suami yang sah atau yang telah melalui suatu bentuk istiadat perkahwinan mengikut agama atau adat walaupun istiadat itu tidak didaftarkan di bawah undang-undang berkaitan pendaftaran perkahwinan. Dato 'Seri Rohani binti Karim, mantan Menteri Pembangunan Wanita, Keluarga dan Masyarakat, semasa membahaskan Rang Undang-undang Keganasan Rumah Tangga (Pindaan) 2017 di Dewan Senat, mengesahkan bahawa Akta ini tidak meliputi pasangan yang tidak mempunyai ikatan perkahwinan, walaupun mempunyai hubungan intim.

PENGALAMAN NEGARA LAIN

Malaysia, Brunei, India dan Pakistan berada dalam kelompok kecil negara yang tidak mengiktiraf pasangan yang belum berkahwin dalam undang-undang berkaitan KRT. Brunei, melalui Akta Wanita Bersuami 2010, India melalui *The Protection of Women from Domestic Violence Act*, 2005 dan Pakistan melalui beberapa Akta berbeza (mengikut lokaliti) juga memberi perlindungan kepada mangsa KRT. Akta-akta ini mempunyai banyak persamaan dengan AKRT 1994 di mana perlindungan melalui Akta-akta ini hanya diberikan kepada ahli keluarga sahaja. Malah, skop mangsa KRT di India dan Pakistan jika dilihat adalah lebih kecil. *Protection of Women from Domestic Violence Act*, 2005 di India (kecuali Jummu dan Kashmir) dan *Sindh Domestic Violence* (*Prevention and Protection*) *Act* 2013 hanya memberi perlindungan kepada wanita sahaja. Pelaku juga mestilah tinggal atau pernah tinggal rumah yang sama ketika mereka mempunyai hubungan kekeluargaan, perkahwinan atau pengangkatan. *Punjab Protection of Women Against Violence Act* 2016 dan The *Balochistan Domestic Violence* (*Prevention and Protection*) *Act* 2014

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bagaimanapun membesarkan perlindungan KRT kepada kanak-kanak, orang tua, orang kurang upaya atau pembantu rumah (Zia, M., 2018 dan Chakraborty, S, 2020).

Majoriti negara di dunia bagaimanapun telah mengiktiraf pasangan intim sebagai sebahagian daripada "mangsa" yang perlu dilindungi di bawah undang-undang berkaitan KRT. Di Singapura, Kementerian Keluarga dan Pembangunan Sosial telah mengklasifikasikan penderaan terhadap kanak-kanak, pasangan suami isteri atau bekas pasangan suami isteri, orang tua, orang kurang upaya dan pasangan intim sebagai sebahagian daripada keganasan terhadap keluarga. Mangsa boleh mendapatkan antara lain Perintah Perlindungan daripada *Family Justice Court*. Pelindungan kepada pasangan intim juga diberikan di Thailand melalui *Protection of Domestic Violence Victims Act B.E.* 2550 (2007) dan di New Zealand melalui *Domestic Violence Act* 1995. Di England, Bahagian 4 Family Law Act 1996 telah memberikan perlindungan sebagai mangsa KRT kepada "cohibitants" yang ditakrifkan sebagai pasangan atau bekas pasangan intim yang tidak berkahwin antara satu sama lain atau pasangan sivil yang tinggal bersama. Takrifan "cohibitants" telah diperluaskan oleh *Violence, Crime and Victims Act 2004* di mana ia juga meliputi mana-mana orang yang walaupun tidak berkahwin satu sama lain, hidup bersama sebagai suami isteri atau (jika mempunyai jantina yang sama) dalam hubungan yang setara. Dengan erti kata lain, England bukan sahaja mengiktiraf pasangan intim sebagai mangsa KRT malah, ia juga mengiktiraf pasangan intim sejenis sebagai sebahagian daripada orang diberi perlindungan di bawah undang-undang berkaitan KRT. Pengiktirafan yang sama juga diberikan oleh *Violence Against Women Reauthorization Act* of 2013 di Amerika Syarikat.

KESIMPULAN

Ketiadaan perlindungan kepada pasangan intim dalam AKRT 1994 tidak bermakna mangsa tidak boleh mendapatkan perlindungan dan keadilan. Mangsa masih boleh membuat laporan polis dan siasatan polis akan dilakukan menurut Kanun Keseksaan . Namun begitu, mangsa tidak boleh mendapatkan perlindungan yang diwujudkan khusus oleh AKRT 1994 untuk mangsa KRT seperti Perintah Perlindungan, Perintah Perlindungan Interim dan Perintah Perlindungan Kecemasan.

Namun begitu, memasukkan pasangan intim sebagai sebahagian daripada mangsa yang dilindungi oleh AKRT 1994 ialah sesuatu yang perlu dipertimbangkan oleh penggubal undang-undang di Malaysia. Walaupun kajian menunjukkan bahawa KRT adalah lebih lazim di kalangan pasangan yang berkahwin atas faktor kebergantungan pasangan daripada segi kewangan dan emosi (Awang, H. and Hariharan, S., 2011), menurut data *Women Aids Organization* (2015), wanita menghadapi penderaan bukan sahaja daripada suami malah daripada teman lelaki juga. Untuk mengiktiraf pasangan intim dalam AKRT 1994, pertimbangan perlu dibuat berdasarkan keperluan atas dasar keperluan dan keadilan serta halangan undang-undang sedia ada, adat dan agama yang rata-rata tidak membenarkan hubungan intim di luar perkahwinan. Seksyen 23 dan 27 Akta Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1997 antaranya menggariskan bahawa perbuatan bersekedudukan, perhubungan seks luar nikah dan berkhalwat sebagai satu kesalahan.

Namun begitu, melihat kepada keadaan sosial sekarang, makin ramai yang berada dalam perhubungan intim terutama daripada kalangan bukan Islam dan undang-undang perlu mengambil kira semua orang bukan sahaja yang beragama Islam.

Memasukkan pasangan intim ke dalam AKRT 1994 juga sejajar dengan cadangan oleh Persatuan Bangsa-bangsa Bersatu dalam Rangka Kerja PBB untuk Model Perundangan mengenai Keganasan Rumah Tangga mengiktiraf perlakuan keganasan rumah tangga sebagai "bentuk kekerasan 'khusus gender' yang ditujukan kepada wanita, yang berlaku dalam keluarga dan dalam hubungan interpersonal." Model ini juga mencadangkan agar "semua hubungan di kediaman bersama harus dimasukkan dalam lingkungan undang-undang KRT dengan penyenaraian yang jelas mengenai sifat hubungan yang dilindungi, terutamanya semua hubungan kebergantungan, termasuk pekerja rumah tangga, serta definisi mengenai 'kediaman bersama'."

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EDUCATION AND LAW

PENGGUNAAN KATA BERDASARKAN GENDER DALAM HANTARAN MEDIA SOSIAL DARIPADA PERSPEKTIF PERUNDANGAN

Any Rozita binti Abdul Mutalib & Hishamudin Isam

MOOCS AND THE LEGAL EDUCATION: THE WAY FORWARD

Aida Abdul Razak

KEPERLUAN LITERASI UNDANG-UNDANG BAGI PEMIMPIN SEKOLAH DALAM MALAYSIAN SCHOOL GOVERNANCE (MySG) 2021

Azhan bin Anuar & Azura binti Abdul Raof

POTENTIAL AND PITFALLS OF CLOUD COMPUTING ADOPTION TOWARDS QUALITY HIGHER EDUCATION IN MALAYSIA

Ng Chen Hong & Ani Munirah Mohamad

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ABSTRAK

Setiap pemilihan kata yang digunakan dalam media sosial walau pada hakikatnya hanya penggunaan secara tidak formal boleh mendedahkan pengguna media sosial kepada tindakan yang melibatkan aspek perundangan. Hal ini berlaku jika kata-kata yang digunakan memberikan tafsiran yang boleh dianggap sebagai sesuatu yang negatif. Hal ini termasuk dalam menjatuhkan reputasi individu dan membawa kepada fitnah secara terbuka. Namun, pemilihan kata dalam hantaran dan hantaran balas dalam media sosial mempunyai coraknya tersendiri berdasarkan gender. Tidak dapat dinafikan, penggunaan dan pemilihan kata antara gender mempunyai perbezaan tersendiri dalam aspek kesantunan mahupun penggunaan kiasan yang memperlihatkan aspek ambiguiti dalam pentafsiran makna ujaran. Sehubungan itu, kertas kerja ini akan memperlihatkan empat (4) penggunaan kata dalam hantaran dan hantaran balas di media sosial yang berbeza berdasarkan gender yang boleh disabitkan tindakan perundangan. Penelitian data adalah berdasarkan perkataan yang digunakan dalam hantaran di media sosial yang maksudnya memperlihatkan wujud aspek-aspek yang menjatuhkan reputasi individu dan fitnah. Analisis data dibuat dengan merujuk kepada penelitian kes-kes lepas yang telah dibuat tuntutan dan disabitkan di bawah peruntukan undang-undang. Secara kesimpulannya, kertas kerja ini memperlihatkan perbezaan penggunaan kata dalam media sosial berdasarkan gender yang boleh membawa kepada tindakan undang-undang. Berdasarkan perihal ini, kertas kerja ini dapat membantu pengguna media sosial dalam pemilihan kata yang boleh dielakkan bagi mendedahkan mereka kepada tindakan undang-undang dan mengambil iktibar daripada kes-kes sebelumnya.

Kata kunci: kata, media sosial, gender, linguistik perundangan, hantaran

PENGENALAN

Pemilihan kata yang digunakan dalam perbualan di media sosial walau pada hakikatnya hanya penggunaan secara tidak formal boleh mendedahkan pengguna tersebut kepada tindakan yang melibatkan aspek perundangan melalui tafsiran yang boleh dianggap sebagai sesuatu yang negatif. Daripada perspektif linguistik, ambiguiti dalam pentafsiran makna perkataan boleh menimbulkan pentafsiran makna yang berganda selain membawa

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kepada batasan dalam tafsiran makna perkataan tersebut. Hal ini seterusnya memberikan impak kepada seseorang individu yang boleh membawa kepada tindakan undang-undang jika makna perkataan itu ditafsirkan dan dikaitkan dengan sesuatu perkara yang boleh menjatuhkan reputasi individu, membawa kepada imputasi fitnah menerusi hantaran balas atau komen dalam media sosial.

Penggunaan kata dalam hantaran atau hantaran balas atau komen dalam media sosial mempunyai coraknya tersendiri berdasarkan gender. Tidak dapat dinafikan, penggunaan dan pemilihan kata antara gender mempunyai perbezaan tersendiri dalam aspek kesantunan mahupun penggunaan kiasan yang memperlihatkan aspek ambiguiti dalam pentafsiran makna ujaran. Justeru itu, kertas kerja ini dijalankan bertujuan memperlihatkan penggunaan kata berdasarkan gender dalam hantaran di media sosial yang boleh dikenakan tindakan undang-undang berdasarkan kes-kes lepas yang melibatkan media sosial.

LINGUISTIK DAN PERUNDANGAN

Bidang linguistik dan perundangan dilihat mempunyai perkaitan jika sesuatu kes tersebut melibatkan aspek linguistik yang jelas sama ada dengan penggunaan kata, frasa, klausa atau ayat sehingga mengakibatkan kesan ke atas seseorang individu. Penggunaan aspek linguistik tersebut boleh menjadi punca kepada tindakan awal untuk sebarang tuntutan yang melibatkan undang-undang dan menjadi fakta kes. Jika ditinjau daripada perspektif linguistik dan perundangan, amat sedikit kajian yang dikaitkan dengan menggabungkan kedua-dua bidang tersebut.

Sehubungan itu, kajian yang berkaitan aspek linguistik dan perundangan dilihat mempunyai perkaitan dan signifikan terutama bagi mendapatkan dapatan-dapatan terkini khususnya melibatkan media sosial yang menjadi medium utama komunikasi pada masa kini. Antara contoh kajian yang meneliti aspek linguistik dan perundangan yang melibatkan media baharu ialah kajian yang dijalankan oleh Azul Mohamad Salleh, Ali Salman dan Nurul Madiha Mohd Ilham (2015), Wan Amizah Wan Mahmud dan Mahmud Muhammad Adnan bin Pitchan (2017), Mohd Azul Mohamad Salleh dan Nurul Madiha Mohd Ilham (2017), Ruzian Markom, Ziantul Ashiqin Zainol dan Nurhidayah Ahmad Fuad (2019), serta Ahmad Shamsul Abd Aziz dan Nor Azlina Mohd Noor (2020). Kajian-kajian ini berjaya membuktikan bahawa Malaysia masih belum mempunyai sebarang akta khusus yang berkaitan dengan kawalan media baharu tetapi terdapat beberapa tindakan dalam perundangan yang boleh diguna pakai dalam mengaitkan kesalahan berkaitan media baharu. Antaranya Akta Komunikasi dan Multimedia 1998, Akta Suruhanjaya Komunikasi dan Multimedia 1998, Akta Tandatangan Digital 1997, Akta Jenayah Komputer 1997, Akta Teleperubatan 1997, Akta Perdagangan Elektronik 2006, Akta Aktiviti Kerajaan Elektronik 2007, Akta Perlindungan Data Peribadi 2010, Akta Hak cipta 1987 Pindaan 2012 dan Akta Hasutan 1948. Sebagai rumusan kepada kajian mereka, undang-undang tersebut perlu ditambah baik agar sesuai dan relevan mengikut peredaran masa dan teknologi.

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METODOLOGI

Data yang digunakan dalam kertas kerja ini merupakan sumber asal yang didapati dari media sosial Facebook. Data dikumpul menerusi hantaran dan komen balas daripada 60 orang responden (30 lelaki dan 30 wanita) yang dijalankan menerusi Operasi Pengiklanan Maya (OPM), iaitu suatu operasi standard yang sering digunakan untuk memperoleh data dari pangkalan data raya yang bersifat umum dan terbuka seperti Facebook (Nor Fazilah Noor Din, & Hishamudin Isam, 2020). Analisis penggunaan kata berdasarkan gender pula di klasifikasi secara manual ke dalam kategori tertentu yang dibina berdasarkan prinsip kognitif oleh Taylor (1995) iaitu menerusi ciri-ciri persamaan bentuk penggunaan atau kesepunyaan seperti persamaan bentuk, saiz, dan bahan, serta aspek atribut atau sifat sesuatu objek. Memandangkan langkah penganalisisan data dijalankan secara manual, maka hasil analisis perlu disemak beberapa kali sebelum disemak semula oleh seorang pakar untuk tujuan semakan keabsahan (*validity check*) dan semakan keandalan (*reliability check*) (Creswell 2008).

ANALISIS DAN PERBINCANGAN

Dalam sistem perundangan, penggunaan unsur linguistik dalam hantaran di media sosial yang melibatkan pertuduhan boleh dibuktikan dan diperincikan dengan melihat kepada penekanan aspek kata dalam sesuatu hantaran yang dibuat selain melihat keseluruhan teks secara holistik. Berdasarkan kes-kes lepas, individu yang membuat hantaran menerusi laman Facebook sama ada sebagai pihak pertama atau pihak ketiga, boleh disabitkan tindakan undang-undang jika disalah ertikan maknanya atau jelas makna yang ingin disampaikan dan jika dibuktikan dapat menjatuhkan seseorang individu.

Hasil analisis mendapati, terdapat 6 kategori kata yang mempunyai penekanan terhadap perkataan yang boleh membawa maksud negatif iaitu menjatuhkan reputasi dan membawa kepada unsur fitnah sehingga boleh diambil tindakan yang melibatkan perundangan. Kategori tersebut ialah kata yang menggunakan ganti nama haiwan, kecam badan, unsur lucah, unsur fitnah, hiperbola, dan merendahkan imej.

Jadual 1- Perbandingan penggunaan kata bagi responden lelaki dan wanita

Responden	Ganti nama haiwan	Unsur lucah	Unsur fitnah	Hiperbola	Merendahkan Imej	Kecam Badan
Lelaki	271	175	161	118	121	76
Wanita	67	73	112	174	107	247

Ambiguiti Penggunaan Kata oleh Gender Lelaki

Analisis terhadap penggunaan kata bagi 30 orang responden lelaki menunjukkan, kecenderungan responden lelaki menggunakan kata penggantian bagi nama haiwan

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adalah yang paling tinggi. Haiwan yang dijadikan perujuk pula ialah babi. Berikut disertakan 5 contoh hantaran dengan penggunaan kata ganti nama babi.

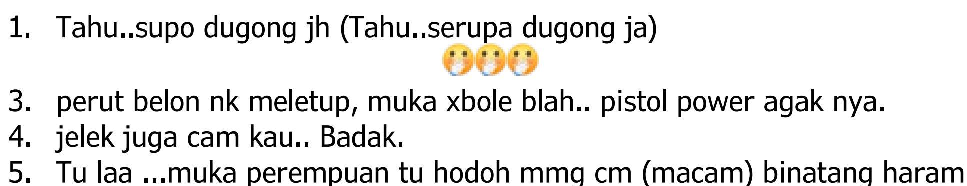
1. Babi punya ore la mcm ni.klau dah artis tu… Buatla kerja Artis
2. tidak makan babi pun otak mcm babi.
3. Betina ini Bangsat umno, muka serupa babi ! datang dari mana ? bangsa johor tak akan buat perkara begitu !
4. Setuju klu sy nk bls kata2 cina dap ni yg muka dia serupa tahik babi.
5. tapi semua dah kene reman kan? 5 daripadanya positive dadah.. macam babi

Bagi perkataan 'babi', Mahkamah boleh membenarkan kes dengan mengambil kira peranan linguistik dalam pembuktian makna secara menyeluruh. Perkataan 'babi' dalam kalangan rakyat Malaysia jelas memberikan maksud yang tidak baik dan negatif. Perkataan tersebut boleh dihujah dengan maksud lazim iaitu dengan penggunaannya dalam masyarakat atau maksud semula jadinya yang membawa makna binatang yang haram yang mempunyai sifat yang negatif. Berdasarkan penilaian yang diberikan, kedua-dua perkataan tersebut boleh disabitkan tindakan undang-undang seperti penilaian dalam kes *Jones* lawan *Skelton* [1963] 3 All ER 952, dinyatakan bahawa makna biasa dan makna semula jadi perkataan mungkin boleh berupa makna harfiah atau makna tersirat atau makna yang disimpulkan atau makna tidak langsung iaitu mana-mana yang bermaksud tidak memerlukan sokongan fakta khusus di luar pengetahuan umum. Sebaliknya, memadai jika perkataan-perkataan tersebut mempunyai makna yang mampu memberi kesan yang tidak baik dalam bahasa yang digunakan. Kes ini dilihat seperti hujah dalam fakta kes Masyitah Binti Md Hassan dan Sakinah Sulong (2018). Berdasarkan pembuktian tersebut, maka penggunaan kata babi boleh diambil tindakan undang-undang jika individu yang dituju merasakan bahawa kata tersebut mempunyai imputasi fitnah dan memberikan persepsi negatif yang boleh menjatuhkan reputasinya iaitu dalam konteks ini sebagai seorang manusia.

Ambiguiti Penggunaan Kata oleh Gender Perempuan

Analisis terhadap penggunaan kata bagi 30 orang responden wanita pula menunjukkan, kecenderungan responden wanita menggunakan kata bentuk kecam badan adalah yang paling tinggi. Berikut disertakan 5 contoh hantaran dengan penggunaan kata kecam badan.

1. Tahu..supo dugong jh (Tahu..serupa dugong ja)



3. perut belon nk meletup, muka xbole blah.. pistol power agak nya.
4. jelek juga cam kau.. Badak.
5. Tu laa ...muka perempuan tu hodoh mmg cm (macam) binatang haram

Berdasarkan contoh-contoh di atas, Mahkamah boleh membenarkan pertuduhan atas beberapa asas atau fakta yang dilihat boleh menjatuhkan individu alasan sebagai kecam

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badan. Bagi contoh keenam (6), apabila komen dibuat ke atas gambar seseorang yang dengan jelas telah merujuk kepada individu tersebut yang dinyatakan sebagai dugong. Kes ini boleh dibenarkan pertuduhan seperti hujah dalam kes Masyitah binti Md Hassan dan Abdul Latiff bin Mohamed iaitu dengan jelas menggunakan perkataan yang bermaksud negatif yang merujuk kepada individu dalam gambar berkenaan. Begitu juga bagi contoh ketujuh (7) yang menghina fizikal individu tersebut. Secara ambiguitinya, perkataan tersebut boleh ditafsirkan sebagai makna yang tersirat melalui penekanan terhadap emoji. Hal ini boleh dihujah dengan keadaan fizikal individu tersebut dan bahagian badan yang dimaksudkan iaitu dalam contoh ini ialah gigi. Bagi contoh yang seterusnya iaitu kelapan (8), kesembilan (9) dan ke-10 boleh dirujuk sebagai kecam badan secara jelas. Hal ini juga boleh dihujah seperti kes Masyitah binti Md Hassan dan Abdul Latiff bin Mohamed Mahkamah dengan mengambil kira beberapa asas terutama yang telah secara peribadinya memberikan kesan kepada individu yang dimaksudkan iaitu mencaci secara terang, membawa kepada pendedahan untuk penghinaan secara berterusan menerusi hantaran balas serta membuka ruang kepada orang awam untuk menyebabkan cemuhan yang berlanjutan. Dalam fakta kes, tuntutan boleh dibuat dengan melihat penggunaan perkataan yang berkait dengan konteks dan difahami oleh pembaca apabila dikaitkan dengan individu yang dimaksudkan. Justeru itu, penggunaan kata sama ada ambiguiti atau memberikan makna secara langsung boleh disabitkan dengan pertuduhan atau tindakan undang-undang selagi mana maknanya boleh dihujah dalam pelbagai konteks jika dilihat secara holistik dalam keseluruhan ayat.

KESIMPULAN

Media sosial yang sering menjadi tempat berinteraksi bertukar khabar dan pendapat, berkongsi maklumat dan sebagainya sering disalahgunakan penggunaannya sehingga merugikan dan menggugat individu lain. Dengan akta-akta dan peruntukan undang-undang yang berkaitan dengan media sosial pada masa kini, dapat disimpulkan bahawa, ia tidak membantu membendung fenomena tersebut dari terus berlaku. Sebaliknya, pengguna media sosial sering menggunakan hak kebebasan bersuara seperti yang diperuntukkan dalam Perkara 10(1)(a) Perlembagaan Persekutuan sebagai cara untuk meluahkan apa sahaja yang mereka inginkan dengan sewenang-wenangnya. Kertas kerja ini telah memberikan gambaran awal bahawa, penggunaan kata oleh kedua-dua golongan lelaki dan wanita mempunyai perbezaan dalam kecenderungan mereka memberikan respons terhadap sesuatu isu berdasarkan kategori kata yang digunakan dalam komen menerusi media sosial Facebook. Penggunaan kata bagi kedua-dua lelaki dan wanita dalam komen tersebut boleh mengakibatkan tindakan undang-undang diambil berdasarkan hujah yang diberikan dalam kes-kes lepas.

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MOOCS AND THE LEGAL EDUCATION: THE WAY FORWARD

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ABSTRACT

With the Covid-19 pandemic still looming across the world, most universities had to close campuses and initiated remote online learning. Universities need to incorporate technology and embraced online learning or remote online learning. One alternative for remote online learning is Massive Open Online Courses (MOOCs). The purpose of this article is to determine the current problems and the possible directions for the development and improvement of legal education using MOOCs. this article is guided by three research questions; namely, (i) what are the opportunities for using MOOC in legal education, (ii) what are the obstacles faced by instructors in using MOOC, and finally (iii) what are the suggestions to cope effectively with these obstacles? The future problems and opportunities for legal education are also discussed. Given the situation of the on-going Covid-19 pandemic, it is recommended that higher education providers consider the issues and solutions when designing courses for legal education.

Keywords: MOOC, online learning, legal education

INTRODUCTION

Online learning has become a necessity in the global education. With the recent outbreak of Covid-19, all the universities need to conduct online learning since all campus are not accessible. Hence, another medium for remote online learning is Massive Open Online Courses (MOOCs). MOOCs are an interactive step-by-step course designed to reach unlimited number of learners worldwide which will then create a community of lifelong learners. It is accessible to learners who have internet access. Many universities and colleges worldwide are approaching education differently nowadays to nurture creativity.

We are in the twenty-first century where there is a need for the education system to be revolutionized. The major objective of twenty-first century education is to aid individuals in their learning capacity and support their development into lifelong, active and autonomous learners (Scott, 2015). Educators' role is as facilitators or instructors to guide learners in developing skills and how to interact with knowledge (Scott, 2015). Learners need to comprehend, critic, influence, design, construct and transform knowledge into appropriate skills. Instructors need to foster students' intellectual inquisitiveness, problem identification and problem-solving abilities, and their skills to create new knowledge with others (Bull & Gilbert, 2012).

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There should be a gradual move from traditional face to face lectures towards anyplace, anytime learning and open education (Scott, 2015). The open education movement is motivated by the shift for making it available for everyone. MOOC is inspired by the open education movement (Scott, 2015). It should be noted; however, that the term MOOC was first used in 2008 (Reich, 2013). In principle, MOOC is defined as "online courses with no formal entry requirement, no participation limit, and free of charge" (Gaebel, 2013). The concept of MOOC is so broad and has evoked the changes in the original interpretation.

Google launched MOOC.org in 2014 as an open-source platform which is made available to all institutions (Scott, 2015). Universities integrated Learning Management Systems to assist on-campus courses (Scott, 2015). Online discussion forums, assignments and grading are all available through the Learning Management Systems (Scott, 2015). One of the obstacles encountered in MOOCs is the completion rates are generally quite low; however, the number increases dramatically when there are completion certificates or credentials provided by online course providers (Scott, 2015).

REVOLUTIONIZED LEGAL EDUCATION

Initially, most MOOC courses offered were limited to science and technology fields; however, MOOCs on legal courses became available in 2013 (Schrag, 2014). Law schools have implemented many approaches to incorporate MOOC in the legal education including designing hybrid programs whereby coursework is completed in face-to-face lectures as well online. Nevertheless, there are several issues relating to MOOCs and legal education. This includes the audience, content of the course and perception by the public on the law. Maharg (2016) contends that law faculties are criticised for failing to design their curriculum accordingly. Hence, this article is guided by three research questions; namely, (i) what are the opportunities for using MOOC in legal education, (ii) what are the obstacles faced by instructors in using MOOC, and finally (iii) what are the suggestions to cope effectively with these obstacles?

BENEFITS AND CHALLENGES

MOOC is an excellent learning method to support distance learning where it promotes independent learning and is self-paced. However, all is not without challenges. The main challenge is that some instructors do not actually know the purpose of MOOC. Therefore, there will be a redundancy of contents and assessments between face-to-face classes and MOOC. According to the instructors, there is no clear implementation guidelines in conducting MOOC, thus constituting to this problem. Other barriers include the accessibility by students, the suitability of MOOC for courses that need a more hands-on approach, assessments methods relating to oral communication and concerns of different stakeholders in integrating e-learning in the curriculum (Kumar & Al-Samarraie, 2018).

With the above challenges in mind, Kumar and Al-Samarraie (2018) have proposed some solutions to these challenges. Firstly, there should be proper training and support for the instructors to design and develop the courses content and curriculum. Policies relating to

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infrastructure, curriculum design, course learning outcomes, educator's professional development, leadership qualities and capacity building (Kong et al., 2014) are some of the areas that should be focused. In a way, instructors need to work together with multimedia or information technology (IT) personnel. Instructors can develop the curriculum and IT personnel can help with the content's delivery. Secondly, policy makers should consider incorporating MOOCs into the current Learning Management System to reduce the burden of course assessment. Thirdly, integration of web tools should be done to promote interactivity between participants. Finally, network bandwidth and computer facilities need to be improved to guarantee the success of MOOC.

There are benefits and challenges in conducting MOOC. It all relates back to the instructor's readiness on conducting MOOC and the learner's readiness on self-learning (Kumar & Al-Samarraie, 2018). The management of higher institutions plays a big role in this. Some institutions wish to conduct MOOC just to be in the "hype", and because of this, other important aspects of implementation are not considered. Some instructors are of the opinion that MOOC is redundant as the Learning Management System also uses the same method in MOOC; in particular, distance online learning (Kumar & Al-Samarraie, 2018). Usually in Higher Education, the instructors or facilitators are entrusted to develop the contents and delivery of modules in MOOC. One of the drawbacks is that instructors do not have a clear understanding on how to construct MOOC. Thus, it will be a problem for instructors or facilitators that do not have a hand or knowledge in IT or multimedia. It is true that the instructors have knowledge about the curriculum of the course, but some instructors do not have adequate knowledge in multimedia or IT to develop the delivery of the course. Thus, it would be handy if instructors can work together with IT personnel to develop the content and delivery of the course. The development of the curriculum in MOOC courses must not be redundant with the institutions Learning Management System. Therefore, before developing the MOOC course, instructors need to take into consideration the curriculum in the Learning Management System to avoid any similarity or redundancy.

There should be policies to ensure successful implementation of MOOC and institutions that implements MOOC must have a policy requirement on standard bandwidth and computer facilities on campuses. For curriculum integration, policies should be in placed in the MOOC curriculum as well so that the impact on student's learning time, outcomes and assessments can be minimized. The Malaysian Higher Education has launched the Guidelines for the Development and Delivery of Malaysian MOOC in 2017 (Garis Panduan Pembangunan dan Penyampaian MOOC Malaysia) (Department of Higher Education, 2017). However, the success of MOOC mainly lies with instructors. Policymakers needs to focus on the implementation of MOOC and their educational objectives with regards to the quality of the education provided.

Another aspect is the accessibility to the internet. We must remember not all students have privileges to the internet. For these students, it will be difficult for them to participate in MOOC. Therefore, there must be a solution for the underprivileged students as how they can participate in MOOC without adding unnecessary burden. Institutions need to provide

facilities for the students. Although MOOC promotes lifelong learning, we cannot leave the underprivileged students behind.

CONCLUSION

Since we are now in the twenty first century, education should evolve according to time. Instructors should be encouraged to experiment with new innovative teaching technologies (McGovern & Baruca, 2013). MOOC is an option for innovative education but expertise to MOOC remains a potential concern (Baker et al., 2015). The MOOC phenomena will continue to evolve due to the growing interest. Many institutions have welcomed MOOCs as the future of education. If MOOCs are going to really change higher education, they should find solutions for the challenges as voiced out by Kumar and Al-Samarraie, 2018. There should be support in terms of training, facilities and guidelines to encourage participation in the MOOC revolution. Given the situation of the on-going Covid-19 pandemic, it is recommended that higher education providers consider the issues and solutions when designing courses for legal education.

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KEPERLUAN LITERASI UNDANG-UNDANG BAGI PEMIMPIN SEKOLAH DALAM MALAYSIAN SCHOOL GOVERNANCE (MySG) 2021

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ABSTRAK

Kertas konsep ini mengenai pencarian literasi undang-undang di kalangan pemimpin pendidikan di Sekolah-sekolah Malaysia yang sesuai dengan keperluan Pelan Pendidikan Pembangunan Malaysia 2013-2025. Gelombang ketiga rancangan ini bertujuan untuk meningkatkan fleksibiliti pengetua dan guru besar dalam menguruskan sekolah. Menurut artikel ini, pemahaman tentang fungsi menguruskan sekolah yang berkaitan dengan Undang-undang Malaysia akan membantu mereka menguruskan sekolah dan mengurangkan yang akan mengakibatkan tindakan undang-undang. Artikel ini memfokuskan bab bahagian pertama kandungan di MySG sebagai rujukan Pengurusan Sekolah Malaysia.

Kata kunci: literasi undang-undang, MySG,PPPM2013-2025

PENGENALAN

Pelan Pembangunan Pendidikan Malaysia 2013 - 2025 akan berakhir dalam masa tiga tahun lagi. Inti pati Gelombang tiga ialah sekolah-sekolah akan beranjak ke arah kecemerlangan dengan peningkatan keluwesan operasi. Pada permulaan Gelombang 3, semua sekolah, guru dan pengetua/guru besar perlu menunjukkan prestasi melebihi standard minimum. Oleh itu, Kementerian akan memberikan tumpuan kepada meningkatkan keluwesan operasi untuk memupuk budaya kepimpinan rakan setugas bagi pembangunan kecemerlangan profesional. Kementerian juga akan menganjakkan kebanyakan sekolah kepada model pengurusan berasaskan sekolah dan membangunkan model kejayaan sekolah berdasarkan inovasi dalam pengajaran. Matlamat Kementerian adalah untuk membangunkan sistem pengekalan kemajuan kendiri yang mampu untuk mencetuskan inovasi dan meningkatkan pencapaian yang lebih tinggi. (PPPM 2012-2025). Institut Aminuddin Baki telah diamanahkan untuk menyediakan kursus kepada pemimpin sekolah di Malaysia untuk membantu meningkatkan kompetensi mereka sebelum layak untuk mendapat jawatan sebagai Pengetua atau Guru Besar. Kursus Kelayakan Profesional Pemimpin Pendidikan (NPQEL) menyediakan 4 Modul yang membantu kompetensi pemimpin. Salah satu tajuk yang berkait dengan undang-undang ialah Perundangan Dalam Pendidikan yang diajar dalam tempoh empat (4) jam. Persediaan bakal Pengetua dan Guru Besar sebelum menjawat jawatan ini memerlukan pengetahuan yang

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bersesuaian terutama melibatkan konsep pengurusan berasaskan sekolah dan undang-undang yang menjadi rujukan. Kajian oleh Dr. Edo dan rakan-rakan (2019) menjelaskan pengurus sekolah yang memahami atau mempunyai kesedaran tentang undang-undang pendidikan akan mengurangkan risiko dikenakan tindakan undang-undang.

KEPENTINGAN LITERASI UNDANG-UNDANG KEPADA PEMIMPIN SEKOLAH

Terdapat banyak aspek undang-undang yang melibatkan penjawat awam termasuk guru-guru di sekolah. Semasa menjalankan amanah dan tanggung jawab, guru-guru akan terdedah kepada melakukan kesalahan sama ada disedari ataupun tidak. Contoh undang-undang yang boleh dikaitkan adalah undang-undang kontrak, undang-undang hak cipta, konsep in loco parentis dan undang-undang tort. Pengetua atau Guru Besar sebagai pentadbir dan pengurus sekolah perlu mempunyai pengetahuan dan dapat menyampaikan kepada semua staf di sekolah masing-masing. Literasi undang-undang membantu pemimpin sekolah melakukan tugas merancang, mengatur, mengawal dan memimpin aktiviti pengajaran dan pemudahcaraan yang dijalankan. (Mohd. Ismail Othman(2008).

Di dalam Teori Motivasi Maslow juga ada menyentuh berkaitan dengan keperluan undang-undang dalam menjamin kesejahteraan di peringkat kedua iaitu Peringkat Keselamatan. Setelah keperluan pertama dicapai, manusia akan mencari keselamatan hidup, kestabilan kerja, jagaan masyarakat sekeliling, undang-undang serta membebaskan diri dari segala ancaman luaran mahupun dalaman. Tahap keselamatan ini amat diperlukan bagi menjamin kesejahteraan hidup. Sebagai contoh, keselamatan di dalam kelas,makmal sains mahupun di padang ketika bersukan. Hal ini penting kerana murid-murid akan berasa lebih selamat dan dapat menumpukan perhatian sepenuhnya kepada pelajaran. Manakala perspektif pentadbir dan guru pula,mereka memerlukan undang-undang bagi melindungi diri mereka daripada ancaman atau daripada dakwaan pihak tertentu kerana tugas sebagai guru dan pentadbir sememangnya mempunyai risiko terhadap dakwaan adalah sangat tinggi

Salah satu aspek terpenting dalam pengurusan sekolah ialah memastikan murid-murid selamat sepanjang berada dalam pengawasan pihak sekolah. Ia melibatkan segala tindakan yang dilakukan oleh pemimpin untuk memastikan murid-murid dapat mengikuti pelajaran bersama guru dalam persekitaran yang kondusif dan selamat.

MALAYSIAN SCHOOL GOVERNANCE 2021

Kementerian Pendidikan Malaysia telah mengambil inisiatif menerbitkan MySG sekolah-sekolah Malaysia. Ketua Setiausaha KPM telah menjelaskan bahawa penerbitan MySG diharap menjadi rujukan rasmi berkaitan prosedur kerja dan tanggung jawab dengan lebih berkesan. Inisiatif yang disediakan adalah bertujuan untuk mengurangkan kekaburan dalam pelaksanaan dan seterusnya meningkatkan prestasi penyampaian pendidikan. (MySG Sekolah Menengah, 2021).

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Asas kepada penerbitan MySG 2021 ialah melalui kajian KPM pada tahun 2016 yang menunjukkan kekaburan peranan merupakan elemen paling berpengaruh iaitu 36.9% dalam kalangan pendidik. (MySG Sekolah Menengah, 2021). Kekaburan tentang peranan boleh dikaitkan dengan kekaburan tentang undang-undang yang digunakan melalui peruntukan yang sedia ada seperti Akta Pendidikan 1996, Surat Pekeliling Ikhtisas, Surat Siaran dan Garis Panduan yang dikemukakan oleh KPM.

Ketetapan MySG melalui Surat Pekeliling Ikhtisas Bilangan 4/2021 dijadikan Garis Panduan Tadbir Urus Sekolah yang akan mengatasi kekaburan peranan oleh Pegawai Perkhidmatan Pendidikan (PPP) dan Anggota Kumpulan Pelaksana (AKP). Apabila MySG dijadikan rujukan rasmi , satu perkara yang perlu diberi perhatian adalah sama ada terdapat elemen-elemen undang-undang dimasukkan di dalamnya atau ia memerlukan satu manual pelengkap yang menerangkan perincian aspek undang-undang berkaitan pengurusan di sekolah.

Mandat yang besar telah diberikan untuk pelaksanaan MySG apabila ia telah dipersetujui dalam Mesyuarat Profesional KPM Bil.11/2021 dan Mesyuarat TOP KPM Bil.9/2021 agar MySG dijadikan rujukan rasmi pengurusan sekolah-sekolah KPM.

MENGAPA PERLU LITERASI UNDANG-UNDANG?

Literasi Undang-undang berkait rapat untuk menjaga keperluan hak setiap individu. Apabila berlaku sesuatu kes, pengetua dan guru besar perlu tahu cara untuk mempertahankan hak dan melindungi diri mereka dari didakwa oleh pihak tertentu sesuka hati. Ramai para pendidik dan pentadbir sekolah tidak mempunyai pengetahuan yang mencukupi mengenai keputusan yang diambil oleh mahkamah yang bersabit dengan kes-kes dalam pendidikan (Rossow L.F, 1990). Ini adalah kerana mereka tidak mempunyai pengetahuan undang- undang yang mencukupi sehinggakan mereka tidak tahu hak mereka sendiri. Kedua ialah supaya tiada yang melampaui bidang kuasa. Kadangkala pengetua dan guru tidak sedar bahawa sesuatu tindakan tersebut terkeluar dari landasan peraturan sehingga ke peringkat boleh didakwa. Ini turut dipersetujui oleh Stewart (2005), yang mengatakan bahawa pengetahuan dalam bidang undang- undang pendidikan oleh guru dan pentadbir sekolah dianggap sudah memadai sebagai suatu tindakan berjaga-jaga bagi mengelakkan mereka daripada dikenakan dakwaan di mahkamah. Di samping itu, pentadbir sekolah dan guru mempunyai tanggungjawab melindungi dan menghormati hak setiap individu yang ada di sekolah. Tindakan melampaui bidang kuasa yang dibenarkan boleh dielakkan jika mereka mempunyai pengetahuan dan kesedaran mengenai undang-undang. Seterusnya ketiga ialah menjaga reputasi Perlembagaan Persekutuan. Manakala keempat didapati bahawa masyarakat semakin terpelajar. Masyarakat khususnya ibu bapa boleh bertindak dengan pelbagai cara dalam mendakwa sekolah, pentadbir dan guru walaupun pada hakikatnya pihak pentadbir dan guru tidak bersalah. Masyarakat pada masa kini bijak dalam memastikan mereka menang dalam sesuatu kes yang berlaku. Ia bertambah mudah untuk mendakwa pengetua dan guru besar tersebut jika mereka tidak mempunyai literasi berkaitan undang- undang dan hanya menyerah kalah. Pengetahuan undang-undang adalah sangat penting untuk dipelajari dan

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difahami supaya pengetua dan guru besar tidak mudah dipermainkan dengan pelbagai dakwaan yang tidak berasas.

MENINGKATKAN KOMPETENSI LITERASI PENGETUA DAN GURU BESAR TERHADAP UNDANG-UNDANG BERDASARKAN MYSG.

Terdapat empat bab yang menerangkan peranan pengurusan sekolah dalam menjalankan tugas yang diberikan. Makluman umum pengurusan telah menjelaskan bahawa KPM menggunakan peruntukan berikut dalam menjelaskan tugas dan tanggung jawab di sekolah. Peruntukan undang-undang tersebut adalah seperti berikut:

(i) Akta Pendidikan 1996 (Akta 550)
(ii) Buku Dasar Pendidikan Kebangsaan Edisi keempat, cetakan pertama 2017

Akta yang dinyatakan dan pernyataan dasar oleh KPM perlu difahami supaya kompetensi pengurus sekolah dapat ditingkatkan sejajar dengan hasrat menempatkan kepimpinan prestasi tinggi di setiap sekolah.

Seorang pengurus sekolah perlu mempunyai kompetensi terhadap empat jenis komponen pengurusan yang paling utama di sekolah. Komponen utama tersebut ialah Pengurusan dan Pentadbiran, Pengurusan Kurikulum, Pengurusan Hal Ehwal Murid dan Pengurusan Kokurikulum. Setiap komponen ini mempunyai peruntukan undang-undang di bawah Akta Pendidikan, Dasar Pendidikan Kebangsaan dan Surat Pekeliling Ikhtisas. Kompetensi pengurus sekolah dalam hal ini akan membantu dan sekali gus menjadi penyelamat apabila berlakunya sesuatu perkara yang boleh menyebabkan dakwaan ke mahkamah.

Rajah 1- Komponen Utama Pengurusan Sekolah

Rajah 1: Proses Pengurusan Sekolah Menengah KPM

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KESIMPULAN

Secara umumnya, dapatlah dirumuskan di sini bahawa pengetahuan undang-undang amat perlu diketahui oleh semua pentadbir sekolah kerana ia boleh membantu pentadbir sekolah dalam membuat keputusan yang tepat dan memberikan keyakinan kepada pentadbir sekolah dalam mengurus sekolah berdasarkan lunas-lunas yang betul (Institut Aminuddin Baki, Kementerian Pendidikan Malaysia). Peraturan dan undang-undang sekolah hendaklah jelas dan disampaikan kepada guru-guru, kakitangan, ibu bapa dan murid-murid semasa perhimpunan, melalui edaran pemberitahuan dan juga buku panduan peraturan(Mohd. Ismail Othman, 2006). Justeru itu, pentadbir sekolah hendaklah mengetahui dan memahami kandungan Ordinan Pelajaran 1957, Akta Pelajaran 1961, Akta Pendidikan 1996, Laporan jawatankuasa Kabinet 1979 serta semua Surat Pekeliling Ikhtisas daripada KPM supaya mereka dapat melaksanakan tugas dengan lancar dan berkesan. Di samping itu, bagi meminimumkan kemungkinan pihak sekolah didakwa kerana kecuaian, pentadbir sekolah perlu memahami dan menguasai aspek perundangan di sekolah terutama yang berkait dengan kecuaian dan tingkah laku serta elemen pengurusan di sekolah untuk mengelakkan institusi sekolah daripada dikenakan tindakan mahkamah. Oleh itu didapati MySG perlu dikuasai dan diimplementasikan secara lebih mendalam bagi memastikan semua Pengetua dan Guru Besar mempunyai literasi Undang-undang.

PENGHARGAAN

Kami mengambil kesempatan ini untuk mengucapkan terima kasih semua pihak yang telah memberi peluang kepada kami untuk meningkatkan diri dalam konteks untuk menyumbang pandangan dan idea daripada pandangan pendidikan berkaitan undang-undang. Pengetahuan tentang undang-undang dan pengurusan sekolah akan membantu kami menjadi pegawai perkhidmatan pendidikan yang lebih berkualiti.

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POTENTIAL AND PITFALLS OF CLOUD COMPUTING ADOPTION TOWARDS QUALITY HIGHER EDUCATION IN MALAYSIA

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ABSTRACT

Cloud computing is a worldwide trend as everybody uses cloud computing for business purpose, learning, storing, etc. In the context of higher education, cloud computing improves the effectiveness and efficiency to the educational users to access and store various educational resources. It is undeniable that the flexibility of cloud computing brought a lot of advantages to the students, however, there're some threats from using cloud computing which requires us to pay attention especially for the security issues. Accordingly, this paper aimed at highlighting the potential and pitfalls of cloud computing adoption in higher education in Malaysia. Among others, cloud computing holds huge potential for the higher education context, such as ease and flexibility of the cloud infrastructure, facilitation of online learning, as well as storage by saving cost and space. On the other hand, there also seem to the downside and pitfalls of cloud computing in higher education, such as confidentiality threats, data security risks and slow speed. It is hereby submitted that this study is significant to better understand the higher education landscape of Malaysia, towards achieving the United Nation's 4th sustainable development goal of quality education (SDG4). Hopefully, paper can become a catalyst for further research on these key concepts of cloud computing, quality education and higher education.

Keywords: Cloud computing, higher education, higher education institutions, quality education, SDG4

INTRODUCTION

Cloud computing refers to the delivery of on-demand computing services that allow users to access to anything from applications to data storage from a cloud service provider. In the era of technology, cloud computing services are widely used as the preferred choice for storing, managing and processing any materials. The most common platform for cloud computing can be referring to Google Drive, iCloud, Amazon Web Services, etc.

It must be mentioned that higher education institutions (HEIs) optimize the use of cloud computing which specifically refer to online learning by storing the teaching and learning

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materials, managing and processing the materials as well as retrieving the information for their teaching purposes especially during this critical moment - pandemic COVID-19. Even though there are many advantages can be gained through cloud computing in education, however, Mary.T (2019) indicated that there is security issue on personal data in cloud computing.

In tandem with the need to promote and achieve quality education particularly the United Nation's 4th Sustainable Development Goal of higher education, it is hereby submitted that this study is pertinent towards understanding what cloud computing can offer to improve the higher education in Malaysia. At the same time, it is also significant to identify the issues and pitfalls of cloud computing in this context. Therefore, this paper seeks to highlight the main objective of: To examine the potential and pitfalls of cloud computing adoption in higher education in Malaysia. Accordingly, there are three major sections of this paper. The first section provides an account of the review of literature of the key concepts engaged in this study. The second and third sections deliberate on the potential and pitfalls of cloud computing adoption by HEIs in Malaysia. The paper concludes by highlighting the key findings of the study and proposing directions for future research.

CLOUD COMPUTING IN HIGHER EDUCATION INSTITUTIONS

Cloud computing bring huge impact to education where the general infrastructure for giving conceptual and operational integration of ICT in activity fields and daily life areas translates. It is effective in the case of learning in higher education, university management and education research. Cloud computing eases the process of teaching and learning activities in higher education. (Masud, 2012). Moreover, based on Akande (2014), cloud computing enhances the efficiency and flexibility to the educational users to access to various educational resources which include access to software and platform whenever the users intend to do so in the only condition that the internet access is available. Hence, cloud computing had been widely used in higher education worldwide.

The use of the cloud may save a lot of resources as it contributes to the decreased consumption of printers, toners and papers which the cloud would improves productivity, effectiveness and efficiency. Since higher education institutions encounter budget restriction and sustainability challenges, the best solution to overcome these problems is cloud computing. Throughout cloud computing, education institutions save a lot the costs to build up the technology systems. In some large universities, they might beam a provider of cloud services. The trend in the greater use of mobile devices supports and encourages the use of cloud computing in the sense of it provides access to applications, storage and other resources to users without any restriction from any smartphone device. (Sasikala, 2011)

Hence, there is unquestionable that universities have become more reliant on information and communication technology (ICT) and internet-based services which to provide their stakeholders with educational services. However, the level of usage of cloud computing services is different from the countries. According to Abdulatif (2020), the experimental

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result of his research showed that the adoption of cloud computing services and applications is in a low level and deem as weak in most of the HEIs in Sudan. The factors of these circumstances are lack of resource requirements, lack of proper infrastructure and lack of training opportunities to IT staff on modern systems. These problems happen in many developing countries and under developing countries.

POTENTIALS OF CLOUD COMPUTING IN HIGHER EDUCATION

The higher education institution should weight the benefits and possible threats in using cloud computing. The benefits of cloud computing solutions over traditional devices and technologies include ease and flexibility of the cloud infrastructure, facilitation of online learning, as well as storage by saving cost and space.

Easy and Flexible

In this era, the students commonly use their mobile devices to access data. They can just use their smartphone, laptop or tablet to refer the teaching materials, journals, and even do their homework online. The cloud-based classroom applications may become one of the best ways to facilitate this exchange between student and faculty (Yadav, 2014).

Facilitates Online Learning

There are many HEIs are attempting to give the virtual classrooms through cloud. Cloud servers allow education institutions to offer this teaching method that can be accessed by students without the restriction of place and time through mobile devices, tablets or computers (Luo & Zhang, 2013).

Storage by saving cost and space

Scalable cloud storage provides the HEIs the capability to enlarge storage capabilities. Higher education institutions contain a large data to contend with, including everything from the staffs, students and faculties information to course material. These data can quickly overwhelm traditional on-site storage options (Al-Malah, et, al. 2021). In addition, if there was natural disaster such as storms happens or in the circumstance where the server down, the colleges and universities may lose the data stored that may never be retrievable again. Cloud storage can avoid such problem by offering business continuity and disaster recovery.

PITFALLS OF CLOUD COMPUTING IN HIGHER EDUCATION

According to Turab (2013), there are five challenges that may arise from the cloud service provider CSP level attacks include guest-hopping attack, SIL injection, side channel attack, malicious insider and data storage security. Due to the research by Munjal (2015), there are some threats and challenges which caused by cloud computing in higher education

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which include data security, and unsolicited advertising and failure of cloud service. The most concern issue of the higher education institution is the breach or leaked of the confidential data which may involve student, lecturer, staff, faculty and other member.

Confidentiality Threats

There are confidentiality threats arise from insider user's threats and external attacker threats. Insider user threats may refer to the bad faith cloud provider users, cloud customer users with malicious intention, suspicious third-party users. This kind of threat of insiders accessing customer data held within the cloud is greater because of each of the delivery models may introduce the need for multiple internal users (Tchernykh, et. al, 2019). The external attacker threats consist of remote software attack of cloud infrastructure or cloud applications, remote hardware attack towards the cloud or cloud users' organizations' endpoint software and hardware as well as social engineering of cloud provider users and cloud users. This threat from external attackers is difficult to be prevented it usually happens in the public Internet facing clouds.

Data Security

Raisian (2015) states several data security subjects about cloud computing including availability, confidentiality, integrity, data location, data recovery, retention, ownership, access control and data lock-in. Moreover, this scholar further points out the virtual machine level security issues which include hypervisor security, authorization and authentication, networking and isolation. Apart from that, this scholar indicated the issues on application security which consist of cloud browser security, cloud malware attack, backdoor and debug option, cookie poisoning and privacy.

Slow Connection

Apart from the issue of security, the slow connection also is a challenge in using cloud computing in higher education institution Malaysia. The speed of internet connections to cater all the services and data sharing or files transfer which still a big challenge and serious matter to Malaysian Higher Education Institutions. (Darus, 2015). Even though government encourage Malaysia citizens to utilize the convenient of internet in daily life including education, e-commerce, etc, but there is undeniable that the internet speed still needs a lot of improvement. Malaysian Communications and Multimedia Commission (MCMC) states that the increased use of the internet by Malaysian during Movement Control Order (MCO) period has slowed down its speed (New Straits Times: Life& Times, 2020).

CONCLUSION

The study sought to examine the potential and pitfalls of cloud computing adoption towards achieving quality higher education in Malaysia. The study concluded that there is huge potential for cloud computing in the higher education context, such as ease and flexibility

of the cloud infrastructure, facilitation of online learning, as well as storage by saving cost and space. Meanwhile, there also seem to the downside and pitfalls of cloud computing in higher education, such as confidentiality threats, data security risks and slow speed. Such findings only support that this study is highly significant to better understand the higher education landscape of Malaysia, towards achieving the United Nation's 4th sustainable development goal of quality education (SDG4). Future research should be directed towards gathering empirical data from the HEIs in Malaysia in substantiating such findings which are hereby found in this paper conceptually.

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EMPLOYMENT LAW

WHISTLEBLOWING IN MALAYSIAN PRIVATE COMPANIES AND ITS IMPLICATION ON EMPLOYEES: DISCLOSE OR REMAIN SILENT?

Vishanthini a/p Veerasingam & Zuryati Mohamed Yusoff

PENELITIAN TERHADAP PINDAAN AKTA PERHUBUNGAN PERUSAHAAN 1967

Mohd Rasul Mohammad Noor, Mohd Faizal Md. Isa & Ahmad Shamsul Abd. Aziz

SISTEM SOKONGAN SOSIAL TERHADAP PEKERJA PENJAGAAN KESIHATAN: FENOMENA PANDEMIK COVID-19

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#HARTALDOKTORKONTRAK: APPRAISING THE LEGAL ISSUES

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PEMAKAIAN "JUBAH HITAM" DI MAHKAMAH SIVIL: SATU SOROTAN ASAL USUL

Noor 'Aza Ahmad & Nor Hayati Abdul Samat

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WHISTLEBLOWING IN MALAYSIAN PRIVATE COMPANIES AND ITS IMPLICATION ON EMPLOYEES: TO DISCLOSE OR REMAIN SILENT?

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ABSTRACT

Whistle blowing has been receiving increased attention and support in recent times as a means of detecting and correcting wrongdoings in organizations. The function of whistleblowing as an effective mechanism has been accepted in any organization worldwide. While there appears to be consensus amongst policy makers that legislation to protect whistle-blower is needed, the emerging policy question addresses what institutional framework is most fit to implement whistle blowing legislation. Previous whistle-blowing literature includes many studies that have attempted to identify various predictive variables of whistle-blowing intention. However, the results of these studies remain inconclusive. Further, it is known about the underlying mechanism behind the relationships between the predictive variables and whistle-blowing intention. Undoubtedly, whistle blowing plays a vital role in preventing corruption, fraud and other unethical issues practiced in the organization. This is where the law ensures the promotion of whistle blowing practices, to avoid any demotivation of employees' attitudes in reporting such issues to the right channel without any injustice circumstances. The importance of this paper is to illustrate the employees' attitudes towards whistle blowing in an organization thus the tussle between internal and external protection of whistle blowing practices and legal issues in governing the Malaysian private companies. Hence the questionnaire is designed on employees' attitudes towards whistle blowing and how the law deals with the issues faced by Malaysian private companies. The findings confirm that employees, especially of private companies need to be protected against unfair retaliation for making legitimate disclosure and thus, employers are urged to prevent irreparable damage from abusive disclosure of sensitive corporate information.

Keywords: Organizational wrongdoing, Whistle blowing- protection, characteristics, and intentions and Private Companies

INTRODUCTION

Whistleblowing refers to the voluntary release of information, as an ethical dissent, by an individual from an organization about unlawful or unethical lead in the organization that is contradicted to the open intrigue and simple characterized as "the exposure by

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organization members on unlawful or ill-conceived practices to people". Indeed, whistleblowing plays a vital role as a flawed control of an organization when the unequivocally consolidates certain employees that reveal the occurrence of wrongdoing. Apparently, the whistle-blower is a person who exposes negligence, abuse of power, or danger (such as misconduct or professional incompetence) in the organization. Disclosure of information outside the organization is the original meaning of the term "report," which compares this behaviour with a harsh hiss, a piercing background noise, and destroying the false harmony or imposing silence on the status quo. However, both external and internal reporting of irregularities has similar problems, challenges and risks. Reporting the decision to a colleague or employer is not an easy task; unless there is a legal obligation to report, it should be considered a step when all else fails. A true external report requires the whistle-blowers to use all appropriate channels within the organization to correct the error but was unsuccessful. On many occasions, external reporting incidents that occurred after all internal reporting failed through the hierarchy. It shows either directly or indirectly that an organization does not support those who blow the whistle for violating professional standards, indicating the failure of organizational ethics.

In a large circumstance where the employees blowing up the issues in an organisation on any of the unethical issues such as misbehaviours to the pertinent people or organisations that might have the option to take the reasonable and appropriate action. This implication which explains the basic principle of this research is to re-examine several individual (individual) variables of reporting intentions in the form of internal or external reporting channels, which may provide new perspectives and explanations for reporting research pointed out that reporting is particularly affected by cultural background, because different countries may have very different views on right and wrong, justice, morality, and loyalty (Near and Miceli, 1985). Given the aspect of whistle blowing as an important mechanism in exposing the wrongdoings and misconduct in organization, it is vital for management to understand the factors that determine the likelihood of employees to blow the whistle.

The Whistle blower Protection Act 2010 (WPA 2010) was introduced in Malaysia as a component of the battle to combat defilement and acts of neglect in public sector and private sector through giving insurance to informants. Under the Malaysian Anti-Corruption Commission, the WPA 2010 clearly stated that this is an act to promote disclosure of information about any corruption or other misconduct. The Act will protect whistle-blowers from any prejudicial effects arising from the disclosure conducts.

For quite a while, whistle blowing has been dubious in Malaysian private industry. The current emphasis on the necessity for whistle blowing in private circles may be credited to the inconvenient effects of corruption and dishonest practices. This is going on considering the way that Malaysian response towards witness affirmation particularly identifying with the WPA 2010 is still at the weak level. Since people do not blow the whistle, it upholds up the amount of misfortunate conduct, distortion and wrongdoings among the industry practitioners.

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This article aims to explore the impact of ethical leaders in the employee's organizational environment to increase the likelihood whistle blowing (whistle blowing intention). In addition to that, whistle blowing could also depend on the individual aspect of employees. The considerable lack of experience in implementing this policy as an open policy must be due to this which clearly explained the lack of policies implementation of the laws. Due to excessive attention to processes and lack of sufficient expertise, regulators have not effectively strengthened the company's enforcement (Oladinrin and Ho, 2015a). However, it is highly imaginative that if this policy is properly arranged in all organizations in the private industry in Malaysia, professional ethics may be improved. If the whistleblowing policy is implemented correctly, this will promote the progressive movement of private sector. In this perspective state that whistle-blowers are probably going to be people who have proficient situations in the organization, their residency or time of management in the organization was equivalently more that it will be receptive to employee's complaints in any unlawful activities (Oladinrin and Ho, 2015a).

PROBLEM STATEMENT

Whistleblowing is in fact an important organization's internal control mechanism in combatting improper conducts within the organization. A whistle-blower is just someone who informs an employer or a co-worker for intervening in illegal or unethical corporate practices. This would be traditionally an employee at the workplace who identifies a conspiracy or plan and comes forward before reporting the employer to the authority. Blowing a whistle on an employer puts an employee at risk of losing his or her job, either through the work or through uncomfortable situations. In most situations, employees are too afraid to express their complaints about the wrongdoings they have endured at work. Thus, instead of just blowing a whistle, more people are likely to turn a blind eye for fear of how exposing any misconduct could affect their employment. Most of them are likely at some point to observe wrongdoing in the organizations, and some of them will blow the whistle to someone with the authority to put a stop to the wrongdoing. This situation puts them in a dilemma.

Moreover, the introduction of a specific law by the Malaysian government to provide protection for persons making those disclosures from detrimental action, yet to be successfully implemented. In order to avoid external whistleblowing, which entails all sorts of costs for the organization, it is desirable that managers take clear steps: investigate the allegations, make the results of the investigation known to those affected, correct the problem if one is found, and avoid reprisal against whistle-blowers. With whistleblowing continually on the rise, the threat of employees no longer keeping silent about unethical behaviour within the workplace, coupled with higher protection from retaliation for whistle-blowers, is a large deterrent to potential wrongdoers, as well as an ambassador for social responsibility.

External whistle-blowing intentions may lead to public embarrassment, government scrutiny, hefty fines and litigation as they do not only expose the internal wrongdoings, but also an institution that fails to stop and correct wrongdoings by itself. It is understood

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that most of the employees tend to blow the whistle externally when they find that the internal audiences are of complicity with the wrongdoings; so, they look for external audiences who are able to intercede. Ironically, a potential whistle blower may have a positive attitude towards whistleblowing, seek the opinion of relevant others and evaluate the difficulties and opportunities before blowing the whistle either to internal or external audiences.

LITERATURE REVIEW

The topic of whistle blowing has gained substantial significance from numerous researchers nearly forty years ago. Numerous researchers have since been conducted in an attempt to provide framework for whistle blowing intention. The proposed framework illustrated the determinants which either influence and/or facilitate whistle blowing intention. These contributing factors would be able to provide insightful guidelines that may increase the likelihood for employees to whistle blow. These articles explore the impact of ethical leaders and the personal attributes of employees on whistle blowing intention. However, it can be argued that whistleblowing is an important and valid method of endeavouring to control possible unethical behaviours by organizations, as well as helping to establish a level of social responsibility. For these reasons, it is important for society to maintain a level of support and encouragement towards whistle-blower, so that their often-valuable contribution towards eliminating corporate wrongdoings can continue.

This research aims to add valuable insights to the literature on whistleblowing. Therefore, the basic principle of this research is to re-examine several individual (individual) variables of reporting intentions in the form of cultural differences, which may provide new perspectives and explanations for reporting research pointed out that reporting is particularly affected by cultural background, because different countries may have very different views on right and wrong, justice, morality, and loyalty. In addition, human behaviours are considered to be the result of cultural and social antecedents (Chiu and Kosinski 1999). Therefore, employees with different socio-economic impacts may have different views on what is ethical and what is unethical (Chen 2001). Therefore, this research extends the investigation into whistleblowing by examining the relationships between selected individual variables; that is, in a cultural context never before explored, internal control points, work experience and ethics training, and the intention to report. These variables are more likely to influence people's propensity to report misconduct or organizational misconduct. Still, the discovery of the relationship between several individual variables, such as internal control points and work experience, and intentions to report remains to be discussed (Miceli, Near, and Dworkin 2008).

On the other hand, the use of moral training as a single variable further strengthens the rationality of this research. The inclusion of ethical training is based on a suggestion by Jones, Massey, and Thorne (2003) that the intention of an individual's moral behaviours is affected by ethical training. Frisque and Kolb (2008) agree that ethics programs can influence the decision of individuals to report wrongdoing. In general, the investigation of complaints in Malaysia is considered important, especially in terms of investigating

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possible factors that may affect the reporting decision, while emphasizing the important role of complaint actions as an internal control mechanism.

Employees Attitudes

As indicated by the primary component under Ajzen's (1988) model of arranged conduct is attitudes, which implies a person's expectation to play out a given conduct. Toward a given lead, attitudes are incorporated social feelings (i.e., feelings about the probability of occasion of explicit results of playing out the direct being alluded to), all of which is expanded by the individual's evaluation of the outcomes. They express that 'while characteristics and feelings expect whistle-blowing, their possessions, all things considered, are more delicate than are those of situational factors stressed over the particular scene of wrongdoings'.

This is because such wide measures can simply predict direct tendencies or for the most part instances of lead express that such expansive measures 'are of minimal worth if we are excited about expecting and seeing some particular movement with respect to the article'. Attitudes towards whistle-blowing aim are the capacity of social convictions and result assessments. Behavioural belief is controlled by how one accepts about the conduct while result assessments are the ticket one connects their convictions with specific results. For instance, the comprehension "Whistle-blowing forestalls damage to organization" is a conviction that interfaces as indicated by Ab Ghani (2013), the greater part of the workers will in general blow the whistle remotely when they track down that the inner crowds are of complicity with the wrongdoings.

Current law and whistle blowing practices

It is critical to consider the most well-known obstructions to whistle blowing. The weight of current systems forced on whistle-blower is additionally a matter of concern. For instance, in Germany, the Federal Labour Court has maintained in specific events that local officials wishing to reveal wrongdoings" need to first look for in-house explanation and decide the suitability of their divulgence or they could confront a legitimate excusal in the event that they neglect to effectively exceed the public interest versus their dependability obligation.

For the most part, courts attempt their own enthusiasm for circumstances, which practically speaking establishes a disincentive to turn into a whistle blower. The legitimate capability dependent on ideas of obligation is available in numerous nations. Whistle blowing ought to likewise be recognized from laws and approaches on security of witnesses. There is some cover between the two, regularly including a guarantee to keep the personality of the individual private. Nonetheless, witness insurance is a significantly more genuine matter, including ordinarily the actual assurance of the person who won't affirm in a criminal case except if they are guaranteed protection.

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It can likewise be more extensive in scope, including individuals who are not in the association and might have simply seen something or run over the data they are being approached to affirm on as a component of their positions. Whistleblowing, then again, ought not to damage to the vocation and interests of the person at the work environment.

RESEARCH METHODOLOGY

This research is non-doctrinal based research hence is solely more on socio-legal research to identify the connection between the perspective between workers together with the whistle-blowers. The scope of a study explains the extent to which the research area focusing on the Klang Valley private companies whose total are 10, 8595. The sampling was carried out at the chosen ten manufacturing sector where the targeted respondents are 150 employees who categorized from the three-tier hierarchy level of the organization which includes first-line management which consists of executive and office managers, middle management which consists senior managers and lastly top management which includes President, CEO and Vice President. These participants of this study are basically from the executive and management levels, with 34 executives, 58 managerial and 58 President, CEO, CFO and Vice President working in the manufacturing sector. Lastly, the respondent is the employees are working for their employers in the manufacturing sector.

Analysis of Data

The questionnaire-based survey of employees had been used to conduct research working in Klang Valley Area manufacturing sectors in Malaysia hence analysis with SPSS. The actual test begins by considering two hypotheses. They are called the null hypothesis and the alternative hypothesis. These hypotheses contain opposing viewpoints. H0: The null hypothesis: It is a statement of no difference between sample means or proportions or no difference between a sample mean or proportion and a population mean or proportion. In other words, the difference equals 0. Ha: The alternative hypothesis: It is a claim about the population that is contradictory to H0 and what we conclude when we reject H0. Since the null and alternative hypotheses are contradictory, the evidence must be examined in order to decide if there is enough evidence to reject the null hypothesis or not. The evidence is in the form of sample data. There are two options for a decision. They are "reject H0" if the sample information favours the alternative hypothesis or "do not reject H0" or "decline to reject H0" if the sample information is insufficient to reject the null hypothesis.

Hypothesis

Hypothesis 1 (H1)

Ha: There is a significant relationship between the employee's attitudes and whistle-blower in Malaysian private companies.

Hypothesis 2 (H2)

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Ha: There is a significant relationship between the internal versus external whistle-blowing current law practices and the whistle-blower in Malaysian private companies.

No	Hypothesis	P- Value	Decision
H1	There is a positive relationship between the employee's attitudes and whistle-blower in Malaysian private companies.	0.000	Accept and Significant
H2	There is a positive relationship between the internal versus external whistle-blowing law practices and the whistle-blower in Malaysian private companies.	0.000	Accept and Significant

SUMMARY

This chapter summarizes the results of the analysis. The analysis method used in this study consists of descriptive analysis, reliability analysis, and Pearson's correlation, and Multiple Regression Analysis. Based on the results of the analysis, all both two hypotheses are significant with the dependent variables. The results of analysis conclude that the employee's attitudes and internal versus external whistle-blowing law practices and the whistle-blower in Malaysian private companies. Whistleblowing ought to likewise be recognized from laws and approaches on security of witnesses. There is some cover between the two, regularly including a guarantee to keep the personality of the individual private. Nonetheless, witness insurance is a significantly more genuine matter, including ordinarily the actual assurance of the person who won't affirm in a criminal case except if they are guaranteed protection. It can likewise be more extensive in scope, including individuals who are not in the association and might have simply seen something or run over the data they are being approached to affirm on as a component of their positions. Whistleblowing, then again, ought not to damage to the vocation and interests of the person at the work environment. In whistleblowing, the emphasis is on the data, not the individual who made the revelation. The purpose in leading this examination was to analyse the predecessors and corresponds of whistleblowing and counter against whistle-blower so that we may better comprehend their job as indicators and inside the whistleblowing cycle.

CONCLUSION

The function of whistle blowing is crucial in exposing wrongdoing due to the nature of corruption that it is not easily detect through formal channels especially in developing countries. Employees who witness misconduct in organization prefer not to come forward to disclose the wrongdoing and remain silent due to risky and ambiguity elements associated with the whistle-blowing behaviour. In these instances, management should address the issue immediately by encouraging the employees to disclose any wrongdoings observed. Much investigation has been guided in an effort to understand and indicate the whistle blowing cycle similarly as to anticipate a counter against the whistle-blower. Of most vital importance is the finding that assessment coordinated on whistle blowing assumptions does not successfully change over into choices about the whistle blower. Or

then again perhaps, to impel our appreciation of this field, we need to explore and list the cycles that occur between the time wrongdoings is seen and exactly when genuine whistle blowing occurs in the organisation practices. Research on the effectiveness of either of these systems is, however, lacking. Previous studies have shown that retaliation is a common (but varying) risk for whistle-blowers, and that this may result in various types of 'suffering', such as work-related problems (e.g., demotivation, disengagement, and distrust to co-workers) and psychological problems like "anxiety, depression, irritability or dread, even suicidal thoughts". However, more research is needed to determine which whistle-blowers suffer and how they suffer (particularly outside the where most research is conducted) (Smith 2014).

Moreover, scholars should also analyse how those who have experienced reprisals have overcome the consequences of it and which support mechanisms are helpful. Such research would be useful for the debate on whether governments should invest in specific tailor-made psychosocial support for whistle-blower's or refer those who suffer from retaliation to general employee assistance programs. Whistleblowing on organisation bad behaviour has become progressively broadcasted lately. Such whistleblowing has helped associations and government offices in ending rehearses that would something else hurt workers and shoppers. Given the potential for positive results to come about because of whistleblowing, it is discouraging to discover that numerous whistle-blowers may fear and even endure reprisal. Much exploration has been directed in an exertion to comprehend and specify the whistleblowing cycle just as to foresee counter against whistle-blower. Of most noteworthy significance is the finding that examination directed on whistleblowing expectations does not effectively convert into decisions about whistle-blower.

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PENELITIAN TERHADAP PINDAAN AKTA PERHUBUNGAN PERUSAHAAN 1967

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ABSTRAK

Artikel ini membincangkan mengenai pindaan yang dibuat terhadap Akta Perhubungan Perusahaan 1967. Akta ini merupakan perundangan yang diguna pakai di Malaysia bagi tujuan mengawal selia hubungan antara majikan dan pekerja serta kesatuan sekerja dalam bentuk pencegahan dan penyelesaian apa-apa perselisihan atau pertikaian di antara mereka. Akta Perhubungan Perusahaan 1967 telah dipinda dan sebahagian besar pindaan tersebut telah dikuatkuasakan bermula 1 Januari 2021. Objektif penulisan artikel ini adalah untuk mengenal pasti peruntukan-peruntukan yang terlibat dengan pindaan ini. Tujuan pindaan kepada akta ini ialah untuk meningkatkan dan memperluaskan perlindungan dan kebajikan golongan pekerja di negara ini, untuk menambah baik sistem penyelesaian pertikaian sedia ada bagi membolehkan pertikaian yang berlaku diselesaikan dengan lebih berkesan dan pantas serta untuk memastikan undang-undang perburuhan di negara ini setara dengan standard antarabangsa yang ditetapkan oleh Pertubuhan Buruh Antarabangsa (ILO). Pindaan ini akan membawa transformasi kepada landskap perhubungan perusahaan dalam negara. Hasil dapatan menunjukkan bahawa pindaan yang dibuat ini merangkumi peruntukan berkaitan representasi pemulihan kerja, rujukan kes pelanggaran terhadap hak-hak pekerja, majikan dan kesatuan sekerja, kes isu kapasiti pekerja dan tuntutan pengiktirafan, perundingan kolektif, piket, mogok, tutup pintu, kuasa serta keanggotaan mahkamah perusahaan dan award.

Kata kunci: Akta Perhubungan Perusahaan 1967, pekerja, pertikaian, pindaan, undang-undang

PENGENALAN

Sistem perhubungan perusahaan di Malaysia secara praktis beroperasi dalam kerangka undang-undang Akta Perhubungan Perusahaan 1967 (APP 1967). Akta ini dikuatkuasakan oleh Jabatan Perhubungan Perusahaan, Malaysia (DIRM). Iklim persekitaran perusahaan yang harmoni antara majikan dan pekerja boleh memberi impak positif dalam setiap

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kegiatan ekonomi. Sehubungan dengan itu, APP 1967 ini menggariskan perkara-perkara berikut bagi membina persekitaran hubungan perusahaan yang harmoni: -

i. Peruntukan berkaitan dengan proses tuntutan pengiktirafan dan skop perwakilan kesatuan sekerja;
ii. Peruntukan yang berkaitan dengan kemudahan perundingan kolektif yang berkesan antara kesatuan sekerja dan majikan serta kesimpulan selanjutnya daripada sesuatu perjanjian kolektif;
iii. Peruntukan yang berkaitan dengan pencegahan serta penyelesaian pertikaian perdagangan dan ini termasuklah membuat rujukan kepada Menteri Sumber Manusia dan Mahkamah Perusahaan untuk mendapatkan keputusan;
iv. Peruntukan yang berkaitan dengan tindakan industri seperti piket, mogok dan boikot;
v. Peruntukan yang berkaitan dengan pernyataan tuntutan untuk tujuan pengembalian pekerjaan;
vi. Peruntukan yang berkaitan dengan operasi Mahkamah Perusahaan; dan
vii. Peruntukan yang berkaitan dengan kuasa-kuasa penyiasatan pegawai di Jabatan Perhubungan Perusahaan, Malaysia.

PINDAAN TERHADAP AKTA PERHUBUNGAN PERUSAHAAN 1967

Terdapat pelbagai undang-undang berkaitan pekerja di Malaysia (Yow, 2021). APP 1967 merupakan perundangan yang diguna pakai di Malaysia bagi tujuan mengawal selia hubungan antara majikan dan pekerja serta kesatuan sekerja dalam bentuk pencegahan dan penyelesaian apa-apa perselisihan atau pertikaian di antara mereka. Namun, APP 1967 ini telah dipinda dan sebahagian besar pindaan tersebut telah dikuatkuasakan bermula 1 Januari 2021. Sehubungan dengan itu, penulisan artikel ini dibuat dengan objektif untuk mengenal pasti peruntukan-peruntukan yang terlibat dengan pindaan ini serta impaknya terhadap pekerja-pekerja di Malaysia.

Tujuan pindaan kepada akta ini ialah untuk meningkatkan dan memperluaskan perlindungan dan kebajikan kepada golongan pekerja di negara ini, untuk menambah baik sistem penyelesaian pertikaian sedia ada bagi membolehkan pertikaian yang berlaku diselesaikan dengan lebih berkesan dan pantas serta untuk memastikan undang-undang perburuhan di negara ini setara dengan standard antarabangsa yang ditetapkan oleh Pertubuhan Buruh Antarabangsa (ILO). Justeru, pindaan ini dilihat akan membawa transformasi kepada landskap perhubungan perusahaan di Malaysia.

Pindaan-pindaan yang dibuat merangkumi peruntukan berkaitan representasi pemulihan kerja, rujukan kes pelanggaran terhadap hak-hak pekerja, majikan dan kesatuan sekerja, kes isu kapasiti pekerja dan tuntutan pengiktirafan, perundingan kolektif, piket, mogok, tutup pintu, kuasa serta keanggotaan mahkamah perusahaan dan award (Kumar, 2021).

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Berikut ialah peruntukan-peruntukan di dalam Akta Perhubungan Perusahaan (Pindaan) 2020 yang dikuatkuasakan di Malaysia bermula 1 Januari 2021.

Jadual 1- Pindaan Terhadap Akta Perhubungan 1967

BIL	PERKARA	PERUNTUKAN ASAL	PERUNTUKAN YANG DIKUATKUASAKAN BERMULA 1.1.2021 (AKTA PERHUBUNGAN PERUSAHAAN (PINDAAN) 2020)
1	**REPRESENTASI PEMULIHAN KERJA**	Rujukan ke Mahkamah Perusahaan bagi kes representasi pemulihan kerja dibuat oleh Menteri Sumber Manusia. Beliau juga mempunyai kuasa budi bicara sama ada untuk merujuk atau tidak merujuk sesuatu kes representasi kes pemulihan kerja ke Mahkamah Perusahaan. Peruntukan: Subseksyen 20(3) APP 1967	Rujukan ke Mahkamah Perusahaan bagi kes representasi pemulihan kerja dibuat oleh **Ketua Pengarah Perhubungan Perusahaan. S**etiap kes yang tidak dapat diselesaikan di Jabatan Perhubungan Perusahaan hendaklah dirujuk ke Mahkamah Perusahaan. Peruntukan: Subseksyen 20(3) APP 1967
		Hanya pekerja, majikan, wakil majikan yang diberi kuasa, kesatuan sekerja pekerja, kesatuan sekerja majikan, pertubuhan pekerja dan pertubuhan majikan dibenarkan untuk hadir semasa proses rundingan damai di Jabatan Perhubungan Perusahaan. Peruntukan: Subseksyen 20(6) APP 1967	Selain daripada perwakilan sedia ada, pekerja dan majikan juga boleh diwakili oleh **mana-mana orang** dengan mengemukakan permohonan bertulis dan tertakluk kepada kebenaran Ketua Pengarah kecuali peguam bela dan peguam cara. Peruntukan: Subseksyen 20(6) APP 1967
		Tiada peruntukan.	Pekerja kurang upaya mental yang tidak mempunyai *guardian ad litem* boleh diwakili oleh waris terdekat semasa proses rundingan damai dengan syarat ianya mendapat kebenaran Mahkamah Tinggi. Peruntukan: Subseksyen 20(6A) APP 1967
		Peruntukan berkaitan dengan	Menteri mempunyai kuasa bagi

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		representasi pemulihan kerja tidaklah terpakai bagi pekerja-pekerja yang diambil kerja oleh mana-mana badan berkanun. Peruntukan: Subseksyen 52(1) APP 1967	**memanjangkan pemakaian** peruntukan representasi pemulihan kerja **kepada pekerja-pekerja badan berkanun** setelah konsultasi dengan badan berkanun berkenaan. Peruntukan: Subseksyen 52(3) APP 1967
2	**RUJUKAN KES PELANGGARAN TERHADAP HAK-HAK PEKERJA, MAJIKAN DAN KESATUAN SEKERJA**	Rujukan ke Mahkamah Perusahaan bagi kes pelanggaran terhadap hak-hak pekerja, majikan dan kesatuan sekerja boleh dibuat oleh Menteri Sumber Manusia. Beliau juga mempunyai kuasa budi bicara sama ada untuk merujuk atau tidak merujuk kes berkenaan ke Mahkamah Perusahaan. Peruntukan: Subseksyen 8(2) dan 8(2A) APP 1967	Rujukan ke Mahkamah Perusahaan bagi kes pelanggaran terhadap hak-hak pekerja, majikan dan kesatuan sekerja dibuat oleh **Ketua Pengarah Perhubungan Perusahaan.** Beliau mempunyai kuasa budi bicara sama ada untuk merujuk atau tidak merujuk kes berkenaan ke Mahkamah Perusahaan. Peruntukan: Subseksyen 8(2) APP 1967
3	**KES ISU KAPASITI PEKERJA DAN TUNTUTAN PENGIKTIRAFAN**	Menteri Sumber Manusia boleh memutuskan keputusan berhubung sama ada seseorang pekerja digajikan dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan. Peruntukan: Subseksyen 9(1D) APP 1967	Keputusan sama ada seseorang pekerja digajikan dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan diputuskan oleh **Ketua Pengarah Perhubungan Perusahaan.** Peruntukan: Subseksyen 9(1D) APP 1967
		Menteri Sumber Manusia. Boleh memutuskan keputusan berkaitan dengan kes tuntutan pengiktirafan. Peruntukan: Subseksyen 9(5) APP 1967	Keputusan berhubung kes tuntutan pengiktirafan diputuskan oleh **Ketua Pengarah Perhubungan Perusahaan.** Peruntukan: Subseksyen 9(5) APP 1967
4	**PERUNDINGAN KOLEKTIF**	Peruntukan lama menghalang kesatuan sekerja pekerja membangkitkan perkara-perkara berkaitan pertukaran, pengambilan pekerja, penamatan akibat lebihan tenaga kerja, pembuangan kerja dan	Kesatuan sekerja **boleh membangkitkan secara umum** perkara-perkara berikut iaitu yang berkaitan dengan kenaikan pangkat, pertukaran, pengambilan pekerja, penamatan akibat lebihan

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		pemulihan kerja serta agihan tugas. Peruntukan: Proviso subseksyen 13(3) APP 1967	tenaga kerja, pembuangan kerja dan pemulihan kerja serta agihan tugas. Peruntukan: Proviso subseksyen 13(3) APP 1967
5	**PIKET**	Mana-mana pihak yang terlibat dengan piket yang tidak sah boleh dihukum penjara tidak melebihi satu tahun atau denda tidak melebihi satu ribu ringgit atau kedua-duanya. Peruntukan: Subseksyen 40(3) APP 1967	**Hukuman penjara** bagi **piket** yang tidak sah telah **dimansuhkan** dan **denda** dinaikkan daripada satu ribu kepada **lima ribu ringgit.** Peruntukan: Subseksyen 40(3) APP 1967
6	**MOGOK DAN TUTUP PINTU**	Mana-mana pekerja atau majikan yang terlibat dengan mogok dan tutup-pintu yang tidak sah boleh dihukum dengan penjara tidak melebihi satu tahun atau denda tidak melebihi satu ribu ringgit atau kedua-duanya dan denda tambahan sebanyak lima puluh ringgit bagi tiap- tiap hari kesalahan berterusan. Peruntukan: Subseksyen 46(1) dan (2) APP 1967	**Hukuman penjara** bagi **mogok dan tutup-pintu** yang tidak sah **dimansuhkan** dan denda dinaikkan daripada satu ribu kepada **lima ribu ringgit** dan denda tambahan sebanyak **lima puluh ringgit bagi tiap-tiap hari kesalahan berterusan**. Peruntukan: Subseksyen 46(1) dan (2) APP 1967
		Hukuman penjara yang dikenakan adalah tidak melebihi setahun atau denda tidak melebihi satu ribu ringgit atau kedua-duanya bagi kesalahan menghasut atau mengapi orang lain supaya mengambil bahagian dalam mogok/tutup pintu yang tidak sah. Peruntukan: Seksyen 47 APP 1967	Hukuman denda telah dinaikkan daripada satu ribu ringgit kepada **lima ribu ringgit** bagi kesalahan **menghasut atau mengapi orang lain** supaya mengambil bahagian dalam mogok/tutup pintu yang tidak sah. Peruntukan: Seksyen 47 APP 1967
		Hukuman penjara tidak melebihi enam bulan atau denda tidak melebihi lima ratus ringgit atau kedua-duanya untuk kesalahan memberi bantuan kewangan bagi mengadakan mogok dan tutup-pintu yang tidak sah.	Hukuman denda telah dinaikkan daripada lima ratus ringgit kepada **lima ribu ringgit** bagi kesalahan memberi **bantuan kewangan** untuk mogok/tutup pintu yang tidak sah.

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		Peruntukan: Seksyen 48 APP 1967	Peruntukan: Seksyen 48 APP 1967
7	**KUASA UNTUK MENGHALANG MOGOK ATAU TUTUP-PINTU**	Tiada peruntukan.	Menteri Sumber Manusia mempunyai kuasa untuk mengarahkan supaya mogok atau tutup-pintu dihentikan dalam keadaan ianya membahayakan nyawa, keselamatan dan kesihatan awam. Peruntukan: Seksyen 44A APP 1967
8	**KUASA MAHKAMAH PERUSAHAAN**	Tiada peruntukan.	Untuk kes yang melibatkan representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan 1967, Mahkamah mempunyai kuasa untuk mendengar dan memutuskan tarikh pembuangan kerja sebenar sekiranya tarikh pembuangan kerja yang dinyatakan dalam rujukan oleh Ketua Pengarah dipertikaikan oleh pihak terlibat. Peruntukan: Seksyen 29*(da)* APP 1967
		Tiada peruntukan.	Mahkamah boleh meneruskan prosiding dalam keadaan sekiranya pekerja yang memfailkan representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan 1967 didapati meninggal dunia. Peruntukan: Seksyen 29*(ea)* APP 1967
9	**KEANGGOTAAN MAHKAMAH PERUSAHAAN**	Untuk kes ketidak patuhan award yang melibatkan representasi pemulihan kerja tertakluk di bawah seksyen 20 Akta Perhubungan Perusahaan 1967, keanggotaan Mahkamah hendaklah terdiri daripada Yang Dipertua/Pengerusi, seorang panel majikan dan seorang panel	Untuk kes ketidak patuhan award yang melibatkan representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan 1967, Yang Dipertua/Pengerusi boleh **bersidang sendirian.** Peruntukan: Subseksyen 22(5)

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		pekerja. Peruntukan: Subseksyen 22(5) dan 23(4) APP 1967	dan 23(4) APP 1967
10	**AWARD**	Tiada peruntukan.	Mahkamah Perusahaan mempunyai kuasa bagi mengenakan faedah ke atas award pada kadar lapan peratus setahun atau kadar yang lebih rendah daripada itu. Peruntukan: Subseksyen 30(1A*)* APP 1967
		Mahkamah Perusahaan dalam membuat award bagi kes representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan 1967, adalah terikat kepada sekatan di bawah Jadual Kedua yang menetapkan seperti berikut: i. Had maksimum gaji kebelakang tidak boleh melebihi 12 bulan bagi pekerja dalam tempoh percubaan dan 24 bulan bagi pekerja tetap; ii. Mahkamah Perusahaan boleh membuat potongan gaji kebelakang sekiranya pekerja memperolehi pekerjaan selepas pembuangan kerja berlaku; iii. Mahkamah Perusahaan tidak boleh memasukkan apa-apa pampasan bagi kehilangan pendapatan masa hadapan. iv. Mahkamah Perusahaan boleh mengambil kira faktor salah laku pekerja tersebut. Peruntukan: Subseksyen 30 (6A)	Mahkamah Perusahaan boleh membuat award bagi kes representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan 1967 tanpa terikat dengan sekatan di bawah Jadual Kedua dalam keadaan berlakunya pelanggaran terhadap **hak kebebasan untuk berkesatuan (seksyen 4, 5 atau 7 Akta Perhubungan Perusahaan 1967).** Peruntukan: Proviso Subseksyen 30 (6A) APP 1967

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		dan Jadual Kedua APP 1967	
		Tiada peruntukan.	Mahkamah Perusahaan mempunyai kuasa untuk memerintahkan gaji ke belakang dan/atau pampasan sebagai ganti kepada pemulihan kerja (compensation in lieu of reinstatement) untuk dibayar kepada waris terdekat dalam keadaan pekerja yang memfailkan kes representasi pemulihan kerja di bawah seksyen 20 Akta Perhubungan Perusahaan tersebut telah meninggal dunia. Peruntukan: Subseksyen 30(6B) APP 1967
		Di bawah seksyen 18 Akta Perhubungan Perusahaan 1967 yang berkaitan dengan kes pertikaian perusahaan, Mahkamah Perusahaan tidak boleh menetapkan tarikh kebelakang sesuatu award melebihi tempoh enam bulan daripada tarikh rujukan oleh Menteri Sumber Manusia. Peruntukan: Proviso Subseksyen 30(7*)* APP 1967	Proviso di bawah peruntukan subseksyen 30(7) Akta Perhubungan Perusahaan 1967 dimansuhkan bagi tujuan memberi kuasa budi bicara kepada Mahkamah Perusahaan untuk menetapkan tarikh kebelakang suatu award berdasarkan fakta dan merit sesuatu kes **tanpa terikat kepada had maksimum enam bulan** daripada tarikh rujukan oleh Menteri Sumber Manusia. Peruntukan: Subseksyen 30(7*)* APP 1967
11	**MEKANISMA RAYUAN TERHADAP AWARD**	Setiap pihak yang terkilan dengan award Mahkamah Perusahaan boleh membuat rayuan ke Mahkamah Tinggi hanya atas persoalan undang-undang sahaja dan selepas mendapat kebenaran terlebih dahulu daripada Mahkamah Perusahaan. Peruntukan: Seksyen 33A APP 1967	Peruntukan di bawah seksyen 33A Akta Perhubungan Perusahaan 1967 dimansuhkan dan peruntukan baharu dimasukkan di bawah seksyen 33C bagi menetapkan mekanisma baharu rayuan ke atas Award. Berdasarkan peruntukan seksyen 33C Akta Perhubungan Perusahaan 1967, mana-mana pihak yang terkilan dengan award Mahkamah Perusahaan boleh terus mengemukakan

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			rayuan ke Mahkamah Tinggi dalam tempoh 14 hari dari tarikh penerimaan award **tanpa perlu mendapat kebenaran** terlebih dahulu daripada Mahkamah Perusahaan. Peruntukan: Seksyen 33C APP 1967
12	**KETIDAKPATUHAN TERHADAP AWARD**	Hukuman denda tidak melebihi dua ribu ringgit atau penjara tidak melebihi tempoh setahun atau kedua-duanya dan denda tambahan lima ratus ringgit bagi tiap-tiap hari kesalahan berterusan bagi kesalahan terhadap ketidakpatuhan award. Peruntukan: Subseksyen 56(3) APP 1967	Hukuman denda dinaikkan daripada dua ribu ringgit kepada **tidak melebihi lima puluh ribu ringgit** dan denda tambahan **tidak melebihi lima ratus ringgit** bagi tiap-tiap hari kesalahan berterusan bagi kesalahan terhadap ketidakpatuhan award. Peruntukan: Subseksyen 56(3) APP 1967
		Tiada peruntukan.	Kuasa diberikan kepada Mahkamah Majistret/ Mahkamah Tinggi/ Mahkamah Rayuan untuk mengarahkan orang yang disabitkan kesalahan membayar apa-apa bayaran tertunggak berkaitan award kepada pekerja yang terlibat. Peruntukan: Subseksyen 56(3A) APP 1967
13	**KESALAHAN AM**	Hukuman penjara bagi tempoh tidak melebihi dua tahun atau denda tidak melebihi lima ribu ringgit atau kedua- duanya dikenakan bagi kesalahan-kesalahan am. Peruntukan: Subseksyen 60(1) APP 1967	Hukuman denda dinaikkan daripada lima ribu ringgit kepada **tidak melebihi lima puluh ribu ringgit** bagi kesalahan-kesalahan am. Peruntukan: Subseksyen 60(1) APP 1967

(Sumber: Kajian penulis berdasarkan peruntukan asal Akta Perhubungan Perusahaan 1967 dan Akta Perhubungan Perusahaan (Pindaan) 2020 serta disesuaikan dengan soalan lazim yang terdapat di https://jpp.mohr.gov.my)

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PEMAKAIAN PINDAAN PERUNTUKAN AKTA PERHUBUNGAN PERUSAHAAN 1967

Pindaan terhadap peruntukan-peruntukan dalam APP 1967 ini merangkumi hampir semua aspek dalam perhubungan perusahaan di Malaysia. Sehubungan dengan itu, perlu dimaklumi bahawa pindaan peruntukan-peruntukan APP 1967 ini yang dikuatkuasakan bermula 1 Januari 2021 hanya terpakai bagi kes-kes berikut:-

i. Aduan di bawah seksyen 8 yang dibuat pada atau selepas 1 Januari 2021.
ii. Pertikaian di bawah seksyen 9 (1A) yang dirujuk kepada Ketua Pengarah pada atau selepas 1 Januari 2021.
iii. Tuntutan pengiktirafan yang dibuat pada atau selepas 1 Januari 2021. Representasi pemulihan kerja yang difailkan pada atau selepas 1 Januari 2021.
iv. Siasatan, perbicaraan atau prosiding yang dilakukan, diambil atau dimulakan pada atau selepas 1 Januari 2021.

PINDAAN PERUNTUKAN APP 1967 YANG MASIH BELUM DIKUATKUASAKAN

Terdapat sebahagian kecil peruntukan dalam APP 1967 (Pindaan) 2020 yang belum boleh dikuatkuasakan sepenuhnya pada 1 Januari 2021. Keadaan ini berlaku kerana peruntukan-peruntukan tersebut memerlukan pindaan terhadap Akta Kesatuan Sekerja 1959 dan perlu mendapat kelulusan daripada parlimen terlebih dahulu.

Justeru, berikut disenaraikan peruntukan-peruntukan di dalam Akta Perhubungan Perusahaan (Pindaan) 2020 yang masih belum berkuatkuasa:

i. peruntukan berkaitan hak berunding tunggal.
ii. peruntukan berkaitan penentuan kekuatan keahlian kesatuan sekerja.
iii. peruntukan berkaitan pemeriksaan isu kelayakan.
iv. peruntukan berkaitan halangan untuk kesatuan lain membuat tuntutan pengiktirafan apabila sesebuah kesatuan sekerja telah memperoleh pengiktirafan.
v. peruntukan berkaitan rujukan ke Mahkamah Perusahaan bagi kes yang melibatkan perjanjian kolektif.
vi. Senarai Perkhidmatan Perlu (Jadual Pertama).

Peruntukan-peruntukan yang dinyatakan di atas hanya akan dikuatkuasakan selepas pindaan terhadap Akta Kesatuan Sekerja 1959 diluluskan oleh Parlimen.

KESIMPULAN

Pindaan terhadap peruntukan-peruntukan APP 1967 merangkumi segala aspek yang berkaitan dengan aktiviti yang melibatkan pekerja, majikan dan kesatuan sekerja di

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Malaysia. Pindaan peruntukan-peruntukan ini mencerminkan keprihatinan negara terhadap kebajikan dan kesejahteraan semua pekerja dan majikan di Malaysia. Semua pindaan peruntukan-peruntukan ini perlu dilaksana secara berhemah dan telus oleh semua pelaku yang terlibat agar ianya mampu meningkatkan kualiti hidup semua pekerja dan majikan yang bertindak sebagai pemain dalam aktiviti ekonomi negara. Pindaan ini juga diharapkan dapat memotivasi semua pekerja dan majikan di Malaysia untuk menghasilkan produk dan perkhidmatan yang berkualiti tinggi.

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SISTEM SOKONGAN SOSIAL TERHADAP PEKERJA PENJAGAAN KESIHATAN: FENOMENA PANDEMIK COVID-19

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ABSTRAK

Pekerja penjagaan kesihatan merupakan orang yang paling berisiko semasa berlakunya pandemik. Daripada aspek pekerjaan, pendedahan secara langsung terhadap jangkitan pandemik semasa menjalankan tugas ialah risiko yang paling hampir dengan mereka. Jika berada di rumah, mereka juga perlu meneruskan kehidupan peribadi dan juga keluarga. Pekerja kesihatan merupakan figura yang sentiasa bersedia memberikan sokongan kepada sesiapa yang memerlukan. Namun, dalam memberikan perkhidmatan terbaik kepada orang ramai, adakah mereka sendiri menerima sokongan sosial daripada mana-mana pihak. Oleh itu, kertas kerja ini bertujuan untuk mengenal pasti sistem sokongan yang disediakan dan diperlukan oleh pekerja kesihatan dalam memberi kestabilan kepada mereka apabila melaksanakan pekerjaan dan pada masa yang sama mempunyai kehidupan seperti orang awam yang lain. Objektif dicapai menggunakan kaedah pendekatan kualitatif dan analisis kandungan berdasarkan data primer dan sekunder yang diperoleh daripada ulasan karya sedia ada. Kajian ini mendapati bahawa keadaan tekanan serta trauma yang wujud di kalangan pekerja penjagaan kesihatan ini sangat tinggi semasa pandemik jika dibandingkan dengan persekitaran pekerjaan yang normal. Namun, sistem sokongan sosial didapati agak kurang memandangkan aspek sokongan sosial ni merupakan aspek yang sangat penting kerana ia melibatkan tekanan perasaan seseorang dalam menjalankan pekerjaan ini yang mana ia perlu dijaga serta di beri sokongan terutamanya daripada pihak yang berwajib.

Kata kunci: Pekerja penjagaan kesihatan, pandemik Covid 19, sistem sokongan sosial

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PENGENALAN

Pandemik kemunculan Covid-19 menimbulkan cabaran besar di mana ia tidak pernah terjadi sebelum ini secara berskala besar. Kesannya bukan hanya kepada keadaan kesihatan awam tetapi juga kepada sektor ekonomi dan sosial. Wabak yang muncul memberikan kesan buruk kepada banyak sektor yang sehingga mengancam kehidupan dan kesejahteraan dalam jangka panjang. Tidak dapat dinafikan bahawa berjuta-juta orang di dunia dari seluruh pelosok dunia dipengaruhi oleh wabak ini. Oleh yang demikian, kesan ini juga sangat memberi kesan kepada pekerja kesihatan di mana sebagai pekerja kesihatan, mereka dikategorikan sebagai salah satu pekerjaan perkhidmatan penting yang berkisar kepada aspek penjagaan kesihatan dan perkhidmatan perubatan.

Industri penjagaan kesihatan adalah salah satu persekitaran yang paling berbahaya untuk digunakan sebagai penglibatan dan komitmen mereka untuk memastikan keselamatan dan kesihatan orang lain yang terkesan dengan wabak tersebut. Tugas mereka adalah memberikan perawatan dan perkhidmatan bagi mereka yang memerlukan semasa tercetusnya kemunculan pandemik kerana masyarakat merupakan orang yang berisiko tinggi untuk dijangkiti dan pekerja kesihatan ini akan menjadi responden pertama yang akan menghadapi dan menangani mereka yang telah dijangkiti atau disyaki telah dijangkiti.

Pekerja penjagaan kesihatan merupakan seorang pekerja yang terlibat dalam memberikan rawatan dan perkhidmatan kepada orang sakit secara langsung sama ada mereka ialah seorang doktor, jururawat, pembantu hospital, juruteknik makmal di hospital atau juga pengendali bahan buangan perubatan. Menurut Joseph & (2016), terdapat lebih dari 59 juta orang pekerja kesihatan yang ada di seluruh dunia. Tidak dinafikan bahawa bilangan itu semakin bertambah dari semasa ke semasa memandangkan keperluan sumber manusia dalam bidang pekerjaan kesihatan ini. Menurut Persatuan Kesihatan Sedunia (WHO), pekerja penjagaan kesihatan ini merupakan sumber manusia yang paling berharga dalam aspek kesihatan. Tanpa pekerja penjagaan kesihatan, aspek kesihatan masyarakat akan menjadi semakin teruk dan menakutkan (Joseph &, 2016). Disebabkan itu juga seorang pekerja penjagaan kesihatan memerlukan perlindungan dari bahaya di tempat kerja ini sama seperti kategori pekerjaan lain seperti pelombong atau pekerja binaan atau apa-apa jenis pekerjaan berat dan berbahaya yang lain. Tidak dapat dinafikan bahawa perlindungan pekerja penjagaan kesihatan ini sangat penting demi memastikan kelangsungan dan kelancaran proses penjagaan kesihatan kepada masyarakat terutamanya dalam keadaan pandemik ini di mana mereka perlu dipastikan agar tidak menjadi penyebar jangkitan tersebut kepada orang lain (Zihui et al, 2020).

KONSEP SOKONGAN SOSIAL

Menurut Shumaker & Brownell (1984), sokongan sosial didefinisikan sebagai wujudnya pertukaran sumber di antara dua orang individu di mana salah seorang individu akan memberikan sokongan kepada salah seorang individu yang lain bertujuan untuk memberikan kesejahteraan kepadanya. Takrifan ini boleh dianggap sebagai memberikan

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sokongan kepada orang yang memerlukannya. Di samping itu, menurut Cooke, et al (1988), dari pelbagai takrifan yang boleh di dapati berkenaan sokongan sosial, secara terperincinya konsepnya adalah lebih kurang sama di mana sokongan sosial lebih menumpukan kepada penyediaan sokongan emosi secara empati di mana konsep kepercayaan, pemberi semangat, memberikan perhatian dan menjadi pendengar yang baik. Selain itu, sokongan dalam bentuk lain juga boleh dianggap sebagai sokongan sosial di mana sokongan diberikan secara instrumental iaitu dalam bentuk bantuan kewangan, tenaga kerja, masa atau apa-apa bantuan yang diperlukan oleh seseorang secara langsung. Bagi mereka yang cenderung memerlukan sokongan sosial ini, mereka turut mengharapkan maklum balas, nasihat serta cadangan bagi membantu mereka menangani serta menghadapi masalah yang dihadapi oleh mereka semasa bekerja.

Secara amnya, penggunaan sokongan sosial menunjukkan hubungan antara aspek kesihatan dan juga kesejahteraan hidup manusia dalam menjalani kehidupan (Ahmad dan Abd. Rahman, 2020). Situasi ini boleh didapati daripada sokongan yang diberikan oleh keluarga terdekat dan sesiapa sahaja yang berada dalam persekitaran yang signifikan dalam kehidupan mereka untuk memberi dokongan serta menyokong mereka dalam menghadapi sebarang bentuk tekanan. Terdapat banyak penerbitan yang ditulis mengenai isu sokongan sosial. Sebahagian besar kandungan penulisan tersebut memberi penekanan terhadap psikososial daripada aspek fizikal mahu pun kesihatan mental. Tidak semua keadaan di mana seseorang itu boleh menawarkan diri untuk memberi sokongan sosial kepada orang lain. Tetapi, apabila kesihatan sendiri adalah sihat, maka kecenderungan untuk memberi sokongan sosial kepada orang lain adalah lebih baik (LaRocco, 1980). Umumnya, konsep sokongan sosial ini melibatkan kepada perasaan serta hubungan seseorang individu dengan individu yang lain di mana sokongan ini dapat di akses oleh seseorang melalui hubungan sosial dengan individu, kumpulan, dan masyarakat yang lebih besar (Cooke, 1988). Faktor hubungan ini juga akan mempengaruhi hidup individu yang memerlukan kepada sokongan sosial ini dengan anggapan bahawa sokongan yang diterima akan mengurangkan kesan keadaan hidup atau tahap kesihatan mereka yang terjejas. Sokongan sosial hanya diperlukan dalam konteks semasa sahaja iaitu apabila berlakunya keadaan yang menyebabkan mereka merasa tertekan dengan masalah yang di alami. Pertolongan yang diterima akan menjadi langkah yang paling tepat dalam memberi bantuan daripada aspek sokongan sosial.

KESAN KEPADA PEKERJA PENJAGAAN KESIHATAN SEMASA PANDEMIK

Wabak yang mempunyai kebolehupayaan jangkitan yang meluas ini boleh dikaitkan dengan tekanan psikologi dan gejala penyakit mental bukan sahaja kepada golongan awam malah pekerja kesihatan yang merupakan pejuang barisan hadapan yang berurusan dengan pesakit yang dijangkiti koronavirus juga turut terkesan (Thapa, et al 2020). Di samping itu, menurut Qing, et al (2020), kajian turut membuktikan bahawa mereka yang terlibat dalam pekerjaan penjagaan kesihatan ini cenderung mengalami masalah psikologi. Terbukti semasa tercetusnya pandemik *Severe Acute Respiratory Syndrome* (SARS) yang tercetus pada tahun 2003 dan juga *Middle East Respiratory Syndrome* (MERS) pada tahun 2015, mereka adalah antara golongan yang paling terkesan dengan persekitaran psikologi

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melibatkan tekanan perasaan, kemurungan dan kesusahan untuk tidur di mana pekerja kesihatan juga merupakan golongan yang perlu membuat tindakan atau keputusan di mana ia melibatkan peruntukan sumber manusia iaitu bilangan pekerja dalam memberi kerahan tenaga daripada kalangan pekerja penjagaan kesihatan kepada pesakit-pesakit yang memerlukan.

Hakikatnya, dalam keadaan rebakkan Covid-19 ini, penekanan bukan sahaja harus diberi tumpuan kepada pesakit semata-mata, tetapi juga melibatkan aspek pengawalan jangkitan, cara menghadapi dan menangani jangkitan serta semua aspek lain demi memastikan kadar penurunan penularan jangkitan (Greenberg et al., 2020). Persoalan yang timbul juga adakan berkaitan dengan bagaimana mereka mengimbangi keperluan kesihatan fizikal dan mental mereka dengan pesakit dan keperluan dalam kehidupan sosial mereka bersama keluarga dan rakan-rakan serta masyarakat setempat. Ini kerana, jika dilihat pada aspek lingkungan dan persekitaran pekerjaan pula, pekerjaan jenis ini adalah paling berisiko terdedah kepada jangkitan. Pekerja dalam bidang merupakan orang yang paling dekat yang berurusan dengan pesakit yang telah dijangkiti kerana merekalah yang terlibat secara langsung dalam memberikan perkhidmatan kesihatan kepada pesakit. Semasa awal kemunculan Covid-19, perkara pertama yang menjadi kerisauan ialah penularan jangkiti daripada mereka yang telah dijangkiti kepada pekerja penjagaan kesihatan tidak dapat dielakkan. Mereka sangat terdedah dan paling mudah untuk dijangkiti. Sekiranya ini berlaku, situasi akan menjadi lebih parah memandangkan pekerja penjagaan kesihatan merupakan orang yang paling diperlukan pada ketika ini.

Berdasarkan pandemik yang berlaku sebelum ini, kebanyakan petugas barisan hadapan yang terdiri daripada pegawai perubatan, jururawat dan mereka yang terlibat dalam bidang kesihatan dilihat telah mengalami 'burn out', depresi, stres dan kebimbangan. Ini kerana, mereka terlalu letih kerana terpaksa bekerja lebih waktu untuk merawat pesakit, tidak dapat pulang ke rumah untuk berjumpa dengan anak-anak, suami dan isteri, ibu bapa dan ahli keluarga yang akhirnya menyumbang kepada ketidakstabilan emosi (Aziz et al., 2020). Kesan kesihatan mental akibat penularan Covid-19 yang semakin hari semakin meningkat terhadap pekerja penjagaan kesihatan termasuklah kakitangan perubatan yang melibatkan doktor dan jururawat dan pekerja yang bukan perubatan yang terdiri daripada profesional kesihatan bersekutu, ahli farmasi, juruteknik, pentadbir, kakitangan perkeranian, dan pekerja penyelenggaraan di hospital. Covid-19 telah menyebabkan masalah mengenai tuntutan penjagaan kesihatan dengan kadar yang lebih tinggi dari kebiasaan memandangkan tuntutan dan bebanan kerja sangat tinggi dan jumlah kematian juga berlaku dengan kadar yang sangat tinggi dan cepat disusuli dengan tekanan emosi yang perlu dialami dan ditangani pada masa yang sama oleh pekerja penjagaan kesihatan ini.

Pekerja penjagaan kesihatan berpotensi untuk mengalami tekanan yang tinggi semasa melakukan pekerjaannya. Walaupun tidak disebabkan oleh keadaan pandemik sekalipun, anggapan masyarakat yang sangat tinggi kepada pekerja kesihatan di mana pekerja kesihatan merupakan orang penting yang sentiasa diperlukan dalam mendapatkan khidmat kesihatan sehingga menyebabkan mereka mengalami kekangan masa,

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kekurangan kemahiran memandangkan agak sukar untuk mereka memberi ruang untuk mendapatkan kemahiran yang lebih terkini disebabkan kekangan masa dan kurang mendapat sokongan sosial di tempat kerja. Akibat daripada situasi seperti ini, pekerja kesihatan cenderung untuk mengalami keletihan, mendapat penyakit fizikal, penderitaan daripada segi kestabilan mental dan emosi akibat tekanan kerja sehingga boleh menyebabkan penurunan kualiti dalam memberikan perkhidmatan dalam pekerjaan (Marine et al., 2006). Keadaan pandemik Covid-19 yang berlaku pada masa kini menyebabkan bidang penjagaan kesihatan di seluruh dunia berada dalam keadaan yang tidak pernah dijangka sebelum ini. Mereka yang terlibat perlu membuat keputusan dengan kadar segera serta bekerja di bawah tekanan yang agak melampau daripada kebiasaan mereka bekerja.

Selain itu, peningkatan risiko jangkitan di kalangan mereka juga menjadi penyebab kepada tekanan tersebut kerana mereka merasakan bahawa risiko dijangkiti adalah lebih tinggi berbanding orang lain yang tidak berada dalam bidang pekerjaan ini serta risiko jangkitan itu kepada keluarga mereka. Semasa Covid-19 mula-mula menyerang dunia pada penghujung tahun 2019, disebabkan kekurangan maklumat mengenai wabak itu menyebabkan semua orang termasuk pekerja penjagaan kesihatan berada dalam keadaan yang tidak bersedia untuk melaksanakan tugas mereka. Faktor utama yang menyebabkan mereka agak gusar untuk menjalankan pekerjaan mereka adalah disebabkan oleh risiko jangkitan yang mungkin merebak di kalangan ahli keluarga. Mereka mengambil langkah berjaga-jaga dengan mengasingkan diri dari anggota keluarga yang lain walaupun tinggal serumah bagi memastikan ahli keluarga yang lain selamat (Sandesh et al, 2020). Di samping itu, WHO juga telah mengenal pasti bahawa risiko penularan jangkitan Covdi-19 dalam isi rumah yang sama dengan pekerja dalam bidang penjagaan kesihatan ialah agak tinggi. Situasi ini agak membimbangkan serta menakutkan pekerja penjagaan kesihatan. Keadaan ini sekali gus memberikan tekanan psikologi kepada mereka memandangkan perasaan serta emosi itu bukan sahaja berlaku kepada mereka sendiri malah berpotensi besar melibatkan keluarga mereka juga. Kegagalan untuk membuat penilaian serta mengetahui cara untuk menangani tindak balas psikologi terhadap tekanan tersebut terutamanya yang berkaitan dengan pandemik boleh memberi kesan negatif terhadap fisiologi dan psikologi pekerja penjagaan kesihatan kerana semasa pandemik, merekalah individu yang bertanggungjawab untuk memberikan rawatan kepada pesakit dan mereka jugalan merupakan populasi yang cenderung mengalami tekanan psikologi, termasuk kemurungan dan kegelisahan (Alnazly et al., 2021).

SISTEM SOKONGAN KEPADA PEKERJA PENJAGAAN KESIHATAN SEMASA PANDEMIK

Kesan positif yang terhasil daripada sokongan sosial terhadap pekerja penjagaan kesihatan semasa pandemik telah dibuktikan dalam beberapa Penyelidikan yang terhasil sebelum ini. Sokongan yang diterima oleh mereka yang berada dalam rantaian atau lingkungan sosial kehidupan mereka berpotensi mengelakkan mereka dari berada dalam keadaan yang trauma dan negatif. Komunikasi serta interaktif di antara pemberi sokongan dan penerima sokongan dapat menimbulkan perasaan empati dan cenderung memberikan perasaan yang lebih baik. Oleh itu, dalam keadaan pandemik Covid-19 yang berlaku

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sekarang, sokongan sosial yang mencukupi dapat mengurangkan keadaan tekanan seseorang terutamanya pekerja penjagaan kesihatan memandangkan tahap tekanan bekerja dalam persekitaran biasa dengan bekerja dalam keadaan pandemik adalah berbeza di mana tekanannya adalah lebih tinggi. Pekerja penjagaan kesihatan perlu memberi perkhidmatan yang terbaik sepajang melakukan pekerjaan mereka tetapi pada masa yang sama perlu sentiasa melindungi diri sendiri terlebih dahulu agar tidak dijangkiti sekali gus tidak menjangkiti orang lain yang mana keadaan ini memberi bebanan tanggungjawab yang berlebihan kepada mereka.

Selain itu, pekerjaan mereka juga memerlukan mereka sentiasa memakai pakaian alat pelindungan diri untuk memastikan mereka selamat daripada terdedah kepada virus Covid-19 semasa bertugas (Sandesh et al, 2020). Oleh itu, menurut Zhu (2020), perlindungan kepada mereka yang bertugas semasa pandemik ini perlu diberi penekanan terutamanya daripada aspek kestabilan emosi. Zhu mencadangkan agar program perkhidmatan kesihatan mental secara atas talian 24 jam 7 hari disediakan kepada mereka. Walaupun keberkesanan program ini tidak jelas, namun kesan daripada system sokongan sosial seperti ini sedikit sebanyak memberikan hasil positif kepada mereka yang memerlukan secara langsung pada bila-bila masa sahaja. Mereka memerlukan seseorang untuk melegakan tekanan dan perasaan emosi di mana ekspresi emosi kepada mereka yang mendengar boleh memberi kelegaan yang positif untuk membantu mereka menghadapi hari bekerja seterusnya.

Di samping itu, bagi pekerja penjagaan kesihatan yang bekerja di hospital pula, ialah menjadi tanggungjawab pihak pengurusan hospital untuk menyediakan sistem sokongan sosial ini kepada pekerja mereka. Di antaranya, pengurusan hospital boleh memberikan pendidikan serta bimbingan kepada ahli keluarga pekerja mereka untuk mempunyai kemahiran untuk mendengar dan mempunyai perasaan empati bagi membantu pekerja mereka mendapat sokongan sosial daripada orang yang terdekat iaitu keluarga mereka sendiri. Keadaan ini dapat membantu pekerja untuk mengurangkan kadar kegelisahan dan tekanan yang mereka dapat semasa menjalankan pekerjaan (Zhu, 2020). Selain ahli keluarga juga, sokongan daripada rakan sekerja juga memainkan peranan yang penting. Sikap positif sesama mereka semasa bekerja akan memberikan impak positif. Oleh itu, pihak berkuasa kesihatan harus memberikan sokongan psikologi yang proaktif untuk kakitangan mereka dengan menawarkan sokongan dan latihan, talian hot bimbingan dan menawarkan pembayaran balik kepada kakitangan yang memberikan perkhidmatan semasa pandemik ini. (Caparkaba et al., 2020).

SISTEM SOKONGAN SEMASA PERINTAH KAWALAN PERGERAKAN DI MALAYSIA

Menurut Berita Harian (2020), isu kesihatan mental di tempat kerja seharusnya tidak dipandang ringan oleh mana-mana organisasi. Isu ini merupakan isu global yang boleh mempengaruhi produktiviti sesebuah organisasi serta pekerjaan. Apatah lagi, isu yang melibatkan penyakit kesihatan mental merupakan masalah kesihatan kedua terbesar selepas penyakit jantung menurut Pertubuhan Kesihatan Sedunia (WHO). Menurut 1948 WHO, kesihatan ditakrifkan sebagai keadaan fizikal, mental dan emosi yang sejahtera dan

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bukan hanya sekadar bebas daripada penyakit (European Health Forum, 2011). Manakala, Dasar Kesihatan Mental (2012) pula mentakrifkan kesihatan mental sebagai kemampuan individu, kelompok dan persekitaran untuk berinteraksi antara satu sama lain bagi mempromosikan kesejahteraan subjektif secara optimum dan penggunaan keupayaan kognitif, efektif dan perhubungan ke arah pencapaian matlamat individu dan kumpulan. Suhu kesihatan mental boleh mempengaruhi cara berfikir, tingkah laku dan perasaan seseorang. Tahap kesejahteraan mental mempengaruhi cara seseorang itu membuat keputusan dan pilihan dalam hidup, menyelesaikan masalah serta berinteraksi dengan orang lain. Apabila seseorang mempunyai tahap kesihatan mental yang memuaskan, tekanan hidup seharian yang dilalui akan ditangani dengan berfikir secara positif, tenang dan tidak membahayakan diri. (Aziz et al., 2020).

Sekiranya pekerja mengalami masalah mental akibat tekanan semasa bekerja terutamanya pada masa pandemik, keadaan ini akan mempengaruhi kestabilan emosi pekerja tersebut sama ada boleh meneruskan pekerjaannya atau tidak. Sebagaimana yang dibincangkan, bebanan kerja yang melampau, tempoh masa bekerja yang panjang serta tidak menentu, kurang pengawalan oleh pihak pengurusan, tidak memberikan sokongan yang baik, berlaku konflik serta tiada imbuhan atau ganjaran berpotensi menyebabkan kecenderungan ke arah penyakit kesihatan mental di kalangan pekerjanya. Menurut Timbalan Ketua Delegasi International *Committee of Red Cross* (ICRC), Zurab Burduli, pekerja barisan hadapan lebih memerlukan bantuan mengatasi masalah mental agar mereka dapat terus berkhidmat dengan efisien kepada masyarakat. Beliau menyatakan bahawa tidak ada kesihatan tanpa kesihatan mental dan ia harus menjadi sebahagian daripada tindak balas kesihatan awam pada COVID-19 sejak hari pertama lagi (Astro Awani, 10 Oktober, 2020).

Bagi menangani isu kesihatan mental berkaitan pandemik COVID-19, Perkhidmatan Kesihatan Mental dan Sokongan Psikososial (MHPSS) telah mewujudkan Talian Sokongan Psikososial. Perkhidmatan ini disediakan oleh Kementerian Kesihatan Malaysia (KKM) dengan kerjasama bersama MERCY Malaysia dan agensi-agensi lain seperti Bahagian Keluarga, Sosial dan Komuniti, Jabatan Kemajuan Islam Malaysia (KSK JAKIM), Kementerian Pembangunan Wanita, Keluarga dan Masyarakat (KPWKM), serta pertubuhan bukan kerajaan (NGO) Melalui Talian Sokongan Psikososial yang disediakan ini, sebanyak 36, 269 panggilan sejak 25 Mac sehingga 19 Oktober 2020 dan jumlahnya semakin bertambah dari semasa ke semasa. Namun, perkhidmatan ini lebih umum diberikan kepada sesiapa sahaja dan bukanlah khusus kepada pekerja penjagaan kesihatan tetapi perkhidmatan ini boleh juga dianggap sebagai satu sistem sokongan sosial yang diberikan oleh pihak kerajaan yang terbuka kepada sesiapa sahaja yang memerlukan termasuklah pekerja penjagaan kesihatan (Kementerian Kesihatan Malaysia, 2021).

KESIMPULAN

Kesihatan mental boleh mempengaruhi cara berfikir, tingkah laku serta perasaan seseorang. Tahap kesejahteraan mental juga mempengaruhi cara seseorang itu membuat keputusan dan pilihan dalam kehidupan mereka, bagaimana menyelesaikan masalah serta

cara untuk berinteraksi dengan orang lain. Apabila seseorang mempunyai tahap kesihatan mental yang memuaskan, setiap apa yang berlaku akan ditangani secara positif. Oleh itu, system sokongan sosial amat wajar diberi penekanan kepada golongan yang terlibat secara langsung dengan bidang penjagaan kesihatan.

Sejajar dengan itu, pihak pengurusan organisasi seperti hospital atau mana-mana pihak berwajib seperti Kementerian Kesihatan Malaysia (KKM) seharusnya menyedari kewujudan kepada tekanan, kegelisahan dan beban yang semakin meningkat di kalangan pekerja penjagaan kesihatan. Mereka berkorban walaupun atas nama pekerjaan serta tanggungjawab, tetapi pada masa yang sama memberi perkhidmatan serta faedah kepada masyarakat awam yang memerlukan.

PENGHARGAAN

Para penulis mengucapkan setinggi-setinggi penghargaan kepada pihak Kementerian Pendidikan Malaysia (KPM) atas Dana Geran Khas Pasca Covid-19 (Kod (S/O 14696).

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#HARTALDOKTORKONTRAK: APPRAISING THE LEGAL ISSUES

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ABSTRACT

Conflicts, industrial disputes or disagreement between workers and management are almost frequent, in particular over pay, working conditions, and so on. Industrial action is thus a method to show protest that includes picket, strike or working to rule. Recently we have seen strike or termed hartal was exerted by contract doctors. This incident, which is as unprecedented as the pandemic COVID-19, has taken placed to highlight the quandary the contract doctors are facing especially during the challenging and demanding time. This paper appraises legal issues in response to the plight involving "hartal" and "doctors". The incident of demonstration (hartal) is examined based on the news reported in the mainstream media. The review and analysis to the legal issues are made are reflected and founded on the labour law and industrial relations practices. The underlined subjects are regarding (1) industrial action with specific reference to strike (hartal); (2) the industry that involves essential services (doctor/health). At some points, contemplations are given to the implications toward the workers within the boundary of employment relationship. The paper concludes that industrial action is permissible by law and deemed as one of employees' rights when conflicts and disputes ascended but bound by certain legal boundary of dispute resolution system. Hence, negotiation and social dialogue are encouraged as a means to resolve the disputes amicably. Industrial actions nevertheless are still relevant but should be functioning as the last resort.

Keywords: industrial dispute, industrial action, dispute resolution, industrial relations, legal

INTRODUCTION

The delicate nature of the employment relationship brings about practical challenges to the employer and employee whenever conflicts and disputes are almost inevitable. In the context of industrial relations that may involve trade union, these conflicts and disagreements are called industrial disputes that occasionally calls for trade actions. The functioning labour governance system in a country must be ready to offer the mechanisms for dispute resolutions. Effective procedures and instruments are therefore critical to promote sound industrial relations, together with dispute resolution systems that are effective, accessible and transparent (Gay & Bosch, 2020).

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In the case of #hartaldoktorkkontrak recently, hartal which means mass protest or strike (Ayamani, 2021), had involved contract doctors who pushed for reform of the system which they claim hinders their career progress and offers no job security. The hartal movement was demonstrated and claimed to be strike clearly shows an action taken to protest and show disapproval on matters regarding the services and terms of the contract. The questions ensued from this incident could be on the legality of the strike, in particular when it involved medical officers or doctors who part of essential services are. From the industrial relations perspective, industrial action is possible within certain boundary and subject to the dispute resolution system of the legal framework. A trade union is an essential mechanism for a worker to exercise right on collective bargaining with the employer (Razak & Mahmod, 2020).

At the international level, one of the core labour standards is freedom of association and right to collective bargaining. The principle becomes a tool for labour market governance for a potential productive solution between workers and employers. Through negotiation, parties can build trust and articulate satisfaction thus a means to promote peaceful, inclusive and democratic participation of representative workers' and employers' organizations (ILO, n.d.). Looking at the international agenda and the industrial dispute resolution system of Malaysia, the incident of strike by the contractual doctors is analysed and appraised from the perspective of labour law and industrial relations. The construction of the article commences by deliberating the discussion based on the identified legal issues that are sub-divided into two parts: the strike ("hartal") that falls under the industrial relations law, and the essential services that refers to the healthcare industry because the incident involved "doctors". The author ends the article with a conclusion.

METHOD

This article addresses the legal issues from the event of "hartal doctor kontrak" that is viewed from the perspective of labour and industrial relations law. The analysis is founded on the labour law and industrial relations practices that contemplate the private sector although the incident involved government employees. The relevant legislation and literatures are reviewed along with examination to the incident of strike as per reported in the mainstream media. It is to note that this paper does not intend to question the quandary faced by the contract doctors concerning their terms and conditions of work, rather to discuss the legal issues as part of the labour and industrial relation matters. The legal issues are identified by considering the words "hartal" and "doctor kontrak" where each one is scrutinised under different but related capacity. The sub-headings are therefore industrial dispute (hartal/strike) and essential services (doctor/healthcare industry).

THE LEGAL ISSUES IN #HARTALDOKTORKONTRAK

"Hartal doktor kontrak" refers to the movement of strikes involving contract doctors who protest over a longstanding dispute. The issues spiked when a group of contract medical officers pushed the government to reform the system that they believed hinders their

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career development and progress as well as offers no job security together with the prolonged contract. The Ministry of Health implemented the system in 2016 that offered junior doctors' contractual positions after finishing their houseman ships as opposed to the full-time positions offered to their predecessors. Aside from the reduced pay and benefits even though they work the same hours, the contract doctors are also faced with an inability to further their specialisation as it is only granted to permanent civil servants. The matters even gruelling in the pandemic time when the doctors face burnout, did not have luxury of time while the contracts are coming to an end.

The nationwide demonstration by the contract doctors occurred at different locations and get supports from peers and some others. Organisers of the hartal estimated some 6,000 to 8,000 of the 23,077 contract doctors in the national health care system staged a walkout at around 11am to express dissatisfaction with their current treatment in the system. Pictures on newspaper and social media showed hundreds of black-clad medics holding placards and posters outside their places of employment. Acquainted the COVID-19 pandemic and not to risk the patients, participants had arranged and ensured that permanent doctors would cover their shift during the strike while those in critical services are to return to their posts if necessary. At all locations, the participants had peaceful protest when they came out to the carpark, open areas, walked around the hospital blocks holding placards, even followed the COVID-19 SOP with face masks and face shields, physically distanced and in silence. It took place about 20 to 30 minutes before they resumed to work.

Some argued on the consequences of the demonstration that would harm the patients, cause deregistration of medical doctors, or things that involve professional conduct (or misconduct) while some considers it as employees' rights, matters that involve employer-employee relationship thus permissible and should be even empathised to the doctors.

Industrial Actions

It is the aim of the Industrial Relations Act 1967 (IRA) "to provide for the regulation of the relations between employers and workmen and their trade unions, and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom". This indicates that the law recognises the right to dispute over labour matters (Chia & Kwang, n.d.) and at the same time, to stipulate the mechanisms for resolving the disputes and conflicts arising from the relationship. Thus, the employer, workers and unions as the workers' representative are strongly encouraged to have good relations and to negotiate for any differences and disagreements between them.

Under the IRA, trade disputes mean any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen (section 2, IRA). Simply said, disputes among workers or between employers and workers are connected with the terms or conditions of employment. When dispute arises, measures should be taken to resolve it.

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The most prudent one is direct negotiation that can be executed in accordance with the mutual understanding or procedures of the companies. Another measure are conciliation and arbitration. Nevertheless, there are situations where amicable settlement seems impracticable and prolonged disputes are dragged and instigated into industrial action.

Trade/industrial actions are permissible subject to stipulations in the IRA. Existing in the forms called picketing and strikes, both are actions executed by workers; or lockouts, that exercised by employer. Each one is subject to specified requirements. The restrictions and resolution system anticipate balancing the worker's right to dispute and participate in industrial action against the employer's right to uninterrupted work (Chia & Kwang, n.d.). Picketing as an act of a furtherance of a trade dispute, shall be only lawful if the workers attend at or near the workplace with the purpose to peacefully communicate the information, persuade or abstain other workmen to/from work. Picketing supposed to be held outside working hours, and must not to intimidate any person, to obstruct the way in and out or to cause insurgency (Section 40).

Strikes on the other hand refers to a cessation of work, refusal to continue work, including any limitation, restriction, reduction in the performance of the duties connected with employment. Work-to rule and go-slow, though not to cause a complete cessation of work, are part of strikes as they may lead to a reduction in production (Das, 1991). Only members of a registered trade union may legally participate in a picketing and strike. In order for a strike to be legal, there are particular procedural and substantive requirements. Similar to picketing, strikes may only be carried out for the furtherance of a trade dispute and connected with the employment. Procedurally, a prerequisite for a strike is obtaining consent through the secret ballot of two-thirds of a trade union member. If all requirements are complied with, strike can only commence once a mandatory waiting period of seven days has lapsed. The rationale to allow a "cooling-off" period is to permit appropriate action to be taken which includes a possibility of the union to change their mind (Aminuddin, 2020). For the essential services, such as banking, electricity, fire, health, transport, petroleum and gas, workers intending to strike must give a 42-day notice of strike to the employer besides following all the procedures (Section 43). Upon receiving such notice, the employer must immediately report it to the Director General of Industrial Relations.

Another related issue when involving illegal strike is the possibility of the worker to be charged for breaching the employment contract. In a landmark case of South East Asia Fire Bricks v. Non-Metallic Mineral Product Manufacturing Employees Union [1981] AC 363, when the workers returned to work after the strike had taken place, the company refused and claimed the absence from work was without prior leave or reasonable excuse.

In the current incident, by referring to the IRA, the hartal that was called a strike, although was substantively in furtherance of a trade dispute and relates to the employment, still does not follow the requirements of (1) being moved by a trade union and (2) fulfilling the procedure. Additionally, looking at the actions and arrangements of the events in some locations, they may be seen as a picketing with the terms used in the report that they

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walked out with placards, discharged peacefully, and probably even outside their working hours, considering the shift works of the doctors. It is to note that the latest amendment to the IRA has made the punishment of imprisonment for illegal picketing and strikes been abolished in line with international labour standards.

Essential Services

"Essential services" becomes relevant because the hartal involved the doctors who are working in the health industry. The IRA lists down essential services in the First Schedule that includes health for the restrictions of lockouts and strikes. As mentioned above, section 43 of the IRA allows strikes for essential services subject to more stringent prerequisites. Thus, if the incident was a strike, it flouted the law because of failure to meet the notice requirement. In this case of hartal that involve doctors and healthcare industry, a high number of COVID-19 cases would disrupt health services across the country (Jamaluddin et al., 2021).

CONCLUSION

"#Hartaldoktorkontrak" is a movement of medical officers to gain support to urge the government to alter the system that claimed to be unfair to their service. While the law allows such trade actions, restrictions shall be tolerated so as to balance the right of workers to dispute and participate in industrial action against the employer's right to uninterrupted work. Industrial harmony is largely attributed to the pragmatic labour policies as well as understanding between workers and employers. To preserve industrial harmony, employers too have to be proactive and take steps to avoid trade disputes. The most effective method is through negotiation. Employers also may provide means for the workers to participate in decision-making. Two-way communication can improve the relationship and open the room of understanding between the parties thus may avoid any conflict. Therefore, industrial action is permissible by law and deemed as one of employees' rights when conflicts and disputes ascended but bound by certain legal boundary. Hence, negotiation and social dialogue are encouraged as a means to resolve the disputes amicably. Industrial actions nevertheless are still relevant but should be functioning as the last resort. In the case of strike, it is certainly not encouraged though the workers have fulfilled the legal requirements.

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PEMAKAIAN 'JUBAH HITAM' DI MAHKAMAH SIVIL: SATU SOROTAN ASAL USUL

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ABSTRAK

Pemakaian 'jubah' warna hitam di mahkamah di Malaysia merupakan suatu kemestian bagi para peguam dan hakim yang mendengar atau membicarakan kes. Ini adalah kerana pemakaian 'jubah' warna hitam termasuk dalam kod etika pakaian sesuai semasa menghadiri perbicaraan di mahkamah. Penulisan ini menyingkap sejarah pemakaian 'jubah hitam' di mahkamah, yang berasal dari England. Bermula dengan menjadi pakaian 'resmi' para hakim Inggeris sewaktu menghadiri majlis keramaian di istana, mereka juga perlu memakai 'jubah hitam' bagi majlis perkabungan apabila berlakunya kematian raja dan ratu England. Di samping itu, penulis juga melihat alasan pemilihan warna hitam sebagai warna 'jubah' yang dipakai ke mahkamah oleh para peguam dan hakim. Akhirnya, penulisan ini menganalisis beberapa peraturan serta pekeliling mahkamah yang berkaitan dengannya sebagai kod etika pakaian sesuai di mahkamah di Malaysia.

Kata kunci: 'jubah hitam', peguam, hakim, mahkamah sivil, etika pakaian, asal usul.

PENGENALAN

Malaysia salah sebuah negara yang pernah dijajah oleh kerajaan Inggeris. Pelbagai aspek dalam sistem pentadbiran negara dipengaruhi oleh undang-undang England atau C*ommon Law* dan ia telah diterima pakai sehingga kini. Malah, pada keseluruhannya, prinsip-prinsip *Common Law* England terutamanya mengenai prosedur, bukan sahaja telah menjadi undang-undang yang dipakai di Mahkamah Sivil, tetapi ia juga semakin diguna pakai di Mahkamah Syariah (Abdul Hamid, 1997). Pemakaian undang-undang England bukan sahaja telah mempengaruhi sistem perundangan Malaysia tetapi ia juga melibatkan hal-hal lain seperti kod etika berpakaian di mahkamah sivil. Ini dapat dilihat apabila pemakaian 'jubah hitam' yang berasal dari England menjadi salah satu peraturan dalam kod etika 'pakaian yang sesuai' atau '*proper attire'* bagi peguam-peguam yang menghadiri perbicaraan di mahkamah sivil (Bar Council, 2012).

Dalam hal ini, sebelum seseorang dapat memakai 'jubah hitam' berkenaan di mahkamah, mereka perlu menjadi peguam terlebih dahulu. Atau dengan kata lain, mereka perlulah diterima masuk sebagai seorang peguam bela dan peguam cara atau "*call to the Bar"* (LPQB, 2021). Di Malaysia, kelayakan untuk diterima masuk serta dibenarkan menjalankan amalan sebagai seorang peguam bela dan peguam cara di mahkamah sivil hendaklah

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seseorang yang dianggap 'orang berkelayakan' atau '*qualified person*' (seksyen 3 Akta Profesion Undang-Undang 1976). Kemudian 'orang berkelayakan' atau seseorang yang mempunyai kelulusan Ijazah Sarjana Muda Undang-Undang (LL.B (Honours)) daripada mana-mana Universiti yang diiktiraf oleh Lembaga Kelayakan Profesion Undang-Undang Malaysia (LPQB) (seksyen 11 Akta Profesion Undang-Undang 1976) perlu menjalani tempoh latihan sebagai 'pelatih dalam kamar' atau '*pupillage*' selama 9 bulan sebelum diterima masuk sebagai peguam bela dan peguam cara. Ini adalah selaras dengan kehendak peruntukan seksyen 12 Akta Profesion Undang-Undang 1976 (Akta 166).

Selain itu, mereka yang terdiri dari seseorang yang memegang jawatan sebagai Pegawai Undang-Undang dalam perkhidmatan Kehakiman dan Perundangan, sepertimana tafsiran di bawah seksyen 3 Akta Profesion Undang-Undang 1976 (Akta 166), juga perlu memakai 'jubah hitam' apabila menghadiri perbicaraan dalam mahkamah. Di samping itu, pemakaian 'jubah hitam' di mahkamah sivil, juga adalah selaras dengan 'Pekeliling Pakaian Peguam di Mahkamah' yang dikeluarkan oleh Ketua Pendaftar, Mahkamah Persekutuan Malaysia (Abdul Wahab, 2000). Oleh yang demikian pemakaian 'jubah hitam' ini perlu dipatuhi oleh semua peguam sama ada yang mewakili pihak individu, swasta mahupun pihak kerajaan apabila menghadiri perbicaraan di mahkamah sivil.

ASAL USUL 'JUBAH HITAM' DI MAHKAMAH

Merujuk kepada Kamus Dewan Edisi Keempat, 'jubah' bermaksud baju panjang cara Arab (dipakai oleh haji, paderi, hakim dan lain-lain) (DBP, 2017). Namun begitu, memandangkan sistem perundangan Malaysia berasal daripada sistem Inggeris, maka pemakaian 'jubah hitam' di mahkamah adalah berasal daripada pakaian tradisional Inggeris. Ini jelas dapat dilihat menerusi sejarah bermulanya pemakaian 'jubah hitam' di England. Ia bermula semasa pemerintahan Raja Edward III (1327-1377) apabila 'jubah hitam' dipakai oleh hakim Mahkamah Tinggi. Asal usul 'jubah hitam' atau dikenali sebagai *'black coat'* bermula pada tahun 1327 ketika Raja Edward III merumus serta menetapkan sepasang kostum untuk para hakim dan menjadikannya sebagai kod berpakaian atau '*dress code*' untuk menghadiri istiadat atau majlis di istana. Malah bahan atau kain untuk dibuat pakaian atau jubah istiadat tersebut pada awalnya diberikan kepada para hakim sebagai Hadiah Pemberian Diraja (Chauhanjmu, 2020).

Perkara yang sama juga berlaku di Perancis, apabila pada tahun 1602, kerajaan Perancis telah menetapkan pakaian rasmi para hakim dan peguam bagi semua peringkat kedudukan. Walaupun warna merah menjadi keutamaan, raja yang memerintah Perancis pada masa itu telah menentukan jenis kain, warna, serta labuh 'jubah' khusus untuk dipakai oleh hakim, peguam cara dan peguam bela, serta pegawai kerajaan. Malah warna 'jubah' juga telah ditetapkan berbeza warna mengikut musim dan hari dalam seminggu (L. Harris, 2020). Justeru, dapat dilihat pada ketika itu, ia seolah-olah kelihatan sebagai tanda maruah dan kesetiaan para hakim dan peguam terhadap mahkamah dan keadilan apabila mereka memakai 'jubah' atau menyarung 'jubah kehakiman' (RB. Lamy, 2006).

Kemudian pada tahun 1635, satu garis panduan pakaian kehakiman di England telah

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diterbitkan dan menetapkan pemakaian 'jubah hitam' dalam Peraturan Hakim. Selepas tahun 1635, pemakaian 'jubah' oleh hakim telah berubah mengikut musim. Para hakim akan memakai 'jubah' berwarna hitam dengan di hadapannya diletakkan bulu berwarna terang (miniver) semasa musim sejuk. Manakala, pada musim panas, mereka akan memakai 'jubah' berwarna ungu atau merah tua, dengan taffeta berwarna merah jambu di bahagian hadapannya (The Judiciary, 2021). Walau bagaimanapun, tradisi pemakaian 'jubah hitam' atau 'jubah berwarna hitam' ini telah bertukar kepada simbol atau lambang pakaian berkabung sewaktu Raja Charles II meninggal dunia dalam tahun 1685 (Chauhanjmu, 2020).

Pemakaian 'jubah hitam' ini sekali lagi menjadi pakaian perkabungan semasa kematian Ratu Mary pada tahun 1694. Pengebumiannya telah dihadiri oleh hakim-hakim dari seluruh dunia, dan setiap hakim telah mengenakan 'jubah hitam'. Begitu juga sepanjang dalam tempoh berkabung dan berduka atas kehilangan Ratu Mary, para hakim perlu memakai 'jubah hitam' (Harcourts, 2021). Tradisi memakai 'jubah hitam' atau 'jubah berwarna hitam' sebagai pakaian berkabung telah diteruskan selama beberapa tahun sehingga berlakunya kematian Ratu Anne pada tahun 1714. Selepas itu, pemakaian 'jubah berwarna hitam' telah menjadi suatu kebiasaan atau adat biasa bagi Badan Kehakiman Inggeris. Di samping memakai 'jubah hitam', para hakim Inggeris juga mengenakan pita warna putih (white band) serta rambut palsu juga berwarna putih (white wigs) (Chauhanjmu, 2020).

Selepas tiga abad, apabila sistem kehakiman Inggeris berubah, pakaian rasmi para hakim juga berubah di mana 'jubah hitam' diperbuat daripada kain sutera berwarna hitam atau dikenali dengan nama 'gaun sutera hitam' (RB. Lamy, 2006). Situasi yang sama juga berlaku di Perancis di mana para hakim mahkamah tinggi Perancis secara tradisionalnya perlu memakai 'jubah hitam' daripada kain sutera. Pada masa yang sama Kerajaan Perancis juga telah menetapkan satu garis panduan yang kompleks untuk anggota profesion undang-undangnya di mana 'jubah hitam' yang diperbuat daripada kain sutera warna hitam perlulah berlengan besar seperti loceng (L. Harris, 2020).

Pada ketika itu selain memakai 'jubah hitam', hakim-hakim Inggeris juga memakai 'jubah' berwarna merah dengan selendang hitam dan tudung merah atau hud merah semasa membicarakan kes jenayah. Tetapi untuk kes sivil, para hakim sering memakai 'jubah hitam' atau 'gaun sutera warna hitam' atau *'black robe or gown'* (S. Stone, 2015). Walaupun pada awalnya cadangan pemakaian yang dibuat pada tahun 1971 tidak diterima pakai, pemakaian 'jubah hitam' atau 'gaun sutera hitam' ini tetap kekal sebagai pakaian hakim-hakim serta peguam-peguam Inggeris di mahkamah sehingga ke hari ini (RB. Lamy, 2006). Sejak itu, pemakaian 'jubah hitam' telah menjadi sebahagian daripada etika pakaian sesuai di mahkamah yang menentukan penampilan para peguam dan hakim di seluruh dunia. (Harcourts, 2021).

'Jubah Hitam'

Setiap profesion mempunyai kod pakaian tertentu, dan orang-orang yang tergolong dalam

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profesion tertentu ini akan dikenali melalui pakaian mereka. Begitu juga dalam profesion kepeguaman dan kehakiman. Dengan cara ini, para peguam dikenal pasti dengan pakaian 'jubah hitam' berserta baju putih. Terdapat tanggapan yang menyatakan bahawa peguam mempunyai salah satu kod pakaian yang paling elegan berbanding profesion lain. Peguam juga dikatakan sebagai salah satu bidang profesional yang berpakaian terbaik (Vinita, 2018). Persoalannya kenapa 'jubah' berkenaan mesti berwarna hitam? Sebelum penetapan 'jubah hitam' kekal sebagai pakaian para hakim Inggeris, seperti perbincangan di atas, warna 'jubah' hakim boleh berubah mengikut musim umpamanya 'jubah' dengan warna ungu atau merah.

Terdapat beberapa pendapat berkaitan alasan apabila 'jubah' warna hitam dipilih. Pertamanya, kemungkinan pada abad ke-17 warna dan pewarna lain tidak banyak tersedia, atau dengan kata lain tiada pilihan warna. Ini merupakan satu alasan paling mudah memandangkan 'jubah hitam' telah menjadi sebahagian daripada pakaian rasmi bagi peguam dan hakim pada ketika itu (Harcourts, 2020). Pendapat kedua pula menyatakan bahawa apabila warna ungu ditandakan sebagai warna diraja, dan satu-satunya warna kain yang tersisa ialah warna hitam. Ketiganya, ada juga berpendapat bahawa sebab utama memakai 'jubah hitam' atau *'black coat'* adalah kerana warna hitam melambangkan warna kuasa dan menguasai. Selain itu, terdapat pendapat juga mengatakan warna hitam seperti mewakili diri atau penyerahan diri. Apabila peguam memakai 'jubah berwarna hitam', ia umpama menunjukkan kepekaan serta keprihatinan mereka dalam menegakkan keadilan (Chauhanjmu, 2020).

Namun begitu, ada juga yang berpendapat bahawa dengan memakai 'jubah hitam' kewibawaan si pemakai lebih menonjol dan memberikan gambaran yang unik untuk imej profesion kepeguaman. Warna hitam itu sendiri melambangkan martabat, kehormatan, dan kebijaksanaan. Ini ialah nilai-nilai yang patut dipegang oleh setiap peguam, selain dapat membantu mereka meningkatkan kredibiliti dan rasa hormat di kalangan pelanggan mereka khususnya dan masyarakat amnya (Harcourts, 2020). Sekiranya menyingkap ke abad ke-17, kerabat diraja sering memakai pakaian atau kostum berwarna merah tua dengan hitam, selain warna merah jambu, ungu, dan biru yang menjadi kebiasaan kepada mereka. Pada masa itu penggunaan warna yang betul adalah penting kerana ia mencerminkan cita rasa serta kedudukan seseorang, bukan sahaja oleh kerabat diraja tetapi juga mereka yang mempunyai pangkat atau kedudukan dalam badan kehakiman (L. Harris, 2020).

Tambahan pula, dengan pemakaian 'jubah hitam' atau '*black robe'* yang hampir sama oleh para peguam merupakan salah satu cara untuk menunjukkan bahawa mereka sama-sama terikat dalam tugas menegakkan undang-undang dan keadilan serta hak kesamaan di bawah undang-undang. Di samping itu, dikatakan bahawa pemakaian 'jubah hitam' atau jubah undang-undang warna hitam selama berabad-abad melambangkan si pemakai adalah seorang yang berkelayakan dan mampu menangani masalah undang-undang yang rumit (Harcourts, 2020).

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ETIKA PEMAKAIAN 'JUBAH HITAM' DI MALAYSIA

Menyingkap pemakaian 'jubah hitam' di mahkamah di Britain, para hakim, peguam, dan kerani pengadilan yang berada di mahkamah tinggi pada umumnya diharuskan memakai 'jubah hitam' yang diperbuat daripada kain sutera warna hitam. Mereka memakai 'jubah atau gaun sutera hitam' di atas sut yang dipadankan dengan tali leher juga berwarna hitam, sepanjang masa keberadaan mereka di mahkamah (L. Harris, 2020). Sepertimana yang telah dibincangkan di atas, sistem perundangan di Malaysia berasal daripada sistem perundangan Inggeris, begitu juga halnya dengan pemakaian 'jubah hitam' di mahkamah sivil di mana ia diwarisi dari pakaian kehakiman mereka. Oleh itu, semasa menghadiri perbicaraan di mahkamah terbuka, 'jubah' yang dipakai oleh semua peguam hendaklah berwarna hitam atau '*black robe'.* Ini adalah kerana pemakaian 'jubah hitam' termasuk dalam kod etika berpakaian sesuai atau '*proper attire'* bagi peguam-peguam yang menghadiri perbicaraan di mahkamah terbuka (Bar Council, 2012).

Pemakaian 'jubah hitam' di mahkamah sivil, juga adalah selaras dengan 'Pekeliling Pakaian Peguam di Mahkamah' yang dikeluarkan oleh Ketua Pendaftar, Mahkamah Persekutuan Malaysia (Abdul Wahab, 2000). Dalam hal ini, peguam-peguam ialah mereka yang telah diterima masuk sebagai peguam serta didaftarkan di bawah seksyen 28 Akta Profesion Undang-Undang 1976 (A166). Sepertimana yang telah dibincangkan di atas, selepas diterima masuk sebagai peguam, di bawah seksyen 3 Akta Profesion Undang-Undang 1976 (A166) mereka dibolehkan beramal sebagai seseorang peguam bela dan peguam cara Mahkamah Tinggi di Malaysia. Sekiranya disoroti kembali sejarah pemakaian 'jubah hitam' di mahkamah, pada tahun 1980-an dan sebelumnya, para hakim telah memakai 'jubah hitam' daripada kain sutera warna hitam yang mirip gaun sutera hitam hakim-hakim Inggeris. Manakala, para peguam pula memakai 'jubah hitam' dengan lengan yang terbuka, berkolar, dan '*bands*' putih terikat di leher (CH. Lim, 2018)

Berdasarkan 'Pekeliling Pakaian Peguam di Mahkamah' yang dikeluarkan oleh Ketua Pendaftar, Mahkamah Persekutuan Malaysia, para peguam sama ada lelaki atau wanita perlu memakai 'jubah hitam' semasa menghadiri perbicaraan dalam mahkamah terbuka di Mahkamah Persekutuan, Mahkamah Rayuan, Mahkamah Tinggi dan Mahkamah Khas (Abdul Wahab, 2000). Bagi peguam lelaki sebelum menyarung 'jubah hitam', mereka perlu memakai kemeja berlengan panjang warna putih dengan '*wing collar*' warna putih dan bib, seluar panjang (longgar) warna hitam/biru kelasi/kelabu gelap serta jaket juga berwarna hitam.

Manakala bagi peguam wanita pula, pakaian yang sesuai ialah blaus berlengan panjang warna putih dengan '*wing collar'* warna putih dan bib, skirt warna hitam/biru kelasi/kelabu gelap dan labuhnya di bawah lutut. Peguam wanita juga boleh memakai seluar panjang warna gelap yang longgar serta tidak mendakap anggota badan, atau pakaian tradisional dengan warna yang tidak garang dan tidak menjolok mata. Kemudian diakhiri dengan memakai jaket berwarna hitam sebelum menyarung 'jubah hitam' di luarnya. Oleh yang demikian, para peguam dikehendaki mematuhi kod pakaian yang sesuai bagi peguam-peguam ketika menghadiri perbicaraan dalam mahkamah terbuka di mahkamah sivil.

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Namun begitu, ketika menghadiri perbicaraan di Mahkamah Sesyen, Mahkamah Majistret dan di dalam kamar Mahkamah Tinggi, peguam-peguam masih perlu memakai pakaian-pakaian yang sesuai seperti di atas, tetapi tidak perlu menyarung 'jubah hitam'.

KESIMPULAN

Etika berpakaian sesuai bagi peguam atau pengamal undang-undang semasa menjalani atau menghadiri perbicaraan dengan satu set pakaian khusus secara umumnya adalah untuk menunjukkan rasa hormat terhadap pihak mahkamah (CH. Lim, 2018). 'Jubah hitam' ialah simbol universal profesion undang-undang di seluruh dunia (Harcourts, 2020). Malah pantun Melayu ada menyebut 'hitam-hitam sitampuk manggis, sungguhpun hitam tetap dipandang manis' (DBP, 2008). Dengan menyingkap sejarah pemakaian 'jubah hitam' di mahkamah oleh para peguam dan para hakim, jelas menunjukkan bahawa 'jubah hitam' yang asalnya bermula sebagai hadiah pemberian oleh raja kepada golongan ini, menjadi sebagai pakaian perkabungan diraja selama beberapa tahun. Kemudian akhirnya bertukar menjadi pakaian rasmi pengamal undang-undang sehinggalah ditetapkan menjadi kod 'pakaian yang sesuai' di mahkamah. Atau dengan kata lain, pemakaian 'jubah hitam' di mahkamah sivil melambangkan profesion undang-undang itu sendiri dan bukan semua orang layak untuk memakainya.

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ISLAMIC LAW

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AMALAN KUTIPAN ZAKAT TANPA TAULIAH DI KEDAH DAN PULAU PINANG: PERBANDINGAN ENAKMEN-ENAKMEN NEGERI

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ABSTRAK

Enakmen atau akta kesalahan jenayah Syariah di Malaysia kebanyakannya memperuntukkan kesalahan berhubung kutipan zakat tanpa tauliah. Namun isu berhubung amil palsu ini masih lagi berlaku di Malaysia melalui pelbagai kaedah. Kertas kerja ini membincangkan amalan kutipan zakat tanpa tauliah di negeri Kedah dan Pulau Pinang. Ia bermula dengan pernyataan masalah isu kutipan zakat tanpa tauliah dan penerangan ringkas berkaitan sejarah pentadbiran zakat di negeri Kedah dan Pulau Pinang. Seterusnya kertas kerja ini menganalisis perbandingan enakmen berhubung pentadbiran zakat serta kesalahan dan hukuman berkaitan kutipan zakat tanpa tauliah. Kertas kerja ini juga ialah kajian perundangan yang bersifat kualitatif dan menganalisis data secara deskriptif dan analisis kandungan. Secara konklusinya, kertas kerja ini mendapati terdapat persamaan dari sudut punca kuasa pendakwaan di Negeri Kedah dan Pulau Pinang. Perbezaan wujud apabila Kedah tidak mempunyai sebarang peruntukan khusus berhubung kutipan zakat tanpa tauliah manakala Pulau Pinang memperuntukkan dua seksyen berkaitan kesalahan dan hukuman meliputi individu yang mengutip zakat tanpa tauliah dan juga individu yang membayar kepada individu yang tidak mempunyai tauliah untuk mengutip zakat. Kertas kerja ini mencadangkan kuasa kutipan yang dimiliki oleh Zakat Pulau Pinang tidak boleh dipertikaikan dan LZNK perlu membuat cadangan pindaan kepada mana-mana enakmen sedia ada bagi melindungi hak asnaf untuk menerima zakat dan kutipan zakat dilaksanakan secara bertanggungjawab dan telus.

Kata kunci: Zakat Tanpa Tauliah, Enakmen, Syariah

PENDAHULUAN

Kutipan zakat tanpa tauliah merupakan satu kesalahan seperti mana yang terkandung dalam kebanyakan enakmen atau akta kesalahan jenayah Syariah yang wujud hampir setiap negeri di seluruh Malaysia. Kesalahan berkaitan kutipan zakat tanpa tauliah ini juga

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telah dicatat dalam sejarah sebelum merdeka lagi (Muhammad Faizul Wahab *et. al*., 2014). Sungguhpun begitu, terdapat individu yang masih mengutip zakat tanpa tauliah dan menjadi amil palsu yang bergerak dalam kumpulan kecil melalui Internet dengan menghantar e-mel kepada syarikat tertentu (Mohd Sabran Mohd Sani, 2018). Perbezaan antara amil palsu dan amil bertauliah ialah resit yang dikeluarkan oleh amil bertauliah pasti mempunyai resit rasmi institusi zakat (Baharom Bakar, 2021).

Hal ini berkemungkinan berlaku apabila terdapat negeri yang tidak mempunyai sebarang peruntukan undang-undang berkaitan kutipan zakat tanpa tauliah. Namun, yang lebih merisaukan apabila kejadian berlaku sebaliknya seperti di Selangor. Walaupun wujud peruntukan undang-undang berkaitan kesalahan tersebut, kutipan tanpa tauliah tetap berlaku. Kes yang dapat dirujuk ialah Pendakwa Syarie Selangor Lawan Mohd Azmee dan Omar [Kes Jenayah No: 10006-1450116-2016 dan 10006-145-0117-2016] apabila tertuduh-tertuduh ini tidak pernah diberikan kebenaran atau tauliah untuk membuat sebarang kutipan zakat atau fitrah di dalam negeri Selangor. Kedua-duanya telah disabitkan di bawah Seksyen 52(1)(b) tahun 1995 yang dibaca bersama seksyen 37 Enakmen Jenayah Syariah (Selangor) Tahun 1995 iaitu percubaan pungutan zakat atau fitrah tanpa diberi kuasa dan dijatuhkan hukuman denda sebanyak RM 2,000.00 atau penjara selama tempoh Sembilan hari jika tidak dapat membayar denda tersebut (Mohamed Hadi Abd Hamid dan Ibrahim Ismail, 2017).

Oleh itu, kertas kerja ini akan mengupas berkaitan amalan kutipan zakat tanpa tauliah di negeri Kedah dan Pulau Pinang secara komparatif perundangan. Kertas kerja ini membuat analisis dan perbincangan daripada perbandingan enakmen-enakmen berhubung kutipan zakat dan penelitian kesalahan dan hukuman kutipan zakat tanpa tauliah..

METODOLOGI KAJIAN

Kertas kerja ini ialah kajian perundangan yang melibatkan peruntukan undang-undang yang terdapat dalam enakmen-enakmen negeri. Kajian di dalam kertas kerja ini bersifat kualitatif yang tidak menggunakan teknik statistik kuantitatif (David Silverman, 2010). Di samping itu, data primer yang diguna dalam kajian ini ialah enakmen-enakmen negeri yang telah dirujuk melalui laman portal E-Syariah yang diselia oleh Jabatan Kehakiman dan Syariah Malaysia (JKSM). Kaedah pengumpulan data menggunakan pendekatan sejarah (*historical approach*) iaitu melihat asal usul sesebuah institusi itu ditubuhkan atau melihat bagaimana sesuatu peruntukan telah digubal akan digunakan bagi meneliti tahun gubalan sesebuah enakmen dan tahun penubuhan sesebuah institusi. Selain itu pendekatan perbandingan (*comparative approach*) juga diguna pakai bagi mengkaji titik persamaan dan perbezaan antara dua situasi dalam sistem undang-undang yang sama (Anwarul Yaqin, 2007) yang melibatkan enakmen-enakmen negeri yang terletak di bawah undang-undang syariah.

Data akan dianalisis menggunakan instrumen analisis kandungan (*content analysis*) apabila semua dokumen rasmi yang meliputi enakmen-enakmen negeri yang diperoleh secara atas talian. Analisis dapatan kertas kerja ini dihasilkan menggunakan teknik

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deskriptif. Segala butiran berkaitan enakmen-enakmen negeri dijelaskan melalui jadual bagi mengukuhkan pemerihalan terhadap fenomena yang dikaji. Kajian ini membuat andaian bahawa semua data yang diperoleh ini adalah daripada sumber kajian yang benar.

Pentadbiran Zakat di negeri Kedah dan Pulau Pinang

Setiap Majlis Agama Islam Negeri (MAIN) bertanggungjawab dalam mentadbir zakat melalui kutipan dan agihan (Azizah Dollah dan Abd Halim Mohd Noor, 2009). Walau bagaimanapun, terdapat MAIN yang telah mengambil langkah dengan mewujudkan sebuah pusat, jabatan ataupun institusi dalam melaksanakan proses kutipan dan agihan tersebut. Ada yang telah dikorporatkan dan menjadi sebuah institusi yang bertanggungjawab penuh terhadap kutipan dan agihan zakat, ada yang bertanggungjawab terhadap kutipan zakat sahaja dan ada yang terpisah dan menjadi sebuah entiti berbeza daripada MAIN. Hal ini berlaku disebabkan terdapat desakan agar kutipan dan agihan dana zakat di Malaysia menjadi lebih cekap dan berkesan.

Kedah menjadi satu-satunya negeri yang pentadbiran zakatnya terpisah daripada Majlis Agama Islam Negeri Kedah (MAIK). Secara sejarahnya, institusi zakat Kedah ditubuhkan pada 5 September 1936. Perhimpunan Riyal Zakat dan Sedekah Orang-orang Islam di Negeri Kedah pada tahun 1936 dicatatkan sebagai tarikh bermula sebaran zakat secara rasmi kepada rakyat di negeri Kedah (Lembaga Zakat Negeri Kedah, 2021). Sebuah komiti zakat juga ditubuhkan pada tahun yang sama. Walau bagaimanapun, pada 26 Syawal 1397H (12 Oktober 1977), komiti zakat telah ditukar nama kepada penubuhan Jawatankuasa Zakat (Mohammad Azam Hussein dan Zuryati Mohamed Yusoff, 2005). Jawatankuasa Zakat ini terus kekal ketika di bawah Jabatan Zakat Negeri Kedah Darul Aman (JZNK) dan kini bertukar nama ke Lembaga Zakat Negeri Kedah (LZNK). Ketika JZNK mentadbir zakat di negeri Kedah, Enakmen Zakat Kedah 1955 (No 4) telah digunakan sejak tahun 1955 sehinggalah beberapa pindaan telah dibuat pada tahun 1962 dan 1982. Namun, enakmen tersebut telah digantikan dengan Enakmen Lembaga Zakat Negeri Kedah Darul Aman pada tahun 2015 dan ditadbir oleh LZNK. Menara Zakat Kedah di Alor Setar ialah ibu pejabat LZNK sejak awal pembinaannya di bawah JZNK.

Manakala Pulau Pinang pula pentadbiran zakat meliputi agihan dan kutipan dilakukan oleh sebuah entiti yang telah dikorporatkan sepenuhnya di bawah Akta Syarikat 1965 oleh Majlis Agama Islam Negeri Pulau Pinang (MAINPP) pada 1 Jun 1994 atas nama Syarikat As-Sahabah Urus Zakat Sdn. Bhd. (ASUZ) dengan pelaburan modal sejumlah RM1,019,658.00. ASUZ telah memulakan operasi pada 27 Disember 1994 dengan menggunakan nama Pusat Urus Zakat Negeri Pulau Pinang (PUZ) bertempat Taman Selat, Butterworth. Pada 26 April 2012, MAIPP telah menukar nama korporat yang baru iaitu Zakat Pulau Pinang yang kini beroperasi di ibu pejabatnya terletak di Bandar Perda, Bukit Mertajam (Zakat Pulau Pinang, 2021).

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ANALISIS DAN PERBINCANGAN

Perbandingan Enakmen Berhubung Pentadbiran Zakat

Enakmen pentadbiran agama Islam wujud di semua negeri seluruh Malaysia. Negeri Kedah mempunyai Enakmen Pentadbiran Undang-Undang Islam (Kedah) 2008 dan Pulau Pinang mempunyai Enakmen Pentadbiran Agama Islam (Pulau Pinang) 2004 (Muhammad Hafiz Badarulzaman *et.al*, 2015). Hampir kesemua enakmen mempunyai peruntukan yang sama dari sudut bidang kuasa MAIN dalam pentadbiran dan pengurusan zakat (Muhammad Hafiz Badarulzaman dan Siti Nabilah Sulaiman, 2019). Sungguhpun begitu, Enakmen Pentadbiran Undang-Undang Islam (Kedah) 2008 tidak menyatakan sebarang peruntukan berkaitan kutipan dan agihan zakat. Hal ini disebabkan undang-undang semasa ditadbir oleh enakmen zakat yang khusus iaitu Enakmen Lembaga Zakat Kedah Darul Aman 2015.

Menurut enakmen tersebut Lembaga Zakat Negeri Kedah Darul Aman telah diberikan kuasa berkaitan kutipan dan agihan zakat di negeri Kedah (Enakmen Lembaga Zakat Kedah Darul Aman 2015, Seksyen 4(1)). Manakala MAIPP telah diberikan kuasa kutipan dan agihan zakat di Pulau Pinang (Enakmen Pentadbiran Agama Islam 2004, Seksyen 86). Kedua-dua peruntukan tersebut menunjukkan bahawa LZNK bertanggungjawab memungut dan mengagih bagi pihak Ke bawah Duli Yang Maha Mulia Sultan Kedah, Al Aminul Karim Sultan Solehuddin ibn Almarhum Sultan Badlishah. Manakala Zakat Pulau Pinang bertanggungjawab mewakili Seri Paduka Baginda Yang Di-Pertuan Agong, Sultan Abdullah ibn Al Marhum Sultan Ahmad Shah.

Kesalahan dan Hukuman Berkaitan Kutipan Zakat Tanpa Tauliah

Kesalahan berkaitan zakat dapat dilihat melalui enakmen-enakmen kesalahan jenayah bagi zakat (Muhammad Hafiz Badarulzaman dan Siti Nabilah Sulaiman, 2019). Peruntukan undang-undang berkaitan kesalahan mengutip zakat tanpa tauliah bagi negeri Kedah dan Pulau Pinang dapat dilihat menerusi Enakmen Kesalahan Jenayah Syariah (Negeri Kedah) 2014 dan Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996.

Secara umumnya, kesalahan zakat di negeri Kedah boleh dirujuk melalui seksyen 15(2) iaitu menghasut supaya mengabaikan kewajipan agama (Enakmen Kesalahan Jenayah Syariah (Kedah) 2014). Manakala Pulau Pinang telah menjelaskan kesalahan berkaitan kutipan zakat tanpa tauliah secara khusus melalui seksyen 33 (Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996). Selain itu, Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996 juga memperuntukkan Seksyen 34 berhubung pembayaran zakat atau fitrah yang dianggap batal oleh undang-undang.

Secara analisisnya, wujud persamaan antara Pulau Pinang dan Kedah dari sudut punca kuasa pendakwaan yang boleh dirujuk dalam enakmen kesalahan jenayah syariah di negeri masing-masing. Kuasa pendakwaan terletak di Jabatan Kehakiman Syariah Malaysia (JKSM) setelah siasatan dibuat oleh Pegawai Penguat kuasa Agama (PPA) di jabatan agama Islam masing-masing. Namun perbezaan wujud dari sudut kesalahan dan hukuman

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berkaitan kutipan zakat tanpa tauliah. Kedah tidak menyediakan sebarang peruntukan undang-undang berkaitan kesalahan individu yang membayar zakat kepada seseorang yang mengutip zakat tanpa tauliah ataupun kesalahan terhadap individu yang mengutip zakat tanpa tauliah. Manakala Pulau Pinang menganggap kutipan zakat tanpa tauliah adalah suatu kesalahan dan boleh dihukum denda tidak melebihi tiga ribu ringgit atau dihukum penjara tidak melebihi dua tahun atau kedua-duanya (Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996, Seksyen 33). Peruntukan yang sama turut mengarahkan supaya wang yang dirampas untuk dimasukkan ke dalam akaun yang dimiliki oleh MAIPP sebagai pemegang amanah.

Di samping itu, Pulau Pinang juga menganggap mana-mana individu yang membayar zakat atau fitrah kepada mana-mana individu yang tidak mempunyai tauliah adalah melakukan suatu kesalahan dan boleh dihukum denda tidak melebihi satu ribu ringgit atau dihukum penjara tidak melebihi enam bulan atau kedua-duanya sekali duanya (Enakmen Kesalahan Jenayah Syariah (Negeri Pulau Pinang) 1996, Seksyen 34). Kewujudan kedua-dua peruntukan tersebut dapat memastikan bahawa tiada penyelewengan berlaku terhadap sebarang kutipan zakat tanpa tauliah. Ini juga dapat menjamin bahawa hasil kutipan zakat secara sah mampu disalurkan kepada asnaf yang diiktiraf oleh institusi zakat. Walaupun negeri Kedah mahu mendidik dan bukan menghukum mana-mana rakyat dalam urusan zakat (Muhammad Hafiz Badarulzaman et.al, 2015), namun untuk menjadikan sesuatu penguatkuasaan itu efektif, peruntukan berkaitan kesalahan dan hukuman khususnya kutipan zakat tanpa tauliah perlu dinyatakan di dalam mana-mana enakmen yang berkaitan.

PENUTUP

Secara penutupnya, Kedah dan Pulau Pinang ialah dua buah negeri yang berada di utara Semenanjung Malaysia. Kedua-dua negeri ini biarpun mempunyai persamaan dari sudut dialek, tetapi berbeza dari sudut bidang kuasa pentadbiran zakat serta kesalahan dan hukuman zakat khususnya dalam isu kutipan zakat tanpa tauliah. Kedah menjalankan pentadbiran zakat yang memisahkan bidang kuasa MAIK dan menyerahkan sepenuhnya kepada LZNK. Pulau Pinang pula menyerahkan urusan pentadbiran zakat dari sudut kutipan dan agihan kepada Zakat Pulau Pinang yang dilantik oleh MAIPP.

Selain itu, wujud persamaan antara Pulau Pinang dan Kedah dari sudut punca kuasa pendakwaan yang boleh dirujuk dalam enakmen kesalahan jenayah syariah di negeri masing-masing. Cuma perbezaan wujud dari sudut kesalahan dan hukuman berkaitan kutipan zakat tanpa tauliah. Kedah tidak mempunyai sebarang peruntukan khusus berkaitan kesalahan dan hukuman kutipan zakat tanpa tauliah. Pulau Pinang pula memperuntukkan dua seksyen berkaitan kesalahan dan hukuman tersebut meliputi individu yang mengutip zakat tanpa tauliah dan juga individu yang membayar kepada individu yang tidak mempunyai tauliah untuk mengutip zakat.

Setiap persamaan dan perbezaan yang wujud berkaitan kutipan zakat tanpa tauliah tidak menghalang bidang kuasa pentadbiran zakat. Namun, peraturan dan undang-undang yang

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telah ditetapkan oleh pemerintah atau *Ulil Amri* yang menyatakan bahawa hak kutipan hanya terletak pada kuasa Zakat Pulau Pinang tidak boleh dipertikaikan demi siasah dan *maslahah* ummah. LZNK juga disaran agar membuat cadangan pindaan kepada enakmen kesalahan jenayah syariah negeri ataupun enakmen yang mentadbir LZNK sendiri. Ini bagi memastikan wujud peruntukan undang-undang yang melindungi hak asnaf untuk menerima zakat sewajarnya. Selain itu, peruntukan undang-undang ini penting bagi memastikan kutipan zakat dilaksanakan secara bertanggungjawab dan telus apabila dilantik secara sah oleh LZNK.

PENGHARGAAN

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MAQASID SYARIAH DALAM WAKAF KESIHATAN

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ABSTRAK

Masyarakat Malaysia akur dengan pelaksanaan *lockdown* mulai 1 Jun 2021 hingga 14 Jun 2021. Selanjutnya *lockdown* tersebut dilanjutkan sehingga 28 Jun 2021 kerana peningkatan kes wabak COVID-19 di Malaysia. Kerajaan Malaysia mementingkan kesihatan masyarakat. Pelbagai langkah telah dilaksanakan oleh pihak kerajaan untuk membantu masyarakat dalam menghadapi situasi *lockdown* di Malaysia. Kajian ini bertujuan memupuk masyarakat agar mengamalkan wakaf kesihatan bagi menjamin kemaslahatan masa hadapan. Kajian ini mengkaji peranan wakaf kesihatan dalam menangani wabak COVID-19 di Malaysia. Wakaf ini perlu dipergiatkan untuk menjamin kesihatan masyarakat dalam keadaan baik. Wakaf yang diuruskan dengan kaedah yang betul harus disokong oleh pelbagai lapisan masyarakat bagi menangani wabak ini yang menular di seluruh dunia. Wabak ini bukan sahaja mengganggu kesihatan masyarakat bahkan membawa kematian yang meningkat dari semasa ke semasa. Oleh itu, langkah berjaga-jaga dan mencegah itu lebih baik agar masyarakat prihatin tentang kesihatan masing-masing. Justeru itu, kajian ini mendapati bahawa wakaf kesihatan menyumbang kepada bantuan aspek kesihatan kepada masyarakat di Malaysia pada masa kini mahu pun akan datang. Kerajaan, pihak swasta, para alim ulama serta orang awam perlu berganding bahu untuk memantapkan wakaf kesihatan di Malaysia. Wakaf kesihatan berteraskan aspek al-Quran dan al-Hadis. Wakaf telah dipelopori sejak zaman Rasulullah s.a.w Wakaf kesihatan ini berteraskan agama Islam. Kajian ini mengaplikasikan metodologi kualitatif.

Kata kunci: Covid-19, Kesihatan, *Lockdown*, Maqasid Syariah, Wakaf

PENGENALAN

Chan et al. (2020) menyatakan bahawa wabak COVID-19 berpunca daripada Koronavirus 2 atau SARSCOV2. Mohamed Azam (2021) berpandangan bahawa maqasid syariah adalah berteraskan kepentingan umum dan mencegah keburukan. Konsep syariah ini selaras dengan rahmat dan petunjuk sebagaimana surah al-Anbiya' ayat 107 dan surah Yunus ayat 57. Oleh itu, setiap aspek kehidupan manusia perlu menepati objektif Syariah berdasarkan perkara penting (dharuriyyah), kemudahan (hajiyyah) dan hiasan (tahsiniyyah). Mohammad Hashim Kamali (2021) menegaskan bahawa wabak COVID-19 mengancam salah satu maqasid penting dalam kategori dharuriyyat. Ini berkaitan dengan

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aspek perlindungan nyawa (hifz al-nafs) yang perlu diberikan keutamaan oleh masyarakat di seluruh dunia. Oleh itu, aspek kesihatan amatlah penting seumpama pepatah mengatakan bahawa "mencegah lebih baik daripada mengubati".

Musim lockdown memberikan kesan kepada ekonomi masyarakat di Malaysia. Oleh itu, wakaf kesihatan perlu dipergiatkan bagi meringankan beban kewangan yang ditanggung oleh masyarakat. Kajian ini mendapati bahawa wakaf kesihatan menyumbang kepada bantuan aspek kesihatan bukan sahaja pada musim pandemik ini tetapi juga untuk masa akan datang. Sesungguhnya agama yang sempurna di sisi Allah ialah agama Islam seperti mana surah al-Imran ayat 19. Cecep & Mas Nooraini (2021) menyatakan bahawa sejarah mencatatkan wakaf kesihatan tidak hanya untuk pembinaan hospital tetapi merangkumi penyediaan pelbagai ubat-ubatan melalui farmasi yang dibiayai oleh wakaf, menyediakan pakar perubatan serta penubuhan sekolah perubatan yang dibiayai oleh wakaf.

LITERATUR

Wakaf daripada segi bahasa bererti menahan, berhenti, diam di tempat atau berdiri. Wakaf adalah isim masdar. Isim bererti kata nama manakala masdar ialah kata terbitan (Qahaf,1412H). Munzir Qahaf yang merupakan ulama kontemporari mentakrifkan wakaf adalah menahan aset untuk waktu selamanya atau untuk sementara waktu bagi memanfaatkan hasilnya secara berterusan menurut agama Islam.

Maqasid Syariah terbahagi kepada tiga bahagian iaitu pertama adalah dharuriyyah (kepentingan atau keperluan) contohnya keperluan agama dan dunia. Kedua adalah hajiyyah iaitu kemaslahatan bersifat keperluan dan hajat manusia. Ketiga adalah tahsiniyyah iaitu merupakan peringkat paling bawah dalam susunan maqasid syariah. Islam menyarankan agar umat Islam bersedekah dan berkelakuan baik daripada segi tutur kata dan perilaku. (Nasrul et al., 2015). Oleh itu, konsep dharuriyyah, hajiyyah dan tahsiniyyah ini membantu mencapai konsep maqasid syariah iaitu menjaga kepentingan masyarakat melalui kekuatan iman, nyawa, akal, keturunan, harta dan sebagainya (Prihantoro, 2017; Ahmad, 2021).

MAQASID SYARIAH

Syatibi, 1997 menegaskan bahawa ajaran Islam memberikan perhatian kepada permasalahan manusia di dunia. Beliau menjelaskan bahawa iman dalam kitabnya al-Muwafaqāt iaitu:

> "sesunguhnya semua ajaran syariah Islam bertujuan mewujudkan kemaslahatan manusia di dunia dan akhirat" (Syatibi, 1997)

Oleh itu, maqasid syariah mementingkan kemaslahatan umum dengan memberikan penumpuan kepada wakaf kesihatan. Wakaf kesihatan adalah bertujuan untuk menjaga agama Islam (hifzu ad-din), menjaga nyawa (hifzu an-nafs), menjaga akal (hifzu a'ql), menjaga keturunan (hifzu an-nasab), menjaga harta (hifzu al-mal) dan sebagainya.

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WAKAF KESIHATAN

Wakaf kesihatan adalah penting untuk menangani wabak COVD-19 di Malaysia. Wabak berasal daripada perkataan Arab iaitu al-waba'(الوباء). Wabak ini juga dikenali sebagai al-taun (الطاعون) yang bermaksud merebak atau berjangkit.

Doktor,jururawat dan pegawai perubatan bertungkus lumus merawat pesakit COVID-19. Peranan mereka amat berharga bagi masyarakat. Mereka sanggup mempertaruhkan nyawa mereka demi rakyat semasa menjalankan tugas merawat pesakit semasa COVID-19. Oleh itu, insentif dan pampasan kematian anggota kematian perlu diberi perhatian khusus oleh pihak kerajaan mahu pun swasta. Wakaf kesihatan sangat penting untuk insentif pekerja kesihatan atau pampasan kematian tersebut. Namun begitu, pelaksanaan wakaf bukanlah mudah kerana wakaf perlu dikendalikan oleh individu yang berkompetensi dan bertanggungjawab serta amanah. Para fuqaha mensyaratkan pentadbir wakaf mesti mampu melakukan transaksi, dapat dipercayai dan berkebolehan dalam bidangnya.

Kematian

Setiap yang hidup di dunia tidak akan kekal lama begitu jua umat yang hidup di dunia pasti akan mati. Surah al-Anbiya ayat 35 bermaksud:

> "Tiap-tiap yang bernyawa pasti akan merasakan mati. Dan Kami akan menguji kamu dengan keburukan serta kebaikan sebagai cubaan. Dan hanya kepada Kamilah kamu akan dikembalikan"

Setiap manusia akan menempuhi saat kematian. Namun kematian yang diimpikan adalah husnul khotimah. Umat Islam hari ini terkilan jika tidak mencapai husnul Khatimah dalam kehidupan di dunia. Manusia hanya boleh merancang strategi mencegah COVID-19 namun Allah sahaja yang lebih mengetahui apa yang terbaik untuk umat di seluruh dunia.

METODOLOGI KAJIAN

Kajian ini mengaplikasikan metodologi kualitatif. Kajian kepustakaan (library research) diaplikasikan dengan merujuk Al-Quran dan al-Hadis, laman sesawang Scopus, Web of Science, Google Scholar bagi memperoleh artikel, jurnal berimpak tinggi, media masa serta kontemporari wakaf kesihatan. Penulis mengumpulkan kesemua rujukan yang diperoleh dari laman sesawang dan selanjutnya menganalisis maklumat bagi mengkaji maqasid syariah dalam wakaf kesihatan.

Analisis wakaf kesihatan meneliti jumlah kes COVID-19 di Malaysia yang meningkat setakat 27 Mei 2021 seperti yang tercatat di Jadual 1. Oleh itu, langkah mempergiatkan wakaf kesihatan diteruskan oleh orang awam bagi menangani wabak ini di Malaysia. Lockdown ialah pembatasan individu untuk keluar rumah yang dikuatkuasakan di Malaysia mulai 1 Jun 2021 hingga 28 Jun 2021 kesan peningkatan kes wabak COVID-19. Jumlah kes setakat

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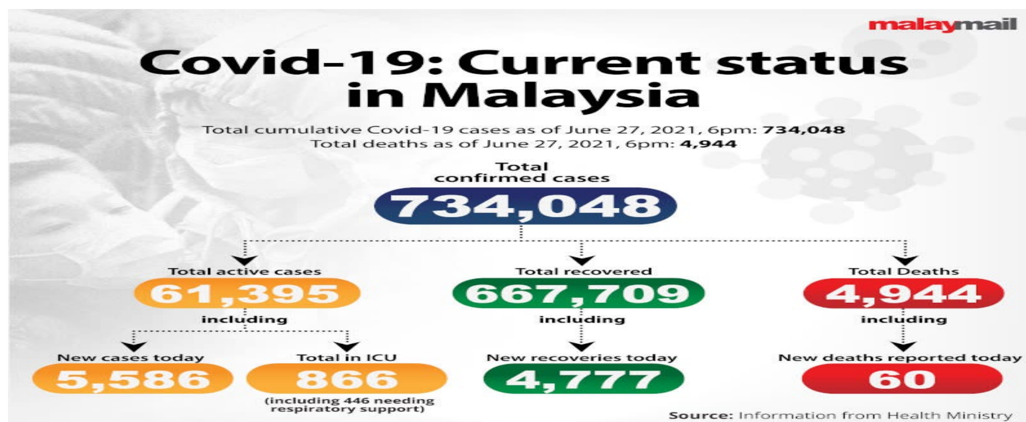
27 Jun 2021 di Malaysia ialah 734,048 manakala jumlah kes kematian ialah 4,944 seperti mana yang tercatat di dalam Jadual 2.

Jadual 1- Jumlah Kes COVID-19 Di Malaysia Setakat 27 Mei 2021

Negeri/Wilayah	Jumlah Kes	Angka Kematian	14 Hari Kes Bertambah
Selangor	177,450	692	+15.5%
Sabah	61,274	460	+3.3%
Johor	56,231	246	+11.9%
Kuala Lumpur	56,032	248	+12.9%
Sarawak	44,738	272	+16.7%
Penang	27,284	70	+15.6%
Kelantan	24,723	112	+24.8%
Negeri Sembilan	24,166	70	+14.8%
Perak	19,490	85	+14.5%
Kedah	17,011	87	+27.6%
Melaka	10,812	56	+24.3%
Pahang	8,649	38	+28.5%
Terengganu	7,957	27	+30.6%
Labuan	3,164	15	+20.5%
Putrajaya	1,778	9	+16%
Perlis	465	4	+12.90%

Jadual 2- Jumlah Kematian Di Malaysia Setakat 27 Jun 2021



Sumber: Malay Mail 27.6.2021 (Ahad) jam 7.57 malam (https://malaysia.yahoo.com/news/ismail-sabri-11-sectors-given-115755117.html)

DAPATAN KAJIAN

Wealth Health Organization (WHO) mentakrifkan sihat sebagai sihat fizikal atau jasmani, sihat mental atau rohani dan sosial sehingga seseorang mampu beriadah dengan baik

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(Wealth Health Organization, 2020). Islam mendidik umat agar menjaga kesihatan jasmani dan rohani dengan dua kaedah iaitu menjaga dan mengubati sebagaimana sabda Rasulullah s.a.w:

> "Sesungguhnya Allah SWT itu suci yang menyukai perkara-perkara yang suci, Dia Maha Bersih yang menyukai kebersihan, Dia Maha Mulia yang menyukai kemuliaan, Dia Maha Indah yang menyukai keindahan, karena itu bersihkanlah tempat-tempatmu."(Hadis riwayat Tirmizi).

Islam juga mendidik umat agar berubat dari semua jenis penyakit. Rasulullah s.a.w bersabda:

> "setiap penyakit ada ubatnya, Apabila ditemukan ubat yang tepat untuk suatu penyakit, akan sembuhlah penyakit itu dengan izin Allah "azza wajalla" (Hadis Riwayat Muslim)

Justeru itu, umat Islam memberikan perhatian kepada sektor kesihatan dengan mewakafkan harta untuk pembangunan hospital dan klinik untuk merawat pesakit serta membina institusi pendidikan perubatan yang berkualiti. Wakaf kesihatan bukan sahaja untuk manusia tetapi juga untuk merawat haiwan. Wakaf kesihatan juga untuk kos perkhidmatan atau bantuan kesihatan secara percuma kepada semua pesakit (Cecep & Nooraini, 2021).

KESIMPULAN

Wakaf kesihatan perlu dipergiatkan oleh masyarakat Islam seluruh dunia. Wakaf kesihatan perlu dilaksanakan dengan baik menurut maqasid syariah. Konsep maqasid syariah mementingkan kebajikan kesihatan umum. Wakaf kesihatan menjadi sia-sia jika pihak kerajaan, pihak swasta mahu pun pentadbir yang dilantik tidak menguruskan aset wakaf dengan amanah berkonsepkan Islam. Justeru itu, penyelidik mencadangkan agar penyelidik pada masa akan datang akan mengkaji aspek wakaf kesihatan dengan lebih baik lagi. Wakaf kesihatan perlu dimajukan bagi menghadapi wabak COVID-19 yang tidak ada seorang pun mengetahui bilakah pengakhiran wabak ini.

PENGHARGAAN

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SENARIO KES PERISYTIHARAN BUKAN ISLAM DI MAHKAMAH SYARIAH; RINGKASAN CONTOH KES-KES YANG TELAH DIPUTUSKAN

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ABSTRAK

Artikel ini menyatakan tentang ringkasan contoh-contoh kes penentuan sebagai bukan Islam melalui permohonan untuk keluar agama yang telah diputuskan di Mahkamah Syariah. Laporan kes-kes terdahulu dirumus bagi mengenal pasti gambaran dan isu dalam proses penentuan status agama melalui permohonan keluar Islam. Dalam hal ini, penulis telah mendapatkan laporan kes daripada lama sesawang pangkalan data seperti Malayan Law Journal (MLJ), Current Law Journal (CLJ) dan Shariah Law Reports melalui pangkalan data Lexis Nexis Malaysia. Walaupun diiktiraf sebagai satu-satunya forum untuk menyelesaikan kes-kes yang melibatkan pertikaian status akidah orang Islam, Mahkamah Syariah masih dilihat menghadapi kekangan-kekangan dari sudut konflik bidang kuasa dan kelompangan peruntukan undang-undang tatacara bagaimana memaksimumkan bidang kuasanya membuat perisytiharan bukan Islam seseorang. Persoalan lain adalah sama ada bidang kuasa ini wujud sebagai platform kepada orang yang mempunyai status Islam untuk keluar Islam.

Kata kunci: perisytiharan bukan Islam, keluar Islam, Mahkamah Syariah

PENGENALAN

Di Malaysia, seseorang yang memiliki status Islam dalam kad pengenalannya adalah seorang yang beragama Islam menurut undang-undang; justeru tertakluk kepada undang-undang Syariah dalam enakmen negeri-negeri. Sekiranya seseorang individu ingin membuat sebarang pindaan berkaitan maklumat agama dalam kad pengenalannya, Jabatan Pendaftaran Negara (JPN) telah mensyaratkan satu perintah Mahkamah Syariah atau pengesahan Majlis Agama Islam atau Jabatan Agama Islam untuk berbuat demikian. Pada masa yang sama tindakan untuk keluar Islam melalui permohonan perisytiharan status agama di Mahkamah Syariah pula mencetuskan persoalan bagaimana Mahkamah Syariah boleh membenarkan seseorang Muslim itu untuk murtad.

Secara umum, (Pg Ismail Pg Musa & Siti Zubaidah Ismail, 2015) mengkategorikan pendekatan undang-undang berkaitan kesalahan keluar Islam dalam tiga keadaan. Pertama: keluar agama dikategorikan sebagai satu kesalahan jenayah Syariah yang diperuntukkan dalam Enakmen Kesalahan Jenayah Syariah Negeri-Negeri, kedua: tindakan

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keluar Islam dimulakan dengan membuat permohonan keluar Islam di Mahkamah Tinggi Syariah, ketiga, permohonan keluar Islam difailkan melalui peruntukan undang-undang yang khas memperuntukkan perihal keluar Islam seperti di Negeri Sembilan. Dalam artikel ini, beberapa keputusan Mahkamah Syariah dinyatakan bagi menggambarkan bagaimana pendekatan Mahkamah Syariah dalam menangani isu penentuan status agama melalui permohonan keluar Islam.

RINGKASAN CONTOH KES YANG DIPUTUSKAN DI MAHKAMAH SYARIAH

Pada tahun 2018, dalam kes permohonan keluar Islam Michiel Ur David, Mahkamah Tinggi Syariah Kuantan Pahang telah memutuskan bahawa pemohon yang terdiri daripada seorang bapa, ibu dan anak telah diisytiharkan sebagai bukan Islam sejak awal lagi justeru permohonan keluar Islam yang difailkan telah diluluskan. Dalam kes ini, pemohon pertama dan kedua ialah dilahirkan dalam keluarga yang berbangsa India dan beragama Hindu. Pemohon pertama telah bersetuju untuk memeluk Islam pada tahun 1989 dengan alasan untuk mendapat bantuan pembiayaan dari Bank Pertanian. Setelah memeluk Islam, pemohon pertama tidak pernah faham dan mengamalkan ajaran Islam sehingga pemohon telah berkahwin dengan pemohon kedua. Pemohon kedua juga memeluk Islam mengikut pemohon pertama. Pemohon ketiga merupakan anak yang dinamakan sebagai nama Islam dalam sijil kelahiran namun menggunakan nama India dalam urusan kehidupannya. Permohonan keluar Islam seterusnya mendapatkan status sebagai bukan Islam difailkan bagi pemohon-pemohon menjalani hidup sebagai penganut agama Hindu dengan tenang. Mahkamah Tinggi Syariah Kuantan telah meluluskan permohonan ini dan memutuskan bahawa pemelukan Islam pemohon pertama dan kedua adalah tidak sah menurut Hukum Syarak dan undang-undang kerana pemohon tidak memahami syahadah yang dilafazkan. Justeru, pemohon ketiga tidak boleh disabitkan sebagai penganut agama Islam juga.

Di Sabah, Mahkamah Tinggi Syariah Kota Kinabalu telah menolak satu permohonan keluar agama dalam kes Roslinda Rafi lwn. Ketua Pendaftar Muallaf, Sabah. Dalam kes ini, pemohon membuat permohonan ke Mahkamah Syariah untuk mengisytiharkan bahawa beliau sudah pun murtad serta bukan lagi beragama Islam. Pemohon membuat permohonan berdasarkan Perkara 11 Perlembagaan Persekutuan yang membenarkan kebebasan beragama. Pemohon menyatakan bahawa perisytiharan bukan Islam adalah penting untuknya untuk meneruskan kehidupan.

Dalam kes ini, mahkamah Syariah Kota Kinabalu memutuskan bahawa Mahkamah Syariah tidak berbidang kuasa untuk mengeluarkan apa-apa perintah untuk membenarkan seseorang Muslim itu untuk keluar agama atau murtad. Mahkamah Syariah hanya berbidang kuasa untuk mengesahkan dan memutuskan sama ada perbuatan seseorang itu telah menyebabkan ia telah terkeluar daripada akidah Islam atau murtad berdasarkan sesuatu aduan atau dakwaan. Penghakiman yang dibuat menunjukkan Mahkamah Syariah hanya akan menentukan status keislaman pemohon berdasarkan sesuatu perbuatan tertentu yang dilakukan oleh pemohon. Bagi kes ini, Mahkamah mendapati tiada satu pun perbuatan dan alasan pemohon yang menunjukkan pemohon telah melakukan satu

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perbuatan yang berlawanan dengan akidah Islam untuk diisytiharkan sebagai telah keluar Islam atau murtad.

Di Mahkamah Syariah Negeri Pahang, pemohon dalam satu kes Dalam Perkara ex p Muhamad Ramzan Maniarason telah membuat permohonan untuk keluar Islam setelah sudah tidak berminat dengan agama Islam. Pemohon merupakan seorang mualaf yang memeluk Islam dan setelah 12 tahun pemelukan Islam, pemohon ingin keluar daripada Islam. Dalam kes ini, Hakim Mahkamah Tinggi Syariah Kuantan menolak permohonan ini dan mengarahkan agar pihak berwajib seperti Pejabat Agama Islam Daerah, Jabatan Agama Islam, Majlis Agama Islam dan Badan-badan NGO seperti PERKIM dan lain-lain patut tampil memberikan bantuan demi menyelamatkan akidah pemohon. Mereka harus memberikan segera bantuan mualaf, bimbingan agama dan berusaha mencari jodoh untuk pemohon.

Berlainan pula situasi dalam kes Siti Fatimah Tan di Pulau Pinang. Yang Amat Arif Hakim Mahkamah Rayuan Syariah Pulau Pinang telah berpendapat bahawa peruntukan yang menyatakan perihal bidang kuasa Mahkamah Syariah membuat perisytiharan bahawa seseorang itu bukan lagi beragama Islam adalah bertujuan untuk mereka yang telah mengucap dua kalimah syahadah tetapi status seterusnya belum ditentukan sama ada mereka mengamalkan rukun-rukun atau syarat-syarat syahadah tersebut. Menurut YAA Hakim Mahkamah Rayuan ketika itu, peruntukan bidang kuasa ini bukan bermaksud membenarkan orang Islam untuk keluar Islam tetapi untuk mengesahkan status pemelukan Islam seseorang.

Di Negeri Sembilan, pemakaian bidang kuasa membuat perisytiharan bahawa seseorang itu bukan lagi beragama Islam ini juga dapat dilihat dalam kes Akbar Ali. Perayu dalam kes ini mengatakan bahawa mereka telah keluar Islam dan seterusnya memohon perisytiharan tentang kemurtadan mereka melalui seksyen peruntukan bidang kuasa Mahkamah Syariah membuat perisytiharan status seseorang bukan lagi Islam. Pada masa kes ini didaftarkan, peruntukan yang menjadi panduan kepada perkara ini adalah Seksyen 90 Enakmen Pentadbiran Hukum Syarak (Negeri Sembilan) 1991 yang secara umum membenarkan seseorang keluar Islam setelah memeluk Islam. Walau bagaimanapun, Mahkamah Rayuan Syariah pada ketika itu telah mengambil pendekatan berhati-hati bahawa untuk mengesahkan sama ada seseorang telah keluar Islam atau masih Islam memerlukan rujukan kepada pakar-pakar ilmuwan Islam. Setelah kes itu dilaporkan barulah pindaan kepada Enakmen Pentadbiran Agama Islam dibuat bagi mewajibkan permohonan keluar Islam dibuat melalui Mahkamah Syariah.

Di Wilayah Persekutuan, situasi kes permohonan keluar Islam dapat dilihat dalam kes Balbir Abdullah di mana plaintif merupakan seorang mualaf yang telah berhasrat untuk membatalkan status keislamannya. Tidak dilaporkan punca plaintif ingin membatalkan keislamannya setelah proses pemelukan Islam dibuat dan didaftarkan mengikut undang-undang. Plaintif telah memfailkan notis saman terhadap Pendaftar Mualaf Wilayah Persekutuan yang dinamakan sebagai defendan dalam kes ini. Defendan telah membuat bantahan kerana defendan tidak sesuai dinamakan sebagai defendan dalam kes

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melibatkan permohonan keluar Islam defendan juga menghujahkan bahawa tiada peruntukan undang-undang yang membolehkan Mahkamah Syariah Wilayah Persekutuan mendengar kes ini. Walaupun peruntukan di Wilayah Persekutuan tidak menyatakan bidang kuasa membuat perisytiharan status agama seseorang, namun Yang Amat Arif Hakim dalam menolak permohonan ini menjelaskan bahawa Mahkamah telah menggunakan bidang kuasa secara implikasi. Kes ini ditolak berikutan defendan yang dinamakan adalah tidak tepat dan Mahkamah tidak mempunyai garis panduan dalam menyelesaikan kes ini.

Daripada contoh-contoh kes yang dilaporkan di Mahkamah Syariah, beberapa kesimpulan dapat dibuat. Secara jelas, Mahkamah Syariah tidak menyediakan fasiliti untuk seseorang individu yang berstatus Islam untuk meninggalkan Islam dengan mudah. Walau bagaimanapun, penelitian yang dibuat juga menjelaskan bahawa Mahkamah Syariah juga di dalam beberapa keadaan telah meluluskan permohonan keluar Islam dan juga membatalkan pemelukan Islam seseorang individu. Dapatan yang sama juga diperoleh dalam kajian terdahulu di mana golongan mualaf juga banyak membuat permohonan untuk keluar Islam setelah pemelukan Islam dilakukan (Nor Ashikin dan Siti Zubaidah, 2017). Kajian terdahulu juga menunjukkan bahawa Mahkamah Syariah akan meluluskan sesuatu permohonan keluar Islam sekiranya pemohon dapat membuktikan wujudnya isu teknikal seperti pemohon tidak pernah tahu dan mengamalkan ajaran Islam sepanjang mempunyai status tersebut.(Mohd Al-Adib Samuri & Muzammil Quraishi, 2014).

Kepelbagaian undang-undang berkaitan pengaturan prosedur penentuan status agama memberi kesan kepada sikap dan keputusan Mahkamah Syariah yang pelbagai dan tidak konsisten. Keadaan ini juga menjadi faktor permasalahan isu penentuan status Islam dalam kes permohonan keluar Islam perlu diteliti. Mahkamah Syariah telah menolak sesuatu permohonan kerana tiada undang-undang tatacara untuk memandu mahkamah dalam membuat keputusan. Permasalahan penentuan status agama melalui kes-kes permohonan keluar Islam yang difailkan di Mahkamah Syariah juga dapat dilihat dari sudut kedudukan undang-undang dan prosedurnya. Sebagai contoh, di Selangor, kajian menunjukkan terdapat beberapa kes yang disifatkan sebagai tergantung kerana tiada garis panduan undang-undang yang jelas bagaimana sesebuah kes perisytiharan status agama Islam ditadbir. (Syahrul Faizaz Abdullah & Ssuna Salim, 2014).

KESIMPULAN DAN PENUTUP

Senario undang-undang berkaitan isu keluar Islam dan hak untuk diisytiharkan sebagai bukan Islam merupakan satu senario yang kompleks apabila ia melibatkan doktrin agama Islam dan dari satu sudut lain ialah suatu hak kebebasan beragama yang dijamin pengamalannya dalam Perlembagaan Persekutuan di Malaysia. Adakah seseorang yang berstatus Islam itu boleh meninggalkan Islam dan memilih agama lain sebagai status agama dalam kad pengenalannya? Sekiranya boleh, adakah individu tersebut boleh dihukum di bawah kesalahan percubaan murtad atau kesalahan keluar agama dalam undang-undang Enakmen Negeri-Negeri? Ini kerana Perkara 11 Perlembagaan secara jelas memberi keizinan kepada setiap individu dalam hal kebebasan beragama. Orang bukan

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Islam boleh memeluk Islam atas dasar mereka bebas untuk menukar agama, namun untuk keluar daripada agama Islam adalah tidak dibenarkan dan tidak patut dijadikan isu sensitiviti agama dan kaum (Rusniah et all, 2020). Undang-undang dalam enakmen negeri mesti menyatakan dengan jelas bahawa setelah seseorang itu berstatus Islam, tindakan dan percubaan untuk keluar Islam adalah tidak dibenarkan. Dalam isu penentuan status agama melalui permohonan keluar Islam, undang-undang Islam yang meliputi larangan keluar agama atau percubaan murtad ditadbir oleh negeri-negeri di bawah bidang kuasa Mahkamah Syariah. Memohon Mahkamah Syariah mengisytiharkan seseorang Muslim sebagai bukan Islam tanpa alasan dan fakta yang kukuh akan mencetuskan sensitiviti agama. Penulis berpandangan peruntukan undang-undang berkaitan bidang kuasa Mahkamah Syariah dalam hal perisytiharan status agama perlu dikemas kini dan ditambah baik. Ini adalah kerana prosedur tatacara pengurusan kes perisytiharan status Islam melalui permohonan keluar Islam masih belum seragam dan tersusun. Pengemaskinian undang-undang ini termasuk penjelasan kepada pemakaian bidang kuasa Mahkamah Syariah mengisytiharkan status agama. Ini bermaksud, undang-undang mesti menjelaskan keadaan-keadaan yang membolehkan seseorang individu membuat permohonan perisytiharan status agama.

Penambahbaikan pengurusan kes perisytiharan status agama di Mahkamah Syariah perlu dilakukan kerana Mahkamah Syariah telah diiktiraf sebagai forum yang paling kompeten menyelesaikan isu berkaitan penentuan status agama Islam seseorang. Penghakiman Mahkamah Persekutuan Malaysia dalam kes Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain pada tahun 2007 telah menegaskan bahawa isu-isu berkaitan penentuan status Islam seseorang hanya boleh diputuskan di Mahkamah Syariah. Permasalahan sama ada seseorang itu telah bukan lagi Islam atau masih beragama Islam hanya boleh ditentukan oleh Mahkamah Syariah kerana ia melibatkan isu keagamaan. Penghakiman majoriti dalam rayuan kes Lina Joy di Mahkamah Persekutuan menegaskan bahawa selagi mana seseorang yang mempunyai status Islam tidak ditentukan sebagai bukan lagi beragama Islam oleh Mahkamah Syariah, maka individu tersebut tidak boleh mendakwa bahawa Mahkamah Syariah tidak berbidang kuasa ke atasnya. Ini bermakna daripada pandangan undang-undang, seseorang individu akan kekal berstatus Islam selagi Mahkamah Syariah tidak mengesahkan sebaliknya walaupun pada hakikatnya individu tersebut telah pun tidak beriman dengan ajaran Islam. Walau bagaimanapun, pada awal 2021, Mahkamah Persekutuan melalui kes Rosliza Ibrahim telah memutuskan sebaliknya apabila Rosliza diputuskan sebagai bukan Islam apabila tiada rekod dan bukti bahawa dia telah mengamalkan Islam dalam kehidupannya. Penghakiman Mahkamah Persekutuan dalam kes Rosliza ini seharusnya dijadikan sebagai tanda aras bahawa pengurusan penentuan status agama Islam di Mahkamah Syariah perlu diteliti semula.

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OMBUDSMAN SCHEME UNDER THE ISLAMIC FINANCIAL SERVICES ACT 2013: AN OVERVIEW

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ABSTRACT

The Ombudsman for Financial Services (OFS) was established on October 1st, 2016, as an alternative complaint or dispute resolution avenue to assist consumers in resolving their respective complaints or disputes. This plan, in addition to the traditional judicial litigation scheme and various arbitration channels, provides an alternative entry point into the justice system. The goal of this paper is to assess the role of the Ombudsman Scheme, which was established by the Islamic Financial Services Act of 2013. This project is being carried out using a qualitative research method. The research design used in this paper was phenomenology. Data will be gathered from journals, case law, and statutes. Thematic and content analysis methods will be used to analyse the data. This paper concludes that the Ombudsman for Financial Services (OFS) plays a critical role in reducing complaints or redress made to the OFS due to amicable resolutions by the OFS as well as other options available under the Alternative Dispute Resolution framework versus court litigation. This, in turn, indicates the efficiency of the OFS, which is based on the Ombudsman Scheme regulatory regulations of the Islamic Financial Services Act 2013.

Keywords: Ombudsman Scheme, Islamic Financial Services Act 2013, Alternative Dispute Resolution

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INTRODUCTION

On October 1st, 2016, the Ombudsman for Financial Services (OFS) was established as an alternative complaint or dispute resolution avenue to assist consumers in resolving their respective complaints or disputes. This scheme, in addition to the traditional litigation scheme of the judiciary and other arbitration routes, provides an alternative access to the justice system. The OFS has been approved by Bank Negara Malaysia under the Financial Services Act 2013 "(FSA 2013") and the Islamic Financial Services Act 2013 ("IFSA 2013") to provide a fair and efficient medium for consumers to resolve disputes with financial service providers, also known as Islamic Financial Institutions – the term used in this paper. One of the OFS's most appealing features is its core concept of an independent redress mechanism with minimal formality for dispute resolution. An additional bylaw, the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015, was also issued to detail the financial ombudsman scheme's functions and duties (Mohamad & Hassan, 2019). According to Lawrence et al. (2012), there is a need to assess the impact of such an Ombudsman Scheme provided by IFSA 2013 to curb unnecessary risks resulting from untimely and indiscreet dispute settlement in order to be in line with Shariah principles for dispute resolution, wherein the al-Quran and al-Sunnah repeatedly stress the importance and benefits of settling disputes quickly and discreetly. According to Raja Abdul Aziz and Abdul Hamid (2017), it is critically important that the OFS makes a ground-breaking move toward consumer protection through dispute resolution, especially since the OFS's most recent annual report claims a decrease in complaints or cases brought forward. This raises the question of what the Ombudsman Scheme's roles are under the IFSA2013.

This study will now assess the roles of the IFSA 2013 Ombudsman Scheme and other relevant regulatory legislations in resolving disputes between Islamic Financial Institutions (IFI) and their customers. The stated goal will be met by investigating the regulatory legislations governing the Ombudsman Scheme and reviewing market trends in seeking redress or resolution through the ombudsman scheme versus litigation cases brought in court or other ADR mechanisms. Because there are few resources available to better understand the impact of the Ombudsman Scheme for dispute resolution, the underlying goal of this study is to serve as pioneering research for other academics or experts to further investigate the area.

LITERATURE REVIEW

As part of its literature review, this study employs an argumentative review. According to Bacha (2019), this type of review examines selective literature to support or refute specific arguments or philosophical problems that are easily established in other literatures in the hope of developing a contrarian opinion. The use of ADR as mechanisms for dispute resolution in Islamic Finance matters is undeniably beneficial, though at the time of the study's completion, the litigation route was more popular due to a lack of awareness of ADR mediums. This reading would help to establish a general understanding of the ADR framework in Islamic finance in relation to the Ombudsman Scheme. Although the paper

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does not provide a comprehensive opinion on the provisions provided by IFSA in relation to the Ombudsman Scheme, it is still useful to the study's objective (Raja Abdul Aziz & Abdul Hamid) (2017). An article by Mohamad and Hassan (2019) provides a comprehensive description of the Ombudsman Scheme with regard to financial consumer protection. The explanation of the scheme in the aforementioned literature covers historical milestones such as Bank Negara Malaysia's proposal to form an Ombudsman body, provisions in the IFSA governing and providing for the establishment of such body, as well as other significant landmarks relevant to the incorporation and development of the Ombudsman Scheme and the OFS. These descriptions are necessary to provide a clear understanding of the Ombudsman Scheme, but little evidence is presented regarding the writer's views on the IFSA 2013 provisions relevant to the Ombudsman Scheme. Zain and Adawiah (2016) provided a thorough understanding of the Ombudsman Scheme provisions included in the IFSA 2013. They claimed that the IFSA 2013 is "an innovative and revolutionary legal masterpiece" that incorporates Islamic finance principles, particularly in the area of dispute resolution in relation to the Ombudsman. The goal of this study will be accomplished seamlessly by taking into account the writings in this paper to better understand the provisions of IFSA 2013.

In addition, Oseni et al. (2012) emphasised the inadequacy of most IFIs' in-house dispute resolution mechanisms and recommended the implementation of a muhtasib mechanism to streamline corporate governance and promote a sustainable and responsible business culture within the IFIs. A thorough understanding of the need for a muhtasib avenue is required to support the study's goal of assessing the preference for the Ombudsman route and examining its effectiveness. In her analysis of Malaysian dispute resolution mechanisms, Zubair (2020) reveals that disputing parties face significant challenges when attempting to resolve their disputes through court processes, and there is an urgent need to further train civil court judges in the area of Islamic finance so that they can sit and adjudicate as experts rather than "purely English trained judges." The areas for improvement in the aforementioned litigation processes add to the notion of the Ombudsman Scheme being a more efficient, timely, and effective dispute resolution route. According to Lawrence et al. (2012), many consumers are sceptical of using Alternative Dispute Resolution mechanisms and prefer to go the arbitration route. This article contributes to this study's goal of assessing the effectiveness of the Ombudsman Scheme established by IFSA 2013.

Lukonga (2015) made some significant points prior to OFS about the ADR avenues available at the time, including the arbitration centres established in Malaysia and other countries for the purposes of Islamic finance disputes, as well as an argument about the lack of required experts in the field of Islamic finance for arbitration procedures. The IMF research conducted prior to the ground-breaking OFS provides insight into past dispute resolution trends that will be useful in further reviewing the effectiveness of the Ombudsman Scheme. According to Oseni and Sodiq (2013), the processes of sulh, tahkim, muhtasib, and fatwa al-mufti can be structured into an integrated online dispute resolution that "serves the needs of dispute resolution, objectives of Islamic law, and initial value proposition of Islamic finance as an enhancement feature of Malaysia's dispute settlement avenues." This

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study considers such an online structure because it may provide a solution to any gaps in the Ombudsman Scheme's effectiveness. It is undeniably important to emphasise that this paper is insufficiently comprehensive to support any recommendations to improve the Ombudsman Scheme's effectiveness. There are also a limited number of resources on the same topic regarding an integrated online dispute resolution medium to back up any findings. Yaacob (2012) stated in her research published in the ISRA Series in Contemporary Islamic Finance 3 that the predecessor of the current OFS, the Financial Mediation Bureau (FMB), provides a more convenient and cost-effective solution for "any financial dispute and reduces long outstanding exposure to bad debt or false claims by certain parties." Because the primary goal of this study is to determine the effectiveness of the Ombudsman Scheme, Yaacob's literature aids in the examination of the services provided by the FMB in comparison to the OFS in terms of the efficiency and timely resolution of disputes. It should be noted, however, that this study is out of date, and more developments have occurred since then.

Hasan and Asutay (2011) presented an analysis of Malaysian court decisions on Islamic finance disputes. In this paper, various case law has been reviewed to assist this study in identifying the trend of issues brought before the judiciary and some notable opinions raised by the judges with respect to legal issues on dispute resolution for Islamic finance. According to the authors, there are ongoing legal uncertainties involving the Islamic finance jurisdiction with a flexible and comprehensive regulatory framework, which may yield a different or partially similar result from this study of complaints and disputes filed with the OFS. Dahlan and Palil (2018) presented a series of arguments on the difficulties of using ADR mechanisms to resolve disputes in Islamic finance; however, the resolution of such disputes through ADR has shown positive developments in the field. According to the findings of this study, consumers prefer ADR because it provides a smooth, convenient, timely, and low-cost medium, as well as the presence of relevant expertise and a solution technique to achieve agreed-upon outcomes from settlements. This would aid the study in identifying market trends related to the decrease or increase in cases or complaints brought to the OFS versus court procedure. In their research paper, Abdullah and Yaacob (2012) proposed that ADR mediums be incorporated as a governing clause for dispute resolution in any Islamic financial contract. The application of this would relieve the court's burden in adjudicating a backlog of cases and would assist IFIs and other stakeholders in avoiding legal risk and other negative consequences.

Besides that, Kunhibava (2015) provided a clear view of the Shariah Advisory Council's (of both Bank Negara Malaysia and the Securities Commission) roles in spearheading and addressing Shariah compliance issues in the industry. The findings of this paper are useful in determining whether any decrease or increase in cases or complaints submitted to OFS is influenced by SAC directives. Along with the papers of the learned researchers, the FSA 2013 and IFSA 2013 were also examined in order to comprehend the specific provisions provided to govern the Ombudsman Scheme. Various OFS Annual Reports and Independent Review Reports were also reviewed in order to obtain statistical data on disputes and complaints handled as part of meeting the study's goal.

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With reference to the cited resources, it is clear that there is a limitation to any specific literature regarding the OFS as well as the provisions governing the Ombudsman Scheme under the IFSA 2013. (Refer Section 138). Furthermore, there is no mention of any studies conducted on the effectiveness of the Ombudsman Scheme or the OFS. Nonetheless, the purpose of this study is to fill a research gap.

RESULTS/FINDINGS

Innovative Roles of Ombudsman Scheme under IFSA 2013

The provisions of IFSA 2013, particularly Section 138 on the Ombudsman Scheme, are "an innovative and revolutionary legal masterpiece that embeds the principles of Islamic finance," particularly in the area of dispute resolution in relation to the Ombudsman. According to Zain and Adawiah (2016), the aforementioned legislation is readily available in its best form, and there is no other citation on any proposed review or amendment to further improve the area. The Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 were also reviewed during the course of this study and showed a detailed set of functions and duties of the financial ombudsman scheme; however, most available resources are only descriptive of how the said bylaw is structured, with no criticism for further examination.

Reduction of Complaints and Enquiries

In 2019, the Public Bank Group's efficient process for timely resolution of customer complaints achieved a 100 percent compliance rate in meeting the 10-day turnaround time for processing complaints, according to the Public Bank Group's Annual Report 2019. Similarly, Maybank claims to have achieved a 97 percent complaint resolution rate in 2019 that was within 48 hours for four consecutive years. The rate of turnaround or resolution suggests that these institutions have placed a high priority on handling complaints and potential disputes.

Furthermore, it is clear from OFS's annual reports in recent years that there has been a general decrease in the number of complaints and inquiries brought forward to the Ombudsman body in relation to financial disputes. The reports also show that only a certain number of cases are registered and then resolved, whereas others are disposed of based on their internal admission criteria. An average of nearly 1000 cases are resolved at the various stages of the Ombudsman Scheme from those that are registered. There has also been a significant increase in the number of visitors to OFS's website (2019: 224733, 2018: 97819, 2017: 77268). These statistics provide a clear picture of the market trend for seeking resolution through the Ombudsman Scheme.

Issues in Alternative Dispute Resolution

Despite the positive numbers represented by the complaints and enquiries, as well as website visitors, various studies have suggested that disputing parties prefer alternative

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dispute resolution mechanisms ranging from ADR (other than the Ombudsman Scheme) to litigation. However, there have been a number of criticisms levelled at these supplementary routes, as well as some valuable recommendations for improving the dispute resolution framework.

On top pf that, Dahlan and Palil (2018) highlighted a number of arguments regarding the challenges of ADR mechanisms in resolving disputes in Islamic finance, despite the fact that such resolution through ADR has shown positive developments in the field. According to the findings of this study, consumers prefer ADR because it provides a smooth, convenient, timely, and low-cost medium, as well as the presence of relevant expertise and a solution technique to achieve agreed-upon outcomes from settlements.

In light of the aforementioned main findings, it is clear that the current Islamic Financial Services Act 2013, as well as the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the Ombudsman Scheme, are capable of providing an efficient and effective Ombudsman Scheme. The gradual reduction in the number of disputes brought to OFS may also be indicative of a solid framework favoured by disputing parties.

DISCUSSION/ANALYSIS

This study's findings have revealed some new insights that can be attributed to readily available literature. In order to explain the new understanding and insight, it is important to recognise the importance of the IFSA 2013 in providing a ground-breaking set of rules governing the Ombudsman Scheme. According to Mohamad and Hassan (2019), the scheme's explanation covers historical milestones such as Bank Negara Malaysia's proposal to form an Ombudsman body, provisions in the IFSA 2013 governing and providing for the establishment of such body, as well as other significant landmarks relevant to the incorporation and development of the Ombudsman Scheme and the OFS. These descriptions are essential because they explain the historical aspects of the Ombudsman Scheme through the bodies that were established for that purpose. This can be seen in the formation of the Insurance Mediation Bureau in 1991, the Banking Mediation Bureau in 1996, and the merger of the two in 2004 to form the Financial Mediation Bureau, just before it was rebranded and enhanced as the Ombudsman for Financial Services.

In comparison, Yaacob (2012) stated in her research published in the ISRA Series in Contemporary Islamic Finance 3 that the Financial Mediation Bureau (predecessor of OFS) provides a timelier and budget-friendly means for any financial dispute and reduces exposure to bad debt or false claims by certain parties. It should be noted, however, that this study is out of date, and more developments have occurred since then. Nonetheless, the key point here is to emphasise the scheme's effectiveness and attractiveness even before it was rebranded as OFS. According to the OFS's Annual Reports, awareness and attractiveness of the Ombudsman Scheme are no longer an issue. However, it is safe to assume that because most IFIs have extensive experience resolving disputes through the OFS, these institutions have already deployed internal mechanisms to address any complaints or potential disputes at the early stages of the chain. This could be due to their

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internal risk management policy, which seeks to avoid unnecessary reputational or financial risks, in addition to their obligation to follow any Policy Document or Guidelines issued by BNM. It is suggested that a comprehensive study be conducted on IFIs or other traditional institutions to ascertain statistics on complaint and dispute handling, which would provide insight into the transparency and efficiency of dispute resolution at the micro level. As a side note, the International Network Financial Services Ombudsman Scheme can be a viable source of guiding principles to benchmark when assessing this.

One of the study's findings is that there is a decrease in complaints and disputes filed with OFS, which may be indicative of a trend toward seeking redress from OFS due to its accessibility and timely resolutions. More and more people are visiting their website to learn more, but do these statistics support the idea of an effective Ombudsman Scheme.

Nonetheless, with OFS statistics indicating an average of 1000 cases resolved annually and a recent rating of 68 percent satisfied complainants, it is questionable whether the case management process can be accelerated further. It is assumed that there are a limited number of experts, Ombudsman, or case managers - though no exact figure on manpower is given - which may result in a backlog of disputes to be resolved. According to the OFS Annual Report 2019, 76 percent of disputes are resolved within 6 months of registration: is there room for improvement to either increase the percentage of disputes resolved within the same timeframe or can the 6-month period be reduced to 3 months for a timelier resolution.

The findings on Public Bank Group and Maybank's efficient processes for timely resolution of complaints indicate that these institutions have a specific focus and priority in managing complaints and potential disputes. However, there are some questionable areas of concern regarding the study's objective. There is no established process or algorithm for determining the relationship between complaints lodged with banks and those lodged with OFS. All of the annual reports and other reporting documents examined do not provide a clear picture of the number and nature of cases that were previously brought to the Bank and then escalated to OFS. Nonetheless, the effectiveness of the Ombudsman Scheme is evident in the statistical figures provided by OFS on all complaints and amicably resolved disputes.

After analysing the FSA 2013 and IFSA 2013 to understand the specific provisions provided to govern the Ombudsman Scheme, it is discovered that the specific provisions of both Acts are identical, with no differential marks in terms of any shariah principles. This does not imply that the IFSA 2013 should be revised to include any Islamic concepts, as the existing terms are already in accordance with Islamic teachings, according to the various articles cited in this study. However, a brief description of the various forms of dispute resolution routes available in Islamic finance, such as sulh, tahkim, muhtasib, and fatwa al-mufti, would be beneficial. Though not entirely within the purview of BNM, nor is it a prerogative of the IFSA 2013, a brief notation would undoubtedly provide some legal guidance and segregation as to the ADR available and that of the Ombudsman or muhstasib, which is already provided.

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According to Oseni and Sodiq (2013), the processes of sulh, tahkim, muhtasib, and fatwa al-mufti can be structured into an integrated online dispute resolution that "serves the needs of dispute resolution, objectives of Islamic law, and initial value proposition of Islamic finance as an enhancement feature of Malaysia's dispute settlement avenues." It is undeniably important to emphasise that this paper is insufficiently comprehensive to support any recommendations to improve the Ombudsman Scheme's effectiveness. There are also a limited number of resources on the same topic regarding an integrated online dispute resolution medium to back up any findings. The proposed online structure was presented with little detail, but it appears to be a complicated exercise because it would involve centralising the functions, if not the processes, of dispute resolution bodies across the country. To meet the goal of establishing a centralised online platform, the OFS, Securities Industry Dispute Resolution Centre, Financial Industry Dispute Resolution Centre, and Asian International Arbitration Centre, to name a few, would need to synergize their roles.

CONCLUSION

It is hereby established that the current IFSA2013, together with the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 and the Ombudsman for Financial Services, are capable of providing an efficient and effective Ombudsman Scheme. The gradual reduction in the number of disputes brought to OFS reflects a solid framework favoured by disputing parties. The main takeaway is that the current OFS provides a more convenient and cost-effective solution to any dispute and reduces long-standing exposure to bad debt or false claims by certain parties. Though there is still a long way to go before we see any developments regarding the introduction of a centralised platform for dispute resolution and other efforts to improve the Ombudsman Scheme in relation to ADR in Malaysia, the current structure is effective, efficient, and accessible.

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LAND LAW

FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 1)

Nuarrual Hilal Md Dahlan

FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 2)

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FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 3)

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DEPARTURE FROM THE CAVEAT LESSEE PRINCIPLE ON THE IMPOSITION OF THE OBLIGATION TO REPAIR TO PROMOTE CERTAINTY IN LANDLORD AND TENANT RELATIONSHIP

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FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 1)

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ABSTRACT

Flood in housing projects is typical in Malaysia, particularly during monsoon and tropical wet seasons. There are various causes to it. These include heavy monsoon rain, flawed drainage system, insufficient planning system, inadequate flood risk management strategy, exorbitant rainfall, rapid melting snow and ice, dams or levees breaking, ocean storm surge and sea level rising. The catastrophe has resulted in pecuniary and non-pecuniary losses to the purchaser residents. Flood is one of the important matters that developers must address during the development planning stage. The developer should get views and approvals from relevant technical agencies, including the agencies responsible for governing safety and security against flood disasters, for instance, the Department of Irrigation and Canal (JPS). This paper aims to study flood legal issues and examine the planning law relating to floods in housing projects. It also provides suggestions for improving the current planning law in dealing with this catastrophe. This paper uses legal research methodology and qualitative research methodology, particularly concerning eliciting information through available literature to study the problem. The writing consists of 3 parts. The instant paper is the Part 1 discussing the planning issues and planning legal aspects relating to the occurrences of flood disasters in housing development. This paper finds that there are lacunae in the planning law that have contributed to flooding occurrences in housing projects. Certain suggestions are provided in the ending part of this paper to deal with the flood problem. This paper, it is submitted, can improve the current policy and planning law in housing development, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: floods in housing projects, planning law, issues, suggestions.

INTRODUCTION

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

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

It is evident that one of the reasons leading to flood disaster and mismanagement is due to inadequate coordination and insufficient integrated policies and practices (legal and administrative) between the State Authority, the Planning Authority, the Building Authority, the technical agencies and the housing authority on housing development projects which can contribute to the occasion of floods in the housing estates. These agencies have separate jurisdictions and powers, and thus issue of inadequate coordination arises. The conditions and requirements between these agencies are not similar and may be contradictory to each other. For instance, even if there is a view from technical agencies (Department of Environment (JAS) and Department of Minerals and Geoscience (JMGS)) that certain location of the housing development project is not suitable for development and prone to flood, this view may not be adhered to by the land authority if the land authority wishes to alienate the land for housing development projects (Aljunid, 2006).

Table 1- Information Flood Occurrences in Malaysia for The Year 2019

State	Number of Flood Occurrences by District	Highest Daily Average (mm)	Maximum Flood Period (Days)	Number of Evacuation of Flood Victims (People)	Loss Assessment (RM)	Maximum Flood Depth (m)
Perlis	7	91	1	146	-	0.6
Kedah	53	82	1	1,114	2,840,000.00	1.5
Pulau Pinang	31	111	1	388	-	2.9
Perak	65	91	1	2,279	-	1.2
Kelantan	18	82	7	18,683	18,290,400.00	2.0
Terengganu	9	180	8	11,384	2,305,000.00	3.0
Pahang	28	119	1	904	-	1.1
Selangor	93	85	1	537	-	1.0
Melaka	12	124	1	1,131	-	0.9
Negeri Sembilan	16	90	1.5	50	3,145,000.00	1.2
Johor	30	152	3	3,562	-	1.5
Sabah	39	143	8	7,443	5,000.00	2.8
Sarawak	118	117	20	1,328	-	3.7
WP Kuala Lumpur	10	99	1	212	-	0.9
WP Labuan	6	122	1	0	-	1.5
Total	535		Total	49,161	26,585,400.00	

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

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

DISCUSSION AND ANALYSIS - PLANNING LAW ISSUES IN FLOOD OCCURRENCES

It is opined that the inadequacy is due to the separate constitutional jurisdictions possessed by the Federal Government agencies and the states' agencies in approving housing development projects. The federal government adopts policies against floods in housing estates, but these policies are not binding on the states' agencies. Thus, even though there are federal laws and policies, these laws and policies may not be implemented by the states, as states are not duty-bound. For example, the Department of Drainage and Irrigation (JPS) (a federal agency) may require developers to provide certain retention ponds in every housing unit, but this may not be required for issuance of Planning Permission and Certificate of Completion and Compliance (CCC) by the local planning authority (state's agency) (Awang, 1997).

Further, there is no legal provision in the National Land Code 1965 ('NLC') (on alienation of lands, category of land use, subdivision of land and imposition of conditions and restrictions in interest etc) that require the State Authority to refer to and be bound by the views of the technical agencies and the planning authority including the policies against floods in housing estates. This is enshrined under section 108 of the NLC. This section undermines the function of the planning authority. Thus, in the exercise of alienation of lands, subdivision and partition of lands and imposition of conditions and restrictions in interests etc for housing development projects, views of the planning authority on floods prevention may not be adhered to by the land authority. There may be views from the planning authority that certain preventive and curative measures against floods must be complied with by the developers before the purported housing development projects can be implemented. However, the views are not binding on the land authority or the State Authority to follow. Likewise, currently, there is no mandatory provision in the Town and Country Planning Act 1976 (Act 172), the States' Planning Control Rules and the planning guidelines of the local planning authority in dealing with applications for planning permission, to refer to the relevant technical agencies for comments and views for instance views in face of flood disasters (Md Dahlan, 2009).

As the highest authority in every state in Malaysia is the State Authority ('SA'), the SA is armed with jurisdictions and powers on vast matters including lands and housing pursuant to the provisions under the Federal Constitution and the States' Constitutions. The

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composition members of the State Authority may also pose certain degree of problem. Usually, the substantial number of members in the SA are from the same political party. The Chief Minister controls SA. Any decision made by the SA may be restricted according to the wishes of the political party. Thus, decisions made are influenced by the political considerations, not to the professional agencies' views, be it the Federal nor States' agencies. These decisions may include measures for flood control (Md Dahlan, 2009).

Land use control and planning against flood disasters can also be effective with the introduction of land digital data available in the land authority office. This data is statutorily provided in the National Land Code 1965 (16th Schedule and section 5D). This provision requires comprehensive data of lands must be recorded into land databases by an electronic technology containing land titles, images, documents or spatial and textual data. The digital data can facilitate the authority to make decisions relating to the relevant lands, including measures against floods and their consequences. Nonetheless, suppose there are inadequate cooperation and coordination among the federal and states' agencies to coordinate land use and planning control, the pool data may be incomplete and thus incapable of providing true information on the land in question. Thus, this will negate its effectiveness (Md Dahlan, 2009).

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

These methods are to aid the land and planning authorities in the evaluation process for better decision-making and enhance the participatory process to leverage the decision-making context, thereby moving closer to transparency in decision-making processes in plan-making to prevent, eliminate, or mitigate flood disasters. For instance, the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (PU (A) 362/87) does not require the housing developer to provide an EIA (Environmental Impact Assessment) report if the housing development project covers less than 50 hectares in area. It is opined that if an EIA report is required regardless of the size of the housing development project, the consequential problems and causes leading to flood disasters might have been discovered earlier. The developer would have made certain measures to prevent and mitigate flood problems (Shamsudin, 2006).

Despite section 22(2)(a) of the TCPA, which requires the local planning authority to comply with the development plans (local and structure plans), if any, in considering applications for planning permission, with the exception of Court of Appeal case - *Perbadanan Pengurusan Trellises & Ors V. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808 (Court of Appeal at Putrajaya), the Court of Appeal held that the Local Planning Authority is duty bound to follow the Development Plan., the development plans need not be followed slavishly. This was the result of the judicial findings in *MPPP v. Syarikat Bekerjasama-Sama*

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Serbaguna Sungai Gelugor [1999] 3 MLJ 1 (Court of Appeal) and in *Chong Co Sdn. Bhd v Majlis Perbandaran Pulau Pinang* [2000] 5 MLJ 130 (Appeal Board (Penang)). The decisions of these cases have marginalized the importance of development plans. Thus, even if there may be certain provisions in the development plans that the applicant developer shall have to comply with, such as provisions for flood control and its mitigation and elimination countermeasure in housing estates, these provisions are not mandatory following the decision of the above case law.

CONCLUSION

It is indeed shown that flood disasters have caused pecuniary and non-pecuniary losses to the public. The instant part illustrates legal issues that have contributed to the occurrences of flood in Malaysia. The issues as discussed emanate from the separate constitutional jurisdictions of the Federal Government and the State Government in the control of flood occurrences through the respective agencies. As the States have their own constitutional jurisdiction over states' matters any directions and policies from the Federal Government will not bind them. Thus, flood control and policies against flood occurrences cannot be coordinated and streamlined. This is evident in State's List and the Federal List to the Federal Constitution, section 108 of the NLC, section 5D and 16th Schedule to the NLC, the coverage of EIA report and the non-binding status of the development plans as decided in the case law.

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FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 2)

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ABSTRACT

Flood in housing projects is typical in Malaysia, particularly during monsoon and tropical wet seasons. There are various causes to it. These include heavy monsoon rain, flawed drainage system, insufficient planning system, inadequate flood risk management strategy, exorbitant rainfall, rapid melting snow and ice, dams or levees breaking, ocean storm surge and sea level rising. The catastrophe has resulted in pecuniary and non-pecuniary losses to the purchaser residents. Flood is one of the important matters that developers must address during the development planning stage. The developer should get views and approvals from relevant technical agencies, including the agencies responsible for governing safety and security against flood disasters, for instance, the Department of Irrigation and Canal (JPS). This paper aims to study flood legal issues and examine the planning law relating to floods in housing projects. It also provides suggestions for improving the current planning law in dealing with this catastrophe. This paper uses legal research methodology and qualitative research methodology, particularly concerning eliciting information through available literature to study the problem. The instant paper is the Part 2 discussing the planning issues and planning legal aspects relating to the occurrences of flood disasters in housing development. In continuation of Part 1, this Part 2 instant paper also finds that there are lacunae in the planning law that have contributed to flooding occurrences in housing projects. Certain suggestions are provided in the ending part of this paper to deal with the flood problem. Likewise, this part 2 instant paper, it is submitted, can improve the current policy and planning law in housing development, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: floods in housing projects, planning law, issues, suggestions

INTRODUCTION

Part 1 of this writing explained the statistics and problems of flood disasters. Further the Part 1 discusses several legal issues relating to flood occurrences. This instant Part 2 will continue the legal discussion of Part 1.

DISCUSSION AND ANALYSIS - PLANNING LAW ISSUES IN FLOOD OCCURRENCES

The current establishment of One Stop Centre (OSC) at the State Authority level and the local authority level to coordinate and to expedite the approval process of land development applications at the land offices and the local authority offices, including the applications

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for planning permission and plans' approval (building, infrastructure etc. plans), in the opinion of the author, is still insufficient to solve the problems of flood disasters. This is because even there are guidelines (for example Guidelines for Erosion and Sediment Control in Malaysia & Urban Stormwater Management Manual for Malaysia) against flood disasters and policies relating to flood mitigation and elimination are provided for the administration and operation of the OSC issued by the MHLG, these guidelines and policies shall not bind the State Authority and the local authority. Thus, it is opined, the prevailing practices, such as insufficient coordination and inefficient administration and practices of the State Authorities and the local authorities, in dealing with the applications for land development in their respective states would continue.

Further, based on the latest guidelines issued by MHLG, it is not a requirement for the OSC to refer to MHLG as one of the relevant technical agencies for providing views, suggestions and comments on flood control and mitigation in housing development. This lacuna, it is opined, may become a factor that could render the OSC ineffective in dealing with flood disasters' possible problems (Md Dahlan, 2009).

According to Ruhaina Ibrahim, an officer at BDB Land Sdn Bhd, Jitra, Kedah, as long as the developer complies with the comments of the Department of Irrigation and Drainage ('JPS'), in particular the drainage design, in accordance with MSMA – Manual Saliran Mesra Alam (Urban Stormwater Management Manual for Malaysia), there will not be any possibility of flood occurrences at housing development projects. This manual serves as a best practice guide in dealing with the latest stormwater. Among the contents covered by MSMA are rainwater harvesting, detention pond, erosion and sediment control, culvert and maintenance. Apart from this guideline, Environmental Impact Assessment Report (EIA) provided by the developers will help the local authority in examining the suitability of the project locations and provide appropriate measures and conditions to prevent any occurrences of flood and losses (Md Radzi Othman, Personal Communication, February 22, 2018; Ruhaina Ibrahim, personal communication, March 8, 2018; Department of Irrigation and Drainage, 2012).

It is noteworthy that the liability of the developer only up to the expiry of the defect liability period, i.e., 24 years or 36 years after delivery of vacant possession. Thus, if there is a flood at housing development project, and this flood caused losses to resident purchasers, the developer will be liable. However, if flood occurred after the defect liability period, any liability of losses to the house residents may not be on the shoulders of developers (Ruhaina Ibrahim, personal communication, March 8, 2018). To Affrizal Amran, JPS officer, flood in housing development projects may happen due to the following factors:

1) Failure of the developer to comply with the conditions and guidelines as stipulated by JPS (Jabatan Pengairan dan Saliran – Department of Drainage and Irrigation) and Manual Saliran Mesra Alam (MSMA) (Urban Stormwater Management Manual for Malaysia), in that the drainage does not comply with the required size and no retention pond.

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2) JPS as an advisory body and technical advisor to the local planning authority only, and that their views are not binding on the local planning authority.

3) Political interference may also be a factor where the views of JPS are set aside.

Affrizal Amran said: (Affrizal Amran, personal communication, January 23, 2018):

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

He further said: (Affrizal Amran, personal communication, January 23, 2018):

> "The Ministry of Natural Resources and Environment might not have approved the EIA report. Nonetheless, the proposed project still can be approved by the local planning authority. Similarly, JAS might not have approved the proposed project, yet the proposed project still gets the green light from the local authority. JPS only gives comments and advice in respect of the developers' application, either JPS supports or not support. However, the approval of the planning permission application is ultimately in the hands of the local planning authority. With the support of the State Authority and Local authority, the local planning authority can overrule JAS's comments or disapproval if they wish to. The approval is partly political".

Besides, he said: (Affrizal Amran, personal communication, January 23, 2018):

> "People must realise that when the authority opens a new housing estate, indirectly it has opened that area to a new greater plan area. Thus, how could we control and manage that area? We should allocate and identify certain shared responsibilities among the responsible parties to deal with flood problems. For example, in a housing development project estate, we have JPS to advise the local authority in managing and reducing the damage and losses to the people, their belongings, and property due to flood. Therefore, there are various requests from JPS imposed on the applicant developers in the face of future flood. JPS requests the applicant developers to provide retention ponds and underground retention ponds,

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> for example. All these are made to prevent flood. There must be cooperation between the local authority and the JPS. The local authority should also abide by the advice of the JPS."

On the possibility of corruption involving JAS in the approval of planning permission, he said: (Affrizal Amran, personal communication, January 23, 2018), "in 10 projects, 2 are corrupt."

In addition, according to Wan Salmi Wan Harun, being at officer at the Department of Mineral and Geoscience ('JMGS'), Alor Setar, Kedah the comments of JMGS are based on outdated guidelines that are inadequate to deal with the climate changes and current issues in housing development projects, for example flood disasters. JMGS also does not have comprehensive big data information on location suitability for housing development projects in Malaysia. This big data includes information of rock, sediment, soil fitness, soil suitability, soil issues, soil strengths, soil weaknesses, and other geologic specimens useful for ensuring sustainable housing development.

Apart from these, JMGS also faces insufficient human resource, logistics and budget to carry out detail investigation and assessments. As a result, the comments made may not be comprehensive and detailed to meet the current challenges in housing development projects (Wan Harun, personal communication, January 6, 2021).

In addition, it is submitted that other relevant technical agencies such as Department of Drainage and Irrigation ('JPS'), Department of Public Works ('JKR') and Department of Environment ('JAS') should provide their respective big data relating to their expertise and job scope on every district in Malaysia insofar as prescribed by government policies and the written laws. For example, for JPS, they should provide updated big data information for each district in Malaysia relating to River Basin Management and Coastal Zone, Water Resources Management and Hydrology, Special Projects, Flood Management and Eco-friendly Drainage. The data should provide the nature, feature, issues, problems and measures to deal with the challenges in these respective matters. The data accumulated will help the planning authority to formulate comprehensive development plans and provide inclusive and practical conditions for issuance of Planning Permission for housing development (Official Portal for Department of Irrigation and Drainage, Ministry of Environment and Water, 2021).

Similarly, for JKR, they should provide updated big data information on their job scope and jurisdiction relating to road, building, infrastructure, highway and hill slope for each and every district in Malaysia (Portal Rasmi Kerajaan Malaysia, Kementerian Kerja Raya, 2016).

Likewise, is the JAS, who will be responsible to provide updated big data information for examples on pollution on soil, water, environment, atmosphere; noise; and discharge of wastes (Portal Rasmi Jabatan Alam Sekitar, Kementerian Alam Sekitar dan Air, 2021).

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This is further evident that there is no statutory requirement that imposes on the Local Authority, Local Planning Authority and the technical agencies to provide comprehensive big data as a preventive way to avoid any occurrences of soil problems in the future. The only method is ad hoc planning, i.e., if certain areas are affected by soil problems, only then the Local Authority, Local Planning Authority and the technical agencies will make the planning conditions more stringent. Even the Geological Survey Act 1974 (Act 129), pursuant to Section 6 of Act 129, reads:

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

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

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

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

Similarly, if the Minister disagrees with the request of the State Authority to have a survey be conducted, the State Authority does not have any power and authority to force the Minister and the JMGS to conduct the survey. In respect of the duty and responsibility of the Local Authority to carry out maintenance work over relevant location as a way to prevent occurrences of soil problem due to flood disasters, it is doubtful that the Local Authority has the means and capability (Yeoh Su Guan, personal communication, February 4, 2021; Sukor & Othman, personal communication, February 8, 2021).

CONCLUSION

Under this instant Part 2, further details proving the issue of separate constitutional jurisdictions between the Federal Government and States' Government that lead to flood occurrences. This part 2 shows the weaknesses of the OSC and the guidelines at the State Authority and local authority level, the shortage of JPS and JMGS's power and authority,

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the hegemony of the State Authority and States' agencies, the inadequate data analytics and big data on part of the JPS, JMGS, JKR, JAS that have caused them not to be able to provide preventive measures against flood disasters. Finally, it is found that there are some lacunae in the Geological Survey Act 1974 (Act 129) which have caused the JMGS not to conduct comprehensive geological survey over relevant locations to prevent occurrences of flood in Malaysia.

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FLOOD IN HOUSING PROJECTS IN MALAYSIA: A PLANNING LAW PERSPECTIVE (PART 3)

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ABSTRACT

Flood in housing projects is typical in Malaysia, particularly during monsoon and tropical wet seasons. There are various causes to it. These include heavy monsoon rain, flawed drainage system, insufficient planning system, inadequate flood risk management strategy, exorbitant rainfall, rapid melting snow and ice, dams or levees breaking, ocean storm surge and sea level rising. The catastrophe has resulted in pecuniary and non-pecuniary losses to the purchaser residents. Flood is one of the important matters that developers must address during the development planning stage. The developer should get views and approvals from relevant technical agencies, including the agencies responsible for governing safety and security against flood disasters, for instance, the Department of Irrigation and Canal (JPS). This paper aims to study flood legal issues and examine the planning law relating to floods in housing projects. It also provides suggestions for improving the current planning law in dealing with this catastrophe. This paper uses legal research methodology and qualitative research methodology, particularly concerning eliciting information through available literature to study the problem. The instant paper is the Part 3, as do Part 1 and Part 2, in discussing the planning issues and planning legal aspects relating to the occurrences of flood disasters in housing development. In continuation of Part 1 and Part 2, this Part 3 instant paper likewise finds that there are lacunae in the planning law that have contributed to flooding occurrences in housing projects. Certain suggestions are provided in the ending part of this paper to deal with the flood problem. Similarly, this Part 2 instant paper, finds that there are lacunae in the planning law that have contributed to flooding occurrences in housing projects. Certain suggestions are provided in the ending part of this paper to deal with the flood problem. The outcome of Part 1, Part 2 and Part 3's writings, it is submitted, can improve the current policy and planning law in housing development, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: floods in housing projects, planning law, issues, suggestions.

INTRODUCTION

Parts1 and 2 of this writing explained the statistics, problems of flood disasters and their legal issues. This instant Part 3 will continue the legal discussion of Part 1 and Part 2.

DISCUSSION AND ANALYSIS - PLANNING LAW ISSUES IN FLOOD OCCURRENCES

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According to Mohd Izham Abdul Hamid, being the Planning Officer at the Development Planning Department, Majlis Bandaraya Alor Setar (MBAS), changes to the conditions of the planning permission are inevitable to comply with the latest requirements of the technical agencies in accordance with the current changing needs and issues of the public, for example, flood, soil problems etc. In short, he explained that the new conditions might be imposed by the technical agencies such as the water authority, electric authority and agriculture authority on the basis that new circumstances have rendered new conditions be imposed on the Planning Permission (Abdul Hamid, personal communication, February 6, 2018).

The new conditions also include the duty to provide Demographic Study Report, Economic Study Report, Traffic Audit report, Traffic Impact Assessment, Road Safety Audit, Social Impact Study Report and Environmental Impact Assessment report (EIA) (Abdul Hamid, personal communication, February 6, 2018).

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

According to Ruhaina Ibrahim, an officer in BDB Land Sdn Bhd in Jitra, developers must carry out several feasibilities and estimate studies and several contingency budget provisions to lessen the impact of this problem to accommodate the changing requirements. This also requires prudent financial management and planning of the developers (Ruhaina Ibrahim, personal communication, March 8, 2018).

Certain other new technical agencies are also important and need to be included in the list of such technical agencies if it is expedient to do so. An example is the Department of Minerals and Geoscience ('JMGS'), which will be responsible for looking into the land, location, and geography of the project sites to confirm that the land and the site are fit and suitable for development within certain projected development cost. This is to avoid future land erosion, landslide and to avoid any further cost and work to extract hidden hard rocks/granite and unwarranted soil structures (such as slime), which, if not adequately addressed, may lead to problematic projects (Md Radzi Othman, Personal Communication, February 22, 2018).

Similarly, the Local Planning Authority through One Stop Centre ('OSC') can overrule the views of the technical agencies, as the Planning Permission is issued by the Local Planning Authority and that the views of the technical agencies, for example, Department of Environment (JAS) and Department of Irrigation and Drainage (JPS), are not binding over the Local Planning Authority (Johaimin Johari, personal communication, March 1, 2018; Abd Talip Abd Rahman, personal communication, January 4, 2018). Johaimin Johari said:

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> "I can give an example, that a paddy factory must follow JAS's guideline in respect of the buffer zone that the zone must measure 200 meters from the proposed housing project. Nevertheless, when JAS provided the views to the Local Planning Authority that the proposed housing project breaches the buffer zone, the Local Planning Authority rejected JAS's view. Similarly, this was the case that happened to a project that involved a landslide in Penang. In this project, the EIA report was rejected by JAS, but still, the Local Planning Authority wished the project to proceed."

Further, Johaimin Johari said:

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

Thus, the above point supports earlier Md Dahlan contention, where he stated that problems may also be due to the absence of a specific provision in the TCPA, particularly section 22(2) of the TCPA, which does not require the local planning authority to consider the views from the relevant technical agencies in dealing with an application for planning permission. Due to the absence of such a specific provision, even though in practice there are planning rules and the current states' Planning rules and guidelines to refer to the technical agencies for views, the local planning authority may conduct ad hoc investigations. It may not seek any view from the technical agencies, or if there is any, only a limited and insufficient number of technical agencies are consulted. This is because the duty to refer to these agencies or parties is not mandatory but is a mere directory, i.e., it is subject to the discretion of the planning authority, either to refer or not to refer to them (Md Dahlan, 2009).

This judicial decision gives the local planning authority flexibility in exercising planning control. For this reason, too, it is opined that, following case-law and the subservient authority of the planning authority to the State Authority, these may undermine initiative and need to adopt and apply the gazette comprehensive development plans. This would also give the local planning authority more flexibility, based on expediency and necessity, even where a gazette development plan exists for the area, allowing ad-hoc planning control over the housing developments. However, it is opined, this situation may lead to certain unwarranted results (Aljunid, 2006). Thus, if this were the case, then the judicial policy and the policy of the local planning authority are in conflict with section 22(4)(a) of the TCPA viz, 'the local planning authority shall not grant planning permission if the development in respect of which the permission is applied for would contravene any provision of the development plan'.

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In another situation, the development plans are not gazetted. Thus, the local planning authority and the State's Planning Committee may provide ad hoc planning, not restricted to the ungazetted development of local plans. Instead, the authority and Committee may refer to the development master plan. This happens in Penang (Abd Talip Abd Rahman, personal communication, January 4, 2018).

In the opinion of the author, it is good to have a stringent conditions and requirements on the applicant developers before they can carry out the development to ensure the development issues such as abandoned housing projects, flood and soil problems do occur and protect the resident purchasers. Yet, the conditions and requirements would surely add monetary responsibility and development costs on the developers. As a result, the cost of development will increase. This will mean the prices for the houses for sale will be higher, commensurate with the increasing development costs and may not be affordable for public purchase. This will surely negate the national policy to provide sufficient housing accommodation to its citizen public. Thus, a balance policy and implementation must be formulated to ensure that in pursuit to ensure safety, security, equity, justice, and balance sustainable development to the public, we should not forget to ensure that the houses provided are sufficient and affordable (Othman, 2003; Mohd @ Ahmad, Arbin & Ramly, 2007).

Projects that fall under 'prescribed activities' require EIA Report. The EIA Report will be vetted and examined by JAS. If JAS satisfies, the proposed project will be supported. If not, then JAS will require the developer to amend the proposed development in accordance with the JAS's views. Besides, JAS also invites other technical agencies to examine the EIA report. These agencies include the Department of Public Works (JKR), Department of Irrigation and Drainage (JPS) and Department of Mineral and Geoscience (JMGS). In some cases, JAS found the report was fake and inadequate. Thus, the report is rejected (Johanim Johari, personal communication, March 1, 2018).

In other situation, even though developers might have submitted the Development Proposal Report (DPR) to the local planning authority, pursuant to section 21A of the TCPA, there is possibility that problems (for example prone flood areas) at the location of the project not being emphasized nor envisaged. It should be noted that pursuant to section 21A(1)(d)(i) of the TCPA, the applicant developer shall have to describe, inter alia, the physical environment, topography, landscape, geology and the natural features of the said land. In other words, the report submitted to the local planning authority was incomplete, as the applicant developer did not carry out detailed investigation on the land in order to ascertain the 'suitability' of the purported project land against flood (Md Dahlan, 2009).

The author also finds that the information provided in the development plans are not updated, wrong, inadequate, and not revised in meeting the contemporary development challenges. This is partly due to the absence of big comprehensive data of the developmental element such as the nature of soil, geographical site location and their fitness and sustainability, particularly from the JPS, JAS and JMGS (Abd Talip Abd Rahman, Personal Communication, January 4, 2018; Chong Co Sdn. Bhd v. Majlis Perbandaran Pulau

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Pinang [2000] 5 MLJ 132 and Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; Mohd Izham bin Abdul Hamid, personal communication, February 6, 2018; Wan Salmi Wan Harun, personal communication, January 6, 2021). The above non-compliance is partly because the states had yet, as at the date of the applications for planning permissions by the applicant developer, adopted the TCPA in toto.

Be that as it may, it is submitted that the decisions of the planning authority issuing planning permission can be challenged if it is proven that the decisions were made not in accordance with the law as happened in Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & Ors and Another Appeal [1992] 2 MLJ 393 (Supreme Court at Kuala Lumpur). In this case, the planning authority failed to give the adjoining landowners the right to develop the land that was being subject to the planning permission. This requirement was spelt out in the Planning (Development) Rules 1973, Emergency (Essential Powers) Ordinance No 46 of 1970, the City of Kuala Lumpur (Planning) Act 1973 and the Federal Territory (Planning) Act 1982.

The above principle was also adopted in Mayland Valiant Sdn Bhd v Majlis Perbandaran Subang Jaya [2018] 4 MLJ 685 (Court of Appeal at Putrajaya).

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

CONCLUSION

This part 3 illustrates that there is no obligation on part of the Local Planning Authority to follow the views of the technical agencies in issuing Planning Permission for housing development. Thus, the planning permission may not contain curative and preventive measures against flood disasters. In addition, the information provided in the DPR, EIA Report and Development Plans are inadequate causing the conditions of the Planning Permission incomplete and unable to meet the problems of flood disasters, curatively nor preventively. It is a settled law, that if the Local Planning Authority fails to follow the requirement of the law and fails to comply with the views of the technical agencies, and

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because of this failure, flood disasters occurred to the chagrin of the public, they will be liable at law and in equity.

It is evident that the above issues should be tackled to ensure that measures to deal with the problems arising from flood can be successfully executed. Otherwise, flood disasters can be a problem that can cause losses to the stakeholders in housing projects.

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PELAKSANAAN UNDANG-UNDANG TABUNG JAMINAN TANAH DI MALAYSIA DAN SINGAPURA: SATU ANALISIS PERBANDINGAN

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ABSTRAK

Tabung Jaminan Tanah (TJT) merupakan satu remedi yang disediakan oleh undang-undang kepada mangsa penipuan tanah sebagai satu refleksi kepada prinsip jaminan dalam sistem Torrens. Negara Singapura telah memperuntukkan undang-undang bagi pelaksanaan tabung jaminan ini kepada mangsa penipuan tanah dan kesilapan pendaftaran hak milik tanah di negara tersebut. Namun, Malaysia masih belum melaksanakan undang-undang berkaitan TJT bagi membayar ganti rugi kepada mangsa penipuan tanah dan kesilapan pendaftaran hak milik tanah Artikel ini adalah berdasarkan kepada kajian undang-undang yang dijalankan oleh penulis menggunakan analisis kritikal dan analitikal terhadap peruntukan undang-undang bagi kedua-dua buah negara. Perbincangan tentang TJT ini adalah memfokuskan kepada pelaksanaan undang-undang berkaitan TJT di Singapura dan beberapa cadangan undang-undang yang dibuat ke arah pelaksanaannya di Malaysia pada masa hadapan iaitu daripada segi sumber tabung, kriteria penuntut tabung jaminan, alasan menuntut, tempoh had masa tuntutan dan penubuhan jawatankuasa tuntutan jaminan tanah. Kewujudan peruntukan undang-undang berhubung dengan TJT akan memberikan perlindungan kepada mangsa kesilapan pendaftaran dan penipuan berkaitan hak milik tanah di Malaysia.

Kata kunci: penipuan, remedi, sistem torrens, tabung jaminan, undang-undang tanah

PENGENALAN

Undang-undang Tanah di Malaysia menggunakan sistem Torrens yang berdasarkan kepada sistem tanah negara Australia. Sistem Torrens ini diformulasikan oleh Robert Torrens di negeri Australia Selatan, Australia. Ia ialah satu sistem berpaksikan kepada tiga prinsip iaitu cermin, tirai dan jaminan (O'Connor, 2003; Buang,2015) . Prinsip cermin bermaksud pendaftaran secara jelas dan terang menunjukkan hak milik seseorang. Manakala tirai/*curtain* menyekat kesemua transaksi yang berlaku sebelum hak milik berpindah kepada penama berdaftar semasa. Prinsip terakhir ialah prinsip *assurance* atau jaminan yang bermaksud kerajaan bertanggungjawab terhadap ketepatan pendaftaran dan menyediakan ganti rugi jika berlaku kesilapan pendaftaran sama ada oleh kecuaian

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pejabat tanah atau disebabkan oleh penipuan pindah milik. Prinsip jaminan masih belum dilaksanakan di Malaysia namun negara Singapura telah menerima pakai prinsip tersebut dalam undang-undang tanah mereka sejak tahun 1993 bagi membayar ganti rugi kepada mangsa penipuan tanah di negara berkenaan. Sehubungan dengan itu, artikel ini menganalisis peruntukan undang-undang Tabung Jaminan Tanah (TJT) di Singapura dan juga membincangkan cadangan undang-undang TJT di Malaysia untuk pelaksanaannya pada masa hadapan supaya mangsa penipuan pindah milik tanah mendapat perlindungan undang-undang yang sewajarnya.

PRINSIP TABUNG JAMINAN SINGAPURA

Negara Singapura telah melaksanakan[1] tabung jaminan tanah (TJT) menerusi Land Titles Act 1993 bagi membayar ganti rugi kepada mangsa yang terkesan akibat daripada masalah penipuan tanah. Masalah penipuan tanah berlaku di negara Singapura[2] menyebabkan mangsa menanggung kerugian kerana kehilangan tanah mereka. Mangsa berhak menuntut ganti rugi di bawah TJT yang diwujudkan di bawah *Land Titles Act 1993* (LTA).

Peruntukan undang-undang berkaitan TJT di Singapura dinyatakan di bawah Bahagian/Part XVII *Land Titles Act 1993*. Seksyen 151 Land Title Act 1993[3] memperuntukkan:

> 151.—(1) From the fees which are collected by the Registrar under this Act, the Authority shall set apart the proportion prescribed from time to time by rules made under this Act to constitute an assurance fund, from which shall be paid —
>
> (a) any sum necessary to compensate claimants under section 155; and
>
> (b) such other disbursements as are directed or authorised to be paid, or expressed to be recoverable, from that fund.
>
> (2) The Registrar may authorise payment from the assurance fund of any claim for compensation not exceeding $1,000.

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[1] "Torren's assurance fund in Singapore", di http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-29 (Diakses pada 5 Jun 2019). *The effect of the various legislative provisions basically means that the Singapore Land Authority as the national land registration authority issues and guarantees land titles. For landowners unfairly deprived of their rightful interests through the operation of the statute, there is possible recourse to compensation under an assurance fund established under the Land Titles Act. The fund is financed mainly from a portion of the fees collected by the Registrar of Titles under the Act. If the assurance fund is inadequate, the shortfall may be paid out from the Consolidated Fund.*
[2] *United Overseas Bank Ltd* lwn *Bebe bt Mohammad [2006] SGCA 30*
[3] "Principle of assurance fund in Singapore", di http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A8f61d971-4c42-4d64-8ab3-32292ca098af%20Depth%3A0%20Status%3Ainforce;rec=0. (Diakses pada 15 September 2017).

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(3) A claim for compensation exceeding $1,000 shall be paid from the assurance fund only on the authority in writing of the Minister or on a determination by the court.

(4) If the amount to the credit of the assurance fund is inadequate to meet any claim, the deficiency shall be charged on and paid out of the Consolidated Fund.

(5) The assurance fund shall not be liable to compensate any person suffering loss, damage or deprivation occasioned by the breach by a proprietor of any trust.

Seksyen 151(1) *Land Title Act 1993* Singapura memperuntukkan bahawa daripada yuran yang dikumpul oleh Pendaftar di bawah Akta tersebut, pihak berkuasa boleh meletakkan bahagian untuk dimasukkan ke dalam TJT, yang mana ia boleh membayar; a) apa-apa jumlah yang mustahak bagi membayar ganti rugi penuntut di bawah seksyen 155 Akta yang sama; dan b) apa-apa pembayaran/*disbursement* yang diarah atau diberi kuasa untuk dibayar, atau diputuskan sebagai boleh tuntut, daripada tabungan. Menurut Ricquier, sebanyak 5% daripada yuran pendaftaran yang dikutip oleh Pendaftar dimasukkan ke dalam tabung jaminan tanah.[4]

Manakala subseksyen (2) memperuntukkan bahawa Pendaftar boleh membenarkan pembayaran daripada tabung jaminan apa-apa tuntutan ganti rugi tidak melebihi SD$1,000.00. Subseksyen (3) pula menyatakan tuntutan ganti rugi melebihi SD$1,000.00 boleh dibayar daripada tabung jaminan dengan kebenaran bertulis daripada Menteri atau berdasarkan keputusan mahkamah. Seterusnya subseksyen (4) memperuntukkan jika amaun yang dituntut daripada tabung jaminan ialah tidak mencukupi untuk membayar, maka ketidakcukupan itu perlu diambil daripada tabung penyatuan/*Consolidated Fund.* Dan subseksyen (5) menjelaskan bahawa tabung jaminan tidak bertanggungan untuk membayar ganti rugi bagi apa-apa kehilangan, kerugian, kerosakan atau kehilangan yang berlaku disebabkan kemungkiran pemilik tanah terhadap apa-apa amanah. Berdasarkan seksyen 151(1)(a) dan (b), terdapat dua keadaan di mana tuntutan daripada tabung jaminan boleh dilakukan oleh penuntut iaitu apa-apa tuntutan berdasarkan seksyen 155 dan apa-apa bayaran yang diarahkan perlu dibayar, maka pembayaran boleh dibayar daripada tabung jaminan.

Seterusnya subseksyen 2 hingga 5 menyatakan peraturan pembayaran yang perlu dipatuhi oleh pihak berkuasa dalam membuat pembayaran daripada tabung jaminan. Jika diamati, tuntutan ke atas tabung jaminan boleh dibuat berdasarkan alasan yang agak umum dan pihak Pendaftar boleh mengarahkan pembayaran tidak lebih dari SD$1,000.00 daripada tabung jaminan berdasarkan apa-apa tuntutan dan dengan kebenaran Menteri jika pembayaran tuntutan melebihi SD$1,000.00.

[4] W.J.M Ricquier, *Land Law*, (2010) (4th ed.), Lexis Nexis, Hong Kong.

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Seterusnya seksyen 151(1)(a) LTA memperuntukkan keadaan di mana tuntutan ganti rugi boleh dibuat. Di bawah seksyen 155 diperuntukkan beberapa keadaan di mana tabung jaminan boleh dituntut. Seksyen 155(1) memperuntukkan;

> 155.—(1) Subject to subsection (3), any person who is deprived of land or sustains loss or damage through any omission, mistake or misfeasance of the Registrar, or any member of his staff, in the bringing of the land under the provisions of this Act or in the registration of any instrumen, and who is barred by this Act from bringing any action for the recovery of land, proceeds of the sale of land, moneys secured by a registered mortgage or interests protected by a caveat notified on a folio, may bring an action for the recovery of damages against the assurance fund.

Berdasarkan seksyen 155 LTA Singapura, mana-mana orang yang dirampas tanahnya, atau menanggung kerugian atau kerosakan disebabkan oleh ketinggalan, kesilapan atau *misfeasance* pihak Pendaftar, atau kakitangannya, dalam berurusan dengan tanah sebagaimana menurut Akta ini atau kehilangan atau kerugian semasa pendaftaran apa-apa urus niaga, dan sesiapa yang dihalang di bawah Akta ini membawa tuntutan mendapat kembali tanah, meneruskan dengan menjual tanah, wang yang dijamin dari gadaian yang didaftarkan atau kepentingan yang dilindungi oleh kaveat tertera dalam folio, boleh membawa tuntutan menuntut ganti rugi dari TJT.

Berdasarkan seksyen 155, peruntukan ini memberikan peluang kepada mangsa menuntut dari TJT atas alasan kesilapan atau ketinggalan yang dilakukan oleh Pendaftar di pejabat tanah. Tiada peruntukan mengenai penipuan pindah milik tanah yang dinyatakan. Seksyen 155 hanya menyebut bahawa jika Pendaftar atau kakitangannya telah secara silap mendaftar sesuatu urus niaga secara silap, maka mangsa yang menanggung kerugian atau kehilangan harta tanah berhak menuntut ganti rugi dari TJT. Justeru, jika Pendaftar atau kakitangannya telah secara silap mendaftar hak milik ke atas nama pihak lain dan bukan pemilik yang sepatutnya berhak, maka mangsa yang terkesan berhak menuntut ganti rugi dari TJT. Manakala tempoh 12 tahun diperuntukkan kepada penuntut membuat tuntutan daripada TJT Singapura sebermula masalah kerosakan atau kehilangan tanah berlaku.[5]

Peruntukan *Land Title Act 1993* Singapura memperuntukkan alasan kesilapan pendaftaran oleh Registrar sebagai alasan memohon ganti rugi tanpa alasan penipuan dimasukkan. Justeru, jika seseorang kehilangan hak milik akibat kesilapan pendaftaran, maka boleh menuntut ganti rugi dari TJT tanpa perlu menunggu wujudnya elemen penipuan atau pemalsuan. Pemohon boleh membuat tuntutan berdasarkan bukti yang kukuh dan alasan menurut undang-undang. Jadi berdasarkan peruntukan LTA 1993 ini, penulis berpendapat bahawa walaupun alasan penipuan tidak diperuntukkan secara langsung, mangsa boleh

[5] Mohd Shukri Ismail, Yusri Zakariah & Anesh Ganason, "Land Administration Sistem in Malaysia: The Torrens Assurance Fund", 57

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menuntut atas alasan berlaku kehilangan atau kerugian daripada kesilapan pendaftaran urus niaga. Seksyen 155 dilihat mengaitkan antara kesilapan pendaftaran oleh Pendaftar dengan kehilangan tanah yang dialami oleh mangsa. Jadi atas alasan itu, maka ganti rugi boleh dituntut dari TJT.

KE ARAH PELAKSANAAN TABUNG JAMINAN TANAH DI MALAYSIA

Undang-undang tanah Malaysia mengaplikasikan dua prinsip sistem torrens iaitu cermin dan tirai namun tidak kepada prinsip jaminan. Sehubungan dengan itu, penulis berpandangan ia tidak lengkap dan tidak menyeluruh kerana tiada jaminan atau remedi diperuntukkan kepada mangsa kesilapan, penipuan tanah atau pindah milik tanah di negara ini. Pihak yang terkesan atau mangsa, tidak berpeluang menuntut kerugian atau mendapat perlindungan di bawah undang-undang. Shukri Ismail berkata:

> "The mirror and curtain principles practiced in Malaysia have come to be insufficient in maintaining the rights of registered proprietors from the elements of fraud and forgery. Land administration is at a crossroad whether to introduce the third Torrens principle with the Assurance Fund vehicle in order to provide a complete protection to registered proprietors."

Berdasarkan pendapat penyelidik berkenaan, maka prinsip cermin dan tirai yang dipraktikkan di Malaysia ialah tidak mencukupi dalam melindungi pemilik tanah dari kesilapan, penipuan dan pemalsuan pindah milik. Pentadbiran tanah di negara ini memerlukan TJT dalam menyediakan perlindungan kepada pemilik tanah yang menjadi mangsa kesilapan, penipuan pindah milik tanah.

Penulis juga mempunyai pandangan yang seiring dengan penyelidik terdahulu iaitu negara Malaysia juga disarankan agar melaksanakan prinsip jaminan tanah dalam undang-undang melalui peruntukan KTN 1965. Pelaksanaan prinsip jaminan/pampasan ini akan memberi faedah kepada mangsa penipuan tanah yang kehilangan tanah mereka akibat daripada kegiatan jenayah penipuan pindah milik tanah yang berlaku atau daripada kesilapan pendaftaran di pejabat tanah. Secara tak langsung ia menunjukkan kebertanggungjawaban kerajaan dalam menjaga kebajikan mangsa penipuan dan kesilapan pendaftaran tanah di negara ini.

Idea melaksanakan prinsip jaminan tanah ke atas mangsa penipuan tanah ini telah dicadangkan, namun ia belum dapat direalisasikan. Pasukan Penyelidik Harta Tanah Persekutuan Putrajaya (Penyelidik HTPP) sebelum ini telah mengusulkan cadangan[6] kepada

[6] Mohd Shukri Ismail. 'Insights of the Proposed Insurance Principle of Malaysian Torrens Sistem', 15 Januari 2009, Jabatan Ketua Pengarah Tanah dan Galian Persekutuan, Putrajaya, di www.jkptg.gov.my., 2011. Rujuk juga Mohd Shukri Ismail. 'Measures undertaken to safeguard against fraud in land dealings,' *Jurnal Pentadbiran Tanah,* Vol 1 Bil 1, 2011, ISSN 2231-9190, JKPTG, Kementerian Sumber Asli dan Alam Sekitar, Putrajaya, 2011.

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pihak kerajaan Malaysia supaya seksyen 340 KTN 1965 diberi pembaharuan semula dengan memasukkan peruntukan seksyen 340A yang baru. Ini bagi membolehkan mangsa penipuan dan pemalsuan urus niaga tanah memperoleh pampasan atau ganti rugi daripada kerajaan Persekutuan atau Pihak Berkuasa Negeri (PBN) melalui peruntukan jaminan tanah. Pelaksanaan prinsip jaminan ini dicetuskan daripada idea menyediakan perkhidmatan pendaftaran hak milik tanah dan kepentingan yang terbaik dan terjamin kepada rakyat di negara ini.

Sumber Tabung Jaminan

Tabung jaminan yang diperkenalkan perlu mempunyai dana sendiri dalam membayar ganti rugi kepada mangsa penipuan tanah atau kesilapan pendaftaran oleh Pendaftar. Berdasarkan cadangan yang dibuat oleh pasukan penyelidik HTPP, TJT perlu diwujudkan di dalam KTN 1965 dan wang tabungan akan berasaskan kepada; "persen (biasanya 5%) daripada yuran atau persen daripada levi (biasanya 0.02%) dari nilai tanah yang dikenakan ke atas semua urus niaga di bawah KTN; atau Hak Pihak Berkuasa Negeri untuk subrogasi dan semua bayaran dibuat daripada Akaun Bersatu Negeri dan tiada amaun spesifik ditetapkan untuk tuntutan."

Berdasarkan cadangan penyelidik HPTT di atas, penulis bersetuju bahawa TJT perlu mempunyai sumber tabungannya dalam membayar ganti rugi kepada mangsa. Di samping peruntukan yang disalurkan oleh kerajaan, TJT perlu dijana daripada pembayaran yuran urus niaga di pejabat tanah dan pihak kerajaan negeri juga boleh menyalurkan beberapa persen dari wang kutipan cukai tanah untuk disalurkan ke TJT.

Kriteria Penuntut Ganti rugi

Kriteria penuntut yang boleh menuntut dari tabung jaminan tanah perlulah: "Mangsa yang tidak bersalah (suci hati, untuk nilai dan tanpa pengetahuan) yang diputuskan oleh mahkamah bahawa hak atau kepentingannya telah dirampas menurut seksyen 340(2) KTN 1965; dan penuntut perlu terlebih dahulu membuat dakwaan terhadap mana-mana individu yang bersalah sebelum menuntut ganti rugi dari tabung jaminan." Seterusnya tuntutan juga boleh dibawa terhadap orang yang secara jujur mendaftar dokumen yang tidak betul, iaitu pindah milik palsu, yang akan bertanggungan terhadap pemunya berdaftar terdahulu.

Berdasarkan kertas cadangan oleh Penyelidik HTPP, penulis bersetuju dan merumuskan bahawa sebelum tuntutan terhadap TJT dimulakan, tindakan undang-undang perlu terlebih dahulu dibawa terhadap orang yang membuat permohonan pendaftaran secara tipu atau terhadap orang yang mendapat manfaat atau menerima wang hasil daripada penipuan, pemalsuan, salahnyataan atau tindakan menyalahi undang-undang. Dan jika penuntut gagal menuntut di mahkamah, maka tuntutan seterusnya boleh disalurkan kepada TJT untuk menuntut. Selain itu penuntut juga boleh menyaman mana-mana orang yang mendaftar secara jujur satu hak milik palsu dan jika gagal menuntut, maka ia perlu merujuk kepada TJT untuk mendapat ganti rugi.

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Kertas cadangan penyelidik HTPP seterusnya menyatakan; "Selain itu penuntut berhak mendapat ganti rugi jika pihak yang bertanggungjawab membayar pampasan telah meninggal dunia, bankrap, insolven, atau tidak dapat dijejaki di dalam negeri; dan tuntutan boleh dibawa jika seseorang itu telah menanggung kerugian disebabkan pendaftaran kepentingan yang lain. Seterusnya ganti rugi berhak dibayar atas penipuan yang sebenar; atau pemilik berdaftar yang kehilangan hak miliknya disebabkan penjahat mendaftar harta atas namanya sebelum melakukan pindah milik tipu kepada pembeli suci hati untuk nilai; maka pemilik berdaftar perlu menuntut daripada penjahat terlebih dahulu sebelum menuntut daripada tabung jaminan.

Sekiranya penipu tanah tidak boleh didakwa kerana mati, bankrap, insolven atau tiada dalam bidang kuasa, maka tindakan dibawa terhadap tabung jaminan; atau jika pemilik berdaftar dirampas tanahnya atau kepentingannya secara tipu oleh penjenayah yang tidak mendaftar atas namanya sebagai pemilik, tiada tuntutan boleh dibuat terhadap penjenayah tetapi tuntutan terus dibuat kepada terhadap TJT; dan jika pemilik berdaftar didorong untuk menandatangani dokumen pindah milik, tuntutan juga boleh dibuat terhadap TJT.

Penulis juga berpendapat bahawa TJT boleh dituntut jika pihak yang bertanggungjawab telah meninggal dunia, bankrap atau insolven atau tidak dapat dijejaki. Tuntutan terhadap TJT juga boleh dibuat secara terus apabila pihak yang mendaftar hak milik secara tipu telah mati, bankrap atau insolven atau tidak dapat dijejaki. Ini memberikan peluang kepada penuntut untuk menuntut dari TJT memandangkan pihak-pihak ini telah hilang kelayakan dan tidak lagi mampu bertanggungjawab atas perbuatan mereka.

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Prosedur Tuntutan

Kertas cadangan Penyelidik HTPP juga mencadangkan beberapa prosedur perlu dipatuhi dalam membuat tuntutan seperti:

a) tuntutan boleh dibuat terhadap tabung jika penuntut telah terlebih dahulu menuntut daripada orang bertanggungjawab terhadap kerugian itu.
b) Jika kerugian itu terhasil daripada alasan-alasan kecuaian atau penipuan sebagaimana tercatat di dalam kertas cadangan, maka arahan mahkamah perlulah mengandungi arahan menuntut bayaran daripada tabung.
c) Tiada bayaran ex gratia oleh kerajaan negeri boleh dibuat daripada tabung ini atas kesilapan, ketinggalan atau kerosakan dalam hal keadaan tertentu sebagaimana diperuntukkan dalam seksyen 61, seksyen 386 dan seksyen 393 KTN.
d) Prosiding tuntutan undang-undang dibuat dahulu sebelum menuntut daripada tabung. Dan prosiding itu melalui proses perbicaraan dan keputusan dikeluarkan. Tuntutan tidak akan dilayan selagi tiada keputusan mahkamah didapati terlebih dahulu.

Penulis merumuskan dan bersetuju bahawa sebelum tuntutan dibuat ke TJT, penuntut perlulah melalui perbicaraan mahkamah terlebih dahulu. Bermaksud di sini jika satu pihak yang kerugian akibat daripada keputusan mahkamah selepas perbicaraan, maka pihak itu boleh menuntut dari TJT. Dengan ini ia akan memberikan peluang kepada pihak yang rugi itu menuntut ganti rugi dari TJT. Manakala pihak yang telah mendapat faedah daripada keputusan perbicaraan tidak dibenarkan menuntut dari TJT.

Tempoh had masa tuntutan adalah berdasarkan peruntukan di bawah Akta Limitasi /Had Masa 1955 iaitu enam tahun. Jawatankuasa TJT perlu dibentuk bagi memastikan kelancaran proses tuntutan. Justeru, jawatankuasa perlulah terdiri dari Presiden, Timbalan Presiden dan lima lagi anggota dilantik oleh kerajaan negeri. Anggota yang dilantik mestilah seorang yang layak menurut Akta Profesion Undang-undang 1976. Nama ahli jawatankuasa perlu digazet di Warta/Gazet Negeri. Maka pendengaran kes dan keputusan dibuat oleh Presiden, Timbalan Presiden dan dua lagi anggota sebagaimana diputuskan oleh pengerusi.

Penulis juga mempunyai pandangan bahawa tempoh had masa selama 6 tahun ialah satu tempoh yang sesuai kerana ia ialah tempoh masa umum dalam undang-undang kontrak (Akta Limitasi, 1955). Dengan adanya tempoh tersebut maka penuntut berpeluang membuat tuntutan dan masih lagi menyimpan bahan bukti sokongan bagi keperluan menuntut dari TJT. Penubuhan Jawatankuasa TJT ialah satu langkah yang baik ke arah memastikan setiap tuntutan diuruskan dengan baik dan pembayaran ganti rugi dibuat dengan sewajarnya.

KESIMPULAN

Pelaksanaan TJT ialah pelengkap kepada pemakaian sistem Torrens di Malaysia. Dengan

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adanya tabung itu maka mangsa yang kehilangan tanah akibat penipuan dan kesilapan pendaftaran akan dapat menuntut ganti rugi sebagaimana diperuntukkan oleh undang-undang dalam Kanun Tanah Negara. Tinjauan pelaksanaan TJT dari Singapura wajar dijadikan panduan dalam merealisasikan idea tersebut di Malaysia. Namun, undang-undang tanah di Singapura juga tidak menyatakan secara spesifik tentang perlindungan kepada mangsa penipuan pindah milik tanah tetapi hanya memfokuskan kepada kes kesilapan pendaftaran tanah oleh Pejabat Tanah sahaja. Sungguhpun begitu, undang-undang tanah di Singapura adalah lebih baik dalam konteks ini, jika dibandingkan dengan Malaysia, sekurang-kurangnya mereka telah ada TJT untuk kes kesilapan pendaftaran berbanding dengan Malaysia. Penulis berpandangan kewujudan TJT akan memberi kelegaan kepada pemilik tanah dengan mendapat pampasan disebabkan kehilangan tanah akibat daripada kesilapan pendaftaran atau aktiviti penipuan. Seterusnya ini menunjukkan keprihatinan pihak Kerajaan Malaysia menjaga kebajikan dan memberi perlindungan kepada pemilik tanah yang menjadi mangsa penipuan dan kesilapan pendaftaran.

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FIRE HAZARDS AT HOUSING PROJECTS IN MALAYSIA: A LEGAL OVERVIEW (PART 1)

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ABSTRACT

Fire hazards at housing projects is one of the housing catastrophes in Malaysia. Some of the reasons leading to occurrences of fire are failure of the developers to construct building using approved materials, negligence of the house occupants in using electricity which sparks fires and causes electrical hazards, electrical failure or malfunction, unattended cooking, heating equipment hazards, smoking materials, candle materials, and heat sources too close to combustibles. The catastrophe has resulted in pecuniary and non-pecuniary losses, deaths and injuries to the purchaser residents. Fire hazard is one of the critical matters that developers must address during the development building stage. The developer should get views and approvals from relevant technical agencies, for instance, the Department of Fire and Rescue (Jabatan Bomba & Penyelamat). This paper aims to describe and study fire hazard legal issues and law relating to fire hazards in housing projects. This paper uses legal research methodology and qualitative research methodology, particularly concerning eliciting information through interviews with relevant parties to study the problem. The writing consists of 2 parts. The instant paper is the Part 1 discussing the issues and legal requirements by the Department of Fire and Rescue before Certificate of Completion and Compliance (CCC) can be issued. This paper finds that there are issues that have caused fire hazards in housing projects. This paper, it is submitted, can add to enrich the fire hazard legal literature and discussion on the current policy on fire safety in housing projects, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: fire hazards in housing projects, fire hazard law, issues.

INTRODUCTION

Fire and fire hazards in housing projects in Malaysia is of one housing catastrophes. The causes are due to human errors and Acts of God. The development law provides that before any housing developer commences any housing development, it is incumbent upon them to ensure that the building and environment should be safe from any possible fire hazards. This is particularly so during the building approval stage, governed by Street, Drainage and Building Act 1974 (Act 133) ('SDBA') and Uniform Building By-Law 1984 ('UBBL') that require developers to get support and approval from the Fire and Rescue Department ('FRD') as regards their proposed building plan. The developer is subject to a duty that the materials to be used, and the method of construction of the houses must follow the

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requirements of UBBL, including ensuring that the materials and the method are safe from fire hazards.

Table 1- Fire, Rescue & Humanitarian Services and Special Tasks Of 2018 (January)

No	State	number of calls	fire call	call for rescue	Call special duties	Fire			rescue			loss (myr)	value from rescue (rm)	fake call
						M	C	S	M	C	S			
1	WP PUTRAJAYA	38	8	30	0	0	0	0	0	0	27	247,530.00	1,222,500.00	0
2	JOHOR	794	2	530	18	0	5	6	12	39	32	6,986,890.00	69,053,690.00	4
3	MELAKA	254	77	147	30	0	5	3	2	41	29	603,490.00	80,103,077.00	0
4	NEGERI SEMBILAN	339	99	237	1	0	4	0	13	28	23	1,485,490.00	9,025,460.00	2
5	SELANGOR	1440	418	1015	6	1	10	8	25	122	92	51,228,859.00	1,196,399,490.76	1
6	WP KUALA LUMPUR	271	106	146	16	0	0	12	5	14	113	2,225,530.00	65,840,120.00	3
7	PERAK	623	178	440	4	0	1	12	12	80	62	1,459,457.50	4,698,112.50	1
8	PULAU PINANG	479	146	323	0	0	5	10	6	95	60	3,269,749.30	10,552,503.15	10
9	KEDAH	383	121	244	15	0	1	2	9	42	20	707,145.00	4,817,800.00	3
10	PERLIS	55	22	33	0	0	1	1	2	1	5	95,000.00	282,700.00	0
11	KELANTAN	149	51	77	21	0	1	3	9	29	18	1,313,485.00	1,085,580.00	0
12	TERENGGANU	140	39	88	13	1	0	8	3	34	64	2,028,200.40	1,710,400.00	0
13	PAHANG	363	85	265	11	0	1	15	15	59	50	1,982,160.00	3,575,090.00	2
14	SARAWAK	607	81	490	35	0	5	46	17	49	44	2,971,480.00	6,954,220.00	1
15	WP LABUAN	50	11	39	0	0	0	0	1	1	0	28,068.00	1,567,950.00	0
16	SABAH	476	110	358	5	3	2	9	12	29	23	8,535,593.00	105,771,175.00	3
TOTAL		6461	1794	4462	175	5	41	135	143	663	662	85,168,127.20	1,562,659,868.41	30

Notes: M - dead, C - injured, S – safe

(Source: https://www.bomba.gov.my/bomba/resources/user_1/UploadFile/Orang%20Awam/Statistik/statkebakaranjan2018.pdf)

The above Table 1 shows the Fire, Rescue & Humanitarian Services and Special Tasks of 2018 (January) statistics on the losses and rescue values due to fire hazards in Malaysia. The FRD is one of the technical agencies in approving the building plan. The FRD does not involve in the issuance of Planning Permission by the Local Planning Authority (Abdul Razak Muda, personal communication, February 20, 2018). However, the FRD may be called to

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comment on matters pertaining to the access roads and water facility insofar as these are relevant to their works. The FRD is responsible for making comments on the development plan, which involves inspection of building height is 18 meters and above, about 6 – 7 storey buildings. However, the FRD is not responsible for double-storey houses and buildings.

Fire Hazards Legal Issues

The statute that governs the FRD is the Fire Services Act 1988 (Act 341) ('FSA') with regulations and order. The duties of the FRD are spelt out in section 5(1) and (2) FSA, viz shall include:

1) The duties of the Fire and Rescue Department shall include— (a) the taking of lawful measures for— (i) extinguishing, fighting, preventing, and controlling fires; (ii) protecting life and property in the event of a fire; (iii) securing the provision, maintenance, and proper regulation of fire-escapes; and (iv) securing the provision of adequate means of exit in the event of fire from all designated premises; (b) the making of investigations into the cause, origin, and circumstances of fires; and (c) performing humanitarian services, including the protection of life and property in any calamity.
2) The Fire and Rescue Department may, in addition to its duties under subsection (1), perform such other duties as may be imposed on it by law or as the Minister may direct it to perform. (Emphasis added).

There are specific responsibilities that certain persons must do if their acts may affect any relevant matters stated in FSA. For example, the water authority must notify the FRD's State Director of any action affecting water flow to a fire hydrant (section 24 FSA). The duty of the water authority to notify the FRD's State Director of any action works affecting fire hydrant pursuant to section 23(1).

It is the law under this Act that all designated premises must be issued with fire certificate (section 28(1) FSA). This certificate must be renewed annually (section 28(2) FSA). The application of fire certificate is in form I, applied by occupier or person having the overall management of the designated premises (section 29(6); Regulation 2(1) of the Fire Services (Fire Certificate) Regulations 2001). Upon receipt of the application, the Director-General of Fire and Rescue Department ('DG') shall inspect the designated premises. On being satisfied that there exists adequate life safety, fire prevention, fire protection and fire-fighting facilities, the DG shall issue a fire certificate in Form II of Schedule A for the designated premises subject to such conditions as he thinks fit (section 29(4); Regulation 3(1) of the Fire Services (Fire Certificate) Regulations 2001).

The building plans of the designated premises must comply with the requirements under Part II of the Uniform Building By-Laws 1984 (GN 5178/1985), failing which the plan may be rejected by the DG (Regulation 2A of the Fire Services (Fire Certificate) Regulations).

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The list of designated premises is those listed under the Schedule of Designated Premises of Fire Services (Designated Premises) Order 1998, Fire Services Act 1988 (Act 381). The designated premises are libraries, hospitals and nursing homes, hotels, hostels and dormitories, offices, shops, factories, places of assembly and storage and general (Schedule of Designated Premises of Fire Services (Designated Premises) Order 1998, Fire Services Act 1988 (Act 341).

As regards houses that have been subject to fire, the followings are the excerpt from an interview with Abdul Razak Muda, Fire and Rescue Senior Assistant Commissioner, Alor Setar, on February 20, 2018:

> "…sometimes we have certain limitation, fire-fighters will be called in for a look at the stability of an earthquake area, or a landslide area. What we can do about such a case is that we can see from the electrical system that has been provided, we could know whether the system has complied with the security features or not. In respect of unstable house wall after being subject to fire, we cannot ascertain its stability as we do not have the expertise… That is more to JKR (Jabatan Kerjaraya – Department of Public Works) and IKRAM to have the experts to check the wall stability. Maybe in respect of electrical safety is on the TNB as they are the experts or the Energy Commission. Even now, the fire catastrophe happens at Maahad Tahfiz; we asked for TNB's help to ascertain the electrical safety. GIAT MARA asked for our help to inspect their wiring system. So, we need to consult with TNB because they are the expert in electricity, they know more… The public will usually first contact the FRD when they face natural catastrophes for help, for instance, natural catastrophes such as earthquakes and unsafe buildings. However, we do not have the expertise to deal with these problems; JKR is the appropriate authority to be referred to; even in landslide problems, the FRD will help inspect the site and provide help if possible. The FRD also relies on IKRAM's help. We also rely on the IKRAM report to ascertain whether a building or land is safe or otherwise. There is a collaboration with other agencies in dealing with natural catastrophes involving the FRD, TNB, IKRAM and JKR… We only play our role in helping the victims even though the responsibility is not on our shoulders; we are not accountable…."

While the challenges and issues faced by FRD are the practices of architect, who does not comply with the UBBL requirements. For example, in respect of house parting wall. According to the UBBL, the wall thickness must be 200 mm, using clay brick, but nowadays, developers use sand brick. Sand brick requires certification from SIRIM and FRD. The rampant use of sand brick is a challenge to FRD, as they need to do detail checking in all the housing development projects so that the bricks used are the approved ones. The use of sand brick is preferable as it can lower the developers' costs. However, the brick may not be the ones that are not approved by SIRIM and FRD (Muda, personal communication, February 20, 2018).

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Further, according to Abdul Razak Muda, the ingredients used by developers for house construction are different from what had been approved in the building plan. This is to reduce the developers' costs. Normally the FRD will only do document checking, not site checking. Further, the construction party walls were constructed differently from what had been approved in the approved plan. The wall is stated to be 9 inches in the approved building plan, but this has not been made on-site. If the thickness is less than 9 inches, any fire from the neighbouring house will quickly spread to the adjacent units. Any lesser thickness can cause the wall to crack, and fire penetrates the neighbouring house. Thus, according to Abdul Razak Muda, any defrauded purchaser can sue the developers for having provided walls that are lesser than the required 9 inches. According to Abdul Razak Muda, if the thickness is 200 mm and the building is two-storey shop-houses, the wall can sustain against 4 hours of fire from spreading into the neighbouring unit. If 100 mm wall, it can only sustain for 2 hours only. The use of clay brick is the most preferred choice of brick, but uncertified sand brick is not allowed. The certification must come from SIRIM and FRD. The FRD has its own Research and Development section responsible for testing construction materials' suitability and fitness. The FRD will review and check the building plan as to the suitability of the building in accordance with the UBBL, for example, the parting/dividing house wall. Some developers do not provide the boundary unit or parting/dividing house wall. The provision must be up until the roof. This prevents any possibility of fire spreading (Muda, personal communication, February 20, 2018).

According to Abdul Razak Muda, in Sungai Petani, there is an occasion where the owner of the house sued the developer for having failed to cover and did not seal the boundary unit or parting/dividing house wall between his house and his neighbouring unit fully. The purchaser won the case and succeeded in claiming damages from the developer. In addition, apart from the issue of party wall, the developer also had been found to have failed to comply with the requirement FRD water hose that should be provided beside the road (Muda, personal communication, February 20, 2018).

CONCLUSION

From the above elaboration, some laws govern the safety of the building occupants against fire hazards. However, there are occasions where developers have neglected to comply with the legal requirements to the possible detriment and chagrin of the house occupants. It is proven that the developers have failed to use approved materials and construction methods, and because of this failure, fire has been caused, and the occupants become victims, the occupants shall have a cause of action against the defaulting developer for remedies.

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FIRE HAZARDS AT HOUSING PROJECTS IN MALAYSIA: A LEGAL OVERVIEW (PART 2)

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ABSTRACT

Fire hazards at housing projects is one of the housing catastrophes in Malaysia. Some of the reasons leading to occurrences of fire are failure of the developers to construct building using approved materials, negligence of the house occupants in using electricity which sparks fires and causes electrical hazards, electrical failure or malfunction, unattended cooking, heating equipment hazards, smoking materials, candle materials, and heat sources too close to combustibles. The catastrophe has resulted in pecuniary and non-pecuniary losses, deaths and injuries to the purchaser residents. Fire hazard is one of the critical matters that developers must address during the development building stage. The developer should get views and approvals from relevant technical agencies, for instance, the Department of Fire and Rescue (Jabatan Bomba & Penyelamat). This paper aims to describe and study fire hazard legal issues and law relating to fire hazards in housing projects. This paper uses legal research methodology and qualitative research methodology, particularly concerning eliciting information through interviews with relevant parties to study the problem. The instant paper is the Part 2 discusses the issues and legal requirements by the Department of Fire and Rescue before Certificate of Completion and Compliance (CCC) can be issued being an extension to Part 1 paper. This paper finds that there are issues that have caused fire hazards in housing projects. This paper, it is submitted, can add to enrich the fire hazard legal literature and discussion on the current policy on fire safety in housing projects, particularly the housing development guidelines and the current National Housing Policy (DPN) (2018-2025).

Keywords: fire hazards in housing projects, fire hazard law, issues.

INTRODUCTION

Part 1 of this writing explained the statistics and problems of fire hazards in housing projects. Further Part 1 discusses several legal requirements and issues relating to fire hazards. This instant Part 2 will continue the legal discussion of Part 1.

DISCUSSION AND ANALYSIS - FIRE HAZARDS LEGAL ISSUES

In addition, according to Abdul Razak Muda, the public awareness should be enhanced on the importance of Fire and Rescue Department ('FRD') facilities in the housing development projects. The facilities will include the firewall, fire hydrant and access. Thus, all the requirements of the FRD in these matters should be observed to ensure safety and

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sustainability of the residents. According to Abdul Razak Muda, FRD will do staggered periodic checking over the relevant premises. The purpose of these checking is to make sure that the building complies with the requirements of FRD against any disasters caused by fire. FRD have the power to order for the closure of any building if the building does not comply with the FRD's requirements. However, in respect of housing development area, FRD does not exercise this power. FRD only provides public awareness of the importance of providing facilities and infrastructure against any fire disasters. These include the provisions of fire hydrants. Secondly, FRD establishes the concept of MyBomba and community Fire Brigade under the supervision of KPKT. FRD will conduct awareness programmes for the people. In each housing project, there will be committee representatives, who will be trained by FRD and will be given certificates of training. FRD will also conduct campaigns against fire disasters from time to time. The FRD also teaches the community the usage of fire hydrants, including children nursery, children kinder garden and housing community (Muda, personal communication, February 20, 2018).

According to Abdul Razak Muda, FRD will also be called for rescue missions involving landslide or land problems in housing projects. However, to confirm as to whether the land location is safe or otherwise, the FRD will call IKRAM. They have the expertise and tools. They can measure and understand any movement in the soil. FRD does not have such expertise. IKRAM will call the Department of Mineral and Geo-science ('JMGS') to help them in landslide and land problems (Muda, personal communication, February 20, 2018).

In respect of Development Plan – Structure and Local Plans, the FRD is not one of the agencies called to give input. The safety element in the Development Plan does not involve FRD as one of the technical agencies for comments and advice. During the Planning Permission, the FRD is not also one of the technical agencies that the local planning authority needs to refer to. During the approved building plan application, FRD becomes one of the relevant technical agencies that must be referred to for comments and support. However, for 7 or more storey building, the FRD will not be required to inspect or comment on the building plan. For this type of building, the developer is required to provide fire lift. The FRD will inspect the lift and the stair exit route (Muda, personal communication, February 20, 2018).

In another issue, Abdul Razak Muda said that there is not enough buffer zone between petrol station and housing project that may cause trouble and disaster to the residents. According to Abdul Razak, at least the separating buffer zone should be 30 meters between the petrol station and the housing project. However, the problem is that this will cause more cost to the developer. On the other hand, the developers may use the buffer zone for their commercial purpose (Muda, personal communication, February 20, 2018).

In addition, Abdul Razak Muda mentioned the issue of electrical sub-station and the electrical line and cable besides and above the housing projects. The problem of women infertility is evident in some research due to the existence of the sub-station and electrical line and cable. On the issue that the technical agencies may have changed the conditions for the approved plan before CCC is issued, different from the original approved plan, Abdul

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Razak Muda said that this may happen if the developer modified the original approved plan. Thus, new additional conditions may be imposed to fit the new modified original approved plan by the technical agencies, including FRD. For the time being, Malaysian FRD's best practices used in dealing with fire and its disasters are the British Standard (BS), National Fire Protection Association (NFPA) (US) and the Australian standard. The most stringent is the NFPA standard. These standards involve FRD machinery, pump and all relevant tools and systems to deal with fire and its disasters (Muda, personal communication, February 20, 2018).

The author also managed to get an interview with a house fire victim owner, Noor Afza binti Amran. According to her, certain issues involved when her house was damaged due to fire. As the result, she suffered losses amounting to RM 90,000.00 (USD 21,416.72). The house was burnt, damaged and destroyed. The master bedroom, living hall, lavatories were all damaged with black soot deposition. The fire was caused by the electric spark that caught fire from the unplugged electric plug from the electric socket. The fire occurred on May 23, 2017. However, the losses due to fire were covered by the house fire insurance (MRTA) under the BSN Prudential Takaful. The followings are her statements (Noor Afza binti Amran, personal communication, June 27, 2018):

1) "The electric cable plug must be off and unplugged from its electrical socket sources when unused. There are occasions where if the electric plug was not unplugged, the electrical socket sources might still ignite electricity spark that can catch fire. Even though the electric plug, electric extension cable and electric sockets are indorsed by SIRIM, in the long run, if the users do not correctly use them, for example, unplug them when not used, electric sparks may ignite and catch fire".
2) "Sparking from the electrical cord and unplugged electric cable had caused electrocution and caught fire in the house. The fire spread to the hanging shirts and clothes, pillows, carpet mats, bed mattress, room air conditioners, the whole master bedroom, living room, ceiling, and the house roof. The fire also had spread to the kitchen and the second bedroom. The fire caused black smoke, black soot deposition and blackened the whole floor tiles, lavatory and toilet room. The heat of the fire also had cracked the house separating walls and melted the internal steel beams in the wall concrete".
3) "I, being the house owner, reported the disaster to police, fire and rescue department at Bukit Kayu Hitam and her Quantity Surveyor friend at Alor Setar".
4) "It took 8 months to get the insurance coverage after the fire occurrence and report made'.
5) "Nonetheless, the compensation from insurance was not enough; the victim had to top up her own money to do the repairing works. To be exact, I only obtained RM 70,000 as insurance compensation

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coverage, but actually, the cost of repair of the damaged house was RM 90,000.00'.

6) "The compensation was paid to me as the owner of the house. However, the tenant did not get any compensation from the insurance. Thus, the tenant losses had not been compensated. The losses included the furniture and belongings of the tenant. The belongings included a television set, freezer, clothes, sofa, cookery and dishes utensils, beds, mats, house furniture and pillows".

7) "I, being the owner of house, used Bay' Bithaman al-Ajil (BBA) to finance the purchase of the house. The MRTA was from BSN Prudential Takaful ('BSN'). However, the fire took place after 3 years of the delivery of vacant possession. According to BBA, the house owner is still the BSN being the vendor who sells the house to me being the buyer borrower. In Islamic Law, the vendor should be responsible for the damage done to the house until the title is fully transferred to the victim purchaser upon full repayment and settlement. It is noteworthy that the defect liability period of the house has expired (more than 3 years after delivery of vacant possession); thus, the developer is not liable".

8) "The local authority did not do any site visit and do something that can ensure that the provisions under the UBBL are complied with. For me, the local authority should take note and address my problems. This is because I pay assessment every year. Neither was there any action taken against the developer Teguh Harian by the local authority. Similarly, there is no action taken by developer Teguh Harian to remedy my problems. Only the bank financier BSN did pay a visit and verify the losses that the owner suffered from the fire".

9) "My neighbour's dividing/parting house wall was also cracked. But she (the owner) did not make any claim to her insurance".

10) "There is a possibility that the developer was negligent in fixing the electrical wiring. However, the fire and rescue department had not confirmed this".

CONCLUSION

The above discussion explains the responsibility the FSD in facing fire hazards challenges. Among approaches that the FRD do are carrying out public awareness programmes to ensure safety against fire hazards to house residents, implementing periodic examination of certain buildings, establishing the concept of MyBomba and Fire Brigade company, training public on the usage of fire hydrants, carrying out rescue missions, and applying the best practices in dealing with fire and its disasters for example BS, NFPA and the Australian standards. While through interviews with certain fire victims, certain lessons are learnt and should be followed to ensure safety and security against fire hazards. This writing also illustrates some injustices to house residents who are the fire victims. These

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include the insurance compensation took some long time to be given, the insurance coverage is not enough, the victim tenant does not get any compensation from the insurance coverage, the developer who might have been liable for defective electricity workmanship is not responsible to pay compensation and not liable for the sufferings of the victim residents, the arguable terms in the BBA that are inadequate, unjust and do not provide equitable remedies to the customer fire victims and that nothing has been provided by the Local Authority to lessen the grievances of fire victims.

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PLI NON EST FACTUM: REMEDI ALTERNATIF PENIPUAN PINDAH MILIK TANAH DI MALAYSIA

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ABSTRAK

Pli non est factum berasal daripada undang-undang Inggeris. Pli ini biasa digunakan dalam kes melibatkan pindah milik tanah yang dibuat secara penipuan. Mahkamah Inggeris telah meletakkan kriteria tertentu dalam mengaplikasikan pembelaan ini. Kriteria ini diaplikasikan secara ketat dalam kes-kes di Malaysia terutamanya dalam mengembalikan hak milik tanah kepada pemilik asal. Pli ini dianggap sebagai remedi alternatif di negara ini dalam menuntut kembali hak milik tanah yang diperoleh secara penipuan.

Kata kunci: pli, penipuan, pindah milik, tanah, pembelaan

PENGENALAN

Istilah non est factum atau bukan janji saya dimaksudkan sebagai pengakuan bahawa dokumen yang ditandatangani adalah tindakan yang dibuat di luar pemahamannya sebagai penandatangan dokumen. Pembelaan ini biasa dipohon dalam kes melibatkan pindah milik tanah atau kepentingan yang dibuat secara penipuan.

NON EST FACTUM DI BAWAH UNDANG-UNDANG INGGERIS

Secara harfiah, ungkapan Latin bagi non est factum bermaksud 'itu bukan perbuatan saya'. Daripada segi sejarah, asal-usul doktrin boleh dikesan pada abad ke 16 dalam kes Thoroughgood lwn Cole, di mana hakim berpendapat bahawa jika seseorang itu buta huruf dan diberi pertolongan pembacaan dan pembacaan itu tidak menyatakan dengan tepat apa yang ada dalam tulisan itu, maka individu itu tidak terikat dengan perbuatannya.

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Seterusnya, pada abad ke-19, doktrin ini diperluas untuk merangkumi kontrak bertulis dan juga tindakan seperti dalam kes Foster v Mackinnon di mana Hakim Byles berpendapat bahawa orang celik (tidak buta huruf) yang tidak bertindak cuai juga boleh memohon pembelaan melalui non est factum.

Dan seterusnya pelaksanaan doktrin ini dipermodenkan pada abad ke-20 dalam kes Saunders lwn Anglia Building Society Ltd (Gallie lwn Lee) pada tahun 1971 di mana "House of Lords" memberikan penyataan semula yang lebih moden dan tersusun. Pada asalnya doktrin ini hanya boleh dijadikan pembelaan kepada penandatangan yang boleh membuktikan bahawa mereka tidak melaksanakan perbuatan itu secara fizikal, di mana penandatangan tersebut boleh menuntut secara harfiah bahawa tindakan itu "bukan perbuatan saya", maka tanda tangan berikut dianggap tidak berkuat kuasa dan tidak sah. Dalam kes ini Puan Gallie, seorang wanita berusia 78 tahun, pemilik harta pegangan pajak. Lee, defendan dalam kes ini, telah meminta plaintif menandatangani dokumen dengan memberitahu plaintif bahawa plaintif boleh mengumpul wang bagi keselamatan harta benda. Plaintif menandatangani dokumen tanpa membaca dokumen kerana cermin matanya jatuh dan pecah. Dokumen itu sebenarnya ialah penyerahan hak daripada plaintif kepada Lee. Lee menggadaikan harta itu kepada defendan kedua dan gagal membayar balik. Maka defendan kedua menuntut harta tersebut. Plaintif menuntut pengisytiharan bahawa penugasan adalah tidak sah, berdasarkan pembelaan non est factum dan plaintif Berjaya dalam kesnya.

House of Lords dalam kes ini menyenaraikan elemen yang membolehkan seseorang memohon pembelaan non est factum iaitu:

i) Pemohon perlulah tergolong dalam kelas orang yang, bukan asbab kesalahannya atau kecuaiannya sendiri, tidak dapat memahami mengenai maksud tertentu dokumen, atau kerana buta, buta huruf atau kecacatan yang lain.
ii) Penandatangan mesti membuat kesalahan asas mengenai sifat kandungan dokumen yang ditandatangani dan dokumen mestilah berbeza secara radikal daripada dokumen yang ditandatangani.

Keputusan kes Saunders telah diaplikasikan dalam kes Petelin lwn Cullen , di mana kontrak antara Petelin (yang buta huruf dan tidak fasih berbahasa Inggeris) dan Cullen untuk urusan jual beli tanah adalah tidak sah atas alasan non est factum oleh Petelin. Berdasarkan kes ini menunjukkan golongan yang berhak mendapat pembelaan tersebut ialah mereka yang tidak dapat membaca kerana buta atau buta huruf atau kurang upaya dan yang bukan melalui kesalahan ataupun kecuaian mereka sendiri kerana tidak dapat memahami maksud dokumen tertentu. Petelin perlulah menunjukkan bahawa dia menandatangani dokumen tersebut dengan kepercayaan bahawa dokumen itu berbeza secara radikal daripada yang sebenarnya dan bahawa kegagalannya membaca dan memahaminya bukan disebabkan oleh kecuaian di pihaknya. Mahkamah menunjukkan bahawa terdapat beban berat pada defendan yang ingin membuktikan pembelaan non est factum ialah pembelaan yang luar biasa. Gambaran daripada keadaan kes ini, tingkah

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laku responden yang bersalah, persoalan mengenai kecuaian daripada perayu kerana tidak mengambil langkah berjaga-jaga yang munasabah sudah tidak menjadi isu yang relevan. Oleh itu, perayu berjaya mendapat pembelaan non est factum.

PENGAPLIKASIAN PLI NON EST FACTUM DI MALAYSIA

Prinsip non est factum atau bukan janji saya merupakan prinsip asal daripada undang-undang Inggeris. Prinsip ini juga dibincangkan di mahkamah Malaysia dalam menentukan hak penuntut dalam kes terutamanya membabitkan masalah penipuan pindah milik tanah atau kepentingan tanah. Mahkamah di Malaysia cenderung menerima pakai kriteria yang digarapkan dalam kes Inggeris iaitu Foster lwn McKinnon dan Galli lwn Lee.

Perbincangan dimulakan dengan kes UMW Industries (1985) Sdn Bhd v Kamaruddin Bin Abdullah & Anor di mana mahkamah memutuskan bahawa rayuan pembelaan non est factum tidak akan diterima sekiranya situasi jelas menunjukkan bahawa terdapat unsur kecuaian ketika perlaksanaan perjanjian dijalankan. Maka rayuan pembelaan ini tidak akan dibenarkan.

Seterusnya, keupayaan doktrin ini juga telah dijelaskan di, dirujuk lagi dalam kes Richard Aik Chea Han & Anor v Stuar Bevan Dawson di mana, doktrin non est factum gagal digunapakai dan pihak Mahkamah menjelaskan bahawa doktrin ini tidak dapat diaplikasikan sekiranya terdapat juga unsur pengabaian yang dilakukan kepada pihak yang merayukan pembelaan ini. Seperti contoh, dalam kes tersebut pihak Mahkamah telah menyatakan, sekiranya pihak Defendan tidak memahami Bahasa yang digunakan di dalam Surat Cara Pemindahan iaitu Memorandum of Transfer di dalam Bahasa Melayu, pihak Defendan seharusnya mendapatkan nasihat daripada seseorang yang memahami Bahasa tersebut dan bukannya bangkitkan ia sebagai satu isu selepas hartanah tersebut telah dipindah milik kepada pihak Plaintif.

Manakala kes Wan Salimah Bte Wan Jaffar V Mahmood Bin Omar (Anim Bte Abdul Aziz, Intervener) [1998] 5 MLJ 162 juga membincangkan prinsip ini di mana di dalam kes ini pihak mahkamah telah menjelaskan pembelaan non est factum biasanya akan dibangkitkan oleh seorang yang tidak boleh membaca sama ada melalui kebutaan atau buta huruf sebenar berhubung dengan suatu tuntutan berdasarkan janji yang dibuat di bawah meterai. Keterangan yang didedahkan dalam kes ini memusnahkan penegasan defendan bahawa dia adalah buta huruf, yang tidak diberitahu kandungan perjanjian tersebut dan tidak memahami kandungan perjanjian tersebut. Tambahan lagi, tiada sebarang pernyataan atau keterangan fraud dan tiada keterangan bagi menunjukkan bahawa plaintif telah dengan palsunya menggambarkan sifat dan kandungan perjanjian tersebut kepada defendan. Oleh itu, pembelaan *non est factum* ialah gagal. Pihak Mahkamah juga telah menjelaskan kedudukan non est factum dengan merujuk kepada kes Foster v Mackinnon di mana sekiranya seseorang itu menandatangani perjanjian yang terdapat kekhilafan atau mistake tanpa pengetahuannya, seseorang itu tidak akan terikat kepada perjanjian tersebut kerana pengetahuannya tidak selari dengan perjanjian

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tersebut. Elemen dalam kes Foster ini bertentangan dengan apa yang berlaku dalam kes semasa tersebut.

Namun begitu, terdapat juga beberapa kes di mana penggunaan pli non est factum berjaya diterima oleh pihak Mahkamah di Malaysia lebih-lebih lagi sekiranya difokuskan kepada penipuan tanah di Malaysia. Sebagai contoh dalam kes Darshan Singh Hullan & Anor v Rangasamy A/L Kailasam & Anor di mana pihak mahkamah telah menjelaskan bahawa berdasarkan keseluruhan keterangan dalam kes ini, plaintif telah melepaskan beban tersebut. Isu penipuan telah dikaitkan dengan pli non est factum. Berdasarkan keterangan, plaintif, ketika dia menandatangani dokumen-dokumen pajakan, tersalah anggap akan sifat mereka, beranggapan bahawa dokumen-dokumen yang ditandatanganinya dikehendaki bagi maksud perjanjian jual beli tanah seperti yang dimaklumkan kepadanya oleh defendan pertama. Oleh itu, mahkamah bersetuju dengan kesimpulan bahawa plaintif telah berjaya membuktikan pli non est factum.

Manakala kes Goh Jong Cheng v Mb Melwani Pte Ltd , di mana plaintif ialah pemilik harta tanah yang didaftarkan. Defendan telah memberikan kemudahan kredit kepada sebuah syarikat di mana anak plaintif ialah pengarah. Plaintif telah menyerahkan hak milik harta itu kepada anaknya dan kemudian ditemani oleh anaknya ke pejabat peguam di mana dia menandatangani dua set perjanjian gadai janji yang menggadaikan harta itu kepada defendan. Mahkamah telah memutuskan bahawa plaintif berjaya mengaplikasikan pli non est factum kerana plaintif tidak tahu semasa dia menyerahkan surat hak milik kepada anaknya bahawa ia akan digunakan sebagai jaminan untuk kemudahan kredit yang akan diberikan oleh defendan kepada syarikat dan peguam cara mungkin telah menjelaskan sifat umum perbuatan tersebut kepada plaintif, Peguam cara itu tidak menjelaskan perkara sebenar tentang gadai janji kepada plaintif yang hanya berbahasa Hokkien. Maka pli non est factum dibenarkan dalam kes ini.

Selain itu, kes Soo Pooi Kee @ Soo Kam Pooi v. Soo Kwan Pooi [2013] 1 LNS 983 di mana, Plaintif dan juga Defendan merupakan adik-beradik. Pihak Mahkamah menerima pli non est factum yang digunakan oleh Defendan dan memberi perintah bahawa "Trust Deed" yang ditandatangani oleh defendan batal dan void ab initio.

Selain itu, dalam kes Lin Wen-chih & Anor v Mycom Bhd , pihak Mahkamah telah menjelaskan bahawa penggunaan doktrin non est factum ini bukan sahaja boleh diaplikasikan sebagai pembelaan sekiranya seseorang itu tidak tahu intipati kontrak perjanjian yang telah ditandatangani, tetapi doktrin ini juga lebih merujuk kepada sekiranya intipati perjanjian yang dipersetujui merupakan terma jauh berbeza ataupun berlainan dengan apa yang patut ditandatangani bersama, maka pli ini juga boleh digunakan. Prinsip ini seolah mengaplikasikan kriteria sebagaimana dinyatakan dalam kes Gallie lwn Lee.

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KESIMPULAN

Berdasarkan beberapa kes yang telah dibincangkan di atas, menunjukkan bahawa penggunaan doktrin non est factum sebagai pembelaan yang berjaya diterima oleh pihak mahkamah amat sedikit. Lebih-lebih lagi apabila undang-undang di Malaysia memang silent/diam atau tidak disebut di mana Akta. Ini adalah kerana, prinsip ini merupakan pembelaan undang-undang Inggeris dan boleh diaplikasikan dalam kes-kes terpilih sahaja dan ia perlu diaplikasikan secara ketat. Pada masa yang sama penuntut perlu membuktikan bahawa wujudnya elemen fraud semasa proses transaksi itu dibuat. Pli non est factum tidak memerlukan justifikasi khas, hanya sekadar manifestasi bagaimana undang-undang kontrak menyelesaikan pertikaian antara pihak yang bertentangan niat. Selain itu, ia tidak bersifat anomali, kerana hasilnya dapat dilihat sesuai dengan kontrak dan doktrin undang-undang. Cara terbaik untuk memahami perkara berkaitan non est factum adalah melalui syarat ketidakupayaan atau tipu daya seseorang itu.

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DEPARTURE FROM THE CAVEAT LESSEE PRINCIPLE ON THE IMPOSITION OF THE OBLIGATION TO REPAIR TO PROMOTE CERTAINTY IN LANDLORD AND TENANT RELATIONSHIP

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ABSTRACT

The doctrine of caveat lessee was developed in managing the relationship between lessor and lessee to ensure lessees are aware that they are entering the lease on the condition that the premises is as it is. This principle is no longer suitable at present with the development of legal obligations. Furthermore, its meant to regulate agricultural leases not tenancy of residential premises especially imposing the obligation to carry out repairs to the premises on the tenants. In the absence of an express provision in the agreement, the landlord does not have any obligation to keep the leased premise to be in the state of repair. The issue that this paper seeks to discuss is whether this doctrine of caveat lessee is relevant now taking into consideration the development of the law and needs of the parties in the present era. Disputes that often arises between a landlord and tenant is in determining as to who is responsible to carry out repairs to the rented premises since the responsibility to ensure that the premise is in tenantable condition is not specified clearly in the rental agreement. This paper explores the relevancy of the caveat lessee doctrine and its continued application in the residential tenancies. This research adopts doctrinal method where statutes, cases and journal articles are analysed to support the need to departure from the caveat lessee doctrine. The practice in the United States of America and New Zealand is examined to identify the evolution of the application of the doctrine in modern times. The paper concludes on the relevance and appropriateness in the continued application of this doctrine and proposes that the obligation to repair must be statutorily regulated to ensure fairness in landlord and tenant dealings.

Keyword: landlord, tenant, lease, repair, caveat lessee.

INTRODUCTION

Historically, during the Norman's Conquest, every piece of land was regarded as "owner by the king" and tenant was afforded with few protections in the occupation and use of the land. The court often refuse to grant a possessory interest in the land to the tenant hence the tenant will hold the land subject to the "arbitrary will of the giver". Eventually, husbandry lease become popular (Marley, 1981) as wealthy landowners contracted out

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their land to poor farmers and resulted in the agricultural leases not being concerned with the physical structures on the land rather than the value for farming (Lockitski, 1971, p. 711). The impact of industrial revolution in the 19th century has increased demand for housing in the cities including the issue of habitability. The no-repair rule was appropriate and possibly relevant for agriculture leases where the landlord was not present, and the land is physically under the control of the tenant. However, the rules persisted without regard to its appropriateness to the modern times where the residential tenants needed house to live in and not a land to work on, and that the tenants had little knowledge about the existing structure and maintenance of the house (Green, 2015, pp. 411–412). Initially, Erle C.J held that, "there is no law against the letting a tumbledown house" nor is there any implied undertaking by the landlord that he will carry out any repairs relating to a rented house (Robbins v Jones (1861-73) All ER Rep 544 (Court of Common Bench),547).

FITNESS FOR HABITATION

Under common law, a lease is regarded as a conveyance rather than a contract, and it continued to govern the allocation of responsibility between the parties although the rule of caveat emptor has slowly been eroded from being included in contracts such as contracts for sales of goods (Ahmad Masum, Muhammad Hassan Ahmad, S.M.M Nafess, 2018).The caveat emptor principle provides that, in the absence of fraud and an express warranty, a seller will not be responsible towards the fitness of the subject matter of the transaction (Calandriello, 1941, pp. 1046–1048).The purpose is to encourage the seller to be more honest (as the seller has more knowledge of the subject matter) and the buyer to be more diligent and careful (the buyer has the opportunity to do detailed inspection before concluding the contract) (Vlatas, 1994, pp. 661–662).

The general rule for fitness for habitation is based on the concept of "caveat emptor" which literally means "let the buyer beware". The full Latin maxim is "*caveat emptor, qui ignorare non debuit quod jus alienum emit*" which means "let the purchaser, who ought not be ignorant of the amount and the nature of the interest, exercise proper caution". This principle was developed sometime around 1534 and was applied in transactions involving sale and purchase of livestock such as horses. During this time, all transactions were conducted among relatives and friends. For business transactions involving outsiders, is often conducted during festival times in urban areas (Shukri, Ismail, & Markom, 2021, p. 93). The reluctance of the authorities to provide protection to customer resulted in the acceptance of caveat emptor in business dealings and eventually accepted in real property transactions (L.Pierson, 2017, p. 115). In Malaysia, although the registration of land titles confers indefeasibility of title to the registered proprietor, it is conditional and subject to the statutory exceptions. The statutory exceptions to indefeasibility of titles are related to the concept of caveat emptor, where it poses potential risk to purchasers who are not aware of the risk and the application of statutory exceptions (Lee Siok Ching v Eden Realty Sdn Bhd & Ors [2021] MLJU 1020, Para 1).

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CAVEAT LESSEE

In lease transactions, the doctrine of caveat lessee (means let the lessee beware) developed from the Middle Ages were rampant. During this time, the lessees were considered to be self-sufficient and able to carry out repairs on their own. They also had all responsibilities and control of the lease property, and it was considered as a conveyance of sale of land except that the lessee must pay rent. The landlord in return for the rent, is expected to provide quiet enjoyment of the land to the lessee and the tenant has the right to eject the landlord if the claim of trespassing the land could be proven (Jerald Clifford McKinney II, 2013, p. 1052). It also means that the premise is leased on "as is' basis unless the parties decide otherwise. From this doctrine, it also means that the landlord has no obligation to do repairs or to maintain the leased premises in the absent of fraud or other related provisions in the lease agreement.

In *Sleafer v Lambeth Borough Council* the principle laid was that *"it is well established that in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair"*, (Sleafer v Lambeth Borough Council [1959] 3 WLR 485, 496). In *Cavalier v Pope*, the court held that there was no duty against landlord for renting a dangerous or dilapidated, and due to the condition of the house, if tenant or his agent, guest, or customer is injured, the landlord will not be liable. Unless expressively provided in the agreement, a tenant cannot compel his landlord to do repairs to the rented premises. Once it is agreed that the obligation to do repair arises, then the tenant must give notice of the need to repair to the landlord, informing him the repairs needed.

OBLIGATION TO REPAIR

Under common law, there are two situations upon which the landlord can be put under an obligation to repair. The court began to recognise piecemeal compromise on the right of the tenant in certain type of tenancies. The first situation was made by virtue of the principle from the *Smith v Marrable* case, where in a rented furnished dwelling, it was held that there was an implied warranty for fitness and habitat-ability- a promise that the house would be suitable and decently fit for human habitation (Smith v Marrable (1843) 11 M&W, 693-694). The landlords who let a house must be under implied condition that the house is in the state of fit for decent and comfortable living. The tenant is at liberty to quit the tenancy upon the discovery of nuisance effected the house which is so serious that a reasonable man cannot be expected to live in the house (Georgialee Williams, 1988). However, in relation to unfurnished rented premises, there is no warranty on the fitness or suitability from the landlord. The second situation is where an agreement is executed for the construction of a house, in which there is an implication of the law that the house which is constructed must be fit as a dwelling-house (Miller v Cannon Hill Estates, Limited [1931] 2 KB 113 (Divisional Court),120-121).

There are two possible sources which influenced the imposition of fitness and habitability to the furnished dwellings. Firstly, the application of implied warranty originated from the sale of housing dwellings. A warranty was implied in the sale of housing units which were

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still under construction and the sale of house by showing a sample unit (Lockitski, 1971, p. 711). Secondly, it may have arisen from the principle of hiring of chattels (P. Nevodic, 1969, pp. 258–259). Contracts of hiring and letting chattels carried out with the implied warranty that the chattels must be fit for the purpose it was intended. In *Smith v Marrable,* the furniture in the rented house was infested with bugs. By reason of contract of chattels, the contract had been broken and the contract ceased to be enforceable. On this ground, it can be established that in a contract to rent a furnished dwelling, the tenant can end tenancy upon discovery of defect, regardless of whether the defect was found in the furniture or was not in any way connected in the furniture.

Meanwhile, based on this ground, in contracts for unfurnished premises, the tenant was barred from avoiding the lease contract (Hart v Windsor [1843-60] All ER Rep 681 (Court of Exchequer),684). The question lingers on the possible explanation on rationale for allowing the tenant to avoid the lease contract if defects (rendering the dwellings unfit for habitation) is found on furnished dwellings as compared to the defects found on unfurnished dwellings (Reynolds, 1974). Therefore, the position is clear that the tenant must conduct and inspect the property carefully before deciding to rent it. In Malaysia, section 233(b) National Land Code (Act 828) provides that:

> "In the absence of any express provision therein to the contrary, any agreement to keep any building or part of building **in repair** implied in any lease or sub-lease (whether granted before or after the commencement of this Act)-
>
> (b) shall not to be taken to require the building or part in question to be put into a better state of repair that that in which it was at the commencement of the lease or sub-lease."

The word "in repair" in the section has been defined to mean in a state of repair that a prudent owner is expected to do to keep his property in habitable condition. The word repair does not amount to renew, or to replace. The tenant is expected to keep the lease demised in tenantable repair during the period of lease. However, it does not impose an obligation on the tenants to renew or replace the whole of the premises or certain substantial part of the premises such as an entire part of a roof or wall. If the repair works resulted in the leased premises to be renewed hence increasing the value of the property, hence the repair should be done by the landlord (Mok Tai Dan v Kelang Pembena Kereta-Kereta Sdn Bhd [1996] 1 MLJ 586).

BEST PRACTICES

A cursory analysis of the practices in the United States of America and New Zealand relating to the practice of Caveat Lessee and the progress in ensuring landlord and tenants' rights and responsibilities are balanced and equitable.

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United States of America

The approach adopted in the United States of America has seen progressive developments in recognizing the differences between needs of the modern residential leases as against the medieval agricultural leases. In *Pines v Perssion*, the court pointed out that in managing the residential landlord and tenant relationship, there is an implied warranty of fitness and habitability, a promise that the house rented is suitable for human habitation (Pines v. Perssion, 14 Wis. 2d 590 (Wis. 1961). The readiness to depart from the caveat emptor principle is due to the evolution of modern administration practices and legislative prescriptions, which requires property owners to comply with various statutory requirements such as safe place, health regulations and building codes in ensuring the house is safe to live in. Therefore, following the established principle of no implied warranty of fitness and habitability would be inconsistent with the requirement of the current policy concerning planning and housing codes. The court discusses further the rule of letting "tumble-down" house by a landlord, citing it as a contributing factor to juvenile misbehaviour and urban decay.

In *Javins v First National Realty Corporation*, the court in deciding this case elaborated the duty of the court in reappraising deep-rooted doctrines in view of the current value of contemporary life. The application of vital principles of common law depends on "its ability to reflect in contemporary community values and ethics" (Javins v First National Realty Corporation 428 F.2d 1071 (D.C. Cir 1970)

The application of feudal principles of property law may well be suitable in dealing with leases such as farming and commercial lands, but its application should not be extended to modern residential premises. The focal consideration in agrarian leases is the land itself but in dealing with modern residential tenancies, the value of the tenancy is the ability for the tenant to live and take shelter in the house. Indeed, the landlord and tenant relationship resemble a contract between two parties with mutual promises that the tenant will pay the agreed amount of rent in consideration of a package of goods and services consisting of not only walls and ceiling but adequate lighting, ventilation, heat, and secured windows. The abandonment of caveat lessee principle can be seen as positive steps towards harmonising the contemporary rules and principles imposed to promote a sustainable and affordable housing market.

New Zealand

In New Zealand, the demand for state intervention for raising property management standards in tenancy transactions is argued from the perspective of consumerism and public interest. Although the argument forwarded by the landlord concerns the concept of freedom to contract, the proposals are based on the inequal bargaining power of the tenant who are faced with the prospect of homelessness if the tenancy is not created (Barton, 2014). The intervention is also welcomed based on the issue of safety and health of the rented premises thus connotes to the obligation of habitability. The concern is on the condition of the premises which contributed to the respiratory problems especially among

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young, old and vulnerable tenants and to the extreme end, the death of the tenant. The call for government's immediate action is based on the obligation of the State to provide for adequate affordable housing to the citizens and since the burden cannot be completely and sufficiently delivered by the government alone, so it is expected that the government intervention shall be by drafting just policies and law for the benefit of both landlord and tenants.

RECOMMENDATIONS

1. A specific law governing relationship between the landlord and tenant should be introduced. The law should provide clear details of the rights and obligations of the parties especially regarding the obligation to repair, responsibilities of parties in examining the premises prior, during and after the tenancy period, and the mode and period of notices to be given.
2. Parties to tenancy agreement shall be encouraged to have a written tenancy agreement where the rights and obligations of the landlord and tenant will be expressly provided.
3. Condition report or list of inventories shall be prepared and signed by both parties to consent to the conditions prevailing at the time of the commencement of the tenancy agreement. Therefore, in the event of want of repair, the parties can refer to the condition report or list of inventories to apportion the costs, should any disputes arise on the cost. Similarly, both documents are also useful in determining both parties' obligation to repair prior to expiry or termination of lease or tenancy agreement.

CONCLUSION

The application of caveat lessee shall be used appropriately in line with the demand of current residential market. In the absence of specific law governing landlord and tenant relationship, the parties to the agreement must be diligent in concluding a tenancy with a written tenancy agreement for expressly recording their agreement on the rights and obligations of the parties. The tenancy contract shall be viewed from another perspective as payment of rent paid by one party entitles him to live and take shelter in the house in a safe and conducive manner.

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CRIME AND LAW

PROSIDING ADMIRALTI: SATU PENGENALAN

Asmar Abdul Rahim & Nazli Mahdzir

THE CONCEPT OF LEGAL AND MEDICAL INSANITY IN CRIMINAL LAW

Asmar Abdul Rahim, Marina Hj Hashim & Aspalella A. Rahman

THE (OVER)CRIMINALISATION OF POSSESION OF ITEMS ASSOCIATED WITH TERRORISM IN MALAYSIA

Mukhriz Mat Rus

KEGANASAN SEBAGAI 'JENAYAH ISTIMEWA': SATU PENGUNGKAIAN PERSPEKTIF

Mukhriz Mat Rus

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PROSIDING ADMIRALTI: SATU PENGENALAN

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ABSTRAK

Prosiding admiralti melibatkan perbicaraan tuntutan-tuntutan maritim akibat pertikaian yang berlaku dalam sektor komersial perdagangan maritim dan perkapalan. Prosiding ini diperuntukkan di bawah bidang kuasa admiralti. Sebagai sebuah negara maritim, prosiding admiralti di Malaysia diperuntukkan di bawah Aturan 70 Kaedah-Kaedah Mahkamah 2012 (KKM 2012). Dengan menggunakan pendekatan kaedah secara kualitatif, artikel ini mengupas konsep tindakan in rem dan personam di bawah prosiding admiralti selain akta-akta lain yang berkaitan. Rujukan data-data dalam artikel ini terdiri daripada sumber primer dan sekunder. Ternyata tindakan personam dirumuskan hampir sama tindakan prosiding sivil kes-kes biasa. Namun prosiding in rem lebih unik lantaran tindakan ini boleh membawa kepada penahanan kapal bagi tujuan sekuriti atau jaminan kepada kes yang dibicarakan. Mod penahanan kapal ini telah memberi perbezaan yang cukup berbeza di dalam prosiding di mahkamah kerana tindakan ini dilaksanakan terhadap kapal.

Kata kunci: admiralti, in rem, in personam, penahanan kapal, undang-undang

PENGENALAN

Prosiding admiralti sangat unik kerana melibatkan tuntutan-tuntutan sivil maritim yang dibawa ke mahkamah ekoran pertelingkahan atau pertikaian industri perkapalan dan urusan perdagangan komersial maritim. Terdapat dua jenis pilihan mod tindakan prosiding admiralti yang boleh dilaksanakan sama ada menerusi tindakan *in rem* mahupun tindakan *in personam.* Kedua-dua tindakan ini memiliki kelebihan tersendiri. Di Malaysia, prosiding admiralti diperuntukkan di bawah Aturan 70 Kaedah-Kaedah Mahkamah 2012 (KKM). Manakala bidang kuasa admiralti adalah bidang kuasa spesifik Mahkamah Tinggi sebagaimana yang diperuntukkan di bawah seksyen 24(b) Akta Mahkamah Kehakiman 1964. Dengan menggunakan pendekatan kaedah kualitatif, objektif artikel ini akan membincangkan konsep asas tindakan *in rem* dan *in personam* di bawah prosiding admiralti. Analisa data-data dalam perbincangan artikel ini melibatkan sumber daripada data primer dan juga sekunder. Fokus analisa utama melibatkan kaedah-kaedah di bawah Aturan 70 KKM 2012 selain beberapa akta berkaitan turut dianalisis.

BIDANGKUASA ADMIRALTI

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Bidang kuasa admiralti di Malaysia pada hari ini merupakan satu bidang kuasa spesifik yang dikhususkan di bawah bidang kuasa Mahkamah Tinggi. Sumber utama perundangan ini terdiri daripada peruntukan statut serta bidang kuasa semula jadi (*inherent jurisdiction*) mahkamah (Halsbury's of Law of England, 1990). Perkembangan bidang kuasa admiralti pada hari ini di Malaysia adalah merupakan kesan pengaruh daripada penjajahan (Rahim, 2014). Bidang kuasa admiralti di Malaysia telah dipinda sebanyak dua kali iaitu pada tahun 1984 dan 1987. Namun sehingga kini masih merujuk kepada Akta Mahkamah Agung 1981 (UK) (AMA 1981) sebagai sumber utama bidang kuasa admiralti di Malaysia. Peruntukkan seksyen 20 sehingga seksyen 24 AMA 1981 (UK) merupakan sumber perundangan bidang kuasa admiralti Malaysia.

Perkara admiralti adalah di bawah Senarai Persekutuan (Butiran I, (j) Jadual Kesembilan, Senarai Persekutuan, Perlembagaan Persekutuan Malaysia). Parlimen mempunyai kuasa penuh di bawah Perkara 74(1) Perlembagaan Persekutuan Malaysia untuk menggubal apa-apa peruntukan perundangan dalam konteks admiralti. Bagi bidang kuasa admiralti di Malaysia, perkara ini tertakluk di bawah bidang kuasa spesifik Mahkamah Tinggi sebagaimana yang diperuntukkan oleh Seksyen 24(b) AMK 1964 seperti berikut:

> 'Tanpa menjejaskan keluasan Seksyen 23, bidang kuasa sivil Mahkamah Tinggi hendaklah termasuk —
>
> (b) bidang kuasa dan kuasa yang sama berhubung dengan perkara admiralti seperti yang dipunyai oleh Mahkamah Tinggi Keadilan di England di bawah Akta Mahkamah Agung 1981 bagi United Kingdom;

KAEDAH-KAEDAH MAHKAMAH 2012

KKM 2012 merupakan satu set kaedah-kaedah baru mahkamah yang diperkenalkan dan berkuat kuasa pada bulan Ogos 2012 yang lalu. Pengenalan kaedah ini telah membawa kepada pemansuhan sepenuhnya KKMT 1980. Umumnya KKM 2012 ini merupakan gabungan peruntukan kaedah antara kaedah Kaedah-kaedah Mahkamah Rendah 1980 (KKMR 1980) dan KKMT 1980. Meskipun KKMT 1980 telah dimansuhkan. namun prosedur admiralti masih dikekalkan di bawah aturan yg sama iaitu Aturan 70 KKM 2012 (Rahim, 2014). Aturan ini memiliki sebanyak 43 kaedah yang merangkumi prosedur bagi tujuan tindakan *in rem* dan tindakan *in personam.*

TINDAKAN *IN REM*

Tindakan *in rem* merujuk kepada tindakan terhadap harta dalam bidang kuasa (Report of the Special Law Reform Committee on Admiralty Jurisdiction, 2010) atau dirujuk sebagai '*a real action in which the plaintif claims that as against the world, the thing or res in dispute is his'* (Malaysian Court Practice, 2011). Tindakan *in rem* menjadi tindakan yang paling penting dalam peruntukan bidang kuasa admiralti. Menerusi tindakan ini, prosiding akan dilaksanakan terhadap kapal, freight, kargo *(The Victor* (1860) Lush 72; *The Ocean Jade* [1991] 2 MLJ 285) atau lain-lain harta seperti bekas bahan api (*bunker*), muatan

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(*freight*) seperti dinyatakan dalam kes *The Castlegate [1893] AC 38* & *The Kaleten (1914)* 30 TLR 572; atau kapal terbang (*aircraft*) dalam konteks peruntukan Seksyen (20)(2)(j), (k) dan (l) Akta Mahkamah Agung 1981 (UK); rujuk dalam kes *Re Kota Pahlawan* [1982] 1 MLJ 13).

Tindakan ini dilaksanakan terhadap *res* iaitu merujuk kepada kapal seperti mana yang diputuskan dalam kes *The City of Mecca* (1879) 5 PD 28, hlm 33 dan kes *The Burns* [1907]. Hanya tuntutan sivil maritim yang dikemukakan dengan tindakan ini boleh membawa kepada tindakan penahanan kapal (Rahim, 2014). Umumnya, pihak plaintif dalam tindakan *in rem* mempunyai kedudukan yang lebih kukuh untuk mendapatkan kehendak penghakiman berbanding pihak plaintif dalam tindakan *in personam* (Kaedah 2, Aturan 70 KKM 2012).

Tujuan Tindakan *in rem*

Tujuan utama tindakan *in rem* ialah untuk mendapatkan jaminan. Menerusi tindakan ini pihak plaintif berhak untuk menahan kapal dan kemudiannya kapal diletakkan di bawah jagaan mahkamah. Kegagalan pemilik kapal memenuhi tuntutan sekuriti yang diperlukan akan memberi peluang kepada pihak plaintif untuk memohon kepada mahkamah agar kapal dinilai dan selanjutnya dijual. Penetapan senarai keutamaan kemudiannya ditetapkan. Dalam kes *Re Aro Co. Ltd* (1980) 1 Ch. 196 umpamanya, mahkamah telah membuat perumpamaan bahawa tindakan ini adalah sebagai kaedah untuk memastikan tuntutan hutang dapat dipenuhi sebagaimana peranan gadaian dan caj dalam perundangan menerusi petikan berikut:-

> '...the rights of a plaintiff suing in rem have points of similarity with the rights of a legal or equitable mortgagee or chargee, such persons are also entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit, and if the account is in their favour to have it sold in order to satisfy the debt...'

Keunikan pada tindakan *in rem*

Tindakan *in rem* memiliki ciri-ciri keunikan seperti berikut;

(i) dilaksanakan menerusi writ dengan menggunakan borang khas iaitu Borang 146 sebagaimana di Kaedah 2, Aturan 70 KKM 2012;
(ii) nama plaintif tidak dinamakan dengan penuh dalam writ tetapi memadai dengan dinyatakan sebagai 'Pemunya Kapal 'XYZ' atau Sebagaimana Yang Berkenaan';
(iii) writ *in rem* perlu disampaikan kepada kapal (Kaedah 7(2)(3), Aturan 70 KKM 2012);
(iv) tindakan-tindakan seperti penghakiman ingkar (disebabkan kegagalan memasukkan kehadiran), pembelaan, pembelaan terhadap tuntutan balas atau pemfailan '*preliminary act'* perlu dilaksanakan menerusi usul pemula (*motion);* dan

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(v) writ *in rem* tidak boleh diserahkan terhadap kapal yang masih berada di luar daripada bidang kuasa mahkamah. Namun pengeluaran notis mengenai writ *in rem* dibenarkan meskipun kapal masih berada di luar bidang kuasa mahkamah.

Kelebihan tindakan *in rem*

Sekiranya tuntutan sivil maritim dimulakan dengan tindakan *in rem,* secara automatik tuntutan adalah lebih terjamin sebelum penghakiman diputuskan. Malah tindakan ini merupakan alternatif terbaik memandangkan tidak akan timbul masalah untuk mengenal pasti aset pemilik kapal selain daripada kapal. Selain itu juga, mod ini sangat berguna khususnya dalam perihalan status kapal yang dijual oleh mahkamah menerusi kaedah ini. Status kapal yang dijual melalui proses mahkamah bebas daripada segala bebanan dan lien (Rahim, 2014).

PELAKSANAAN PENAHANAN KAPAL

Pemfailan writ menerusi tindakan *in rem* boleh membawa kepada waran penahanan kapal jika diperlukan. Perkara ini telah diperuntukkan menerusi Fasal 4 Konvensyen Penahanan Kapal 1952 yang memperuntukkan pihak-pihak yang mempunyai kuasa untuk menahan sebuah kapal bagi tuntutan sivil maritim. Berdasarkan kepada peruntukan tersebut pegawai mahkamah atau mana-mana pihak berkuasa yang berkenaan.

Kaedah tindakan penahanan kapal menerusi proses mahkamah pada asasnya boleh dilakukan sama ada sebelum penghakiman atau selepas penghakiman diperoleh.

Penahanan kapal sebelum penghakiman

Penahanan kapal sebelum penghakiman dilaksanakan bagi tujuan mendapatkan sekuriti. Setelah writ *in rem* difailkan, permohonan waran penahanan kapal boleh dipohon di mahkamah. Permohonan waran penahanan kapal boleh difailkan secara serentak Bersama-sama dengan writ *in rem*. Kapal yang akan ditahan kelak menjadi sekuriti atau jaminan terhadap tuntutan kes di mahkamah.

Penahanan kapal selepas penghakiman

Bagi tujuan penahanan kapal selepas penghakiman penuh bagi tuntutan *in rem,* tindakan ini telah diterima pakai di United Kingdom menerusi peruntukannya iaitu Bahagian 65.5(1) Civil Procedure Code 1998. Peruntukan ini telah menyemak keputusan dalam kes *The Alletta* [1974] 1 Llyod's Rep. 40 dan kemudiannya diterimapakai dalam kes *Daien Maru* (No.180 [1986] 1 Llyod's Rep 387*.* Bagi tujuan ini, pelaksanaannya dilakukan dengan menggunakan writ *fi fa.*

Prosedur penahanan kapal di bawah Aturan 70 KKM 2012 boleh dibahagikan kepada tiga peringkat iaitu prosedur sebelum kapal ditahan, prosedur ketika kapal ditahan dan

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prosedur selepas penahanan kapal. Sebelum penahanan kapal dilakukan, dokumen utama writ *in rem,* semakan terhadap kaveat dan waran penahanan diperlukan. Manakala prosedur ketika penahanan kapal melibatkan tindakan dan tanggungjawab pegawai pelaksana sepanjang kapal berada di bawah tahanan mahkamah. Prosedur selepas penahanan pula melibatkan perihalan pelepasan dan penjualan kapal oleh mahkamah.

Kesan daripada penahanan kapal dalam bagi tuntutan sivil maritim boleh mengakibatkan:

(i) Kapal secara automatik diletakkan di bawah pengawasan dan penjagaan pihak mahkamah. Oleh itu segala perubahan pergerakan kapal perlu mendapatkan keizinan daripada pihak mahkamah terlebih dahulu;
(ii) Kapal dihalang daripada meneruskan pelayarannya;
(iii) Status kapal sebagai jaminan setelah ditahan oleh mahkamah tidak akan berubah meskipun berlaku kebankrapan di pihak pemiliknya selepas penahanan dilaksanakan (Messom, 2003).

Perkara ini kemudian telah ditegaskan oleh Hakim Fry dalam kes *The Cella* (1888) 13 P.D. 82, hlm 88 iaitu:-

> '...the arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment...'.

Hakim Lopes senada dengan pandangan yang diutarakan oleh Hakim Fry dalam kes *The Cella* (1888) 13 P.D seperti berikut :-

> '...that from the moment of the arrest, the ship is held by the court to abide the result in the action, and the rights of the parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently...';

(iv) Penahanan kapal secara tidak langsung akan mengukuhkan merit bidang kuasa yang diperlukan sebagaimana yang diputuskan dalam kes *The Anna H* (1995) 1 Lloyd's Rep 11 (C. A) bagi membolehkan tuntutan pihak yang menuntut dipenuhi. Soal merit juga penting bagi membolehkan pindahan kes kepada mahkamah berkenaan dilakukan (jika perlu);
(v) Di bawah tahanan mahkamah, kapal menjadi jaminan utama kepada tuntutan yang diperlukan. Tertakluk kepada penjelasan pembayaran tuntutan, kapal boleh dijual manakala hasilnya menjadi jaminan kepada tuntutan yang dituntut; dan
(vi) Penahanan kapal juga boleh menghentikan had batasan masa bagi maritim lien (Fasal 9(1) Convention on Liens and Mortgages, 1993)

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TINDAKAN IN PERSONAM

Tindakan *in personam* di bawah prosiding admiralti hampir sama tindakan lazim tuntutan civil dalam tort atau kontrak di Mahkamah Tinggi (Zakaria & Sri Ram, 2015; Rahim, 2014). Mod ini adalah satu metod pelaksanaan yang memaksa pihak defendan untuk tampil ke muka pengadilan bagi menjawab kepada tuntutan yang dipohon oleh plaintif. Tindakan *in personam* melibatkan tindakan inter *parties*, servis penyampaian secara kendiri yang akhirnya akan membawa kepada penghakiman terhadap defendan. Dalam konteks admiralti, pelaksanaan tindakan *in personam* ini tertakluk kepada peruntukan dan skop senarai tuntutan maritim sahaja di bawah Aturan 70 KKM 2012 (Zakaria & Sri Ram, 2015).

Dalam prosiding tindakan *in personam,* lazimnya tuntutan yang dibawa ke mahkamah adalah merangkumi kerugian atau kecederaan ekoran pelanggaran kapal (Zakaria & Sri Ram, 2015). Tindakkan *in personam* perlu difailkan di mahkamah secara berasingan dengan writ *in rem. Hybrid* writ tidak dibenarkan bagi tujuan prosiding admiralti (Rahim, 2014). Dalam kes *The Rena* (1979) Q. B. 377, Brandon J. menyatakan tindakan *in rem* dan *in personam* boleh difailkan secara serentak kerana kedua-dua tindakan ini mempunyai fungsi dan ciri yang berbeza:-

> "An action in rem may be filed alongside an action in personam. For so long and to the extent that a judgment in personam remains unsatisfied, it is open to the claimant to bring an alternative action in rem, and the reason for this is because an action in rem is of a different character altogether from a cause of action in personam."

Berbanding tindakan *in rem,* tindakan *in personam* dalam konteks admiralti mempunyai kelemahan. Adakala berlaku kesukaran untuk mendapatkan keizinan bagi melaksanakan penyampaian writ kepada pihak defendan yang berada di luar bidang kuasa. Malah tindakan ini juga tidak memperuntukkan perihalan sekuriti yang boleh menjamin tuntutan yang diperlukan. Risikonya sangat tinggi khususnya ketika pelaksanaan penghakiman kelak kerana ia bergantung kepada kemampuan dan nilai aset sedia ada pemilik kapal (Rahim, 2014). Okali (2010) dalam kajiannya berpandangan bahawa tindakan *in personam* ditujukan terus kepada defendan secara peribadi dan memerlukannya untuk bertindak. Kegagalannya untuk bertindak sewajarnya akan mengakibat penghakiman terhadapnya akan diputuskan oleh pihak mahkamah.

KESIMPULAN

Kedudukan perkara admiralti di Malaysia adalah tertakluk di bawah bidang kuasa dan kuasa Parlimen sebagaimana yang diperuntukkan oleh Perlembagaan Persekutuan Malaysia. Manakala bidang kuasa dan kuasa admiralti pula adalah di bawah bidang kuasa Mahkamah Tinggi. Namun begitu sumber bidang kuasa dan kuasa admiralti di Mahkamah Tinggi Malaysia masih bergantung kepada AMA 1981 (UK). Butiran prosiding admiralti telah diperuntukkan dalam Aturan 70 KKM 2012. Aturan 70 KKM 2012 merupakan Aturan 70 KKMT 1980 terdahulu yang masih dikekalkan selepas KKMT 1980 dimansuhkan. Walau

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bagaimana Aturan 70 KKM 2012 telah dikemas kini dan beberapa pindaan telah dilakukan bagi memastikan agar prosedur penahanan kapal di Malaysia sentiasa segar.

PENGHARGAAN

Kajian ini adalah tajaan di bawah Geran Penjanaan oleh Universiti Utara Malaysia. Kajian Terhadap Pelaksanaan Penahanan Kapal Di Selat Melaka Dalam Konteks Tuntutan Sivil Maritim (Kod SO 13493).

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THE CONCEPT OF LEGAL AND MEDICAL INSANITY IN CRIMINAL LAW

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ABSTRACT

Insanity is a popular defense in criminal cases which has been in existence since many centuries-based on a legendary precedent of Mc Naughten rule. The legal insanity applies to the fundamental principle of an 'act of a person of unsound mind' by excusing those mentally disordered offenders on the rational understanding of their conduct at the time of the crime committed. The was a serious debate among medical, psychology and law professionals on this applicable principle since any person who is mentally ill is not ipso facto exempted from criminal responsibility. In criminal proceeding the court is concerned with legal insanity, and not with medical insanity. By employing qualitative approach and analysing content from the primary and secondary data, this paper is seeking to make the clarification on the distinction between legal insanity and medical insanity. The main section of 84 of the Malaysian Penal Code and decided cases are the main focus of this paper. It is found has been discovered that the term "insanity" itself has no precise definition, carries different meaning in different contexts and describes varying degrees of mental disorders. The application of the insanity in the section 84 of the Penal Code also covers any person, who is suffering from any kind of mental illness is called medical insanity.

Keywords: legal insanity, medical insanity, law, crime

INTRODUCTION

The defense of insanity has become the centrepiece in criminal law. It is a device to sort those defendants who should be treated by the criminal justice system from those who should be treated by the mental health system. The presence of mental disorder at the time of offense is crucial to the successful use of defense of insanity in criminal case. When

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a person with a physical or mental incapacity commits a criminal offence, his criminal liability comes into a question. If persons are found insane, they should not be criminally liable (Herman, 1985. Punishing a person who is not responsible for the crime, becomes a violation of the basic human rights and the principle of natural justice.

Hundreds of years have passed since the legal insanity defence was first proposed. Beginning in the twelfth century, European courts began looking for a concept of insanity in order to absolve defendants of criminal culpability (Hallevy, G. 2015). The first insanity defence, dubbed "the good and evil" test, was introduced into English common law in 1313. The "good and evil" test embraced the idea that mentally ill persons could not commit sins because they were unable to distinguish between good and evil (similar to infants) (Hallevy, G. 2015). Furthermore, the mentally ill did not require legal punishment because their lunacy was not criminal. 'Insane' refers as people who were criminally incapable of being held responsible will be acquitted when their symptoms were considered sufficiently severe at the time offence is committed. The people who were considered insane were acquitted will be transferred to long-term confinements in mental hospitals for further treatment.

The legal insanity and medical insanity are very different in theory and practice as understood by courts, attorneys, psychiatrists and psychologists (Rosenqvist, 2019). However, these two concepts are complementing each other particularly in criminal law. The report from psychiatrists and psychologists plays important evidence to direct the decision of the court.

Thus, this is paper is seeks to shed light on these two concepts in the context view of criminal law. The research also aims to clarify the distinction between legal insanity and medical insanity by using a qualitative approach and analysing content from primary and secondary data. Apart from that the paper also highlighted the main section of 84 of the Malaysia Penal Code and decided cases.

LEGAL INSANITY

Insanity is a common law defence in English law. According to English Law, if the accused individual wants to make use of insanity or unsoundness of mind as a defence, he must be insane at the time of doing or committing the crime. The accused must have been insane at the time of the criminal act or while committing the crime. This is a crucial test for legal insanity rather than medical insanity. The fact that he was admitted to a mental institution before committing the crime is not conclusive to verify his insanity in the eyes of the law (Rahim, 2011). Criminal insanity is understood legally as a range of medical conditions that refer to the situation very ill persons. The fact that the defendant was criminally insane at the time of the crime is the reason for acquittal and there is no need to prove that the crime was a result of the condition. This constitutes the 'medical principle' according to Norwegian legal tradition. The medical principle is unlike the 'psychological principle' that most countries apply, which requires a causal connection between the medical condition and the crime.

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The basic principle in criminal law is for any person to be responsible for the crimes that has committed, the person must be sane and possesses a sufficient degree of reason. If the wrongdoer lacks rational capacity, he or she may be excused from the conviction under the criminal law (Rahim, 2011). The assumption of rational capacity serves as a "precondition to punishment," as well as a "standard and criterion" for assessing eligibility for and immunity from punishment. In most criminal jurisdictions, insanity is one of the defences that exempts a person from any criminal liability. This excuse-based criminal defence focuses on the defendant and claims that he or she should be absolved from criminal culpability for their actions under the circumstances (Maidman, 2016).

The legal insanity defence is founded on the idea that people with specific mental illnesses or defects cannot be held responsible for their acts. Indeed, the general concept is that a defendant's mental or cognitive impairment should prevent him from being held accountable for his acts (Maidman, 2016). Terms such as "insanity" and "unsoundness of mind" are two legal concepts which used frequently and become the centrepiece in the criminal proceeding court of law. For example, a research literature review conducted by Adjorlolo et al. (2019) on defense of insanity from year 2004 to 2019 revealed a range of mental disorders are include schizophrenia, psychosis, major depression, bipolar disorder, substance abuse disorder, personality disorders (e.g., antisocial personality disorders, borderline personality disorders), and mental retardation. Other than that, the 'unconscious' at the time of the crime also included people who suffered from epilepsy, contusion, some intoxications, heavy fever and in some cases and hysteria (Rosenqvist, 2019).

Mental illness is one of the common conditions that can impair the formation of intent. As a result, many jurisdictions, especially common law jurisdictions have enacted a special legislation referred to as the insanity defense (Adjorlolo et al., 2019). This defense is intended to acquit offenders whose crimes were linked to mental illness (i.e., not guilty by reason of insanity. The defense takes the decision out of the hands of the judge or jury in some countries, as another representative of the community to express the view that particular mentally impaired defendants are not blameworthy. The previous criminal record, mental health history, substance use, family and peer relationships, employment and education, physical health (including medication) and prior (mental health) care or treatment are the mitigation factors for this defence.

DEFENCE OF INSANITY - MC NAUGHTEN' s RULE

The Mc Naughten Rules serve as the foundation for the definition of insanity. These regulations have nothing to do with medical definitions of insanity, however they do resemble the criminal term (Mc Naughten, 1843). Under this rule the defendant must be labouring under "a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing or if he did know, that he did not know what he was doing was wrong". In Mc Naughten's case ([1843]), Daniel McNaughten was charged with the murder of Edward Drummond, the private secretary of Sir Robert Peel for the third Prime Minister of England. Mc Naughten was suffering from delusions of prosecution that

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Sir Robert had injured him. He had intended to kill Sir Robert but shot and killed Drummond, mistaking him for the former. He was acquitted on a defence of insanity. Ultimately, the court found Mc Naugthen not guilty by reason of insanity. It was due to the disease of mind leading to the insanity. This occurred after expert witnesses testified that the defendant was psychotic.

The principles relating to insanity in Mc'Naughten are as follows: -

1. Everyone is presumed sane and to possess a sufficient degree of reason to be responsible for their crimes until the contrary is proved.
2. To establish the defence of insanity it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as
   (a) not to know the nature and quality of the act he was doing; or
   (b) if he did know it, that he did not know what he was doing was wrong (Morse & Hoffman, 2007).

The crucial point of time for determining the state of mind (mens rea) of the accused is the time when the offense was committed. The person suffering from mental illness is one of the facts for elements of this defence. Beside that motive of the crime, the previous history as to mental condition of the accused, the state of his mind at the time of the offense, and the events immediately after the incident that throw a light on the state of his mind will take into consideration by the court (Math, Kumar, & Moirangthem, 2015). Most legal insanity standards include the presence of a mental illness that causes significant deficits in the ability to understand the illegal nature of one's act and be aware of the consequences (Van Es, et. al, 2020).

MEDICAL INSANITY

The concept of legal insanity differs from medical. Insanity refers to a disorder of the mind of such degrees as to interfere with a person's ability to be legally responsible for his or her action (Medical Dictionary, 2012). Not every form of insanity or madness which is recognised by law is sufficient evidence to excuse. There are numerous conditions that are recognized as mental illnesses. The term is little used in medicine but might equate to Psychosis. Psychosis is a symptom or feature of mental illness typically characterized by radical changes in personality, impaired functioning, and a distorted or non-existent sense of objective reality (Medical Dictionary, 2012). Mental disorders include depression, bipolar disorder, schizophrenia and other psychoses, dementia, and developmental disorders including autism (WHO, 2019).

In Malaysia no specific definition on medical insanity. According to section 2 of the Mental Health Act 2001 "mental disorder" is defined as any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and "mentally disordered" shall be construed accordingly. Further section 2(2) of the Act the definition of "mental disorder" in subsection (1) shall be

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construed as implying that a person may be dealt with under this Act as suffering from mental disorder by reason only of his promiscuity or other immoral conduct, sexual deviancy, consumption of alcohol or drug, or where he expresses or refuses or fails to express a particular political or religious opinion or belief, or of his antisocial personality. In section 2 (3) Subsection (2) further provided that the mental disorder does not prevent the serious physiological, biochemical or psychological effects, temporary or permanent, of drug or alcohol consumption from being regarded as an indication that a person is mentally ill (Mental Health Act 2001). The Persons with Disabilities Act 2008 defines people with disabilities "those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society" (section 2 Persons with Disabilities Act 2008).

According to Mohd Alias (2015), an accused who have a mental illness or disability are not necessarily rendered unfit to stand trial if they have sufficient comprehension of the nature of the proceedings. The accused who have a mental illness or disability are not necessarily rendered unfit to stand trial if they have sufficient comprehension of the nature of the proceedings (R v. Daniel [2007] NZCA 15). Any person, who is suffering from any kind of mental illness is called "medical insanity". While "legal insanity" means, person who is suffering from mental illness should also have a loss of reasoning power. According to Math, Kumar & Moirangthem (2015) the term legal insanity also refers to the "mental state" of a person at the time of committing crime and nothing else. This is purely a legal concept and is unrelated to the various psychiatric diagnoses. In India for example, mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 Penal Code (Math, Kumar & Moirangthem (2015).

When the offender meets the criteria of insanity and the sufficient clinical information has been produced, the court can take these into considerations when rendering a verdict (Rosenqvist, 2019). In the medical discipline, the patient's mental status on a continuum that ranges from extremely ill to completely healthy. The role of psychiatrist concerns with medical treatment of individual patients while the courts are concerned with the protection of the society from the possible dangerousness from these patients.

LEGAL INSANITY UNDER THE MALAYSIAN PENAL CODE

Legal insanity is a complete and positive defence against crime. Legal insanity is a matter of law and morality, not of medicine, psychiatry, or psychology. Even if it played a causative part in explaining the defendant's behaviour, a mental ailment, no matter how serious, is not an excusing condition. The insanity defence has a moral foundation in that mental illness can impair a defendant's ability to act sensibly or control his behaviour. These are the truly excusable conditions that the other legal insanity criteria address. Excuse is only justified in circumstances where the impairment is severe enough, in which this is a moral and legal concern (Morse, 2011).

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Section 84 of the Penal Code allows for insanity as a defence in Malaysian law (Act 574). This provision, however, does not utilise the term "insanity." In the Penal Code, the word "unsoundness of mind" is employed. According to Section 84: -

> "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The essential ingredients under Section 84 Penal Code (Rahim, 2011) are: -

i. the accused person to be insane at the time of doing or committing the offence, if he wants to plead insanity or unsoundness of mind as a defence.
ii. A person must have suffered a defect of reason from disease of the mind at the time of committing the crime (M'Naghten Rules).
iii. to establish that he did not know the nature and quality of his act, or he did not know that the act is wrong.
iv. The accused in order to establish this defence must go on to show that he did not know the nature and quality of his act; and
v. However, if the accused at the above stage is still aware of the physical nature or quality of his act, he may have to satisfy the next element to plead insanity or unsoundness of mind.

DISCUSSION

When mental illness is claimed for an offense, the court relies on evaluation reports produced by forensic psychiatrists and/forensic psychologists in assisting the court to determine whether a defendant actually labours under the defect of mental illness at the time of committing the crime (Egbenya & Adjorlolo, 2021). Insanity for the purpose of criminal responsibility may not be explained by neuroscientific assessments (Egbenya & Adjorlolo, 2021).

The lack of a widely accepted and authoritative definition of mental sickness is not an unintended historical embarrassment, but rather a reflection of the reality that there are no fundamental grounds in medical doctrine for supporting such a description. The failure of courts to distinguish between the grounds for introducing the phrase, the definition itself, the grounds for adopting criteria, the formulation of the criteria, and the authority for adopting a certain definition or certain criteria has jumbled the treatment of the problem of mental disease in criminal law (Fingarette,1966).

For example, in Carter v. United States (252 F.2d 608 (D.C. Cir. 1957), the appellant's first-degree murder conviction was overturned, and the case was remanded for a fresh trial. The court found multiple flaws in the trial court's proceedings and merely mentioned the insanity test in the second trial for direction. The court stated: -

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> "Mental "disease" means mental illness. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science.... The problems of the law in these cases are whether a person who has committed a specific criminal act-murder, assault, arson, or what not-was suffering from a mental disease, that is, from a medically recognized illness of the mind ..."

The law using the word "mental sickness" as a central term but gives no indication of what it means other than that it is a medical term, therefore many psychiatrists who want to cooperate appropriately with the law have used it felt obliged to decide what mental illness meant (Fingarette,1966). Even if doctors agree on the theoretical nature of mental disease, they may disagree on the type or existence of the illness in a single person. In general, psychiatry and psychology strive to diagnose, assist, and cure; nevertheless, these findings are difficult to translate into legal conclusions concerning responsibility. When it comes to diagnosing defendants, mental health specialists frequently disagree (Maidman, 2016).

The court relies on evaluation reports produced by forensic psychiatrists and/forensic psychologists in the adjudication process. In practice a standard evaluation procedure of all patients who plead defence of insanity is absolutely necessary. Psychiatrists are often called for conducting mental health evaluations and treatment (Math, Kumar & Moirangthem, 2015). Thus, it is the duty of the psychiatrist to ease the court, clarify psychiatric issues, provide honest and objective opinions based on factual data and sound reasoning. According to Math, Kumar & Moirangthem (2015) the courts may also request for various certifications as evidence includes:

1. Certifying the presence or absence of psychiatric illness if the defendant claims for an insanity plea (defendant's mental status when the alleged offense took place).
2. Assessment of fitness to stand trial in cases where mental illness incapacitates cognitive, emotional and behavioural faculties of an individual causing serious impact on the ability to defend the case (defendant's present mental status and his competence during adjudication).

The concept of disease of the mind was explained in the leading case of Sullivan [1983] 2 All ER 673. According to the House of Lords in that case: -

> " ..... 'mind' in the M'Naghten Rules is used in the ordinary "sense of the mental faculties of reason, memory and understanding. If the effect of the disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act."

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Based on the preceding decision, it is clear that the law is concerned with the mind rather than the brain. What matters is that the mental abilities are disrupted in some way, impacting the mind's functioning (Rahim, 2011). The Court of Appeal in the case of Quick [1973] also highlighted that the core concept of a mental ailment is a malfunctioning of the mind induced by the disease. It establishes a limit to the defamation of mental disease by stating that a malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol, and hypnotic influences cannot fairly be called a disease.

Many illegal behaviours appear to be the outcome of erroneous thinking processes. The criminal justice system is still trying to figure out how to state the difference between offenders whose mental illness is so severe that society should not hold them morally responsible for their conduct and offenders whose actions, while objectively unreasonable, ought to be punished (Fingarett, 1966). According Egbenya & Adjorlolo (2021) the M'Naghten Rules explicitly emphasize know the nature, quality and the wrongness of an act.

The application of section 84 of the Penal Code can been illustrated in the case of PP v Shalima Bi [2016] 2 CLJ 231(COA) where the court held that: -

> "Where medical insanity has been established, the defence of insanity under s. 84 of the Code is only available where, at the time the accused committed the act, he:
>
> (a) did not know the nature of his act; or
>
> (b) did not know that what he was doing was wrong; or
>
> (c) did not know that what he was doing was contrary to law."

Further in the case of John a/l Nyambei v. PP [2007] 7 MLJ 206 (COA) "...criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test....". The accused person must be insane at the time of doing the criminal act or during the commission of the offence. This is a very significant test for legal insanity, as opposed to medical insanity. This his has been affirmed in the case of PP v. Muhamad Suhaimi Abdul Aziz [2004] 1 CLJ 378(COA) that "...It is settled law that the defence of insanity under s. 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time...".

The discharge burden of proof of insanity or unsoundness of mind under section 84 of the Penal Code required two-tier test (i) medical insanity and (ii) legal insanity on balance of probabilities (Public Prosecutor v Jegathesan A/L Krishnan [2019] MLJU 119). The medical evaluation report by a psychiatrist has to confirm that the accused person was suffering

from some kind of psychiatric condition which affecting his cognitive faculties at the material time. But to be legally insane, the psychiatrist has shown that the accused to have lost his cognitive faculties to a degree such and he is incapable of knowing the nature of his act, or that what he is doing is wrong or contrary to law (PP v Jufri Bin Nanti [2016] 1 LNS 53(COA).

From the above, we can understand that in order to plead insanity as a defence, the accused must prove on the balance of probabilities that he was suffering from a defect of reason arising from a mental disease, as a result of which he either did not know the nature and quality of the act or did not realize that his actions were wrong (Heaton, 1996).

CONCLUSION

The defence of insanity requires effective combination between legal structures and the current medical knowledge for interest of an individual and society. The responsibility of physicians is to support the basis of current legal status. The law, on the other hand, makes it clear that the accused's understanding at the time of the crime must be tested. Even though Section 84 of the Penal Code 84 lays down the legal test of responsibility in cases of alleged crime done by a person with mental illness but there is no definition of "unsoundness of mind" in the Code. However, the courts have treated this expression as equivalent to insanity. According to the law, every person who is mentally ill is not ipso facto exempted from criminal responsibility.

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THE (OVER)CRIMINALISATION OF POSSESSION OF ITEMS ASSOCIATED WITH TERRORISM IN MALAYSIA

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ABSTRACT

The criminalisation of individual conduct occurs mainly due to the current need of society and reflects existing norms and standards. Behaviour is often criminalised based on its harmfulness and wrongfulness based on society's normative values and social experiences. The criminalisation may also be generated by global events and demands, which impel governments to legislate new laws. In the domain of counterterrorism, the 9/11 attacks amplified the call for states worldwide to criminalise terrorism-related acts. The implications can be seen from a significant number of resolutions issued or endorsed by the United Nations and other international organisations. As a response to the global appeal, the criminalisation process in Malaysia was formalised through the introduction of new laws and series of amendments made to the existing legislation, which incorporated terrorism-related offences into the Penal Code. One of the offences is the possession of items associated with terrorist acts or terrorist organisations, which was frequently utilised by the authorities as a preventive tool against terrorism. Due to the peculiar nature of the offence, as compared to ordinary crimes, the overcriminalisation concern arises. Accordingly, this paper discusses the criminalisation of the precursor offence and examines its traits that substantiate the overcriminalisation claim.

Keywords: terrorism, criminal law, criminalisation, terrorism offence, Penal Code

INTRODUCTION

In 2003, the Malaysian government tabled a bill to create a new chapter in the Penal Code 1936, namely Chapter VIA: Offences Relating to Terrorism. According to the minister who tabled the Bill, the new provisions are prerequisites for Malaysia to be a party to the International Convention for the Suppression of the Financing of Terrorism 1999 and the International Convention against the Taking of Hostages 1979. It was also contended that the proposed provisions embody obligations imposed on Malaysia by virtue of the United Nations Security Council Resolution no.1373 2001. The said Resolution, passed following the 9/11 attacks in the United States, encompasses multiple responses against terrorism and imposes international obligations on each member state to act. The resolution urges UN member states to take measures to prevent, criminalise and suppress all acts of terrorism within their jurisdiction.

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Chapter VIA was passed by the Parliament and came into force in 2007. Among the newly added offences are committing terrorist acts, supporting terrorist groups, promoting terrorism activities, and concealing information related to terrorist acts. The Chapter also provides definitions of 'terrorist', 'terrorist group' and 'terrorist act'. However, the prosecution of terrorism offences was not centre stage at that time, as the Internal Security Act (ISA) 1960 was still in force. The criminalisation process was still curtailed, at least until 2012, when the ISA 1960 was repealed and replaced by the Security Offences (Special Measures) Act 2012 (Whiting, 2014). During the ISA era, the executive-based measures, especially detention without trial, were more preferred by the authorities in countering terrorism than the prosecution of terrorist suspects in court (Human Rights Watch, 2005). The earliest reported prosecution involving a terrorism-related offence under Chapter IVA is Public Prosecutor v Yazid Sufaat & Others (2014). The accused persons were charged with promoting acts of terrorism. Additionally, more terrorism-related offences were incorporated into Chapter IVA in 2012 and 2015, including 'travelling to, through or from Malaysia for the commission of terrorist acts in a foreign country' and possession of items associated with terrorist groups or terrorist acts, which is the subject matter of this article. In this paper, I will discuss the criminalisation of possession of items associated with terrorism by focusing on how the overcriminalisation concern raises and can be possibly mitigated. This doctrinal legal study is conducted by analysing the law, judgments and Hansards, along with secondary sources, including academic works and civil society reports.

THE PREVENTIVE TOOL AGAINST TERRORISM

The criminalisation of special terrorism-related offences often departs from well-established principles and standards of the criminal law (Zedner, 2014). The criminalised conducts in the Penal 1936 include inchoate, preparatory and precursor offences, which were perceptibly designed to prevent terrorism. Enacting precursor offences are not uncommon in anti-terrorism law in other jurisdictions (Walker, 2002). Nevertheless, there are alarming concerns over the enactment and enforcement of precursor offences. Walker (2011) describes the category of offences as 'the most problematic offences' within anti-terrorism law in the UK (p. 205). The scepticism emerges mainly because such offences deviate from the Millian harm principle by criminalising acts with more remote risks, as compared to ordinary crimes (Wallerstein, 2007). The precursor offences cover pre-inchoate, preparatory, facilitative, associative acts of terrorism, such as training for terrorism, possession of items for a terrorist purpose, and directing a terrorist organisation. But the departure from the established principle of harm is not always unjustified. The aim of enacting the precursor offences is justifiably to deploy criminal law as a preventive tool and 'to avert anticipatory risk from terrorism' (Walker, 2012, p.129). As illustrated by the judge in Public Prosecutor v Anuar bin AB Rawi (2016) in the following:

> The preventive action is one of the ways to counter-terrorism activities from becoming rampant in our Malaysian society, particularly among youngsters who can be easily influenced with extremist ideology propagated by the terrorist groups such as IS and Al-Qaeda. (Para. 13)

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Correspondingly, the criminalisation of possession of items linked to terrorism is arguably a move to utilise criminal law as a preventive tool in countering terrorism. The same approach has been adopted to overcome other crimes and can be traced in the pre-independence laws, such as the Minor Offences Act 1955. The legislation criminalised precursor acts, including possession of housebreaking implements or having a blackened or disguised face. Other precursor offences can also be found in the Dangerous Drugs Act 1952. For example, it is an offence to have possession of any pipe or other utensil which can be used in connection with opium consumption.

THE OFFENCE UNDER SECTION 130JB OF THE PENAL CODE

The offence of possession of items linked to terrorism is a textbook example of a precursor offence. In the context of Malaysia, the offence, under section 130JB of Chapter IVA, Penal Code has been routinely used by the prosecution and often reignite controversy over its legitimacy and arbitrary enforcement (Suaram, 2016). S.130JB (1) of the Penal Code states that:

> Whoever—
>
> (a) has possession, custody, or control of; or
>
> (b) provides, displays, distributes, or sells, any item associated with any terrorist group, or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item

First and foremost, it is essential to note that the above provision is problematic from the beginning of its making. This specific provision was highly debated when the Penal Code (Amendment) Bill 2015 was tabled in Parliament. S.130JB was argued to be ill-designed due to the absence of explicit mens rea element (Hansard, 7 April 2015). Another concern is related to its wide-ranging scope of the offence, which may open to abuse. The Members of Dewan Rakyat unanimously agreed that the provision must be referred to the Attorney General for review. Nevertheless, the Parliament proceeded to approve the Bill, with the expectation that an amendment to section130JB would be tabled later in another separate bill. It was due to the assurance given by the minister who tabled the bill, Wan Junaidi Tuanku Jaafar, in the following concluding remark:

> I give my assurance, as proposed by the Member of Parliament of Shah Alam, that I will discuss with the Attorney General soon pertaining to an amendment to s.130JB (Hansard, 7 April 2015 p. 117)

The promised amendment, however, has never materialised to date. The troubling legislative intent was acknowledged by the Court of Appeal in the case Siti Noor Aishah binti Atam v Public Prosecutor (2018). The Court affirmed the view of the trial High Court

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Judge, who considered the offence under section 130JB as a strict liability offence, as opposed to ordinary offence, based on the construct of section 130JB. The trial judge emphasised that:

> If the Parliament intended to enact the offence under s.130JB with 'mens rea'…the words such 'knowing', 'intentionally, "having reason to believe" should have been inserted in the said provision. Public Prosecutor v Siti Noor Aishah Atam [2017] 1 LNS 684, para 30.

Both courts view section 130JB as a valid law and must be construed as it is, albeit the strong opposition of the legislature against the provision. In other words, a legislative intent to review without any affirmative action has no bearing effect on the validity of legislation.

THE OVERCRIMINALISATION CONCERN

Overcriminalisation produces unnecessary offences and opens the possibility of abuse (Husak, 2008). It commonly occurs when the criminalisation process moves beyond the accepted norms and limits of criminal law and justice. This perversion of established values may harm society as well as the criminal justice system (Ashworth and Zedner, 2014). Overcriminalisation, for instance, widens the discretionary power of the authorities where there are overlapping offences. The overzealous manipulation of criminal law in countering terrorism arguably may cause overcriminalisation (Zedner, 2021). This consequence is perceptible from the mass production of terrorism-related offences with exceptional features that compromised the fundamental values and standards of criminal law. The criminalisation of possession of items linked to terrorism arguably falls into the category. Moving back to s.130JB of the Penal Code, the asserted over-criminalisation mainly derives from the following two aspects.

First, the offence embodies the criminalisation of remote harms and consequently seems complicated to fit neatly within the harm principle. This would generate overcriminalisation, as argued by Simester and Von Hirsch (2009). As discussed earlier, the offence under section 130JB is a precursor or preparatory offence. It must be underlined that ordinary criminal law criminalises an attempt to commit a crime but not preparation (Cheang, 1990). The lack of proximity to the completion of a crime is the leading justification. Having possession of an item that may facilitate or can be used in the commission of a crime is usually not a crime. However, this principle is relatively dim under section 130JB, which criminalises the possession of 'any item associated with any terrorist groups or the commission of a terrorist act'. It is imperative to emphasise that the defining criteria relating to the offending items are too vague. 'Items associated with terrorist groups' extend to books, videos, flags and pictures of a terrorist group. Reading disjunctively, one can be convicted of the offence under section 130JB for having custody or control of an item linked to a terrorist group, even though the item has no connection with any terrorist act. In Public Prosecutor v Siti Noor Aishah Binti Atam (2016), the accused was charged with possession of 12 books related to Jemaah Islamiah, Al-Qaeda,

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and Islamic State groups. Magazines published by Islamic State and pictures related to the group were the offending items possessed by the accused in the case of Public Prosecutor v Mohd Haniffa Syedul Abbar (2016). The prosecution bears no burden to prove the items were used or will be used in the commission of any potential terrorist act. It is enough to prove that the items are associated with a terrorist organisation. This makes s.130JB different to s.57(1) and (2) UK's Terrorism Act 2000, which only concerns possession of items for a purpose connected to terrorism (Walker, 2011). In R v Zafar (2008), the court held that the indirect connection between the item possessed, and potential terrorist acts is insufficient to convict a person under s.57 of Terrorism Act 2000. Apart from that, the provision requires a person to have knowledge of the presence and control over the items, as discussed by the House of Lords in the case of R v G and J (2009). Another noteworthy difference between the provisions in the UK's TA 2000 and the Penal Code 1936 is related to the available defence. It is a defence under section 57, TA 2000 for the accused 'to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism'. But this defence is not available under the Penal Code 1936 and causes alarm to journalists, academics, and researchers of related studies.

Second, the argument for overcriminalisation is based on the missing mens rea element in section 130JB, which indicates the departure from the established principle embodied in the maxim actus non facit reum, nisi mens sit rea. That simply means an act does not make a man guilty of a crime unless his mind is also guilty. Without actus reus or mens rea, the crime is incomplete. In the context of Malaysia, these elements are stated explicitly in statutes. The Penal Code 1936 goes one step further to define the meaning of words that carry the blameworthy mental element, such as 'dishonestly, 'fraudulently', and 'reason to believe' stated respectively in sections 24, 25, 26, Penal Code 1936. However, a considerable number of the provisions related to terrorism- offences in the Penal Code 1946 omit to state the mens rea element, which includes section 130JB. Although the Court of Appeal in Siti Noor Aishah binti Atam v Public Prosecutor (2017) has clarified that the offence is not an absolute liability crime, but rather a strict liability one, it is still detrimental to the criminal law. To a certain extent, strict liability offences cause the reversion of the burden of proof to the accused. It is arguably against the cardinal rule in the criminal justice system, where the onus of proof is always on the prosecution.

As contended earlier, overcriminalisation generates unnecessary overlapping offences. Arguably, there are other laws that deal with the possession of offending or harmful objects, which can be used by the authorities to prevent or even pre-empt terrorist acts. For example, laws that govern offences related to the illegal use of dangerous weapons, firearms, and explosive substances, apart from offences related to prohibited publication and multimedia content. Nevertheless, it is plausible that invoking section 130JB will be more appealing to the authorities. The offence is a 'security offence' under Security Offences (Special Measures) Act 2012 and therefore is subjected to special procedures. Hence, special measures with broader powers are at disposal for prevention, investigation, and prosecution purposes (Walker and Mat Rus, 2018). For example, section 4 of the SOSMA

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2012 authorises investigative detention for up to 28 days for investigation, without the need for the police to obtain judicial sanction.

CONCLUSION

The criminalisation of possession of items associated with terrorism in Malaysia is a part of a new paradigm shift taken by the government in the post-ISA era (Ahmad, Rehman, and Skoczylis, 2015). The use of criminal law and justice in countering terrorism appears to be more prominent. In principle, the approach provides more legitimacy and fairness, as compared to the past executive-based approach. However, it can be detrimental to the substantive criminal law and its justice system too. Possible risks and harms dangers to criminal law arise possibly from the clash of security and criminal justice paradigms, which embody distinct values and seek different objectives (Walker, 2004). That produces damaging manipulation of criminal justice values, which includes over-criminalisation. (Zedner, 2014). It has been argued in this paper that the offence under section 130JB of the Penal Code is a product of overcriminalisation. But the need for the offence is not unjustified. The precursor offence provides early intervention for the state to prevent a terrorist incident before it takes place. Arguably, it is more beneficial to the prevention and investigation rather than prosecution and conviction. Although criminalisation of possession has received a certain level of acceptance in the past and at present, careful consideration should be exercised as such offences align with the standards within criminal law. Sufficient safeguards must be in place to ensure the anti-terrorism law retains its legitimacy and constitutional values. The implications of the implementation of the offence to society and the counter-terrorism strategy must be further investigated in the future.

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KEGANASAN SEBAGAI 'JENAYAH ISTIMEWA': SATU PENGUNGKAIAN PERSPEKTIF

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ABSTRAK

Ada ruang bertindih yang besar antara jenayah dan keganasan. Perihal ini terzahir jelas dalam gugusan definisi 'keganasan' yang pernah dikemukakan sama ada di peringkat nasional atau antarabangsa. Keganasan lazimnya merangkumi tindak tanduk jenayah seperti membunuh, mencederakan, merosakkan harta benda dan menculik. Bagaimana pun, keganasan sering dihujahkan tidak seperti jenayah biasa. Keganasan mempunyai sifat-sifat 'istimewa' yang turut mencerminkan bentuk ancaman yang dibawanya. Perspektif tersendiri terhadap sifat-sifat ini juga turut menentukan pendekatan dan strategi sesebuah negara dalam melawan keganasan. Bagi yang memilih untuk mengabaikan ciri-ciri khusus keganasan, undang-undang dan polisi sedia ada dalam menangani jenayah diguna pakai. Sebaliknya pula, bagi yang menanggapi keganasan sebagai suatu fenomena sosial yang berbeza daripada jenayah, langkah-langkah luar sistem keadilan jenayah dipilih dalam melawan keganasan. Perspektif yang menerka keganasan sebagai 'jenayah istimewa' boleh dikatakan berada di titik pertengahan. Dengan memfokuskan kepada konteks Malaysia, kajian doktrin perundangan ini menyelidiki sifat-sifat utama yang membezakan keganasan dengan jenayah biasa dan mengungkai bagaimana undang-undang dan tatacara jenayah domestik berinteraksi dengan semua 'keistimewaan' yang ada. Penulisan ini dihasilkan berdasarkan analisa yang dibuat ke atas teks undang-undang, dan alasan penghakiman mahkamah yang merupakan sumber rujukan utama, selain sumber sekunder yang terdiri daripada karya-karya ilmiah berkaitan. Tiga sifat keistimewaan yang utama bagi keganasan, iaitu rentas sempadan, sulit dan politikal dikenal pasti dan dianalisa. Kajian ini turut mendapati 'keistimewaan' yang ada pada keganasan mempengaruhi bentuk undang-undang anti-keganasan. Ia juga turut membingkai akan sejauh mana undang-undang jenayah yang sedia ada telah diubahsuai. Pengabaian sifat-sifat khusus keganasan dikhuatiri bukan sahaja boleh mengakibatkan upaya dan usaha melawan keganasan menjadi tidak berkesan, tetapi boleh memudaratkan sistem dan nilai sedia ada.

Kata kunci: undang-undang jenayah, prosedur jenayah, keganasan, jenayah, sosma

PENGENALAN

Keganasan dan jenayah bertindihan sifat dan ragamnya. Persamaan paling ketara adalah kebanyak tindak-tanduk pengganas atau insiden keganasan melibatkan perbuatan jenayah (Crelinsten, 2009). Menurut Jenkin (1988) pula, tindakan pengganas yang paling lazim adalah menculik dan menahan tebusan, membunuh, dan melancarkan letupan. Wilkinson

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(1979) menambah perbuatan mendatangkan kecederaan dan memeras ugut. Begitu juga kesalahan yang berkaitan salah guna bahan letupan dan senjata api (Walker, 2011). Oleh demikian, banyak takrif 'keganasan' yang pernah diusulkan memasukkan perbuatan jenayah sebagai unsur utama. Di peringkat antarabangsa misalnya, Perhimpunan Agung Pertubuhan Bangsa-Bangsa Bersatu (PBB) pernah meluluskan Resolusi 49/60 pada 1994 yang menyifatkan keganasan sebagai:

> perbuatan jenayah yang diniatkan atau direncanakan untuk membangkitkan keadaan ketakutan orang awam, sekumpulan orang atau individu tertentu atas matlamat politik adalah salah dalam keadaan apa sekali pun, walau pun atas alasan politik, falsafah, ideologi, bangsa, etnik, agama atau apa sahaja yang mungkin akan dipergunakan untuk menghalalkan tindakan-tindakan tersebut.

Perbuatan jenayah juga boleh didapati dalam takrif yang dikemukakan oleh Majlis Keselamatan badan itu juga pada 2004 melalui Resolusi no.1566.

Dalam konteks Malaysia, seksyen 130B(2) Kanun Keseksaan menyenarai segugus tindakan jenayah yang terjumlah kepada 'tindakan pengganas'. Bahkan pada masa lepas, definisi 'pengganas' dalam seksyen 2, Akta Keselamatan Dalam Negeri 1960 (Akta 82) turut memasukkan perbuatan jenayah menggunakan sejata api atau bahan letupan secara haram yang boleh memudaratkan orang awam dan ketenteraman awam. Di samping itu, pertimbangan keganasan sebagai jenayah juga tercermin dalam tindakan kerajaan Malaysia memasukkan kesalahan-kesalahan keganasan pada 2012 dalam Kanun Keseksaan yang membentuk Bab VIA: Kesalahan-Kesalahan berkaitan Keganasan. Bagaimana pun, ciri dan sifat khusus yang ada pada keganasan berbanding jenayah yang lain tidak wajar dikesampingkan. Ciri-ciri ini berkait rapat dengan bentuk ancaman dan tindakan pengganas yang sentiasa berubah mengikut zaman. Dalam kes *Pendakwa Raya lwn Mohamed Danny Bin Mohamed Jedi* (2018), Mahkamah Rayuan memerihalkan bahawa:

Keganasan adalah kategori jenayah yang berbeza. Ia tidak sama lantaran didorong oleh ideologi yang tegar dan tidak bertoleransi, bukan keuntungan kewangan, kemarahan atau dendam. Keganasan jauh lebih berbahaya kerana ia menyerang cara hidup kita dan berusaha menghancurkan nilai-nilai asas yang mana kita anggap sebagai nilai-nilai yang membentuk intipati demokrasi perlembagaan kita.

Sifat-sifat 'istimewa' keganasan ini perlu diberi perhatian kerana ia turut menentukan bentuk dan hala tuju usaha melawan keganasan. Bentuk khusus kriminaliti pada keganasan lazimnya menjadi justifikasi bagi penggubalan undang-undang khas dalam menangani fenomena itu (Walker, 2009). Atas hujah ini, Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (SOSMA) digubal bagi memperuntukkan tatacara khas dalam menyiasat dan membicarakan kes-kes kesalahan keselamatan termasuklah semua kesalahan berkaitan keganasan. Sifat istimewa keganasan juga turut mempengaruhi proses penghukuman, seperti yang dapat dilihat dalam kes Pendakwa Raya lwn Irwanzir (2021). Penulisan ini akan menganalisis sifat-sifat utama yang membezakan keganasan

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dengan jenayah biasa dan mengungkai bagaimana undang-undang domestik dirangka dan berinteraksi dengan semua 'keistimewaan' itu. Pendekatan doktrin perundangan diguna pakai dalam penyelidikan ini dengan menjadikan teks undang-undang tempatan dan antarabangsa, alasan penghakiman, hansard dan laporan-laporan rasmi kerajaan sebagai sumber utama. Manakala, karya-karya ilmiah berkaitan yang sedia ada dirujuk sebagai sumber sekunder dalam kajian ini.

KEGANASAN RENTASI SEMPADAN

Keganasan lazimnya bersifat rentas sempadan dan melibatkan rakyat pelbagai negara. Frasa 'keganasan global' mula mendapat perhatian terutamanya selepas serangan 9/11 di Amerika Syarikat. Peristiwa yang turut mengaitkan Malaysia yang menjadi lokasi beberapa siri pertemuan suspek-suspek bagi merancang untuk melancarkan serangan berdarah itu (National Commission on Terrorist Attacks Upon the United States, 2004). Bagaimana pun 'internationalisation' atau pengantarabangsaan keganasan bukan suatu yang baharu menurut Jenkin (1975). Kumpulan Islamic State (IS) dikenalpasti antara kumpulan antarabangsa yang boleh memberi ancaman kepada Malaysia dan rantau Asia Tenggara (Samuel, 2016), selain Al-Qaeda yang kian merosot operasinya. Dari 2014 hingga 2017, seramai 394 orang individu yang disyaki terlibat dengan IS telah ditahan di bawah Akta Kesalahan Keselamatan (Langkah-Langkah Khas) 2012 (SOSMA) dan Akta Pencegahan Keganasan 2015 (POTA) (Kementerian Dalam Negeri, 2019). Manakala direkodkan pada 2017, 95 orang warga Malaysia yang berangkat ke Syria untuk menyertai IS, dan 30 orang telah dilaporkan terbunuh (Liow dan Aida Arosoaie, 2019). Pengeboman Kelab Malam Movida pada 2016 merupakan serangan pertama IS di Malaysia dan menunjukkan bahawa ancaman kumpulan itu bukan lagi di Syria (*Pendakwa Raya lwn. Imam Wahyudin Karjono & Satu Lagi*, 2017).

Selain yang berskala global, ada kegiatan keganasan lebih kecil yang beroperasi antara beberapa buah negara sahaja dan lazimnya dirujuk sebagai keganasan transnasional. Bagaimana pun keganasan transnasional dan global sukar dibezakan dengan jelas. Juga, banyak kumpulan pengganas tempatan yang menjalankan operasi rentas sempadan. Contohnya, Kumpulan Abu Sayyaf, organisasi pengganas yang berpusat di selatan Filipina yang terkenal dengan keterlibatan aktif dalam kegiatan jenayah (Abuza, 2005). Pada masa yang sama, kumpulan itu juga mempunyai hubungan dengan organisasi pengganas Al-Qaeda dan Jemaah Islamiah (Daljit Singh, 2009). Banlaoi (2010) menyifatkan Kumpulan Abu Sayaf sebagai simbol kerumitan kekerasan bersenjata yang bercampur baur dengan isu-isu jenayah terancang, keganasan, pemberontakan, pemisahan wilayah, pertelingkahan puak, dan konflik entik. Satu lagi kumpulan pengganas yang bersifat transnasional yang memberi ancaman kepada Malaysia ialah kumpulan yang 'Royal Sulu Army' yang telah menceroboh dan menduduki Lahad Datu pada Februari 2013. Rentetan daripada kejadian tersebut, 30 orang individu telah didakwa di mahkamah bagi kesalahan melancarkan perang terhadap Yang Di-Pertuan Agong dan beberapa kesalahan berkaitan keganasan yang lain di bawah Kanun Keseksaan. Perbicaraan kes *Pendakwa Raya lwn Atik Hussin bin Abu Bakar and Ors* (2016) menyaksikan beberapa peruntukan mengenai tatacara khas di bawah SOSMA 2012 diguna pakai buat pertama kali.

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Sifat rentas sempadan yang ada pada keganasan sekurang-kurang menimbulkan dua implikasi yang jarang ada pada jenayah lain. Pertama, isu bidang kuasa mahkamah jenayah untuk membicarakan kegiatan jenayah yang dilakukan sepenuh atau sebahagian di luar negara. Bagi mengatasi cabaran ini banyak negara yang telah menggubal undang-undang yang meluaskan bidang kuasa mahkamah domestik bagi membicarakan kes keganasan rentas sempadan. Tindakan ini seakan tidak selari dengan prinsip kewilayahan (*territoriality*) bagi undang-undang jenayah, yang menetapkan kuasa sebuah negara untuk mengambil tindakan ke atas jenayah yang berlaku dalam sempadan negaranya (*SS Lotus (France v Turkey),* 1927). Bagaimana pun terdapat beberapa pengecualian ke atas pemakaian prinsip ini (Ireland-Piper, 2012). Masyarakat dunia kelihatan mula mengiktiraf peluasan bidang kuasa luar wilayah bagi beberapa jenis jenayah khas, termasuklah pemerdagangan manusia dan keganasan. Bahkan terdapat perjanjian dan konvensyen antarabangsa, termasuk beberapa resolusi PBB yang menganjurkan perluasan bidang kuasa negara dalam membanteras kegiatan keganasan. Contohnya, Resolusi Majlis Keselamatan PBB no.1373 (2001) dan no.2178 (2014). Dalam konteks Malaysia, mahkamah domestik mempunyai bidang kuasa untuk membicarakan mana-mana kesalahan keganasan yang dilakukan di luar Malaysia, atau disasarkan kepada orang atau harta benda di luar negara, berdasarkan kepada s.130B Kanun Keseksaan. Maka, prosedur khas di bawah SOSMA 2012 juga terpakai bagi kes-kes sebegini. Hal ini telah dibincangkan dan diperjelaskan dalam kes *Pendakwa Raya lwn Yazid Sufaat* (2014). Mahkamah Rayuan memerihalkan:

Perbuatan terrorisme adalah satu transnasional fenomena. Tiada batasan wilayah. Ia menjangkau sempadan negara. Contohnya, satu perbuatan keganasan mungkin dirancang atau direncanakan dalam Malaysia dengan niat untuk dilaksanakan di luar Malaysia. Tujuan SOSMA, antaranya, bagi mencegah Malaysia dari dijadikan tempat perlindungan pengganas. (hal 670)

Maka sasaran keganasan tidak semestinya dalam negara. Misalnya dalam kes *Pendakwa Raya lwn Mohd Asren Saputra BMS Asren* (2020), wang sumbangan disalurkan untuk aktiviti keganasan di Syria.

Satu lagi kesukaran berkait sifat rentas sempadan adalah berkenaan pengumpulan keterangan dan bukti untuk tujuan perbicaraan di mahkamah. Hal ini pastinya menuntut kos dan tenaga yang lebih besar. Lebih merumitkan jika negara tempat berlakunya tindakan keganasan itu sedang bergolak. Dalam perbicaraan kes *Pendakwa Raya lwn Muhammad Kasyfullah bin Kassim* (2016), mahkamah menekankan akan kesukaran yang dihadapi oleh pihak pendakwaan untuk mendapatkan bukti dan keterangan dari Syria dan Istanbul. Kesukaran ini juga boleh dilihat dalam perbicaraan kes Lahad Datu, *Pendakwa Raya lwn Atik Hussin bin Abu Bakar and Ors* (2016), di mana siri pertemuan dan perancangan awal dibuat sebelum serangan dilancarkan diadakan di Filipina. Dalam kes sebegini, cabaran terbesar timbul sejak proses penyiasatan tentang bagaimana untuk mendapatkan dan mengurus saksi yang berada di negara lain (Hogan and Walker, 1989). Oleh sebab demikian kita dapat lihat beberapa peruntukan khas di dalam SOSMA 2012 berkenaan penerimaan masuk keterangan tidak tertakluk kepada aturan di bawah mana-

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mana undang-undang bertulis atau prinsip-prinsip ampuh dalam *common law*. Sebagai contoh, dalam kes *Pendakwa Raya lwn Abu Hasan Chan bin Abdullah* (2020), pengakuan tertuduh sebagai pemilik akaun Facebook kepada pihak polis diterima sebagai keterangan di bawah seksyen 18A SOSMA 2012, biarpun bercanggah dengan seksyen 113 Kanun Tatacara Jenayah.

KERAHSIAN AKTIVITI KEGANASAN

Sifat khusus kedua keganasan adalah berkaitan kerahsiaan. Keganasan lazimnya melibatkan pakatan sulit kumpulan yang memiliki solidariti teguh dan kesetiaan ahli yang ampuh. Sifat ini turut dimasukkan oleh Schmid dan Jongman (1988) dalam definisi keganasan. Dalam kes *Pendakwa Raya lwn Mohamad Nasuha Abdul Razak* (2017), mahkamah telah dikemukakan dengan satu ikatan setia (bai'ah) yang mengikat sebuah kumpulan di Malaysia, yang berbunyi:

Saya ... (nama ahli yang berikrar)… bersumpah demi Allah tidak akan berkhianat kepada Ikhwah Anshar Daulah Islamiyah di mana pun berada, siap menerima azab dari Allah, dan tidak diterima bumi bila saya berkhianat dan saya memberikan informasi penting kepada thagut berupa identitas, strategi, mahupun pergerakan yang sekecil-kecilnya daripada perjuangan ini atau apa pun yang dapat membahayakan keselamatan Anshar Daulah lainnya. Bila saya tertangkap atau terancam dibunuh, saya tidak akan memberikan informasi apa pun kepada musuh-musuh Allah. Inilah sumpah saya atas nama Allah SWT, semoga Allah melindungi saya lahir dan bathin, dunia dan akhirat. Aaamiin Ya Rabal Alamin.

Kesetiaan sebegini menyukarkan penyiasatan dan pendakwaan. Saksi-saksi penting akan enggan memberi kerjasama, lantaran telah bersumpah dan pastinya khuatir akan mendapat akibat jika melanggari janji. Maka dalam menghadapi keganasan peranan perisikan dan pemberi maklumat amat mustahak. Pemberi maklumat atau mereka yang telah 'berpaling tadah' perlu dilindungi. Keterangan daripada mereka amat penting ketika siasatan dan perbicaraan di mahkamah biarpun ada kemungkinan penyataan yang diberikan di mahkamah boleh bersifat berat sebelah. Keadaan ini juga wujud dalam kes-kes rasuah di mana lazimnya dilakukan secara sulit atau menggunakan proksi. Pendakwaan dalam kes rasuah juga ada kalanya terpaksa bergantung harap kepada saksi-saksi yang berkepentingan, yang sebelum ini turut sama terlibat bersama-sama dengan tertuduh melakukan jenayah. Maka kita lihat undang-undang khas digubal dalam menangani rasuah, mengambil kira ciri-ciri yang berbeza daripada jenayah biasa lain. Begitu juga bagi kesalahan-kesalahan berkait keganasan. SOSMA 2012 digubal dengan mengambil kira sifat ancaman keselamatan semasa dan juga kesukaran dalam pembuktian kes melibatkan keganasan dan keselamatan negara (Walker & Mat Rus, 2018). Terdapat peruntukan khas iaitu seksyen 14, SOSMA 2012 berkaitan saksi terlindung, yang membolehkan identiti saksi yang memberi keterangan di mahkamah dirahsiakan daripada pengetahuan tertuduh. Seperti dilaksanakan dalam kes *Pendakwa Raya lwn Jusninawati Abdul Ghani* (2016), hakim perbicaraan terlebih dulu menemu bual bakal saksi bagi mempertimbangkan keperluan perlindungan Juga ada peruntukan-peruntukan di

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Bahagian 4 SOSMA 2012 yang menggariskan tatacara dan kaedah khusus bagi pengemukaan maklumat sensitif.

UNSUR IDEOLOGI DALAM KEGANASAN

Berbanding jenayah biasa, keganasan menggunakan tindakan jenayah bagi menyampaikan mesej politik dan ketakutan (Wattad, 2006). Menurut Jenkins (2018), pengganas inginkan ramai orang yang menonton, dan bukannya ramai yang terkorban. Dalam jenayah biasa, sasaran lazimnya selari dengan niat dan motif pelakunya. Contohnya dalam kes bunuh, pembunuh bertindak dengan niat menghapuskan individu spesifik atas sebab tertentu. Berbeza pula dengan keganasan. Tindakan keganasan dilakukan secara rawak terhadap mana-mana orang, atau harta benda tanpa mengambil kira pemiliknya (Walzer, 1977). Matlamat utama keganasan tidak disasarkan untuk membunuh individu khusus. Bahkan lazimnya, tiada bilangan tertentu atau kumpulan spesifik disasarkan. Paling penting adalah penonjolan keganasan bagi mendapat perhatian seluas-luasnya (Flecther, 2006). Dalam memastikan impak yang maksima dan liputan meluas, pemilihan lokasi amat mustahak. Memandangkan sasaran keganasan bukan mereka yang terbunuh, maka sasaran yang sebenar adalah kepada keluarga, saudara-mara, kawan mangsa, pemimpin kerajaan, pembuat dasar dan masyarakat awam keseluruhannya. Selain itu, impak serangan keganasan juga lebih besar daripada perbuatan jenayah biasa, sama ada dari sudut politik, sosial dan ekonomi. Keyakinan masyarakat terhadap kerajaan boleh terhakis. Dalam konteks Malaysia, hubungan antara kaum pastinya terjejas sekira berlakunya insiden keganasan (Abuza, 2016).

Interaksi unsur politik dalam keganasan dengan undang-undang jenayah dapat dilihat sekurangnya dalam dua perkara. Perkara pertama berkenaan kemasukan unsur motif sebagai satu elemen mental dalam sesuatu kesalahan. Harus ditekankan bahawa secara amnya, motif tidak dianggap sebagai 'mens rea' dalam membuktikan sesuatu kesalahan jenayah (Cheang, 1990). Prinsip ini bagaimana pun tidak diterjemahkan ke dalam kebanyakan undang-undang anti-keganasan di Malaysia, mahupun di negara-negara lain (Roach, 2007). Di Malaysia, seksyen 130B(2), Kanun Keseksaan menyatakan bahawa motif untuk melanjutkan suatu perjuangan politik dan ideologi sebagai niat tindakan keganasan. Maka elemen politik dalam kesalahan keganasan mestilah dibuktikan dalam perbicaraan. Perkara kedua pula berkenaan penggubalan undang-undang jenayah khas bagi mengekang penyebaran ideologi politik keganasan dan tindakan mengagungkan dan mempromosikan keganasan. Langkah ini bagi memutuskan rantai penyampaian mesej atau ideologi politik keganasan. Sebagai contoh, kesalahan menggunakan media sosial atau sarana lain untuk seksyen 130J(k) Kanun Keseksaan meraih sokongan atau mempromosikan kumpulan pengganas dan tindakan keganasan.

KESIMPULAN

Perspektif keganasan sebagai jenayah istimewa terletak di antara dua pendekatan yang berlawanan dalam usaha melawan keganasan. Pendekatan pertama terangkum dalam penegasan bekas Perdana Menteri British, Margaret Thatcher (1981) yang berbunyi, 'satu

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jenayah adalah jenayah adalah satu jenayah, tiada (jenayah) politikal, tapi jenayah…Hanya terdapat jenayah bunuh, jenayah meletupkan, dan jenayah kekerasan'. Pendekatan ini menafikan sepenuhnya sifat khas yang membezakan keganasan dengan jenayah yang lain. Maka tiada keperluan kepada undang-undang khas. Pendekatan yang satu lagi pula menanggapi keganasan sebagai bukan jenayah tapi lebih kepada tindakan perang. Sudut pandang ini adalah justifikasi 'perang melawan keganasan' yang dianjurkan Amerika Syarikat (Forst, 2009). Lantas, langkah-langkah berdasarkan kuasa eksekutif diberikan keutamaan berbanding penggunaan undang-undang dan proses keadilan jenayah. Perspektif keganasan sebagai jenayah khas memberi keutamaan kepada langkah-langkah dalam sistem keadilan jenayah. Namun ada ciri istimewa yang ada pada fenomena itu berbanding jenayah lain diambil kira. Setiap jenayah istimewa ini memerlukan pendekatan khas yang berbeza daripada kaedah biasa agar berkesan dalam usaha mencegah dan menanganinya. Ciri-ciri yang membezakan antara jenayah biasa dan keganasan perlu diberi penekanan bagai memastikan tindak balas terhadap fenomena itu dengan berkadaran dan kekal pada objektifnya. Pada masa yang sama, memandangkan beberapa prinsip ampuh di kompromi, lindung jamin yang secukupnya amat mustahak bagi mengekalkan keabsahan undang-undang jenayah dan mengekang penyalahgunaan kuasa.

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INTELLECTUAL PROPERTY LAW

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ANDA SELEBRITI? KEPERLUAN PENDEFINISIAN DARIPADA PERSPEKTIF UNDANG-UNDANG DI MALAYSIA

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MEDICAL LAW

PENGREKRUTAN SUBJEK DALAM KAJIAN KLINIKAL

Yuhanif Yusof, Syed Zulkifli Syed Zakaria; Rohizan Halim & Mohd Zakhiri Md. Nor

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ABSTRAK

Pemberitahuan sukarela hak cipta yang diperkenalkan di Malaysia pada tahun 2012 memberi alternatif kepada pihak yang berkepentingan dalam sesuatu karya berhak cipta menyimpan rekod berkenaan hak cipta karya tersebut. System rekod ini semakin penting terutamanya dalam era teknologi digital yang membolehkan karya disalin dan ditiru dengan pantas serta sukar dikesan. Pemberitahuan sukarela ini perlu disertakan dengan afidavit atau akuan berkanun yang dinyatakan secara bersumpah mengenai butiran karya, pembuatan karya dan pemilikan hak cipta. Ia diterima sebagai keterangan prima facie dalam sesuatu prosiding tetapi bukanlah merupakan satu-satunya keterangan yang diterima mahkamah kerana keterangan lisan dan bukti-bukti lain boleh dikemukakan untuk menyokong atau menolak butiran yang dinyatakan dalam afidavit atau akuan berkanun berkenaan. Justeru, kesemua syarat hak cipta yang terkandung dalam karya yang dinyatakan dalam pemberitahuan ini perlu dipenuhi terlebih dahulu bagi memastikan maklumat yang tepat dapat dikemukakan apabila diminta atau jika berlaku sebarang pertikaian di kemudian hari.

Kata kunci: pemberitahuan sukarela hak cipta, perkara yang tidak dilindungi hak cipta, syarat-syarat kewujudan hak cipta dalam karya, teknologi digital, undang-undang harta intelek.

PENGENALAN

> *"What is worth copying is prima facie worth protecting". (Hakim Peterson dalam University of London lwn. University of Tutorial Press; ms.610).*

Hak cipta adalah salah satu daripada cabang harta intelek. Perlindungan hak cipta terhadap sesuatu karya di kesemua negara anggota Konvensyen Berne bagi Perlindungan Karya Sastera dan Karya Seni, 1886 (Konvensyen Berne) pada asasnya diberikan secara automatik sebaik sahaja karya tersebut dihasilkan dan memenuhi syarat-syarat yang dikehendaki oleh undang-undang (Artikel 5(2) Konvensyen Berne). Namun, perlindungan

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automatik ini bukanlah menjadi jaminan sesuatu karya berhak cipta itu tidak dilanggar atau dipertikaikan oleh pihak lain terutamanya dalam era teknologi digital yang memudahkan capaian pantas kepada karya-karya tersebut. Karya-karya seperti e-buku, fotograf, karya muzik, video dan rakaman dalam format digital memudahkan proses muat-turun dan penstriman, justeru berpotensi untuk disalin dan ditiru tanpa dapat dikesan dengan mudah.

Sehubungan itu, beberapa buah negara anggota Konvensyen Berne seperti Argentina, India, Jepun, Kanada dan Perancis mengambil pendekatan memperkenalkan sistem pendaftaran sukarela hak cipta bagi menyediakan sistem penyimpanan rekod yang lebih baik dan memudahkan proses menentukan kepengarangan dan pemilikan terhadap karya berhak cipta (WIPO, 2010). Malaysia mengambil pendekatan sama apabila memperkenalkan pemberitahuan sukarela hak cipta melalui pindaan terhadap seksyen 26A Akta Hak Cipta 1987 (AHC 1987), berkuat kuasa mulai 1 Mac 2012 (Akta Hak Cipta (Pindaan) 2012) dan prosedur terperinci diperuntukkan dalam Peraturan Hak Cipta (Pemberitahuan Sukarela) 2012 (PHC 2012), berkuat kuasa mulai 1 Jun 2012. Artikel ini akan membincangkan tentang kepentingan pemberitahuan sukarela hak cipta serta perkara-perkara berkaitan termasuklah syarat-syarat kewujudan hak cipta dalam sesuatu karya dan perkara perkara yang tidak dilindungi hak cipta.

PENENTUAN KEWUJUDAN HAK CIPTA DALAM SESUATU KARYA

AHC 1987 yang berkuat kuasa pada 1 Disember 1987 merupakan perundangan utama yang mentadbir hal-ehwal hak cipta di Malaysia. Akta ini dipinda beberapa kali iaitu pada tahun 1996, 1997, 2000, 2012 dan yang paling terkini pada tahun 2020 bagi memenuhi keperluan semasa dan tanggungjawab Malaysia sebagai negara anggota kepada perjanjian dan triti antarabangsa yang berkaitan. Penyertaan Malaysia dalam perkara berkaitan hak cipta termasuklah keanggotaan dalam Konvensyen Berne pada tahun 1990, Perjanjian TRIPS (The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994) pada 1 Januari 1995, WIPO Copyright Treaty 1996 dan WIPO Performances and Phonograms Treaty,1996 berkuat kuasa pada 27 Disember 2012 (Toh, 2019).

Sesuatu karya boleh diberikan perlindungan hak cipta apabila memenuhi kesemua syarat secara serentak menurut AHC 1987 iaitu karya tersebut:

(a) tergolong dalam salah satu kategori karya yang dilindungi;
(b) mestilah asli;
(c) ditetapkan dalam bentuk bahan; dan
(d) mematuhi kelayakan hak cipta.

Kategori karya yang layak mendapat hak cipta menurut seksyen 7(1) AHC 1987) merangkumi karya sastera, karya muzik, karya seni, filem, rakaman bunyi dan siaran. Selain itu, karya terbitan yang merangkumi terjemahan, penyesuaian, susunan dan perubahan lain karya yang menjadi suatu hasil ciptaan intelek oleh sebab pemilihan dan susunan kandungannya turut dilindungi hak cipta menurut seksyen 8(1) AHC 1987

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sepertimana karya asal. Kesemua kategori karya ini yang memenuhi syarat-syarat hak cipta akan dilindungi undang-undang tanpa mengira kualiti dan tujuan ia dihasilkan (seksyen 7(2) AHC 1987). Walaupun kualiti karya dianggap tidak penting, sesuatu karya sastera, muzik atau seni hanya layak mendapat hak cipta apabila syarat asli dan penetapan dalam bentuk bahan dipenuhi.

Keaslian karya bermaksud karya itu mestilah karya asal pencipta yang tidak disalin atau ditiru daripada karya lain (seksyen 7(3)(a) AHC 1987). Mahkamah dalam kes Goodyear Tire & Rubber Company lwn. Silverstone Tire and Rubber Co. Sdn. Bhd. [1994] 1 CLJ 509, 513 menyatakan dua orang yang berlainan boleh memiliki hak cipta sendiri terhadap hasil karya yang serupa dengan syarat mereka membuat dan mengusahakan sendiri hasil karya tersebut tanpa menyalin atau meniru antara satu sama lain. Prinsip tentang syarat keaslian ini berasaskan kepada keputusan yang dibuat oleh Hakim Peterson dalam kes University of London lwn. University of Tutorial Press [1916] 2 Ch 601 mengenai persoalan sama ada kertas peperiksaan kepunyaan Plaintif merupakan hasil karya asli yang patut mendapat perlindungan hak cipta.

Defendan dalam kes ini berhujah bahawa kertas-kertas soalan itu hanya mengandungi perkara-perkara yang merupakan pengetahuan umum yang tidak mempunyai nilai sastera bagi melayakkannya mendapat hak cipta. Namun, mahkamah memutuskan kertas-kertas soalan itu mengandungi ciri-ciri keaslian menurut prinsip hak cipta atas alasan hak cipta bukanlah berkenaan keaslian idea tetapi keaslian luahan idea dalam karya tersebut. Justeru, hak cipta tidak memerlukan karya unggul tetapi karya itu mestilah tidak disalin daripada karya lain.

Di Malaysia, mahkamah dalam kes Creative Purpose Sdn. Bhd. lwn Intergrated Trans Corporation Sdn. Bhd [1997] 2 CLJ Supp 107 menyatakan keaslian karya boleh ditentukan sama ada usaha yang mencukupi telah dilakukan oleh pencipta untuk menjadikannya bersifat asli. Bagi menentukan kewujudan keaslian karya, mahkamah merujuk kepada keputusan Hakim Costello dalam kes Allibert S.A. lwn. O'Connor & Anor. [1981] FSR 613, 621 yang menyatakan keaslian sesuatu karya ditentukan berdasarkan kepada kemahiran dan tenaga yang disumbangkan pencipta terhadap karya tersebut dan mahkamah menentukan sama ada pencipta telah melakukan usaha yang mencukupi secara bebas (tanpa menyalin) sebagai asas pemberian hak cipta terhadap karya yang dihasilkannya. Justeru, tahap usaha, kemahiran atau tenaga kerja yang dikeluarkan dalam menghasilkan karya tidak dapat dipisahkan dengan keaslian karya tersebut (Megnaway Enterprise Sdn Bhd lwn. Soon Lian Hoc (No. 2) [2009] 8 CLJ 130).

Syarat penetapan karya dalam bentuk bahan menurut seksyen 7(3)(b) AHC 1987 menghendaki sesuatu karya sastera, seni dan muzik perlu ditulis, di rekod, dirakam atau dijadikan dalam bentuk bahan yang boleh disimpan (sama ada boleh dilihat atau tidak) dan dikeluarkan semula seperti penyimpanan di dalam cakera keras komputer (Nazura, 2014).

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Sesuatu karya juga perlu memenuhi salah satu syarat kelayakan perlindungan hak cipta dengan merujuk kepada: (i) status pencipta iaitu pencipta karya mestilah warganegara atau pemastautin tetap Malaysia (seksyen 10(1), 3 & 59A AHC 1987: peluasan pemakaian kepada warganegara atau pemastautin tetap negara anggota dalam triti); (ii) penerbitan karya mulanya diterbitkan di Malaysia; atau (iii) pembuatan karya dibuat oleh / di bawah arahan atau kawalan Kerajaan Malaysia dan organisasi antarabangsa yang ditetapkan (seksyen 11 AHC 1987).

Perkara-Perkara Yang Tidak Dilindungi Hak Cipta

Undang-undang hak cipta di Malaysia memperuntukkan dengan jelas perkara-perkara yang tidak diberikan hak cipta. Seksyen 7 (2A) AHC 1987 secara khusus mengecualikan idea, tatacara, kaedah pengendalian atau konsep matematik semata-mata daripada perlindungan hak cipta. Peruntukan ini menyatakan, seasli mana pun sesuatu idea itu, hak cipta tidak diberikan kepada idea atau prosedur untuk melakukan, membuat, atau membina barang; kaedah atau penemuan saintifik atau teknikal; operasi atau prosedur perniagaan; prinsip matematik; formula atau algoritma; atau mana-mana konsep, proses, atau kaedah operasi lain semata-mata. Namun, hak cipta diberikan kepada keterangan, penjelasan, atau gambaran mengenai idea atau sistem berkenaan apabila syarat undang-undang hak cipta dipenuhi (kes Goodyear Tire, ms. 512).

Misalnya, penulis buku yang menerangkan sistem baru untuk pemprosesan makanan dilindungi hak cipta apabila buku itu siap ditulis dan diterbitkan. Hak cipta dalam buku ini, menghalang orang lain daripada menyalin atau menyebarkan teks dan ilustrasi yang digambarkan oleh penulis tersebut tetapi tidak menghalang mereka daripada menggunakan sistem tersebut dan menyesuaikannya untuk tujuan komersial atau daripada menggunakan prosedur, proses, atau kaedah yang dijelaskan dalam buku berkenaan. Perkara ini diputuskan dalam kes terkemuka Baker lwn Selden (1880) 101 US 99 iaitu hak cipta tidak melindungi idea atau konsep tetapi melindungi ungkapan atau luahan pencipta mengenai idea tersebut. Ini bermakna, hak cipta hanya diberikan kepada buku tersebut melalui cara penyampaiannya tetapi tidak kepada teori atau sistem perakaunan yang terkandung di dalamnya. Justeru, bahasa yang pencipta gunakan untuk menerang, memperihal atau selainnya luahan pencipta dalam sesuatu karya asli itu adalah dilindungi hak cipta (Samuelson, 2007, ms.1974).

PEMBERITAHUAN SUKARELA HAK CIPTA

Walaupun pendaftaran rasmi karya berhak cipta tidak disyaratkan, AHC 1987 memperkenalkan pemberitahuan sukarela bagi tujuan perekodan dan penerimaan sesuatu keterangan mengenai hak milik karya berkenaan. Ini dapat membantu pemilik hak cipta mendapatkan suatu bentuk perlindungan yang lebih nyata melalui penyimpanan salinan karya tersebut kepada Perbadanan Harta Intelek Malaysia (MyIPO) (Abraham, 2015, ms. 248).

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Seksyen 26A AHC 1987 dan peraturan 5 PHC 2012 menggariskan perkara yang perlu dipenuhi dalam permohonan pemberitahuan iaitu ia boleh dibuat oleh warganegara atau pemastautin tetap Malaysia yang merupakan pencipta, pemunya, pemegang serah hak, atau pemegang lesen hak cipta ataupun wakil mereka dengan menyatakan butiran mengenai kategori karya, tajuk karya, nama pencipta, dan apa-apa maklumat lain yang berkaitan. Pemberitahuan ini perlu diserahkan kepada Pengawal Hak Cipta menggunakan borang yang ditetapkan bersama dengan akuan berkanun, salinan karya yang jelas serta bayaran fi yang ditetapkan.

Penerimaan akuan berkanun dalam pemberitahuan ini sebagai keterangan di mahkamah berkuat kuasa apabila sijil pendaftaran pemberitahuan dikeluarkan oleh MyIPO (Abraham, 2015, ms.249), berbeza dengan afidavit di bawah seksyen 42 AHC 1987 yang berkuat kuasa serta-merta sebagai keterangan prima facie menurut undang-undang. Namun, kandungan afidavit atau akuan berkanun yang dibuat perlu memenuhi kesemua perkara yang dikehendaki dalam seksyen 42(1) (a) (i-iii) AHC 1987 dengan menyatakan status pemohon, butiran karya serta salinan asal karya seperti yang diputuskan oleh Mahkamah Persekutuan dalam kes Dura-Mine Sdn Bhd lwn. Elster Metering Ltd & Anor [2015] 1 CLJ 887.

Afidavit atau akuan berkanun yang memenuhi syarat ini boleh menjadi keterangan "prima facie" berkenaan hak milik karya berhak cipta dan boleh diterima sebagai bukti dalam sebarang prosiding di bawah AHC 1987 sebagaimana yang diputuskan mahkamah dalam kes Siti Khadijah Apparel Sdn Bhd lwn. Ariani Textiles & Manufacturing (M) Sdn Bhd [2019] 8 CLJ 695 iaitu akuan berkanun plaintif mengenai pemunyaan hak cipta terhadap telekung Siti Khadijah hendaklah diterima sebagai keterangan prima facie dalam prosiding tersebut.

Namun, afidavit bukanlah satu-satunya keterangan yang diambil kira dalam membuktikan hak cipta. Dalam kes Dura-Mine Sdn Bhd, Mahkamah Persekutuan menyatakan selain daripada afidavit atau akuan berkanun, seseorang yang menuntut hak cipta boleh mengutarakan keterangan lisan dan mengemukakan bukti lain kepada mahkamah. Malah, Mahkamah Persekutuan mengiktiraf pendekatan pragmatik yang diamalkan oleh sesetengah mahkamah yang membenarkan keterangan lisan dibuat memandangkan ia boleh disoal semasa pemeriksaan balas bagi menambah, membetulkan dan malah menggantikan kecacatan yang terkandung dalam afidavit atau akuan berkanun. Justeru, keterangan lisan ini dianggap mempunyai nilai keterangan yang lebih tinggi berbanding afidavit atau akuan berkanun.

KESIMPULAN

Hak cipta secara umumnya kekal sebagai hak yang dilindungi secara automatik apabila sesuatu karya itu memenuhi syarat yang diperlukan tanpa ada syarat untuk membuat pendaftaran secara rasmi. Dalam hal ini, pilihan yang diperuntukkan oleh AHC 1987 untuk membuat pemberitahuan sukarela hak cipta dapat memberikan kelebihan kepada pencipta, pemilik hak cipta dan pihak-pihak lain yang mempunyai kepentingan dalam sesuatu karya hak cipta untuk menyimpan rekod mereka secara rasmi dalam Daftar Hak

Cipta. Tujuannya adalah untuk menyokong tuntutan mereka terhadap pemilikan hak cipta dan dapat mengemukakan maklumat yang sama sekiranya berlaku pertikaian kelak.

Perlu diingat juga, afidavit atau akuan berkanun yang dikemukakan dalam pemberitahuan ini bukanlah satu-satunya bukti yang diambil kira dalam menentukan pemilikan hak cipta. Justeru, semua maklumat yang dinyatakan dalam afidavit atau akuan berkanun ini perlu dinyatakan dengan tepat secara jujur memandangkan sebarang maklumat yang tidak tepat boleh diketepikan apabila berlaku sebarang pertikaian. Malah, terdapat implikasi perundangan yang boleh dikenakan kepada mereka yang bertanggungjawab mengemukakan maklumat salah atau tidak tepat dalam afidavit atau akuan berkanun tersebut.

PENGHARGAAN

Artikel ini adalah sebahagian daripada penyelidikan di bawah Geran FRGS (FRGS/1/2018/SSI10/UUM/03/1) yang dibiayai oleh Kementerian Pengajian Tinggi Malaysia

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SEHARUM BAU SEMANIS RASA: PERLINDUNGAN PETUNJUK GEOGRAFI NEGERI PERLIS

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ABSTRAK

Mangga Harumanis telah diperkenalkan oleh Institut Penyelidikan dan Kemajuan Pertanian Malaysia (MARDI) pada tahun 1980. Klon mangga Harumanis (MA 180) yang diperkenalkan ini berasal dari Sungai Nibong, Kuala Selangor dan benihnya dipercayai berasal dari Indonesia. Pada tahun 2011, Jabatan Pertanian Negeri Perlis telah mendaftarkan tanaman ini dengan nama Mangga Harumanis Perlis (Klon MA 128) sebagai suatu harta intelek negeri Perlis di bawah perlindungan petunjuk geografi. Artikel ini membincangkan tentang isu sama ada ekoran daripada pendaftaran harumanis sebagai harta intelek negeri Perlis, adakah negeri-negeri lain masih boleh memasarkan produk mangga menggunakan nama Harumanis di Malaysia? Bagi tujuan menjawab persoalan tersebut, artikel ini menggunakan kaedah kajian kualitatif undang-undang dalam bentuk kajian perpustakaan. Data diperoleh daripada analisis yang dibuat ke atas beberapa peruntukan undang-undang yang terdapat di Malaysia dan jurnal-jurnal yang berkaitan. Artikel ini mendapati bahawa tiada pihak dari negeri selain negeri Perlis yang boleh memasarkan produk mangga menggunakan nama Harumanis apatah lagi nama mangga Harumanis Perlis. Sungguhpun begitu, tidak menjadi suatu kesalahan jika spesies mangga klon MA 128 ini ditanam atau dihasilkan di tempat selain negeri Perlis.

Kata kunci: Harumanis, Perlis, Petunjuk Geografi, Harta Intelek, Undang-undang

PENGENALAN

Mangga Harumanis telah diperkenalkan oleh Institut Penyelidikan dan Kemajuan Pertanian Malaysia (MARDI) pada tahun 1980. Klon mangga Harumanis (MA 180) yang diperkenalkan ini berasal dari Sungai Nibong, Kuala Selangor (didaftarkan di Selangor pada 28 Mei 1971) dan benihnya dipercayai berasal dari Indonesia (Uda et al, 2020). Sejak diperkenalkan, mangga Harumanis telah melalui pelbagai proses penyelidikan bagi mempergiatkan hasil pengeluaran yang berkualiti. Pada tahun 2011, Jabatan Pertanian Negeri Perlis telah mendaftarkan tanaman ini dengan nama Mangga Harumanis Perlis (Klon MA 128) sebagai suatu harta intelek negeri Perlis di bawah perlindungan petunjuk geografi.

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Harta intelek adalah ikatan hak yang melindungi aplikasi idea dan maklumat yang mempunyai nilai komersial (Aziz & Noor, 2020). Setiap pemilik harta intelek akan memiliki hak eksklusif terhadap sesuatu produk atau ciptaan yang didaftarkan untuk suatu jangka masa yang ditentukan oleh undang-undang (Mohamed & Aziz, 2006). Perundangan petunjuk geografi adalah salah satu cabang daripada harta intelek di Malaysia. Ia dikawal selia oleh Akta Petunjuk Geografi 2000 di bawah Perbadanan Harta Intelek Malaysia. Petunjuk geografi pada asasnya adalah tanda yang digunakan ke atas sesuatu produk kerana produk tersebut mempunyai kualiti dan reputasi yang boleh dikaitkan dengan kawasan berkenaan (Perbadanan Harta Intelek Malaysia, 2021). Sehingga 2021, terdapat 98 produk yang telah didaftarkan sebagai Petunjuk Geografi di Malaysia. Daripada jumlah ini, sembilan daripadanya merupakan produk dari luar negara yang turut didaftarkan di Malaysia. Produk-produk ini terdiri daripada jenis minuman keras seperti Champagne, Cognac dan Tequila. Secara umumnya, perlindungan terhadap petunjuk geografi pada asalnya adalah untuk melindungi produk minuman keras seperti wain dan spirit (Drahos, 2017).

Oleh itu, artikel ini membincangkan tentang isu sama ada ekoran daripada pendaftaran harumanis sebagai harta intelek negeri Perlis, adakah negeri-negeri lain masih boleh memasarkan produk mangga menggunakan nama Harumanis di Malaysia? Bagi tujuan menjawab persoalan tersebut, artikel ini menggunakan kaedah kajian kualitatif undang-undang dalam bentuk kajian perpustakaan. Data diperoleh daripada analisis yang dibuat ke atas beberapa peruntukan undang-undang yang terdapat di Malaysia dan jurnal-jurnal yang berkaitan.

PERLINDUNGAN PETUNJUK GEOGRAFI

Harumanis Perlis telah didaftarkan sebagai Petunjuk Geografi Perlis pada 2 Ogos 2011 oleh Jabatan Pertanian Perlis. Sebagai satu aset ekonomi berharga menerusi pelancongan dan juga alat perniagaan kritikal yang boleh memberi daya saingan dan boleh menyumbang ke arah kemajuan ekonomi negeri Perlis, perlindungan undang-undang di bawah pertunjuk geografi ini adalah sangat penting bagi memastikan kepatuhan undang-undang semua pihak yang terlibat.

Petunjuk geografi telah ditafsirkan oleh undang-undang Malaysia sebagai mana yang diperuntukkan oleh seksyen 2 Akta Petunjuk Geografi 2000 sebagai suatu petunjuk yang mengenal pasti di mana barangan atau produk itu berasal dari negara atau wilayah, atau sesuatu kawasan atau tempat dalam negara atau wilayah itu, jika suatu kualiti, reputasi atau ciri lain tertentu pada produk itu adalah pada dasarnya boleh dianggap berpunca dari tempat asal geografinya. Secara amnya, petunjuk geografi boleh didefinisikan sebagai satu petunjuk yang memberitahu para pengguna bahawa sesuatu produk itu dihasilkan di sesuatu kawasan atau tempat tertentu dan mempunyai ciri yang tersendiri yang berkait rapat dengan tempat pengeluaran atau geografinya serta dipengaruhi oleh faktor persekitaran seperti iklim dan tanah (Aziz & Noor, 2014). Pendaftaran sesuatu produk tempatan sebagai petunjuk geografi akan memberi faedah dan nilai tambah bukan hanya kepada produk tersebut malah sumber ekonomi penduduk setempat (Forrest,2017).

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Salah satu keistimewaan petunjuk geografi ialah ia berkait rapat reputasi dan kualiti suatu produk dengan kedudukan geografi atau tempat asal sesuatu produk tersebut. Perkara yang penting bagi petunjuk geografi ialah kualiti, reputasi atau ciri-ciri lain yang unik dan tersendiri pada produk tersebut berdasarkan kepada kedudukan geografi tempat produk itu dikeluarkan. Ia juga harus mempunyai reputasi yang baik untuk menjadi terkenal sebagaimana yang diperuntukkan di bawah seksyen 12(1)(e) Akta Petunjuk Geografi 2000. Tanpa kualiti, reputasi atau ciri-ciri lain yang tertentu, maka sesuatu produk petunjuk geografi itu tidak mempunyai perbezaan berbanding produk yang tidak mempunyai petunjuk geografi. Justeru, petunjuk geografi ini penting khususnya bagi seorang pengusaha dalam mempromosikan perniagaannya yang mempamerkan ciri-ciri keistimewaan asal-usul sesuatu produk.

Penggunaan petunjuk geografi ini adalah tidak terhad kepada keluaran pertanian sahaja tetapi termasuk juga hasil kraftangan dan hasil industri. Seksyen 2 Akta Petunjuk Geografi 2000 telah mendefinisikan 'barang' dalam akta sebagai "apa-apa keluaran semula jadi atau pertanian atau apa-apa keluaran kraftangan atau industri.". Pendaftaran produk boleh di buat mengikut kelas produk berdasarkan Peraturan 5, Peraturan-Peraturan Petunjuk Geografi 2001 melalui Jadual Ketiga. Pengelasan barang bagi maksud pendaftaran petunjuk geografi, termasuklah wain dan spirit, barang yang dikilangkan seperti kraf tangan dan makanan, keluaran semula jadi seperti galian dan pertanian, dan kepelbagaian produk lain yang diluluskan oleh Perbadanan Harta Intelek Malaysia.

Petunjuk geografi merepresentasi atau mewakili sesuatu keluaran oleh komuniti pengeluar dalam sesebuah wilayah (Wadehra,2004). Hanya pengeluar yang menjalankan aktiviti di dalam kawasan geografi seperti yang dinyatakan di dalam sijil pendaftaran sahaja boleh menggunakan Petunjuk Geografi yang berdaftar dalam urusan perniagaan. Hak penggunaan produk hendaklah seperti mana yang didaftarkan berdasarkan spesifikasi kualiti, reputasi atau ciri-ciri yang dinyatakan di dalam sijil pendaftaran.

Pendaftaran petunjuk geografi merupakan konsep pemilikan bersama bagi pengeluar-pengeluar yang menjalankan aktivitinya dalam kawasan geografi yang didaftarkan. Ia adalah sangat wajar jika Petunjuk geografi didaftarkan oleh suatu pihak yang berwibawa seperti mana-mana badan kerajaan atau badan berkanun yang menjalankan fungsi yang dipunyai, bagi pihak, atau yang dibenarkan oleh kerajaan atau suatu organisasi dan persatuan perdagangan yang menjalankan aktiviti-aktiviti pengeluaran produk petunjuk geografi tersebut. Walau bagaimanapun, sekiranya hanya individu atau pengeluar tersebut sahaja yang mengeluarkan produk petunjuk geografi di kawasan tersebut, maka individu atau pengeluar tersebut berhak mendaftar petunjuk geografi tersebut secara pemilikan individu (Aziz & Noor, 2014).

Menurut Perbadanan Harta Intelek Malaysia (2021), pendaftaran sesuatu produk tempatan sebagai petunjuk geografi sememangnya memberi faedah dan nilai tambah bukan hanya kepada produk tersebut malah penduduk setempat. Ia ialah satu bentuk kekayaan baharu dalam penjanaan ekonomi yang boleh dieksploitasi kerana harta intelek didaftarkan di Perbadanan Harta Intelek Malaysia dan memberi hak eksklusif kepada pemilik.

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Pendaftaran di Perbadanan Harta Intelek Malaysia ini memberi hak untuk mengguna, memasarkan mahupun melesenkan hak tersebut serta boleh mengambil tindakan undang-undang ke atas sesiapa yang menggunakan harta inteleknya tanpa kebenaran.

KEPENTINGAN PERLINDUNGAN PETUNJUK GEOGRAFI

Dalam ekonomi semasa yang berasaskan pengetahuan, petunjuk geografi boleh menjadi satu aset ekonomi berharga menerusi pelancongan (Melda & Pasli, 2019) dan juga alat perniagaan kritikal yang boleh memberi daya saingan serta boleh menyumbang ke arah kemajuan ekonomi (Kolady, 2010). Produk mangga Harumanis Perlis merupakan suatu medium strategi alternatif bagi mempromosikan produk bercirikan negeri Perlis dan sekali gus dapat menarik minat pelancong dalam dan luar negara untuk berkunjung ke negeri Perlis.

Sebagai perbandingan, Teh Sabah yang telah didaftarkan sebagai petunjuk geografi sejak 10 Oktober 2006 oleh Desa Tea Sdn.Bhd. telah dikenali di peringkat tempatan dan luar negara serta telah menarik pelancong-pelancong luar untuk datang melawat ke ladang teh tersebut (Aziz & Noor, 2008). Justeru, memiliki produk petunjuk geografi sangat penting untuk tujuan pemasaran khususnya pada zaman teknologi di hujung jari, suatu maklumat mudah diakses dalam memperkenalkan sesuatu produk tersebut. Pendaftaran petunjuk geografi akan memberi nilai tambah kepada sesuatu produk. Apa yang menjadi keutamaan ialah semua pihak perlu saling menghormati hak harta intelek milik pihak lain (New Sabah Times, 2016).

MANGGA HARUMANIS: HAK PERLIS

Isu mangga Harumanis Perlis mendapat perhatian masyarakat apabila gesaan Persatuan Pengusaha Harumanis Perlis yang meminta negeri lain selain Perlis tidak menggunakan jenama Harumanis untuk mangga yang diusahakan mereka. Secara umumnya, tindakan boleh diambil menurut Akta Petunjuk Geografi 2000 sekiranya mereka menggunakan nama 'Mangga Harumanis Perlis'.

Walau bagaimanapun, Ketua Pengarah Perbadanan Harta Intelek Malaysia (MyIPO) pada 30 Jun 2020 menyatakan bahawa bukan setakat larangan penggunaan nama mangga Harumanis Perlis bagi buah tersebut yang dihasilkan di negeri-negeri lain bahkan nama Harumanis itu sendiri tidak boleh digunakan sekiranya ia bukan ditanam di negeri Perlis. Menurutnya lagi, perkataan Harumanis telah dicipta dan diwujudkan oleh komuniti negeri Perlis. Oleh yang demikian, hanya negeri Perlis mempunyai hak eksklusif untuk menggunakan nama Harumanis dan mana-mana pengusaha mangga Harumanis yang menggunakan nama Harumanis selain di Perlis boleh dikenakan tindakan mahkamah di bawah seksyen 5 Akta Petunjuk Geografi 2000 iaitu tindakan yang berkaitan dengan perintah injunksi dan tuntutan ganti rugi (Sinar Harian, 2020).

Sebagai perbandingan, produk yang turut mendapat perlindungan petunjuk geografi seperti Keropok Lekor Terengganu yang didaftarkan pada 14 Mac 2014 oleh Yayasan

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Pembangunan Usahawan Terengganu, sekiranya produk keropok lekor yang dihasilkan bukan di negeri Terengganu dan memasarkan sebagai Keropok Lekor Terengganu ialah merupakan suatu kesalahan. Namun, sekiranya ia dipasarkan sebagai Keropok Lekor Kedah bagi produk yang dihasilkan di negeri tersebut, maka bukanlah suatu kesalahan kerana nama "keropok lekor" itu sendiri bukanlah sesuatu yang dilindungi di bawah undang-undang petunjuk geografi. Selain itu, sebagaimana yang dinyatakan dalam pengenalan artikel ini, benih Harumanis itu berasal dari Indonesia yang menyebutnya sebagai Arumanis, sejenis mangga yang terbaik dihasilkan (Wardiyati, Roviq & Ashari, 2016). Justeru, nama Harumanis itu sendiri dipercayai berasal daripada nama Arumanis yang merujuk kepada harumnya bau dan manisnya rasa jenis mangga tersebut.

KESIMPULAN

Mangga Harumanis Perlis merupakan produk petunjuk geografi yang menjadi kebanggaan negeri terkecil di Malaysia. Justeru, tiada pihak dari negeri selain negeri Perlis yang boleh memasarkan produk mangga menggunakan nama Harumanis apatah lagi nama mangga Harumanis Perlis. Sungguhpun begitu, tidak menjadi suatu kesalahan jika spesies mangga klon MA 128 ini ditanam atau dihasilkan di tempat selain negeri Perlis. Penggunaan nama selain Harumanis perlu digunakan untuk tujuan tersebut demi melindungi produk petunjuk geografi negeri Perlis ini.

PENGHARGAAN

Artikel ini adalah sebahagian daripada penyelidikan di bawah Skim Geran Kajian Kes (Research ID- 10009845/ SO Code-21006) yang dibiayai oleh Universiti Utara Malaysia.

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ANDA SELEBRITI? KEPERLUAN PENDEFINISIAN DARIPADA PERSPEKTIF UNDANG-UNDANG DI MALAYSIA

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ABSTRAK

Dewasa ini, kita melihat kewujudan individu-individu dalam masyarakat yang muncul seperti cendawan tumbuh selepas hujan dan menggelar diri mereka sebagai selebriti. Isunya adalah, siapakah sebenarnya selebriti dan apakah ciri-ciri yang perlu ada dalam diri seseorang itu sebelum mereka boleh menggelari diri mereka sebagai selebriti? Pendefinisian selebriti berdasarkan ciri-ciri yang perlu ada adalah penting kerana undang-undang melindungi beberapa hak istimewa seorang selebriti yang tidak boleh diguna pakai oleh individu lain. Artikel ini membincangkan adakah wujud satu keperluan untuk mendefinisikan seseorang individu itu sebagai selebriti di Malaysia? Bagi tujuan menjawab persoalan tersebut, artikel ini menggunakan kaedah kajian kualitatif undang-undang dalam bentuk kajian perpustakaan. Data diperoleh daripada analisis yang dibuat ke atas beberapa peruntukan undang-undang yang terdapat di Malaysia dan jurnal-jurnal yang berkaitan. Artikel ini mendapati bahawa tiada definisi yang wujud dalam undang-undang sedia ada tentang maksud istilah selebriti sama ada di bawah undang-undang umum seperti Akta Tafsiran 1948 dan 1967. Ekoran daripada itu, wujud satu keperluan bagi memberikan tafsiran kepada selebriti di bawah undang- undang di Malaysia.

Kata kunci: selebriti, undang-undang, definisi, Malaysia

PENGENALAN

Dewasa ini, kita melihat kewujudan individu-individu dalam masyarakat yang muncul seperti cendawan tumbuh selepas hujan dan menggelar diri mereka sebagai selebriti. Isunya adalah, siapakah sebenarnya selebriti dan apakah ciri-ciri yang perlu ada dalam diri seseorang itu sebelum mereka boleh menggelari diri mereka sebagai selebriti? Pendefinisian selebriti berdasarkan ciri-ciri yang perlu ada adalah penting kerana undang-undang melindungi beberapa hak istimewa seorang selebriti yang tidak boleh diguna pakai oleh individu lain. Artikel ini membincangkan bagaimanakah undang-undang sedia ada

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mentafsirkan seseorang yang boleh dikategorikan sebagai selebriti di Malaysia. Selain itu, perbincangan juga tertumpu pada apakah ciri-ciri yang perlu ada pada seseorang selebriti dan adakah wujud satu keperluan untuk mendefinisikan seseorang individu itu sebagai selebriti di Malaysia?

Selebriti daripada segi istilah ialah orang yang terkenal dan menjadi tumpuan ramai terutamanya dalam bidang hiburan seperti bintang filem, pelakon dan penyanyi (DBP, 2021). Dalam bidang akademik, seseorang yang sepatutnya digelar selebriti ialah personaliti yang amat dikenali dan patut diraikan kerana ketinggian ilmunya dan kesarjanaannya dalam bidang-bidang tertentu mereka inilah yang patut dipopularkan dalam kampus universiti supaya menjadi ikon kepada mahasiswa dalam penyelidikan, pengajaran dan pembelajaran serta sahsiahnya. (Nik Salida Suhaila, 2021).

HAK SEORANG SELEBRITI

Hak selebriti merupakan suatu hak yang agak luar biasa dan unik. Ini kerana, hak ini seolah-olah berbentuk harta dan dimiliki oleh selebriti tersebut (Pareek & Majundar, 2006). Harta yang dimaksudkan di sini adalah seperti nama selebriti itu sendiri serta perkara-perkara yang berkaitan dengannya seperti foto selebriti tersebut. Masalah penyalahgunaan suatu nama dan foto seorang selebriti tanpa izin untuk kepentingan komersial bukanlah suatu perkara yang baharu, malah ia berlaku di seluruh dunia sejak sekian lama. Justeru, undang-undang amat diperlukan bagi menguatkuasakan tindakan terhadap pesalah yang melanggar suatu hak selebriti (Aziz, Mohamed & Noor, 2019).

SIAPAKAH SELEBRITI?

Secara umumnya, undang-undang melindungi individu yang berjaya memperoleh nilai-nilai selebriti berdasarkan usaha, keupayaan atau rezeki. Persoalan yang wujud adalah siapakah individu yang boleh dikategorikan sebagai selebriti. Sehingga ini tiada sebarang tafsiran formal bagi selebriti.

Di Malaysia, tiada definisi yang wujud dalam undang-undang sedia ada tentang maksud istilah selebriti sama ada di bawah undang-undang umum seperti Akta Tafsiran 1948 dan 1967 atau di bawah undang-undang harta intelek seperti Akta Hak Cipta 1987 dan Akta Cap Dagangan 2019. Walau bagaimanapun, ada dua kategori individu yang berpotensi untuk dianggap sebagai selebriti di bawah Akta Hak Cipta 1987 iaitu pengarang dan pelaku (Aziz, Mohamed & Noor, 2019). Walau bagaimanapun pelaku ini sendiri tidak semestinya seorang selebriti dan seorang selebriti mungkin tidak terdiri daripada pelaku (Ahmad & Swain, 2011).

Secara tradisionalnya, status seorang selebriti boleh diperoleh menerusi kelahiran atau keturunan dan menerusi skil atau pekerjaan yang dimilikinya (Budhiraja, 2011). Istilah selebriti pada asasnya berasal daripada perkataan Latin iaitu "celebritas" yang membawa maksud terkenal serta "celebre" yang bererti menjadi kekerapan (Boorstin, 2012). Justeru itu, perkataan selebriti ini merujuk kepada seorang yang diketahui kerana terkenalnya

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atau "known-ness", kerap disebut dan mempunyai nama yang tidak perlu diperkenalkan lagi (Majic, O'Neill & Bernhard, 2020). Menurut Blumell dan Hellmueller (2019), perkataan selebriti itu pula sering kali dikaitkan dengan kemasyhuran, duit, kuasa.

Selebriti juga boleh dikatakan merupakan golongan yang terdiri daripada pelakon, penulis, ahli politik, peragawan, ahli sukan, pemuzik, penyanyi, personaliti televisyen, eksekutif perniagaan dan sesiapa sahaja yang boleh menarik perhatian awam (Ahmad & Swain, 2011). Oleh itu, daripada definisi-definisi ini, selebriti pada asasnya adalah seseorang yang terkenal dalam bidang hiburan seperti penggiat filem, pemuzik, penyanyi, pengkarya seni, penulis, ahli sukan dan termasuklah mana-mana individu atau personaliti yang boleh menarik perhatian masyarakat.

KEPERLUAN PENDEFINISIAN SELEBRITI

Maksud selebriti di atas telah diterjemahkan secara praktikalnya seawal tahun 1983 dalam kes Martin Luther King, Jr., Center for Social Change lwn. American Heritage Products, Inc 694 F.2d 674 (11th Cir.1983). Dalam kes ini selebriti telah diinterpretasikan secara tafsiran dalam skop yang luas meliputi kategori tradisional seperti bintang filem, penyanyi rock dan juga pemain bola sepak. Walau bagaimanapun berikutan peredaran zaman, istilah selebriti juga telah berkembang di mana identiti sesiapa sahaja yang mempunyai nilai dalam pasaran komersial adalah layak untuk mendapat perlindungan daripada penyalahgunaan di bawah ujian 'ujian eksploitasi komersial langsung atas identiti'.

Pada masa kini wujud definisi moden selebriti yang diperkenalkan oleh cendekiawan yang terlibat secara langsung dalam dunia selebriti. Skop definisi selebriti telah diperluaskan lagi tidak hanya tertumpu kepada bidang hiburan semata-mata. Gabler (2001) menyatakan bahawa sebahagian besar individu yang dikenali sebagai selebriti ialah mereka yang mempunyai pencapaian yang hebat, sebagai contoh seorang penghibur tersohor, pengkarya seni, ahli muzik, ahli politik atau pakar-pakar dalam sesebuah industri. Penafian kepada gelaran selebriti terhadap mereka ialah penafian terhadap sumbangan dan pencapaian mereka dalam industri. Seorang selebriti mestilah individu yang amat dikenali masyarakat kerana antara fungsi penting seorang selebriti ialah mereka yang dikenali secara umum.

Alvin (2019) pula berpendapat selebriti adalah seseorang individu yang mempunyai kemasyhuran dan ternama dalam masyarakat yang membolehkan mereka mudah dikenali oleh masyarakat. Beliau juga berpendapat bahawa di negara seperti India, ia boleh dikaitkan dengan pengiktirafan dan kehormatan untuk beberapa bentuk kejayaan oleh kumpulan masyarakat yang besar.

Hak individu ini akan dilindungi undang-undang menerusi hak selebriti atau hak publisiti. Hak publisiti melindungi hak prerogatif seseorang selebriti untuk mengawal pengeksploitasian ke atas identitinya. Hak publisiti ini bermaksud hak setiap individu untuk mengawal penggunaan identitinya secara komersial (McCarthy, 2014). Dalam kes Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956, 957 (6th Cir. 1980), Mahkamah

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telah menyatakan bahawa yang ternama itu mempunyai hak eksklusif di sisi undang-undang semasa beliau masih hidup untuk mengawal dan memperoleh faedah daripada pemakaian secara komersial nama dan personaliti mereka. Walau bagaimanapun seseorang individu mestilah berstatus selebriti sebelum sesuatu hak publisiti ini memberi nilai komersial kepada mereka.

Hakim dalam kes White lwn. Samsung Elec. Am. Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) juga berpendapat bahawa;

> Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrity sole right to exploit this value [i.e., the value of being a celebrity] whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof.

Perlindungan undang-undang yang diberikan kepada selebriti pula berkait rapat dengan elemen terkenal atau tersohor. Schlegelmilch (2016) mendakwa bahawa elemen terkenal ini boleh dilihat sebagai hasil kepada usaha dan kerja keras (labors) seseorang selebriti. Kebanyakan selebriti menjadi terkenal kerana mereka telah berusaha keras dan melaburkan usaha dan kreativiti dalam mencapai sesuatu perkara yang mereka usahakan. Dakwaan ini adalah selari dengan teori buruh Lockean (labor theory) di mana teori ini menyatakan bahawa jika seseorang individu itu berusaha keras untuk membina imejnya, dia sepatutnya diberi pilihan untuk membuat keputusan bagaimana untuk menggunakan hasilnya dan siapa yang boleh mendapat faedah daripada hasil usaha tersebut (Mossof, 2012 ; Mossof, 2015).

Selain usaha dan kerja keras seseorang individu juga, elemen terkenal ini pula ialah sinonim dengan elemen publisiti ialah hak asas setiap individu untuk mengawal penggunaan nama dan identitinya secara komersial dan ia dianggap sebagai asas kepada sesuatu harta (Bruce, 1998). Mudita (2019) pula berpendapat bahawa hak selebriti atau hak personaliti ialah sesuatu hak yang sama yang berkaitan dengan personaliti seseorang individu. Di sinilah undang-undang harta intelek berfungsi untuk melindungi hasil usaha dan kerja keras seseorang individu daripada disalahgunakan oleh individu-individu yang tidak bertanggungjawab.

Pada era media sosial, hampir semua orang boleh menjadi selebriti (Majic, O'Neill & Bernhard, 2020). Pendedahan di media sosial menyebabkan seseorang akan mempunyai ramai pengikut dan diiktiraf sebagai seorang selebriti (Drake & Miah, 2010). Media sosial juga telah membuka ruang interaksi dua hala di antara selebriti dan peminat. Perkara ini boleh mendorong seseorang peminat untuk lebih obsesif dengan para selebriti dan kehidupan mereka (Amin, 2010 & Zsila et.al, 2020). Penggunaan Twitter oleh selebriti antara lainnya adalah untuk memperkenalkan produk miliknya, produk pihak lain atau mendapatkan sokongan terhadap aktiviti-aktiviti daripada peminatnya (Das, Goard & Murray, 2017). Sungguhpun dilabel dengan gelaran selebriti segera, sekiranya seseorang itu memenuhi tafsiran seorang selebriti seperti namanya masyhur dan tidak perlu

diperkenalkan, maka tidak syak lagi, dia sudah pastinya boleh dianggap seorang selebriti (Noor, Aziz & Mohamed, 2020).

KESIMPULAN

Artikel ini mendapati bahawa tiada definisi yang wujud dalam undang-undang sedia ada tentang maksud istilah selebriti sama ada di bawah undang-undang umum seperti Akta Tafsiran 1948 dan 1967. Ekoran daripada itu, wujud satu keperluan bagi memberikan tafsiran kepada selebriti di bawah undang-undang di Malaysia. untuk memastikan seseorang individu tersebut ialah selebriti dan dapat dilindungi oleh undang-undang atau pun tidak, dia hendaklah memenuhi elemen-elemen asas seperti terkenal dan berusaha untuk memperkenalkan diri kepada masyarakat.

PENGHARGAAN

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PENGREKRUTAN SUBJEK DALAM KAJIAN KLINIKAL

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ABSTRAK

Pengrekrutan pesakit atau sukarelawan yang sihat sebagai subjek kajian dalam kajian klinikal tidak dapat dielakkan kerana bukan semua masalah perubatan dan kesihatan manusia dapat diatasi dengan menggunakan subjek binatang. Selain itu, tanpa jumlah pengrekrutan subjek yang mencukupi, sesuatu kajian klinikal itu tidak akan dapat menjawab persoalan mengenai faedah dan risiko ubat baru. Pendek kata, ada tekanan besar untuk merekrut sejumlah subjek yang cukup dan melakukannya dengan cepat untuk menentukan kejayaan sesuatu kajian yang dijalankan. Begitu pun, pengrekrutan subjek bukanlah satu perkara mudah. Sebaliknya ia ialah masalah yang berterusan dihadapi oleh penaja khususnya syarikat farmaseutikal yang ingin menguji ubat baru. Dapatan satu kajian mendapati kurang daripada 3 peratus peserta yang layak telah menyertai kajian klinikal dan kurang daripada 5 peratus kajian klinikal yang telah dijalankan mencapai jumlah penyertaan subjek yang diperlukan dalam tempoh dua tahun. Dapatan kajian lain pula menunjukkan lebih separuh daripada kajian klinikal onkologi terpaksa dihentikan sebelum tamat tempoh kerana pengrekrutan subjek yang rendah. Di Malaysia, pengrekrutan subjek khususnya pesakit bukanlah sukar kerana terdapat banyak pesakit yang sanggup menyertai dalam kajian. Begitu pun, dapatan satu kajian yang memfokuskan kepada halangan-halangan kepada pengrekrutan mendapati pengrekrutan dalam kajian klinikal kanser sangat rendah. Oleh itu, tujuan artikel ini adalah untuk mengenal pasti faktor-faktor yang mempengaruhi dan menghalang pengrekrutan subjek. Artikel berbentuk konseptual ini ialah kajian kualitatif yang menggunakan metod kajian perpustakaan.

Kata kunci: pengrekrutan, subjek, kajian klinikal, faktor-faktor, mempengaruhi, menghalang.

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PENGENALAN

Kajian klinikal adalah satu 'siasatan' untuk mencari vaksin atau penawar kepada pelbagai jenis penyakit seperti HIV/AIDS, H1N1 dan yang terkini ialah Covid-19 yang masih belum diketahui puncanya. Pendek kata, jawapan bagi setiap masalah atau persoalan perubatan serta penjagaan kesihatan manusia hanya dapat diketahui melalui kajian klinikal. Akan tetapi, kajian klinikal tidak dapat dijalankan tanpa pengrekrutan pesakit atau sukarelawan yang sihat sebagai subjek memandangkan bukan semua masalah perubatan dan kesihatan manusia dapat diatasi dengan menggunakan subjek binatang. Sebagai contoh, kajian klinikal menggunakan subjek manusia adalah satu-satunya cara bagi membuktikan kesan penggunaan thalidomide terhadap kecacatan bayi setelah kajian menggunakan subjek binatang gagal (Jackson, 2006). Akan tetapi, tanpa jumlah pengrekrutan subjek yang mencukupi, sesuatu kajian klinikal itu tidak akan dapat menjawab persoalan mengenai faedah dan risiko ubat baru yang dikaji. Pendek kata, kejayaan sesuatu kajian klinikal itu bergantung kepada pengrekrutan jumlah subjek yang mencukupi.

Begitu pun, pengrekrutan subjek bukanlah satu perkara mudah. Sebaliknya ia ialah masalah yang berterusan dihadapi oleh penaja khususnya syarikat farmaseutikal yang ingin menguji ubat baru. Dapatan satu kajian mendapati kurang daripada 3 peratus peserta yang layak telah menyertai kajian klinikal dan kurang daripada 5 peratus kajian klinikal yang telah dijalankan mencapai jumlah penyertaan subjek yang diperlukan dalam tempoh dua tahun (Gross, 2006; Gul & Ali, 2009). Dapatan kajian lain pula menunjukkan lebih separuh daripada kajian klinikal onkologi terpaksa dihentikan sebelum tamat tempoh kerana pengrekrutan subjek yang rendah (Schroen & Petroni, 2010).

Di Malaysia, pengrekrutan subjek khususnya pesakit bukanlah sukar kerana terdapat banyak pesakit yang sanggup menyertai dalam kajian. Ini adalah kerana sepertimana kebanyakan negara Asia yang lain, pesakit sangat mempercayai doktor. Sedemikian, pengrekrutan subjek di kalangan pesakit yang mencukupi bukanlah menjadi satu masalah. Mantan pengerusi Research Ethics Committee Institut Jantung Negara, Dr. Suhaini Kadiman berkata, "Based on our experience if the consent is taken by the 'doctor' the chances of recruitment is higher because of trust and confidence in the 'doctor' compared to consent taken by a third party for example a health care personnel" (Yuhanif, Anisah & Zaki Morad, 2014). Begitu pun, dapatan satu kajian yang memfokuskan kepada halangan-halangan kepada pengrekrutan mendapati pengrekrutan dalam kajian klinikal kanser sangat rendah (Loh et al., 2012).

Oleh itu, tujuan artikel ini adalah untuk mengenal pasti faktor-faktor yang mempengaruhi dan menghalang pengrekrutan subjek. Mengetahui sebab-sebab mengapa masyarakat bersedia atau enggan direkrut dalam kajian klinikal akan membolehkan doktor-penyelidik mengatasi halangan dan berusaha ke arah faktor positif untuk meningkatkan kadar pengrekrutan. Artikel berbentuk konseptual ini ialah kajian kualitatif yang menggunakan metod kajian perpustakaan.

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FAKTOR-FAKTOR MEMPENGARUHI PENGREKRUTAN SUBJEK

Penyakit yang ditanggung oleh pesakit menjadi antara faktor utama mempengaruhi kesanggupan untuk direkrut sebagai subjek. Sememangnya sudah dimaklumi bahawa apabila seseorang itu menderita sesuatu penyakit, dia akan bersetuju untuk melakukan apa sahaja yang difikirkan dapat memberikan kelegaan atau menyembuhkannya. Secara tidak langsung, ini juga bererti pesakit setuju direkrut adalah disebabkan faktor kepentingan diri untuk mendapatkan manfaat kesihatan. Dapatan satu kajian menunjukkan bahawa faktor utama mendorong subjek direkrut terutama di kalangan pesakit kanser adalah dengan harapan ubat baru yang dikaji berupaya memberi kesembuhan dan rawatan alternatif yang ada adalah terhad (Lee et al., 2012). Dapatan seterusnya juga mendapati kedudukan kesihatan pesakit misalnya pesakit menanggung penyakit kronik berupaya mempengaruhi kesanggupan untuk direkrut. Daripada 462 (47.53%) orang peserta yang menjawab soalan sama ada keadaan kesihatan akan mempengaruhi keputusan untuk direkrut, 271 (58.66%) orang peserta menjawab 'ya' manakala 104 (22.51%) menjawab 'tidak' diikuti 85 (18.4%) menjawab 'tidak pasti' (Yuhanif et al., 2020).

Seterusnya, doktor memainkan peranan penting kepada pesakit dalam keputusan untuk direkrut sebagai subjek. Sikap percayakan doktor menjadi menjadi penyebab kepada hal ini (Anderson et al., 2011; Lee et al, 2016; Ayodele et al, 2016). Bagaimanapun, satu dapat kajian menunjukkan sebaliknya, walaupun cadangan doktor amat mempengaruhi kesanggupan pesakit untuk direkrut tetapi keputusan akhir sama ada untuk setuju atau tidak direkrut adalah terletak pesakit (Lee et al., 2012).

FAKTOR-FAKTOR MENGHALANG PENGREKRUTAN SUBJEK

Terdapat pelbagai faktor sebagai penghalang pengrekrutan subjek. Begitupun, bimbang akan kesan-sampingan dalam kajian (Harrison, Solomon & Young, 2007; Brubaker et al., 2013; Chakrapani et al., 2012), kurang maklumat berkaitan kajian (Chu et al, 2015; Amit Sood et al., 2009; Joshi et al, 2013), bimbangkan tentang 'randomisation' (Jenkins & Fallowfield, 2015; Mittal et al, 2016), takut akan risiko atau komplikasi (Al-Dakhil et al, 2016; Choi et al., 2016; Bouida et al., 2016) dan penyakit yang ditanggung subjek (Cheung et al, 2008; Ayodele et al, 2016) adalah antara faktor yang sering menghalang pengrekrutan subjek.

Hilang kepercayaan kepada kajian yang melibatkan konflik kepentingan tidak ketinggalan menjadi penghalang kepada pengrekrutan subjek (Aitken, Cunningham-Burley & Pagliari, 2016; Critchley, Bruce & Farrugia, 2013; Caulfield et al., 2006). 'Habuan besar' dalam bentuk insentif kewangan (Caulfield & Griener, 2002) ini telah mencetuskan pelbagai insiden tidak beretika. Misalnya, ada di antara doktor-penyelidik yang melakukan penipuan, memalsukan rekod pengrekrutan semata-mata untuk mengaut keuntungan lebih. Malah, terdapat juga di antara mereka yang langsung tidak ambil peduli dengan kriteria kemasukan atau penyingkiran yang ditetapkan oleh protokol, umpamanya dengan merekrut pesakit dalam kajian yang tidak berkaitan dengan penyakit yang ditanggung

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sekali gus mengambil mudah akan isu risiko kepada pesakit (Lemmens & Miller, 2003). Sedemikian, apabila tiada kepercayaan maka pengrekrutan subjek dalam kajian klinikal akan kurang (Caulfield et al., 2006; Gatter, 2003).

KESIMPULAN

Pengrekrutan subjek amat penting bagi menjamin kelangsungan kajian klinikal. Justeru itu amat penting untuk mengetahui terutamanya faktor-faktor yang berpotensi menghalang kesanggupan subjek untuk direkrut. Ini secara tidak langsung dapat membantu doktor-penyelidik untuk mencari kaedah bagi mengatasi semua halangan tersebut. Pada masa yang sama, ia juga dapat membantu meningkatkan jumlah pengrekrutan subjek.

PENGHARGAAN

Artikel ini adalah berdasarkan kajian yang dibiayai oleh Kementerian Pendidikan Tinggi (KPT) melalui Skim Geran Penyelidikan Fundamental (FRGS/1/2018/SSI10/UUM/02/9) dengan kod S/O: 14191.

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COMMERCIAL LAW

RESPONSIBLE LENDING IN MALAYSIA: AN ANALYSIS

Nurul Afifah Adawiyah Rafie & Ibtisam @ Ilyana Ilias

EJEN PERUNCIT V DROPSHIPPER: SIAPAKAH ANDA?

Wan Izzat Wan Ahmad, Azlin Namili Ramli & Nor Anita Abdullah

EQUITY CROWDFUNDING: DEVELOPMENT IN MALAYSIA

Che Thalbi Md Ismail

WEB OF LAWS APPLICABLE TO REGULATE LEGAL RELATIONSHIP OF CONTRACTORS IN PRIVATE PROJECTS IN MALAYSIAN CONSTRUCTION INDUSTRY

Wan Izzat Wan Ahmad, Rohana Abdul Rahman & Muhammad Nushi Izahar

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RESPONSIBLE LENDING IN MALAYSIA: AN ANALYSIS

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ABSTRACT

During recent times, irresponsible lending practices have become a major concern for many countries on a global scale. This work aims to examine the existing responsible lending regime in the Malaysian consumer credit industry. The scope of the consumer credit industry includes banking, pawnbroking, hire-purchase, moneylending, credit sale and cooperatives, as industries are subjected to fragmented regulation. This study adopts a doctrinal legal research methodology and content analysis of both primary and secondary sources of law, including the Financial Services Act 2013 (FSA), Moneylenders Act 1951(MLA), Pawnbrokers Act 1972 (PA), Hire Purchase Act 1967 (HPA), Consumer Protection (Credit Sale) Regulation Act 2017 (CPR), Cooperative Society Commission Act 1993 (CSCA), Guideline on Responsible Financing (GRF), Guideline on Credit Facility for Cooperatives (GCFCs) and other relevant policies, guidelines and regulations. This study finds an inconsistent approach in dealing with responsible lending in the Malaysian consumer credit industry, as the banking institution under the supervision of the Central Bank of Malaysia is subject to the lending practices through GRF, while others are under no legal obligation to conduct mandatory suitability and affordability assessments. In avoiding the issue of inconsistency, numerous recommendations have been suggested for future improvements by policymakers and relevant authorities. These suggestions will help policymakers to seriously consider the best manner to impose duty and obligation towards all credit providers in exercising prudent lending practices. Simultaneously, responsible lending practices will eventually provide strong financial consumer protection in the Malaysian consumer credit industry.

Keywords: financial consumer protection, consumer credit, responsible lending

INTRODUCTION

Responsible lending through the imposition of mandatory affordability and suitability assessment plays a crucial role in preventing over-indebtedness issues, as it could be among the feasible mechanisms for protecting consumers, other than by training them in the field of financial management and borrowing behaviour (Malbon, 2011). The term 'responsible lending' has been widely used by regulators, financial institutions, researchers

and credit consumers. Among the recommended measures to promote responsible lending in Malaysia are encouraging sensible and responsible lending practises among credit providers, protecting consumers' well-being, and supporting more coordinated and consistent supervisory mechanisms for credit providers (Nordin, Sheng Ling, and Abd Aziz, 2018).

In dealing with over-indebtedness, the regulatory framework needs to provide an efficient redress mechanism, not only to resolve individual concerns, but also to allow regulators to recognise emerging consumer problems (Tomas and Martin, 2013). The underlying intuition behind this concept is that 'lenders should assess whether individuals are likely to be able to repay, and not merely determine whether lenders will recover their money, and to ensure that a credit product should be suitable for the consumer' (Cherednychenko and Meindertsma, 2019). An efficient responsible lending regulatory framework must cover five major consumer protection areas, namely, (1) institutional arrangements, (2) disclosure, (3) business practices, (4) consumer redress and (5) financial capability (The World Bank, 2017). All of these regulatory mechanisms can be integrated to ensure that the regulatory system responds to and meets the needs of each type of consumer (Tomas and Martin, 2013).

LAW AND GUIDELINES FOR BANKING INSTITUTION

Policies that protect the interests of consumers in financial products and services have contributed to enhanced risk management by households, a more competitive financial market and greater financial stability as a whole (Financial Stability Board, 2011). Thus, in order to maintain effective and robust financial consumer protection, the FSA 2013 was enforced and administered by Bank Negara Malaysia (BNM) in June 2013. Though the objective of the FSA is to promote financial stability in Malaysia, BNM plays a significant role to protect the rights and interests of consumers of the financial services and products promoted by several service providers (Gumis and Tan, 2021).

Responsible lending has been acknowledged when power has been granted to the BNM to provide a standard provision either by recommendation or advice, including the assessment of suitability or affordability of financial services or products offered to financial consumers, as illustrated in Section 123(2) of the FSA. BNM has introduced the Guideline of Responsible Financing (GRF), which provides an obligation to all banks to conduct lending practices. Non-compliance with the GRF is considered an offence under Section 272(2)(b) of the FSA. Thus, BNM may pursue administrative or civil action in the event of breach as laid down under Section 234 of the FSA.

The Guideline of Responsible Financing (GRF)

Banks have generally tightened lending standards through the GRF as consumers rely heavily on credit to purchase what they need (Musa, 2015). The main requirement under GRF is the mandatory suitability and affordability assessment, which will first determine the consumer's ability to repay their debts in the future (Ilias et al., 2019). Moreover, GRF

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makes it mandatory for all banking institutions to conduct a suitability and affordability assessment for each new and additional credit facility it offers (Ilias et al., 2019). Meanwhile, consumers are expected to make sound borrowing decisions that fit their obligations, only after sufficient knowledge has been clearly explained to them (Musa, 2015). Banks must ensure that consumers are affordable and reasonably meet the repayment obligations in full throughout financing, without recourse to debt relief or substantial hardship (Ilias et al., 2019).

Besides, financial institutions have the obligation to assess the consumer's ability to afford the financing based on the prudent Debt Service Ratio (DSR) (Bank Negara Malaysia, 2012). The financial service provider determines the appropriate financing products and the ability of the consumer to repay their loan afterward by observing the DSR (Ilias et al., 2019). DSR is computed by the standard formula as mentioned in table 1.

Table 1- The Formula for Calculating Debt Service Ratio (DSR)

DEBT SERVICE		All outstanding debt repayment obligations (Including those not covered by Central Credit Reference Information System (CCRIS))
RATIO(DSR)	=	Income after statutory deduction (Including tax, EPF, SOCSO etc)

(Sources: Guideline on Responsible Financing, Bank Negara Malaysia 2012.)

Furthermore, financial institutions will evaluate consumer's repayment history and credit scores by putting forward appropriate enquiries about the consumer's income after statutory deduction for tax, Employment Provident Fund (EPF), as well as current and future debt repayment obligations, either in the banking or non-banking industry (Musa, 2015; Ilias et al., 2019). To accurately compute DSR, the financial institution has the obligation to check the CCRIS of the consumer's outstanding debt obligation for either secure or non-secured entities that provide them the credit facilities, besides observing the history of their repayment obligation (Musa, 2015).

Furthermore, in ascertaining income in computing DSR, financial institutions must enquire into the sources and amount of income that can be evaluated by the consumer's six-month salary and proven by reliable evidence (Bank Negara Malaysia, 2012). Besides, the financial institution should make further verification or reject the consumer's application if there is any discrepancy accrued after taking into consideration all the prominent circumstances (Musa, 2015). The financial institution must also provide adequate buffers for expenses and contingent liabilities, taking into account the consumer's relevant circumstances, which may include adequate consideration of the nature of employment, number of dependents, residence location, and other relevant factors that may affect the consumer's level of expenditure (Bank Negara Malaysia, 2012; Musa, 2015).

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Moreover, there must be proper and appropriate documentation for the financial institution that supports the decision that will be facilitate the internal risk management and supervisory reviews afterward (Bank Negara Malaysia, 2012). The bank, however, should not solely consider collateral in extending financing to a consumer who has otherwise been assessed to be unable to afford the financing offered due to several reasons (Ilias et al., 2019). The banks may encourage consumers to register and attend the programme conducted by Agensi Kaunseling dan Pengurusan Kredit (AKPK) for financial literacy and to improve consumers understanding of credit management (Ahmed and Ibrahim, 2018). Further inquiries or information can be accessed through various platforms, such as surfing BNM's webpages, which provide financial yearly reports, press releases, financial education and literacy and other relevant publications to consumers (Bank Negara Malaysia, 2012).

For financing tenure, financial institutions may extend the tenure to enhance affordability in the near term (Bank Negara Malaysia, 2012). Although the financing tenure can be extended, vehicle financing is limited to nine years, while housing financing and personal financing should be extended to 35 years and 10 years respectively (Bank Negara Malaysia, 2012). Furthermore, the financial institutions shall consider the rate of accumulation of EPF, pension provisions and contract annuity payments when the financing term is extended until the financing repayment during retirement (Bank Negara Malaysia, 2012).

In terms of compliance, GRF relies on BNM as the enforcement agency and delegates the duty to the senior manager and the board of the bank to conduct sufficient actions and plans to resolve any issues that arise within their power (Ilyana Ilias and Amin, 2016). The GRF, on the other hand, does not clearly state the consequences of non-compliance, albeit in general, if the guidelines are violated, BNM may employ appropriate enforcement authorities (Ilias et al., 2019). In the event of any non-compliance, the financial institution itself must have an action plan to rectify the issue (Ilias et al., 2019). If the bank has breached the duty stated under GRF, action will be taken by BNM, as mentioned in section 234 of the FSA.

LAW AND GUIDELINES FOR NON-BANKING INSTITUTION

Generally, there are variety of consumer credit providers categorised under the non-banking industry that are governed by various laws, regulations and guidelines such as the Moneylenders Act 1951(MLA), the Hire Purchase Act 1967 (HPA), the Pawnbroking Act 1972 (PA), the Consumer Protection (Credit Sale) Regulation Act 2017 (CPR), the Cooperative Society Commission Act 1993 (CSCA) and Guidelines on Credit Facility for Cooperatives (GCFC). Each of these laws is ministered by a different ministry, and some have their own enforcement department to enforce predefined laws.

Upon examining these legislations, there is no specific legal provision imposing a mandatory suitability and affordability assessment on the consumers, prior to granting credit approval. Thus, moneylenders, pawnbrokers, cooperatives, non-bank companies offering hire-purchase as well as credit sale companies are at the liberty to conduct the

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mentioned assessment. The nature of the assessment may also vary from one company to another. With regards to cooperatives, despite the presence of the Guidelines on Credit Facility for Cooperatives, the instrument does not provide a complete assessment of creditworthiness, as no verification of income, credit score system or the effect of non-compliance has been laid down. In the absence of a uniform mandatory assessment, there is a high possibility that credit is extended, although the consumer is already over-indebted.

CONCLUSION

In strengthening financial stability in the country, BNM puts great effort into providing a better solution to cure the problem of over-indebtedness among consumers. The discussion reveals that BNM has only made an effort to promote lending practises among banking institutions, as they will assess the creditworthiness of consumers. In determining the suitability and affordability assessment, bankers will evaluate the repayment history and credit scores. In observing a prudent DSR, income verification of the consumer and restriction on loan tenure can be viewed positively to prevent over-indebtedness.

Nonetheless, significant flaws have been discovered in the current GRF. Since the system does not include data on debt obligations from institutions outside its coverage, determining overall debt obligations for the calculation of prudent DSR levels pursuant to the GRF is not possible using CCRIS. Although information can be received from the consumer, its accuracy is occasionally called into doubt. Furthermore, the GRF delegated the responsibility for ensuring compliance to each financial service provider's top manager and board. There is no recourse accessible for financial consumers who have suffered as a result of lending practices. The power of the court or alternative dispute resolution authorities in respect of financial consumers' agreements and obligations as a result of irresponsible lending is also not established in the existing legal framework.

On the other hand, the non-banking industry also needs to play the important role of curbing the crucial problem of over-indebtedness. The laws and guidelines on non-banking institutions, however, do not provide any responsible lending regime for the credit provider to evaluate the consumer's current financial obligation. This issue will become more serious when a meticulous advertisement campaign is carried out by non-banking credit providers to offer their credit to consumers who are not suitable for such credit products. The debt spiral will continuously occur in our society, as non-bank credits providers will encourage consumers who are disqualified to get loans from banking institutions.

Therefore, there is a need for the government to enact a single law that can be enforced on all service providers to create a better responsible lending framework in the future. Among the recommended aspects are to promote responsible lending in the country by encouraging prudent and responsible lending practises among credit providers, protecting consumers' well-being, and supporting more coordinated and consistent supervisory procedures for credit providers. As such, this will contribute to the sustainable growth and

financial stability of the country, besides helping financial institutions to reduce any risks or losses that will be faced in the long term.

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EJEN *DROPSHIPPING*: SIAPAKAH ANDA?

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ABSTRAK

Pandemik Covid 19 yang melanda dunia telah menyebabkan majoriti negara-negara di dunia melaksanakan perintah kawalan pergerakan (PKP). Akibatnya, banyak perniagaan yang dijalankan secara konvensional terpaksa dihentikan dalam tempoh pelaksanaan PKP kerana peniaga mengalami kerugian berikutan kehilangan pelanggan. Ramai juga yang turut kehilangan pekerjaan serta sumber pendapatan. Maka, peniaga dan pekerja terpaksa memikirkan cara lain untuk mengatasi masalah ini. Perkembangan pesat teknologi telah membawa perubahan yang besar terhadap cara pengendalian perniagaan serta e-dagang di mana ramai peniaga beralih kepada jualan atas talian. Namun bagi meluaskan pasaran perniagaan, ada di antara mereka memilih untuk menceburkan diri dalam perniagaan secara *dropshipping*. Model perniagaan secara *dropshipping* ini telah menjadi satu fenomena terkini sehingga mendapat sambutan yang sangat menggalakkan memandangkan konsepnya yang lebih mudah serta tidak melibatkan kos yang tinggi. *Dropshipping* menjadi pilihan ramai kalangan suri rumah, para pelajar serta orang awam untuk menjana pendapatan sama ada secara tetap atau sambilan. Walau bagaimanapun, tiada suatu kajian khusus dilakukan berkaitan konsep *dropshipping* yang digunapakai di Malaysia. Manakala definisi atau pemakaian *dropshipping* juga tidak diberi penerangan serta perbahasan secaran spesifik dalam mana-mana perundangan sedia ada di Malaysia. Oleh itu, kertas kerja ini bertujuan untuk mengenalpasti pembentukan dan definisi sebenar *dropshipping* yang berlaku di Malaysia. Ia juga bertujuan untuk mengetahui sama ada pelaksanaannya sama seperti kaedah yang dipakai dalam perundangan ejensi di mana ia mempunyai hak-hak sebagaimana yang diperuntukkan di bawah Akta Kontrak 1950. Kaedah penyelidikan kepustakaan dan soalselidik digunakan bagi menganalisis konsep tersebut serta melihat amalan praktikal oleh ejen-ejen yang terlibat dalam perniagaan secara *dropshipping* di Malaysia. Hasil perbincangan dan analisa mendapati bahawa definisi dan pembentukan *dropshipping* adalah bersandarkan kepada konsep ejensi dalam undang-undang kontrak. Dapatan ini

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diharap dapat memberikan penerangan yang lebih jelas dan membantu penyelidikan seterusnya berkaitan perundangan yang melibatkan *dropshipping.*

Kata kunci*:* Ejen, Dropshipping E-Dagang, Undang-undang kontrak

PENGENALAN

Peruncitan merupakan sistem yang berkaitan dengan perniagaan runcit, iaitu pembelian dan penjualan barang secara sedikit-sedikit (Kamus Dewan Edisi Keempat, n.d.). Ia bertujuan bagi mendapatkan keuntungan dan disasarkan kepada pelanggan yang membeli secara persendirian atau untuk keluarga dan penggunaan isi rumah (Tehseen, n.d.) dan tidak membelinya bagi tujuan perniagaan. Ia merangkumi jenis-jenis barangan dan perkhidmatan yang sangat luas bermula daripada perniagaan kecil-kecilan seperti penjaja sehinggalah kepada kompleks-kompleks membeli-belah mega. Kebanyakan daripada perniagaan-perniagaan ini banyak mengambil ejen-ejen bagi meluaskan lagi perniagaan mereka.

Seksyen 135 Akta Kontrak 1950 telah mentakrifkan ejen sebagai seseorang yang diambil kerja untuk membuat sesuatu tindakan bagi pihak seseorang atau untuk mewakili seseorang dalam urusan-urusan dengan pihak ketiga. Manakala prinsipal pula ialah pihak kepada siapa tindakan itu dilakukan. Ini bermaksud bahawa ejen boleh bertindak dan mempunyai kuasa mewakili prinsipalnya. Kesannya secara am ialah prinsipal bertanggungan ke atas kontrak tersebut dengan pihak ketiga. Terdapat pelbagai cara pembentukan ejensi. Antaranya ialah secara nyata dan juga tersirat. Seksyen 140 Akta Kontrak menerangkan bahawa pelantikan ejensi secara nyata berlaku apabila ejen diberikan kuasa secara lisan atau bertulis bagi maksud tersebut, manakala ejen dilantik secara tersirat apabila seseorang melalui kata-kata atau perbuatannya, mengemukakan pihak lain sebagai berkuasa untuk mewakili pihaknya dalam melakukan urusan atau tindakan. Selain itu, ia boleh wujud melalui keperluan atau ratifikasi.

Terdapat pelbagai jenis ejen yang muncul selaras dengan perkembangan dunia komersil. Sebagai contoh, ejen komisen atau pedagang komisen dilantik bagi sesuatu urusan jual beli dan menerima sebahagian daripada wang yang dibayar dalam transaksi tersebut (Cambridge Dictionary,n.d.) Ejen komisen juga tidak memegang barangan prinsipal tersebut. Ini bermaksud bahawa ejen komisen diiktiraf sebagai mengikat kontrak dengan pihak ketiga atas namanya sendiri, tanpa mengira sama ada identiti prinsipal didedahkan atau tidak walaupun semua kontrak diikat untuk pihak prinsipal. (Hill, 1968).

Analisa berkaitan hubungan undang-undang di antara ejen, prinsipal dan pihak ketiga amat bergantung kepada keadaan bagaimana kontrak diikat oleh ejen dengan pihak ketiga. Secara amnya, ia melibatkan tiga keadaan. Pertama, apabila kewujudan dan nama prinsipal didedahkan oleh ejen, maka prinsipal yang akan bertanggungan terhadap sebarang liabiliti dengan pihak ketiga yang berkontrak. Kedua, iaitu apabila kewujudan prinsipal didedahkan tetapi namanya tidak didedahkan, maka prinsipal juga akan bertanggungan. Manakala dalam keadaan yang ketiga, apabila kedua-dua nama dan

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kewujudan prinsipal tidak didedahkan, yang mana ejen berkontrak seolah-olah dirinya adalah prinsipal, pihak ketiga boleh memilih siapa yang akan dipertanggungjawabkan dalam kontrak yang diikat bagi sebarang liabiliti.

Arus globalisasi serta perkembangan teknologi terkini telah memberi kesan yang amat besar terhadap kaedah pengendalian perniagaan termasuklah perniagaan runcit yang mana kebanyakannya telah terlibat dalam e-dagang iaitu perniagaan secara atas talian. Tambahan pula, wabak Covid-19 yang melanda dunia juga telah menyebabkan rata-rata perniagaan tidak dapat meneruskan perniagaan secara fizikal seterusnya bergantung kepada teknologi dan Internet bagi meneruskan kelangsungan perniagaan mereka. Ini menyebabkan kaedah *dropshipping* menjadi pilihan kebanyakan perniagaan runcit untuk mengembangkan perniagaan mereka dengan mengambil ramai ejen untuk perniagaan mereka. Ia telah berkembang dengan meluas memandangkan kaedahnya yang mudah, tidak melibatkan kos yang tinggi dan boleh dijalankan dari rumah. Memandangkan wabak Covid-19 telah menyebabkan ramai yang terjejas dengan teruk daripada segi kewangan, kaedah ini memudahkan ramai orang mendapatkan sumber pendapatan sebagai ejen *dropshipping*.

Sorotan kajian terdahulu mendapati belum ada kajian perundangan secara khusus dibuat melibatkan ejensi *dropshipping* di Malaysia. Namun, terdapat penulisan artikel dalam laman web yang menyentuh tentang model dan isu-isu perundangan berkaitan *dropshipping* yang mana menyarankan beberapa aspek perundangan yang perlu diteliti oleh pihak-pihak yang terlibat dengan *dropshipping* (Laman web https://www. richardweechambers.com/ model-and-legal-issues-of-dropship/, 2021). Bagaimanapun, penulisan artikel itu hanya menyentuh secara umum dan tidak menggariskan sepenuhnya secara terperinci undang-undang yang berkaitan dengan perihal *dropshipping* tersebut. Terdapat juga kajian melibatkan *dropshipping* daripada aspek komersil lain. Sebagai contoh, kajian oleh Wan Mat Rashid dan Othman, 2015 membincangkan tentang aspek pengurusan teknologi hijau melibatkan peluang dan strategi perniagaan *dropship*. Kajian oleh Jahari dan Al-Aidaros, 2016 pula meliputi aspek pandangan ilmuwan Islam terhadap *dropshipping* secara online dalam transaksi perniagaan di Malaysia. Atas aspek ketiadaan kajian undang-undang setakat ini, maka soal selidik ini dijalankan bagi mempelopori kajian undang-undang berkaitan ejensi *dropshipping*. Namun, ia hanya memfokuskan kepada definisi dan pembentukan ejensi *dropshipping* serta peruntukan undang-undang kontrak yang berkaitan pembentukan, hak-hak serta tangungjawab ejen *dropshipping*. Kajian tidak membincangkan tentang hak-hak dan tanggungjawab ejen *dropshipping* daripada aspek perundangan yang lain. Data yang dikutip daripada soal selidik juga hanya mendapat 28 respons dan mungkin tidak dapat digeneralisasikan.

PEMBENTUKAN HUBUNGAN *DROPSHIPPING* (PESAN HANTAR)

Definisi Dan Pembentukan Hubungan *Dropshipping*

Dropshipping (pesan hantar) ialah satu sistem perniagaan di mana ejen *dropshipping* (ejen pesan hantar) menjual barangan daripada pembekal barang tanpa perlu ada barang,

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menyimpan stok barang, membungkus dan membuat penghantaran kepada pembeli. Semua aktiviti tersebut akan dilakukan oleh pembekal barang tetapi nama ejen *dropshipping* akan diletakkan sewaktu penghantaran barang. Ejen *dropshipping* pula ialah penjual dalam sistem ini yang tidak perlu memiliki barang, menyimpan stok, membuat pembungkusan dan penghantaran kepada pelanggan (Dwi Rani Ambarwati, 2019). Ia hanyalah orang tengah antara pembekal dan pembeli (Rahiman, U.B., et al, 2017).

Sistem ini memberi kebaikan kerana ejen *dropshipping* tidak perlu ada modal untuk membeli barang, tidak perlu mempunyai tempat penyimpanan untuk stok barang dan juga tidak perlu bersusah payah untuk membungkus dan menghantar barang malah namanya tertera sebagai penjual atau pengirim barang di mana pembeli mungkin tidak tahu pemilik sebenar barang. Adalah memadai ejen *dropshipping* mengiklankan barang yang hendak dijual malahan kadang-kadang iklan ini juga disediakan oleh pembekal. Namun terdapat kekurangan bagi sistem ini kerana kemungkinan komisen yang diterima oleh ejen *dropshipping* adalah sedikit dan dia juga tidak boleh menentukan harga barang kerana tidak mempunyai hakmilik barangan tersebut. Kesulitan akan berlaku jika berlaku kecacatan atau masalah berkaitan barang atau penghantaran barang kepada pembeli kerana semuanya di luar kawalan ejen. (Dwi Rani Ambarwati, 2017).

Pembentukan ejensi *dropshipping* ini boleh berlaku sama ada melalui kontrak secara formal antara pembekal dan ejen *dropshipping* atau tidak melalui kontrak yang formal iaitu seperti persetujuan beberapa perkara melalui *Whatsapp* antara mereka berdua. Jahari dan Al-Aidaros, 2016 menyatakan terdapat lima langkah proses *dropshipping* iaitu pertama, persetujuan antara ejen *dropshipping* dan pemilik atau pembekal produk berkaitan syarat-syarat antara mereka yang mana ejen *dropshipping* akan menjadi ejen pembekal walaupun tidak secara formal. Kedua, penghantaran gambar digital produk oleh pembekal beserta dengan huraian produk yang akan dipromosikan oleh ejen *dropshipping* di media sosial. Harga produk sudah termasuk keuntungan pembekal dan bayaran kepada ejen *dropshipping*. Ketiga, pembeli menghubungi ejen *dropshipping* untuk pertanyaan stok dan ejen *dropshipping* memeriksanya dengan pembekal. Selepas diberitahu oleh ejen *dropshipping,* pembeli akan membuat pembayaran yang sudah termasuk dengan komisen ejen *dropshipping* dan kos penghantaran. Pembayaran dibuat sama ada ditujukan kepada ejen *dropshipping* yang akan mengambil komisennya terlebih dahulu dan seterusnya membuat bayaran kepada pembekal atau bayaran daripada pembeli ditujukan terus kepada pembekal yang mana pembekal nanti yang akan membayar komisen kepada ejen *dropshipping*, Keempat, apabila pembayaran telah dibuat oleh pembeli, maka ejen *dropshipping* akan menghantar butir-butir pembeli kepada pembekal dan kelima, pembekal akan membuat pembungkusan dan penghantaran produk kepada pembeli sama ada dengan meletakkan nama ejen *dropshipping* pada bungkusan produk tersebut atau nama syarikatnya pada bungkusan tersebut tanpa ada nama ejen *dropshipping*.

Oleh yang demikian, dalam keadaan di atas, sistem *dropshipping* boleh dianggap sebagai satu teknik pengurusan rantaian kumpulan di mana penjual atau penjual runcit tidak memiliki stok barang di mana barang yang ingin dijual hanya di iklan melalui paparan iklan. Daripada segi keuntungan pula, ia lebih bersifat sebagai selisih harga di antara

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harga pemborong dan juga peruncit. Jenis perniagaan ini dapat menarik minat seseorang untuk menceburkan diri dalam perniagaan *dropshipping* ini (Pejabat Mufti Wilayah Persekutuan, 2021). Berdasarkan definisi dan pembentukan ejensi mengikut Akta Kontrak 1950 pula, dapat dikatakan bahawa ejensi *dropshipping* ini ialah merupakan sebuah perhubungan yang melibatkan perwakilan. Manakala ejen *dropshipping* ialah merupakan seorang ejen komisen di mana dia bekerja mewakili prinsipalnya iaitu pembekal dalam berurusan dengan pihak ketiga iaitu pembeli. Ini kerana ejen *dropshipping* dilantik bagi urusan jual beli dan menerima sebahagian daripada wang yang dibayar dalam transaksi tersebut serta tidak memegang barangan pembekal.

Tanggungjawab ejen *dropshipping* mengikut Akta Kontrak 1950

Mengikut Akta Kontrak 1950 iaitu dalam seksyen 164 ialah menjadi tanggungjawab seorang ejen agar mematuhi arahan prinsipal atau melaksanakan tugas mengikut adat biasa perwakilan jika tiada arahan prinsipal. Jika tiada arahan lanjut, maka ejen perlu menghubungi prinsipal mengikut seksyen 167. Tinjauan soal selidik menunjukkan sudah ada pemahaman antara ejen *dropshipping* dan pembekal berkaitan prosedur yang perlu diikuti antara mereka. Seksyen 165 pula adalah mengenai kewajipan menjalankan tugas dengan berhati-hati, tekun dan mahir. Seorang ejen juga harus mengemukakan akaun dengan betul di bawah seksyen 166 AK 1950 dan menyerahkan semua wang yang diterima kepada prinsipal di bawah seksyen 171, namun ejen berhak untuk menyimpan sejumlah wang atau menyimpan produk (di bawah seksyen 174) jika komisennya masih tidak dibayar oleh prinsipal. Namun, peruntukan seksyen 171 ini tidak dapat digunakan oleh ejen *dropshipping* bagi memegang barangan kerana mereka tidak menyimpan stok barangan pembekal. Seorang ejen juga tidak boleh menerima untung rahsia tanpa pengetahuan prinsipal. Oleh itu, seorang ejen *dropshipping* tidak boleh menaikkan harga produk tanpa kebenaran daripada pembekal.

Hak Dan Perlindungan Ejen *Dropshipping*

Memandangkan tiada perundangan khusus mengenai *dropshipping* serta pelaksanaannya daripada konteks perundangan Malaysia setakat ini, maka pemakaian konsep ini lebih cenderung berada di bawah asas perundangan kontrak dan juga perundangan ejensi. Oleh yang demikian, sekiranya berlaku apa-apa situasi atau masalah yang timbul semasa dalam proses pelaksanaan transaksi *dropshipping*, peruntukan yang berkaitan dengan undang-undang ejensi boleh diguna pakai.

Menurut Seksyen 172 Akta Kontrak 1950, seperti yang dijanjikan semasa ejen *dropshipping* mula-mula dilantik sebagai *dropshipper*, adalah berdasarkan komisen yang dijanjikan oleh pembekal (prinsipal). Oleh itu, adalah menjadi hak ejen untuk mendapat dan diberikan komisen tersebut memandangkan itu adalah salah satu sebab ejen berminat untuk menceburkan diri dalam perniagaan jenis *dropshipping* ini. Komisen ini juga dianggap sebagai upah atau ganjaran kepada ejen sebagaimana yang dipersetujui dan merupakan hak ejen yang tidak boleh disekat atau dihalang oleh prinsipal dengan sengaja. Di samping itu, sekiranya ada apa-apa pembayaran yang telah dibuat oleh ejen dalam menjalankan

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tanggungjawabnya sebagai ejen juga perlu dibuat ganti rugi oleh prinsipal sebagaimana yang diperuntukkan dalam Seksyen 175 Akta Kontrak 1950 dan sekiranya berlaku apa-apa bencana, kerugian atau kemalangan kepada ejen semasa menjalankan tanggungjawabnya juga perlu ditanggung oleh prinsipal sebagaimana yang terkandung dalam Seksyen 176 Akta Kontrak 1950. Prinsipal perlu bertanggungan kepada ejen. Memandangkan ejen *dropshipper* tidak memegang produk dan produk akan dihantar kepada pembeli oleh pembekal, kemungkinan isu liabiliti juga akan timbul apabila produk yang dibeli tidak diterima oleh pembekal. Namun, sekiranya pemakaian undang-undang ejensi ini terpakai, sebagaimana yang dijelaskan sebelum ini, ejen *dropshipping* adalah bertanggungjawab kepada pembekal iaitu prinsipal. Apabila pembekal mewakilkan transaksi perniagaannya kepada seorang ejen *dropshipping*, maka secara jelas juga boleh dikatakan bahawa hak dan perlindungan sebagaimana yang diperoleh di antara ejen dan juga prinsipal boleh di dapati melalui peruntukan di bawah Akta Kontrak 1950 yang melibatkan hubungan di antara ejen dan prinsipal.

Namun, isu seterusnya yang timbul adalah berkaitan tanggungjawab ejen *dropshipping* untuk menanggung liabiliti bagi kontrak yang dimasukinya dengan pelanggan bagi prinsipal kerana ia amat bergantung kepada keadaan bagaimana kontrak itu dimasuki berdasarkan prinsip ejensi. Sekiranya ejen *dropshipping* mendedahkan kewujudan dan nama pembekal sebagai prinsipal atau kewujudan pembekal didedahkan tanpa didedahkan namanya, maka prinsipal akan bertanggungan terhadap kontrak tersebut. Namun, jika ejen *dropshipping* tidak mendedahkan kewujudan atau nama pembekal sebagai prinsipalnya, maka pihak ketiga iaitu pelanggan yang mengikat kontrak boleh memilih sama ada ejen atau prinsipal yang bertanggungan. Jika pihak pelanggan memilih ejen untuk bertanggungan, maka prinsipal pula tidak akan terikat untuk bertanggungan walaupun ejen menjalankan kontrak bagi pihak prinsipal. Kedudukan undang-undang ini seharusnya amat penting untuk difahami oleh ejen *dropshipping* supaya tidak berlaku kesulitan jika timbul sebarang pertelingkahan kelak.

PERBINCANGAN SOALSELIDIK

Kajian ini menggunakan kaedah penyelidikan kepustakaan bagi menganalisis definisi dan konsep *dropshipping* serta pembentukannya di Malaysia. Analisa seterusnya dibuat dengan melihat peruntukan undang-undang berkaitan ejensi bagi melihat secara jelas sama ada pembentukan ejen *dropshipping* adalah termasuk dalam ruang lingkup perundangan ejensi di Malaysia. Seterusnya, soal selidik telah dibuat melalui pengisian maklumat dalam *Google Form* bagi melihat praktis kegiatan ejensi *dropshipping* oleh ejen-ejen. Soal selidik yang dijalankan telah mendapat 28 respons daripada ejen-ejen *dropshipping* yang mana hampir 43 peratus terdiri daripada individu berumur 20 hingga 30 tahun. Manakala selebihnya berumur dalam lingkungan 31 tahun ke atas. Majoriti mereka adalah dari Utara Semenanjung iaitu sebanyak 57.1 peratus. Sebanyak 17.9 peratus dari Pantai Timur manakala 14.3 peratus adalah dari Pantai Barat. Sebanyak 32.1 peratus baru terlibat dalam ejensi *dropshipping* iaitu kurang daripada 1 tahun dan 50 peratus telah terlibat dalam lingkungan 1 hingga 5 tahun. Manakala selebihnya telah terlibat dalam lingkungan 5 tahun ke atas.

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Jika dilihat daripada soal selidik yang dijalankan, cara bagaimana ejen *dropshipping* ini menjalankan tugas adalah mengikut arahan pembekal. Sebanyak 10.7 peratus ejen *dropshipping* menyimpan produk di tempatnya sendiri, 32.1 peratus pula tidak menyimpan produk sendiri tetapi mengambilnya daripada pembekal ketika mahu membuat penghantaran barang. Manakala sebanyak 57.1 peratus menunjukkan bahawa penghantaran produk dibuat secara terus oleh pembekal kepada pembeli. Bagi komunikasi yang dijalankan antara mereka pula, sebanyak 88.9 peratus adalah melalui media sosial seperti *Facebook, Whatsapp* dan *Instragram*. Hanya 11.1 peratus saja menggunakan cara selain dari media sosial. Bagi aspek penghantaran barangan pula, 57.1 peratus menggunakan servis kurier pilihan pembekal dan hanya 25 peratus memberikan kebebasan kepada ejen *dropshipping* untuk menggunakan servis kurier pilihan sendiri. Sebanyak14.3 peratus ejen pula menghantar sendiri atau mengupah pihak lain dan ada juga keadaan yang mana pembeli datang mengambil sendiri daripada ejen *dropshipping*. Manakala bagi cara pembayaran pula, sebanyak 85.7 peratus responden menyatakan bahawa bayaran dibayar kepada ejen *dropshipping* yang kemudiannya akan membuat bayaran ke akaun pembekal. Hanya 7.1 peratus menyatakan bahawa pembeli membuat bayaran terus kepada pembekal. Sebanyak 75 peratus platform pesanan adalah dibangunkan oleh pembekal secara sistematik dan hanya 25 peratus dibangunkan oleh ejen sendiri.

Ciri-ciri ejensi *dropshipping* secara umumnya adalah memenuhi takrifan hubungan ejensi dalam undang-undang kontrak. Soal selidik menunjukkan bahawa ada ejen yang menyangka bahawa mereka menjadi ejen *dropshipping*, tetapi tidak menepati ciri-ciri sebenar ejen *dropshipping*, iaitu tidak menyimpan sendiri barangan pembekal serta tidak membuat sendiri penghantaran tetapi hanya membuat promosi, mengambil serta menghantar pesanan kepada pembekal. Namun, tidak dapat dipastikan sama ada keadaan-keadaan yang berlaku di luar ciri-ciri sistem *dropshipping* yang dibincangkan secara literatur boleh menyangkal seseorang daripada dianggap menjadi ejen *dropshipping* atau hanya ejen peruncitan talian secara biasa serta kesan-kesan jika ada perbezaan kerana masih tiada kajian yang dilakukan berkaitan perkara tersebut.

CADANGAN DAN KESIMPULAN

Sebagai kesimpulannya boleh dikatakan ejen *dropshipping* adalah ejen peruncitan yang tertakluk kepada perhubungan ejensi di bawah Akta Kontrak. Ia patut diberikan tanggungjawab-tanggungjawab dan hak-hak asas seorang ejen. Klasifikasi juga perlu dibuat bagi mengenal pasti hak-hak dan tanggungjawab seorang ejen *dropshipping* secara khusus yang melibatkan undang-undang. Ini adalah kerana transaksi secara atas talian amat terdedah kepada pertelingkahan undang-undang. Kajian seterusnya dapat dijalankan bagi melihat aspek perundangan lain melibatkan ejensi *dropshipping*.

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EQUITY CROWDFUNDING: DEVELOPMENT IN MALAYSIA

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ABSTRACT

Crowdfunding is getting the world's attention due to the fact that it is particularly useful to support the development of new ideas and initiatives that cannot be funded by traditional mode of financing such as financing from financial institutions. Being globally recognized as the next best alternative for entrepreneurs to raise funds, it is highly important to discover the laws regulating to the management of raising funds through this mechanism. Based on the analysis of the law and regulations in Malaysia, this paper will address the issues associated with crowdfunding and presents the regulations and data protection in the crowdfunding platforms. Apart from enriching the literature in crowdfunding, this paper is expected to spur awareness on the importance of the regulators and roles of governing bodies in the Malaysian capital market.

Keywords: equity crowd funding, regulations, regulators

INTRODUCTION

In Malaysia, crowdfunding has emerged and is steadily gaining popularity as an alternative source of financing for various ventures. What in the beginning may seem like a trend embraced only by start-ups desperate for cash. Hence, this paper firstly will discuss on the development of crowdfunding internationally and locally. Next, the paper discusses on laws of the management of raising funds, there are a few legislations in Malaysia which will be focused on this study. Among them to be analysed are in the Capital Markets and Services Act 2007, the Capital Markets and Services (Amendment) Act 2015 and the Guidelines on Recognised Markets 2016. While to look at the role of governing bodies, the research will concentrate Securities Commission as provided under the Securities Commission Act 1993.

The activities of crowdfunding are done in the digital and cyber world. Hence, they are vulnerable to cybercrime offences which are increasing in Malaysia. According to a report the crimes jumped by 88 per cent in 2011 with 15,218 cases compared with 8090 in 2010. This report has caused a lot of concern from the Government and the public. At a glance, these crimes are like 'diseases' spreading throughout the country and causing damage to people, the economy and the country. Although various efforts have been taken and some are still ongoing, total prevention of cybercrime is very difficult. Combating the threat is very challenging since Malaysia is still lacking in many of the tools required including manpower and technology. (Duryana, 2012) Hence, the paper further explains the role of the main governing bodies include the main body i.e., the Securities Commission.

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INTERNATIONAL HISTORY OF CROWD FUNDING

Crowdfunding has a long and rich history. The past decade has shaped modern day crowdfunding and contributed to the recent surge in crowdfunding activity started from 1997 in the United States of America. (startup.com, 2021)

1997- The Inception of Modern-Day Crowdfunding

The first recorded successful instance of crowdfunding occurred in 1997, when a British rock band funded their reunion tour through online donations from fans. Inspired by this innovative method of financing, Artist Share became the first dedicated crowdfunding platform in 2000. Shortly thereafter, more crowdfunding platforms began to emerge, and the crowdfunding industry has grown consistently each year.

2009- Crowdfunding Emerges as a Major Funding Source

The crowdfunding industry has quickly emerged as a popular option for entrepreneurs to validate their ideas, gain exposure, and gain funding. Crowdfunding revenue tripled from $530 million in 2009 to $1.5 billion in 2011 and is expected to continue rapid growth in the coming four years.

Crowdfunding boasts a 74% compounded annual growth rate. It is an incredibly important funding option because other funds (such as Small Business Association loans) have become significantly less available in the past few years.

2011- Crowdfunding Gains Washington's Support

In April of 2012, President Barack Obama signed the Jumpstart Our Business Start-ups (JOBS) Act into law. Also known as "the crowdfunding bill," the JOBS Act aims to lessen regulation burdens on small businesses and has legalized equity crowdfunding. This includes removing the ban on general solicitation that prevents entrepreneurs from publicizing that they're raising money.

Though the JOBS Act was signed into law in April of 2012, the Securities Exchange Commission is still in the process of setting regulations to ensure that both investors and entrepreneurs remain protected. Regulations are anticipated to be finalized in early 2013.

2012- Fundable Launches the First Business Crowdfunding Platform

The Fundable platform launched in 2012 to help entrepreneurs fund and grow their business through rewards and equity crowdfunding. Fundable was founded by serial entrepreneurs Wil Schroter and Eric Corl.

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It can be observed here that, crowdfunding had been paid attention in the United States of America long ago. The country further developed the legal protection for both the investors and entrepreneurs. It also recognised several official platforms for these crowdfunding activities.

HISTORICAL DEVELOPMENT OF EQUITY CROWDFUNDING IN MALAYSIA

Previously, entrepreneurs who want to expand their business and need additional capital injections can get the information from various agencies which offer financing facilities. The agencies which offer financing facilities for business expansion are MARA, TEKUN, SME Bank, CGC and others. Raising funds from public started only after 2015 when the 2015 Amendment Act came into force, in which the Securities Commission is empowered to administer this activity.

There are several online platforms registered by the Securities Commission Malaysia. To date, 10 ECF platforms have been registered. ECF allows these small businesses to offer equity in their companies to investors, who in turn invest in the idea they see potential in. With ECF, investors have the opportunity to diversify their investments beyond the traditional asset classes.

Malaysian ECF platforms have seen significant growth in line with the government's call for financial services providers to embrace technology to develop a more inclusive, innovative and efficient capital market. As of December 2019, RM73.74 million investments was raised, with 80 successful campaigns and 77 successful issuers. The investment demographic revealed that 46% of the participants were below the age of 35 and 52% of the investment came from the retail sector.

In recent years, crowdfunding has emerged and is steadily gaining popularity as an alternative source of financing for various ventures. What in the beginning may seem like a trend embraced only by start-ups desperate for cash.

To have an efficient capital market, several legislations were drafted which govern the management of platform and funds, management of Islamic capital market and so on. Among the laws to be explained are in Capital Markets and Services Act 2007 which governs on the registration of the crowdfunding platform and the management of the funds.

Next, is the Capital Markets and Services (Amendment) Act 2015 which governs the duties of the operators of the platform and provides a significant law on Islamic Capital Market Products. While the Guidelines on Recognized Markets 2016 further strengthen the framework for the platforms, their facilities and additional requirements applicable to crowdfunding operators.

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There are also several other statutes to be analysed such as the Securities Commission's Guidelines on Recognised Markets 2020 (GRM 2020) and the Companies Act 2016 in relation to the roles and duties of the directors of the platform company.

ROLE OF REGULATORS

There are a few regulators responsible to ensure the smooth running of the crowdfunding activities. The main regulator is the Securities Commission which its role is provided under the Securities Commission Act 1993.

Securities Commission (According to SC Act 1993)

Section 3 of the Securities Commission Acts state that there is hereby established a body corporate by the name of "Securities Commission" with perpetual succession and a common seal, and which may sue and be sued in its corporate name and, subject to and for the purposes of this Act, may enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description and may convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property or any interest vested in the Commission upon such terms as it deems fit.

While the function of the Commission among others is to advise the Minister on all matters relating to securities and derivatives industries, to regulate all matters relating to securities and derivatives, to be responsible for supervising and monitoring the activities of any exchange holding company, exchange, clearing house and central depository and to take all reasonable measures to maintain the confidence of investors in the securities and derivatives markets by ensuring adequate protection for such investors.(Section 15(1) of the SCA 1993)

Further, the Commission shall have the functions and powers conferred upon it by or under the securities laws (Section 15(3) Securities Commission Act 1993). Section 16 SCA - Powers of the Commission. The Commission shall have all such powers as may be necessary for or in connection with, or reasonably incidental to, the performance of its functions under the securities laws.

In short, the role of the Securities Commission is to regulate and enforce regulations pertaining to the capital market, ensuring sustainable market growth and development, supervising capital market activities and market institutions including the exchanges, clearing houses and registered market operators, and regulating all entities and persons licensed under the Capital Markets and Services Act 2007. Based on the SCA 1993, the SC reports to the Minister of Finance and the accounts are tabled in Parliament annually.

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The areas of responsibilities include:

(a) Developing the overall capital market and its market segments such as the equity market, bond and sukuk market, Islamic capital market, fund management, derivatives and other market-based platforms and services.
(b) Facilitating innovation and digital services through the capital market.
(c) Creating avenues for a sustainable financing ecosystem.
(d) Ensuring proper conduct of all market participants through our supervisory, surveillance and enforcement work.
(e) Championing good corporate governance practices; and
(f) Facilitating greater cross-border regulatory co-operation and thought leadership.

Underpinning all the work of SC is a firm focus on investors. The SC mandates to regulate and ensure market growth are always done with the objective of protecting the investors, including initiatives to raise the levels of financial and investment literacy.

THE GOVERNING BODIES

Malaysia's financial services industry has traditionally been a key driver of its economic development and is the foundation of the Financial Sector Blueprint (FSB), the 10-year master plan implemented by the Malaysian central bank, the Bank Negara Malaysia (BNM), for managing Malaysia's transition towards becoming a high-value-added, high-income economy (Securities Commission Malaysia, 2020).

In line with the FSB, the regulatory and supervisory framework of Malaysia in respect of the banking and finance sector was consolidated under the Financial Services Act 2013 (FSA) and the Islamic Financial Services Act 2013 (IFSA) (collectively, the Acts), both of which came into force on 30 June 2013, simultaneously consolidating and repealing the Banking and Financial Institutions Act 1989 (BAFIA), the Islamic Banking Act 1983, the Insurance Act 1996, the Payment Systems Act 2003 and the Exchange Control Act 1953. The Acts aim to provide a regulatory framework for both the conventional financial and shariah-compliant sectors and endow the BNM with greater powers to counter future risks to stability in the financial sector, increase consumer protection and promote competition in the financial services sector. The Acts also contain provisions that preserve every guideline, direction, circular or notice previously issued under any repealed legislation in relation to any provision of the Acts prior to their coming into force.

Malaysia has also established its own mid-shore jurisdiction on the island of Labuan, off the coast of Borneo, regulated and administered by the Labuan Financial Services Authority (the Labuan FSA) pursuant to the Labuan Financial Services Authority Act 1996 (the Labuan FSA Act). In 2008, the jurisdiction was renamed the Labuan International Business and Financial Centre (the Labuan IBFC), and an entity called Labuan IBFC Incorporated was established as the jurisdiction's marketing arm in 2008. The Labuan FSA and the Labuan IBFC work together to promote Labuan IBFC's reputation as the premier mid-shore

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international business and financial centre in the Asia region. Entities operating in the Labuan IBFC are subject to federal laws that are specific to the Labuan IBFC. Labuan banks are subject to the Labuan Financial Services and Securities Act 2010 (LFSSA) and Labuan Islamic banks are regulated under the Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA).

Bank Negara (Central Bank of Malaysia)

The BNM is a statutory body wholly owned by the government that was established under the Central Bank of Malaysia Act 1958 and continues to operate under the Central Bank of Malaysia Act 2009 (CBA), which became effective on 25 November 2009. The BNM reports to the Minister of Finance (the Minister) and keeps the Minister informed of policies governing the monetary and financial sector.

The BNM is empowered to act as the regulator of banking institutions under the Acts and the CBA. The CBA confers the necessary powers and instruments on the BNM to achieve its mandates effectively and legitimises the duality of both the conventional and the Islamic financial systems in Malaysia, and in doing so establishes the legal foundation for the development of an Islamic financial system within the Malaysian financial system.

The BNM's primary objectives include the prudent conduct of monetary policy, financial system stability, and the development of a sound and progressive financial sector. In carrying out the aforementioned, the BNM is responsible for advising the government on macroeconomic policies and the management of public debt. It is also the sole authority for issuing currency and managing the international currency reserves of the country. Other functions of the BNM include the regulation and supervision of financial institutions as described below, and the monitoring and supervision of payment systems, money markets and foreign exchange markets.

From a supervisory perspective, the BNM is empowered by the Acts to regulate banking institutions and does so by way of a risk-based supervisory (RBS) approach that monitors and reviews the manner in which all financial institutions identify, control and deal with their respective business risks.

Securities Commission

In addition to the foregoing, financial institutions and investment banks that provide capital markets services are regulated by the Securities Commission (SC), a statutory body with investigative and enforcement powers established under the Securities Commission Act 1993 (SCA).

The SC is the regulatory body mandated to regulate the Malaysian capital market, and is directly responsible for the regulation, supervision and monitoring of all persons licensed under the Capital Markets and Services Act 2007 (CMSA) with the core objective of investor

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protection. The SC is also primarily responsible under the CMSA for encouraging and promoting the development of the securities and derivatives markets, and for the monitoring and supervision of public-listed companies to ensure compliance with securities laws.

The CMSA constitutes a single framework regulating the offering and licensing of capital market services, market conduct, issuances of securities, and the conduct of takeovers and mergers. Debt issuances (bond and sukuk) in Malaysia require the approval of the SC and are further governed by various guidelines and practice notes issued by the SC under the CMSA.

Companies Commission of Malaysia

Banks in Malaysia fall under the general supervision of the Companies Commission of Malaysia (CCM), as the FSA and the IFSA require incorporation under the Companies Act 2016 (CA) for the undertaking of banking business. However, the IFSA provides for international Islamic banks to do business through either a locally incorporated company or a branch registered with the CCM, whereas banks in Labuan are required to be incorporated or registered under the Labuan Companies Act 1990 (Financial Services Act 2013, section 12).

CONCLUSION

To conclude, Malaysia has a good legal system that is the result of many decades of good work and systematic development. The strength of the BNM's institutional arrangements has been tested and has always been proven in times of change and uncertainty. Although the pandemic, together with fundamental shifts in political and social dynamics, has made the regulatory and policy-making environment increasingly challenging, it is believed that Malaysia will maintain its role at the forefront of banking and financial regulation, and continue its outstanding work towards a better future for all Malaysians

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WEB OF LAWS APPLICABLE TO REGULATE LEGAL RELATIONSHIP OF CONTRACTORS IN PRIVATE PROJECTS IN MALAYSIAN CONSTRUCTION INDUSTRY

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ABSTRACT

Construction industry in Malaysia is subject to a myriad of rules and regulations. Laws are necessary evil to monitor and keep industry players in check. However, too many laws in the form of legislations and subsidiary legislations may constrict the freedom of the contractors to carry out their construction endeavours in the best possible ways to achieve the desired end result as suggested by the smart regulation principle. The paper strives to examine some of these necessary evils of laws and regulations bound by contractors in private projects. In particular, the discussion focuses on the laws applicable to govern their rights and liabilities. The data used is secondary in nature and the analysis is by way of legal and critical analysis. This paper finds that an overwhelming legal instrument such as statutes of general and specific applications may impinge upon the move to self-regulatory mechanism by contractors in construction industry particularly in private projects but nevertheless important in order to avoid legal repercussions in the long run. Further research is necessary to look on the legal status of the self-regulation mechanisms in this area to be better regulated in achieving successful and efficient delivery of projects.

Keywords: construction law, construction industry, contractor, self-regulation, sustainability

INTRODUCTION

Malaysia is an evolving country both in physical and economic development. Construction industry in Malaysia, being the significant catalyst for nation's developments has played important roles by constructing and maintaining infrastructures necessary for socio-economic growth. The workings of construction activities involve and affect various parties taking part in a variety of transactions. Meanwhile, laws and regulations are necessary to monitor and regulate the construction activities given the fact of numerous parties and

transactions involved there. The colonization era in Malaysia has left various construction legacies including in the administration of those construction activities. The history of administration of construction activities in our country shows that both formal and informal methods governed the construction works, especially in the British era of colonization. For example, public works construction projects carried out by the British had formally used English legal principles of common law and equity while the local indigenous ones used informal arrangements according to local customary practices and local laws. (Rajoo and Singh, 2012). The reception of English contract law by virtue of *First Charter of Justice* in Penang in 1807 and its extension to Singapore and Malacca by virtue of *Second Charter of Justice* in 1819 and 1824 respectively had incorporated English law into local commercial activities. It is noted that the construction-related law at that point of time mainly involved contract law, thus English contract law was immensely applied in this industry.

The complexity and variety of construction projects as well as the technical problems has seen that in many circumstances, problems may occur, hindering the efficient delivery of projects. The legal bureaucracies add on to the legal conundrum that may further bring the adversity in construction projects. Public regulations normally involve some lengthy process of formalities than private self-regulation. Thus, more time is involved, higher costs are required and more expenses as regard to the technicalities as well as expertise also need to be spent. As a result, the construction community also now is attracted to the premise of smart regulation where the efficient delivery of project may be better achieved by the cooperation of both government command and control regulation with private regulation. This concept covers the regulatory pluralism which is more flexible and innovative forms of regulating society that sees the role cooperatively played by governments, business and third parties. It consists of self-regulation and co-regulation, based on the premise that the use of multiple policy instruments and a broader range of regulatory actors, will produce better regulation (Gunningham and Sinclair, 2017).

Self-regulation is one of such mechanisms to achieve smart regulation in construction industry. Gunningham and Rees (1997) defines industry self-regulation 'as a regulatory process whereby an industry-level (as opposed to a governmental or firm-level) organization sets rules and standards (codes of practices) relating to the conduct of firms in the industry'. They emphasize that 'there is no clear dichotomy between self-regulation on the one hand and government regulation on the other' but it stands on different points of the ranges of regulatory mechanisms. Costs of formulation, preparation and enforcement within the self-regulation mechanisms are much lower since these activities are mostly centralized around the experts within the industries themselves. Williams, 2004 suggests that 'the emergence of self-regulatory regimes within selected industries is a rational response to external pressures in the marketplace and the broader societies in which firm operates'. The move towards self-regulation in commercial worlds has become a subject of enormous discussions and debates, including in the construction industry. For example, there is a suggestion that architect should move towards self-regulation (Ismail, et al, 2016). However, some also perceive that self-regulation mechanisms should operate against the backdrop of legal safety net. Thus, for the future research, it should be

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important to look at the operation of self-regulatory mechanisms in this industry and the role of law in its application.

DEFINITION OF CONSTRUCTION LAW

Construction law is the term that has no specific definition. Previously, the law applicable to construction activities was based mainly on contractual terms and principles. Rapid development in the economic and well-being of the country has seen the construction industry to widen its activities, becoming more complex and involving more diverse participants. This development requires 'the need for an array of laws governing the construction industry, per se, to be collated, formally recognised and put in place' (Rajoo and Singh, 2012). In general, construction law can be said as a multitude of laws dealing with matters in building construction, engineering, and related fields of construction industry. These laws include contract law, commercial law, planning law, procurement law, employment law and tort. The coverage of legal issues including contract, negligence, bonds and bonding, guarantees and sureties, liens and other security interests, tendering, construction claims, and related consultancy contracts. Undoubtedly, construction law affects various players in the construction industry, including financial institutions, surveyors, quantity surveyors, architects, builders, engineers, construction workers, and planners. This paper examines the relevant laws and legislations and in particular, as relevant to contractors in private projects.

SOURCES OF CONSTRUCTION LAW IN MALAYSIA

Basically, there are two main sources of laws relating to construction in Malaysia: written and unwritten laws. Written laws consist of Federal Constitution, State Constitution, Acts of Parliament, Ordinances and Enactments as well as any other legislative enactments or legislative instruments in force in Malaysia and all other subsidiary legislations made thereunder (section 3 of the *Interpretation Acts 1948 and 1967*) The Federal Constitution is the supreme law of the land that provided for the powers of the Federal and State Governments. The federal government refers to the Government of Malaysia and thus the federal government has the constitutional power to deal with the construction of public infrastructure projects via contract. Another important source of law is State Constitution. Every State of the Federation of Malaysia possesses its own state constitution, except the federal territories of Kuala Lumpur, Putrajaya and Labuan. The provisions of state constitution are covered in the Eight Schedule of the Federal Constitution.

Next source of law is the legislation which are the Acts of Parliament / Statutes. Parliament and the State Legislature enact laws subject to the provisions set out in the federal and state constitutions. Parliament is competent to enact laws on matters enumerated in List I of the Ninth Schedule meanwhile List II of the Ninth Schedule is for the State matters. Concurrent matters are provided in List III for both Parliament and State Legislature to have concurrent power of legislating. This concurrent power includes power to enact laws relating to public health – sanitation and prevention of diseases, drainage and irrigation, provision of housing accommodation. All these are well within the construction industry.

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Meanwhile, subsidiary legislation explains on the details in law provided in the general provisions of legislation passed by Parliament and the State Legislatures. The *Interpretations Act 1948 and 1967* define subsidiary legislation as 'any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Ordinance, Enactment or other lawful authority and having legislative effect.' In subsidiary legislation, technicalities of particular laws are dealt with specific details by the persons or bodies that have been delegated the power to enact such laws. As mentioned above, the myriad of laws applicable to construction industry can be better addressed and supported by subsidiary legislations.

Apart from the above written laws, Malaysia also recognises the principles of English law applicable to local circumstances, judicial decisions of the superior courts, i.e., the High Courts, Court of Appeal and the Federal Court and also the customs of local inhabitants accepted as law by the courts (Lee Mei Pheng, 2005). Notably, judicial decisions in respect of construction cases provide the precedent and consistency in dealing with construction disputes. Furthermore, judicial recognition by the courts of various local customs in construction matters guide the construction participants in their dealings with each other. English common law and equity as expressed in the judicial decisions in English cases may also be applicable in the local context (Section 3 of the *Civil Law Act 1956*, subject to local circumstances). Besides English cases, cases from other Commonwealth jurisdictions such as Australia, New Zealand, Singapore, Brunei, India and Canada are also commonly cited, on persuasive value, in local judgments and law reports. These foreign decisions can be employed by the local courts subject to conditions such as no local case or local provisions on the matter arising or local provisions are ambiguous. (Singh, 2002, page 43)

In respect of construction industry, foreign cases are largely extensive as compared to the local cases. Since foreign cases especially English cases are applicable in accordance with and subject to the limitations imposed by section 3 and 5 of the *Civil Law Act 1956*, they have been widely referred to due to their large extent of coverage as regards to construction industry.

GENERAL LAWS APPLICABLE TO CONTRACTORS IN PRIVATE CONSTRUCTION PROJECTS

As mentioned above, many construction disputes relate to relationship of parties in the construction industry that affecting diverse legal aspects. This article examines web of regulations bound by contractors in private projects. To address the diversity of the legal disputes, law such as general principles of contract, tort and company law may be applicable.

Fundamentally, the law of contract is the essence of construction law. It governs the relationships among the construction players as well as activities incidental to the construction works. For example, it 'applies to the main construction contract, subcontracts for specific work, employer/employee relationships, insurance, sale of goods and land, hire purchase, corporations, partnerships and myriad other arrangements all of which impinge on the project in legal terms (Bailey and Bell, 2011, page 75). Thus, all

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general principles such as pertaining to the formation, elements, type, legality, discharge and remedy of contract are dealt with under this law. These principles are codified in the *Contracts Act 1950*, the main legislation governing the law of contract in Malaysia. Other contractual principles can also be found in pieces of legislation such as the *Civil Law Act 1956*, the *Specific Relief Act 1950*, the *Sale of Goods Act 1957*, the *Insurance Act 1996* and the *Government Contract Acts 1949* (Rajoo and Singh, 2012).

Apart from statutes, principles of contract law can be entrenched in common law and equitable principles as developed by local courts' decisions along with foreign cases where their applications are permitted on persuasive value. In construction contracts, all rights and obligations of the parties and activities incidental to the project are prescribed in the contract documents signed by the parties, either in the form of independently constructed construction contract or standard forms, including amended version of standard forms.

Next, another important law is law of tort. Tort is defined as a civil wrong and usually found in common law. Torts cover wrongful acts and omissions which affect the rights and/or interests of others (Rajoo and Singh, 2012). This means that torts cover the rights and liabilities of the third parties affected by such wrongful acts or omissions by the tortfeasor. Construction industry is fecund for disputes involving torts. This is due to the facts that many construction activities involve many others besides the parties in the contracts. The most important tort that has vast influence in construction industry is the tort of negligence. Negligence has been defined as 'a breach of duty to take reasonable care to prevent damage occurring to others when engaged on anything which a reasonable person would realise requires careful performance'. (Bailey and Bell, 2011, at page 127). Example of action in negligence in the construction industry is such as 'between a client and a building professional engaged to carry out work or services for the client. (Bailey and Bell, 2011). Professional negligence may include failure to carry out adequate examination of construction sites, error in design, provide misleading estimates in cost or failure to select appropriate contractor. Thus, tort determines legal liability for careless actions or inactions which cause injury. Another significant branch of law is company law. Principles of law of company are relevant where the contractor is an incorporated company. The law relating to companies is regulated in the Companies Act 2016 and can also be found in judicial precedents.

SELECTED LAWS APPLICABLE TO CONTRACTORS IN PRIVATE CONSTRUCTION PROJECTS

The following legislations are some selected significant ones that are applicable generally to contractors in private projects and for the matters pertaining to or arising out of the construction projects, works or development.

Legislations Pertaining to Planning and Building

Construction activities need land. Thus, all land matters must abide by the *National Land Code 1965* that governs matters relating to land and tenure. For the planning and building, the main legislation is the *Street, Drainage and Building Act 1974*. It comprises of eight parts

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of provisions pertaining to street, drainage and building matters that are particularly dealt by local authority. Among other things, this Act prescribes matters pertaining to maintenance and repair, improvement as well as acquisition of land for public streets. It also covers the matters regarding the making and repair of private streets. Construction and maintenance of drains and watercourses are also prescribed. Meanwhile, there are also provisions regarding buildings that deals with requirement of plans and specifications for erection of new building to be submitted to local authority and relevant State Authority. An important subsidiary legislation made under this Act is the *Uniform Building By-Laws 1984*. It consists of subsidiary legislation that provides for matters such as procedural aspects in submissions of plans for approval in connection with building operation. It also provides for structural, constructional and fire requirements that should be adhered to in a building construction.

Town and Country Planning Act 1976 is another significant legislation that governs the planning development in Malaysia. Under this Act, National Physical Planning Council has been established under section 2A to ensure the improvement of the physical environment and sustainable development through efficient town planning within the framework of national policy. There are also Malaysian Standards that are applicable for the planning and building activities such as MS 1184 (Universal design and accessibility in the built environment - Code of Practice (Second Revision) and MS 1525 (Energy Efficiency and Use of Renewable Energy for Non-Residential Buildings).

Next is the *Housing Development (Control and Licensing) Act 1966* (Revised 1973 – Reprint 1982) that prescribes matters regarding control and licensing of housing development. *Strata Titles Act 1985* and *Strata Management Act 2013* also are relevant here that provides proper maintenance and management for buildings and common property. Another significant legislation is the *Environment Quality Act 1974* Act 127 (latest amendment 2012). Construction development and activities may have great impact to the environment. As examples, many lands need to be cleared and wastes are dumped due to construction activities. Without efficient regulatory mechanisms, pollutions and many negative effects on environment may possibly become uncontrollable.

Meanwhile, contractor as an employer has the duty to ensure that the health and safety of his employee is safeguarded so far as practicable. Thus, the *Occupational Safety and Health Act 1994* (OSHA) also is important since it regulates safety and health matters particularly in the workplace or site. It specifically provides that the definition of "employee" includes an independent contractor engaged by an employer or a self-employed person and any employee of the independent contractor (Section 15 (3) (a) OSHA). Self-regulatory mechanism is also apparent in the regulatory approach of health and safety matters in workplace given that this Act specifically provides for the Minister to approve and revise industry codes of practice developed as the guidance for the compliance of this Act, upon the recommendation of the Council or Director General. Section 37 (1) and (2) OSHA. Under this Act, an industry code of practice may refer to any code, standard, rule, specification or provision relating to occupational safety or health approved by the Minister or one that may apply, incorporate or refer to any existing document formulated or published by

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anybody or authority (Section 37 (3) OSHA). *Geological Survey Act 1974* is another significant legislation since construction works may involve various kinds of works including site clearance, soil investigation, excavation and others that require geological aspects of operation.

Legislation Pertaining to the Building Contract between Parties

The first one is the *Contract Acts 1950* that governs the principles of contracts executed in Malaysia. The rights and obligations of contracting parties are prescribed therein although these may not be exhaustive. It is common that contractual rights and obligations are supported by some other relevant law such as common law and court cases. The Act lays down the elements essential to a contract such as offer and acceptance, consideration and intention to create legal relationship as well as certainty in the terms of agreement. The parties also must be legally capable to contract and consented to it freely without voidable elements such as coercion, fraud, duress, misrepresentation, undue influence or mistake. The Act also covers matters pertaining to the performance of contract by the contracting parties and the consequences of breach of a contract. In addition, it also provides for the law of agency such as pertaining to appointment and authority of an agent, the duties of agent towards principal and vice-versa and the effect of agency on the contract with third persons are also laid down in this Act. These issues are well within the scope of construction industry.

The next piece of regulation that specifically governs the legal relationships between the building construction parties is the standard form of building contract. There are numerous standard forms such as PAM Contract, JKR (PWD) 203 and 203A Contracts, CIDB Contract, FIDIC Contract and IEM Contract that can be applied according to the necessity of the project. Once the standard form is adopted by the parties in the project, it has the legal binding effect on them and is subject to the principles laid down in the *Contracts Act 1950*.

Another legislation that governs the relationship of the construction parties is the *Employment Act 1955*. This Act is the main *legislation* on labour matters in Malaysia. Since the contractors works for the employer and engage its workers, this Act is also important to govern the principles in employment contract entered by the parties. Meanwhile, clauses incorporating arbitration matters can be found in many standard forms of construction contracts. Thus, arbitration is governed by the *Arbitration Act 2005* for both international and domestic procedures which is based substantially on the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration*. (The Star, 2013).

There are also other legislations that are relevant such as the *Defamation Act 1957* (Revised 1983) that governs tortious acts through negligence defamation. This Act deals with matters such as slander, libel and unintentional defamation. Although defamatory statements made in relation to Malaysian construction industry are relatively rare, but cases can be found in another jurisdiction. In the case of *Wagner & Ors* v *Harbour Radio & Ors* [2018] QSC 201 the Supreme Court of Queensland (Australia) awarded damages in

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the amount of AUD$3.7 million to four brothers over comments made by a broadcaster Alan Jones in 27 radio broadcasts conveying 76 defamatory imputations in relation to the collapse of a dam wall at a quarry owned by the brothers during the big floods inundated Queensland in 2011.

Next, the *Digital Signature Act 1997*. Transactions in the commercial world today, in particular during the Covid-19 pandemic, involve various complex modes that require the industries to accommodate with the changes. Digital signature has become common in many commercial transactions including construction industry. Thus, the provisions of this Act are applicable pertaining to digital signature in construction contract before it can validly be acceptable and has its legal binding effect as any other document signed with a handwritten signature or thumbprint. Another legislation is *Electricity Supply Act 1990*. Electrical works including its construction, extension, installation, repair and maintenance are types of construction works and come under the purview of the *Electricity Supply Act 1990*. Among other things, it prescribes for matters regarding licence requirement for electric supply installation and for the arbitration in matters regarding any dispute or difference.

The above discussion demonstrates that there are many laws and regulations need to be complied in construction contract, particularly, by the contractors in private projects.

CONCLUSION

It is shown here that there are multitude of laws and regulations applicable in delivering the successful projects that must be complied by the contractors, particularly in private projects. However, the range is not limited to the above listed pieces. Even though there are various legislations that are incumbent upon the contractors to follow, in practice, they merely execute those activities as prepared and certified by the professionals, i.e., either the engineers or architects. There are also many other mechanisms including self-regulatory mechanisms such as various standards developed by the industry itself that must be applied to deliver efficient projects. However, the legal status of these mechanisms is yet to be examined and will be a fertile area for further possible research.

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LAW AND GOVERNANCE

KEPERLUAN AKTA PERKHIDMATAN PARLIMEN DIWUJUDKAN SEMULA DI MALAYSIA: SUATU PENGENALAN

Ikmal Hisham Md. Tah, Akmal Hisham Abdul Rahim, Faridah Jalil, Idzuafi Hadi Kamilan & Muthanna Saari

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ABSTRAK

Ahli Parlimen adalah pemimpin yang dipilih rakyat mempunyai peranan signifikan di dalam amalan Demokrasi Berparlimen. Ahli Parlimen tidak boleh menjalankan tanggungjawab mereka sekiranya kekurangan dana dan bantuan yang mencukupi tidak diberikan. Ahli Parlimen tidak mampu membuat keputusan yang bermaklumat tanpa pertimbangan yang baik tanpa sokongan data dan maklumat. Bagi Ahli Parlimen yang dipilih menjalankan tanggungjawab dengan baik dana yang sewajarnya harus diberikan agar mereka dapat bantuan sumber yang boleh dipercayai bagi membuat keputusan yang betul. Penyelidikan Parlimen yang efektif dan perpustakaan yang baik diperlukan bagi membantu Ahli Parlimen menjalankan tanggungjawab mereka yang penting sebagai pembuat undang-undang. Bagi melaksanakan tugas mereka dengan betul dan tanpa pilih kasih dan diskriminasi, mesti ada perkhidmatan penyelidikan parlimen yang boleh dipercayai, tidak berpihak dan berkesan yang tersedia. Sayangnya, walaupun perkhidmatan itu ada, kualiti yang diperlukan tidak ada. Dalam penyelidikan ini, kekurangan dan kekurangan perkhidmatan penyelidikan parlimen yang ada disiasat dan ditentukan. Objektif kajian ini adalah untuk membuat cadangan pembaharuan Parlimen yang akan meningkatkan Perkhidmatan Penyelidikan Parlimen di Malaysia. Dengan menggunakan kaedah kualitatif dan penyelidikan berdasarkan perpustakaan, Perkhidmatan Penyelidikan Parlimen di negara-negara Komanwel terpilih iaitu *Library House of Commons*, UK dan Perpustakaan Parlimen Australia yang relevan sebagai perbandingan akan dijadikan panduan. Cadangan untuk menambah baik sistem dan mengatasi masalah yang membimbangkan perkhidmatan bakal dicadangkan. Pelbagai inisiatif yang dibincangkan dalam makalah ini akan memperkukuhkan perkhidmatan penyelidikan parlimen Parlimen Malaysia.

Kata kunci: Reformasi, Penyelidikan, Perpustakaan, Parlimen, Malaysia.

PENGENALAN

Ahli Parlimen memerlukan sumber yang mencukupi sama ada kewangan, bantuan sumber manusia seperti kakitangan dan penyelidikan Parlimen di dalam menjalankan tanggungjawabnya. Bantuan perkhidmatan kepada Ahli Parlimen secara tidak langsung membolehkan Ahli Parlimen mampu dapat memanifestasikan peranan institusi Parlimen

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di dalam membuat undang-undang, menjadi tempat perbincangan masalah rakyat, menyemak urusan Kerajaan secara efektif dan meluluskan belanjawan. Hal ini semakin signifikan khususnya di dalam menyemak Urusan Kerajaan pada hari ini. Keupayaan Parlimen menyediakan akses kepada penyelidikan dan perpustakaan di dalam institusi Parlimen merupakan aspek penting diberikan kepada semua Ahli Parlimen. (CPA Recommended Benchmarks for Democratic Legislatures, 2005), (David Beetham, 2006).

Hal ini kerana tujuan utama menubuhkan perkhidmatan penyelidikan parlimen adalah untuk menyediakan analisis yang seimbang dan tidak berpihak yang boleh digunakan Ahli Parlimen. (Guidelines for Parliamentary Research Services, 2013). Malah di sesetengah negara juga, Perkhidmatan Penyelidikan dianggap sebagai "*brain of legislature".*(Toshiyuki Yamada, 2017). Perpustakaan .Parlimen menyumbang kepada keefektifan Parlimen dengan menyediakan maklumat yang relevan, berautoriti, bebas dan tidak berpihak (Inter Parliamentary Union, the Association of Secretaries General of Parliaments and IFLA, 2013).

Bagi Parlimen Malaysia, bantuan perkhidmatan kepada Ahli Parlimen termasuk dalam bidang penyelidikan secara kasar bersifat tidak memuaskan khususnya kepada pembangkang. Hal ini secara tidak langsung memberikan kesan terhadap perkhidmatan yang diberikan Ahli Parlimen. (Johan Shamsuddin Sabaruddin, 2013). Hal ini disokong dengan desakan dari semasa ke semasa oleh Ahli Parlimen untuk mendapatkan bantuan perkhidmatan penyelidikan Parlimen yang lebih baik diutarakan di dalam Parlimen. (DR 16.11.1989) (DR 24.11.2016) (DR 05.11.2019). Pada masa yang sama, majoriti Ahli Parlimen tidak menggunakan khidmat penyelidikan Parlimen dan tidak menggunakan langsung perpustakaan Parlimen, Perpustakaan Universiti dan Perpustakaan Negara malah kurang 10 peratus sahaja meminjam buku di perpustakaan Parlimen (Szarina Abdullah, 2012)

Bahagian Penyelidikan dan Perpustakaan Parlimen Malaysia

Sejarah Perpustakaan Parlimen bermula seawal bangunan Parlimen ditubuhkan. Hanya Ahli Dewan yang dibenarkan menggunakan perkhidmatan di Perpustakaan Parlimen ketika itu (Mohamed Noah, 1967). Peranan Perpustakaan di awal penubuhannya adalah bersifat rujukan dan perkhidmatan peminjaman buku kepada Ahli Parlimen dan kakitangan sahaja. (Fauziah binti Abu Hassan, 2003)

Bahagian Penyelidikan dan Perpustakaan Parlimen Malaysia kini terdiri daripada 15 orang pegawai penyelidik bergred 48 dan seorang pegawai perpustakaan bergred 41 dengan diketuai seorang Setiausaha Bahagian Penyelidikan bergred 54. Penyelidikan Parlimen hanya ditubuhkan pada tahun 2005. Penyelidik bertanggungjawab membantu Ahli Parlimen sama ada di dalam Dewan Rakyat dan Dewan Negara dengan menyediakan beberapa bentuk produk penyelidikan. Antara produk penyelidikan Parlimen yang disediakan termasuklah analisis Rang Undang-undang, nota perbahasan, nota isu semasa, nota ikhtisar dan percakapan, dan pelbagai laporan lain (Mohamad Ariff, 2020)

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Selepas Pilihan Raya Umum ke-14 pada tahun 2018, Parlimen mula memberikan perhatian serius terhadap agenda Reformasi Parlimen. Penyelidik Parlimen telah diberikan tanggungjawab terlibat di dalam beberapa tugasan lain termasuklah menjadi pelapor (rapporteur) di dalam beberapa persidangan antarabangsa Parlimen, berpartisipasi di dalam pelbagai seminar anjuran pelbagai pihak di Parlimen dan sebagai sebahagian daripada sekretariat di dalam Jawatankuasa Pilihan Khas Parlimen.

Terkini, Parlimen Malaysia telah membangunkan e-*parliamentary research service system* (e-PRS) bagi menambah baik kaedah penyampaian komunikasi dan maklumat di antara Ahli Parlimen dan penyelidik. (DR 14.7.2020). Selain itu, perpustakaan Parlimen juga menguruskan perkara seperti pangkalan data indeks bagi Rang Undang-undang dan keratan surat khabar dan koleksi multimedia di dalam laman web interaktif.

Walau pun Bahagian Penyelidikan Parlimen ditubuhkan sejak tahun 2005 namun Bahagian Penyelidikan sentiasa menghadapi cabaran khususnya daripada aspek sumber manusia, kepakaran dan sumber (Muhamad Sayuti Hassan dan Khairil Liza Salleh, 2017). Hal ini dapat dilihat daripada penyelidik dan perpustakaan Parlimen. Jumlah kakitangan di Perpustakaan Parlimen tidak mengalami perubahan sejak di awal penubuhan Perpustakaan Parlimen.

United Kingdom

Perkhidmatan penyelidikan dan maklumat di Parlimen United Kingdom dibahagikan dua Perpustakaan Parlimen di *House of Commons* dan di *House of Lords*. Perpustakaan Parlimen di House of Commons mempunyai 80 orang penyelidik yang bertanggungjawab memberi maklum balas kepada pertanyaan ahli Dewan di samping menyediakan nota tugasan. Manakala di *House of Lords* terdapat sejumlah 20 orang kakitangan.

*Parliament Office of Science and Technology (POST) m*empunyai 14 orang penyelidik. Pejabat *POST* menyediakan nota yang bersifat *peer-reviewed dan* proaktif yang melibatkan temuramah pemegang taruh. Pejabat Penyelidik Parlimen di UK juga bertindak sebagai jambatan di antara Parlimen dan kumpulan penyelidikan dan menyediakan latihan bagi menyokong penggunaan penyelidikan secara bukti empirikal di Parlimen.

Terdapat juga pakar rujuk yang merupakan ahli tetap yang menyokong jawatankuasa Parlimen dengan pertanyaan-pertanyaan. Setiap Jawatankuasa akan mempunyai di antara satu hingga lima orang pakar rujuk yang menyokong mereka. POST secara proaktif menyediakan nota yang kebiasaannya melibatkan topik yang dirasakan relevan kepada Parlimen di dalam tempoh 6 bulan ke hadapan hingga 2 tahun. Setiap nota akan mengambil masa 3 bulan untuk disediakan dan melibatkan temu bual 15 orang pakar rujuk yang rentas akademik, industri, kerajaan dan sektor ketiga.

Nota akan disemak secara peer reviewed oleh kumpulan pakar rujuk luar. POST juga menganjurkan dengan membawa pakar rujuk luar ke dalam Parlimen bagi membincangkan tajuk yang relevan dengan dasar kerajaan. Perpustakaan dan

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Penyelidikan Parlimen pula akan mengeluarkan satu lagi nota ringkas berkaitan tajuk tersebut agar Ahli Parlimen dapat bertanyakan soalan semasa program. Mereka juga menyediakan nota bagi tujuan perbahasan, dan tajuk di mana mereka akan banyak menerima pertanyaan daripada ahli-ahli Dewan.

Di Parlimen United Kingdom, Perpustakaan tidak menyediakan sokongan langsung kepada sistem Jawatankuasa Parlimen. Sistem Jawatankuasa mempunyai kakitangannya sendiri termasuk pakar rujuk, yang membuat penyelidikan dan menulis nota dan laporan bagi ahli-ahli jawatankuasa, menyediakan skop dan topik penyelidikan yang berpotensi untuk dikaji, mengenal pasti saksi untuk memberi keterangan lisan kepada jawatankuasa, dan mendraf laporan bagi Jawatankuasa dan sebagainya. POST menyediakan sokong kepada Jawatankuasa dalam bentuk dengan membantu mereka mengenal pasti saksi, berkongsi maklumat dan kerja yang telah ditapis bagi pertanyaan pada masa hadapan dan menyediakan taklimat untuk jawatankuasa.

Berhubung dengan kualiti kertas penyelidikan yang dihasilkan penyelidik di Parlimen UK melalui beberapa proses dalaman dan luaran yang sangat teliti. Pada peringkat awal, rakan-rakan sekerja akan membaca kertas kerja yang ditulis dan akan memberikan ulasan. Selepas kajian semula dalaman, pihak pengurusan Penyelidikan akan meminta pelbagai pihak berkepentingan untuk memberi ulasan mengenai draf sebelum diterbitkan. Sesi temu bual dengan pelbagai pihak juga akan dilakukan sebagai sebahagian daripada proses penyelidikan untuk memastikan bahawa isu yang dikaji adalah relevan dan mewakili pelbagai pandangan mengenai topik terbabit.

Kebanyakan data yang digunakan bagi tujuan penyelidikan di Parlimen UK adalah menggunakan Internet. Ada sebahagian penyelidik kami adalah bekas pensyarah yang mempunyai akses kepada sistem pangkalan data secara online ke universiti mereka. Pada masa yang sama juga alat penyelidikan yang digunakan di Parlimen sangat membantu dan membolehkan kami mencari rekod perbahasan hansard, laporan jawatankuasa, taklimat dan lain-lain lagi dengan mudah.

Australia

Sejarah Perpustakaan Parlimen Australia bermula sejak tahun 1901 dan sejak itu perkhidmatan perpustakaan diberikan secara berterusan bagi menyokong perkhidmatan Parlimen. Perpustakaan Parlimen di Australia merupakan sebahagian dari Jabatan Perkhidmatan Parlimen (*Department of Parliamentary Services*). Perpustakaan Parlimen diwujudkan dengan tujuan untuk yang menyediakan perkhidmatan kepada ahli Parlimen dengan memberikan bantuan sama ada berbentuk rujukan buku, kertas-kertas penyelidikan, rundingan bukan sahaja kepada Ahli-ahli Dewan sama ada di *House of Senate* mahu pun di *House of Representatives,* malahan juga kepada kakitangan di pejabat Ahli Parlimen, kakitangan Jabatan Parlimen dan juga kepada *Governor-General.*

Penyelidik di Parlimen Australia menjalankan tugasan dan kerja di bawah Perpustakaan Parlimen Australia (*Parliamentary Library*). Peranan Pustakawan Parlimen Australia

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dikanunkan di dalam *Parliamentary Service Act 1999* seperti berikut *"… provide high quality information, analysis and advice to Senators and Members of the House of Representatives in support of their parliamentary and representational roles…"*

Bagi menjalankan fungsi Perpustakaan Parlimen bagi membantu Ahli Parlimen, beberapa ciri penting seperti kerja penyelidikan perlu disiapkan dalam tempoh masa yang diperlukan, tidak berpihak dan rahsia. Pada masa yang sama, hasil penyelidikan ini harus berkualiti tinggi dan mempunyai integriti. Produk penyelidikan juga perlu mempunyai asas di mana akses yang sama perlu diberikan kepada semua ahli Senate House dan ahli House of Representatives, jawatankuasa Parlimen dan kakitangan yang bekerja untuk Senator atau jawatankuasa Parlimen dan mempunyai kebebasan dari dikawal oleh badan Eksekutif.

Perpustakaan Parlimen di Australia boleh dibahagikan kepada dua bahagian penting. Pertama, Bahagian Penyelidikan dan kedua, Bahagian Pangkalan Data dan Koleksi Perpustakaan. Bahagian Penyelidikan bertanggungjawab menyediakan maklumat, analisis, interpretasi dan perbincangan melalui rundingan secara bersemuka dan penyediaan kertas-kertas penyelidikan yang tertentu. Kedua, Bahagian Pangkalan Data dan Koleksi Perpustakaan pula menyediakan pelbagai maklumat dan perkhidmatan penghantaran dokumen dan membina dan memastikan sumber maklumat yang diperlukan pelanggan dan kakitangan.

Pada hari ini, terdapat 75 orang penyelidik yang dipecahkan kepada tujuh seksyen yang berlainan terdiri daripada Ekonomi, Hal Ehwal Antarabangsa, Keselamatan dan Pertahanan, Undang-undang dan Rang Undang-undang, Politik dan Pentadbiran Awam, Sains, Teknologi, Alam Sekitar dan Sumber, Polisi Sosial, Statistik dan Pemetaan. Seksyen terbesar adalah Dasar Sosial dan yang terkecil adalah Sains, Teknologi, Alam Sekitar dan Sumber). Manakala di bahagian koleksi perpustakaan dan pangkalan data di ketuai seorang Penolong Setiausaha dan dibahagikan kepada dua yang lain; Pencarian dan Koleksi Perpustakaan dan Sistem Perpustakaan, Projek dan Inovasi.

Selain perpustakaan Parlimen Australia menjalankan perkhidmatan secara konvensional seperti menyediakan pinjaman buku dan bahan rujukan di perpustakaannya, kakitangan perpustakaan juga memantau isu di media melalui surat khabar, media massa dan media sosial. Penyelidik pula akan menyediakan analisis dan penyelidikan yang tertentu yang bersifat rahsia, memberikan bantuan nota ikhtisar bagi delegasi Parlimen, menerbitkan bahan penyelidikan, akses atas talian bagi pangkalan data dan perkhidmatan sepanjang 24 jam dan juga menyediakan kuliah, seminar dan latihan tertentu berhubung kait dengan perpustakaan dan perkhidmatannya.

Kawalan kualiti untuk bahan penerbitan yang dimasukkan di dalam laman web Parlimen adalah lebih ketat dan kadang kala memakan masa, kebiasaannya produk penyelidikan seperti ini akan melibatkan dua orang penyemak yang terdiri dari kalangan ahli akademik; yang membuat pengeditan, dan kadang kala pengulas luar.

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Bagi sesetengah bahan yang diperlukan oleh Ahli Parlimen di Australia, penyelidikan mereka biasanya akan disemak oleh Pengarah atau Setiausaha Bahagian dan kadang kala di semak oleh rakan sejawatan mereka yang lain sebelum dihantar keluar kepada ahli Parlimen. Terdapat pelbagai produk penyelidikan yang disediakan untuk Ahli Parlimen termasuk Bills Digest, Research Publications, Monthly Statistical Bulletin, Search Parlinfo dan sebagainya.

Selain itu, Perpustakaan juga menganjurkan kuliah dan seminar bagi tujuan memberikan kebaikan kepada Ahli-ahli Senator dan Ahli Dewan. Tujuan program seminar ini adalah untuk membawa penceramah yang berautoriti ke Parlimen dan bertukar-tukar pandangan dan pendapat melalui perbincangan secara langsung dan mendengar sendiri berhubung topik-topik yang relevan.

Selain dari katalog perpustakaan Parlimen, Perpustakaan Parlimen juga menyediakan Summons, artikel jurnal, keratan surat khabar, siaran radio dan tv, *parliamentary handbook, political press releases, political party documents, library portal access for senators and members and access library resources remotely.*

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Reformasi Perkhidmatan Penyelidikan Parlimen di Malaysia

Cadangan mereformasi Bahagian Penyelidikan Parlimen telah dikemukakan pelbagai pihak. Antara aspek penting yang perlu diteliti adalah berhubung dengan kerangka Bahagian Penyelidikan, kakitangan, kewangan, produk penyelidikan parlimen, kualiti produk, latihan, E-PRS dan sebagainya. Aspek penting ini selari dengan prinsip Parlimen bebas dan demokratik di mana sumber manusia dan kewangan yang mencukupi harus disediakan. (David Beetham, 2006) (CPA Recommended Benchmarks, 2005).

Institusi Penyelidikan Parlimen Malaysia

Antara inisiatif penting di dalam melaksanakan reformasi Parlimen adalah dengan menginstitusikan Bahagian Penyelidikan Parlimen Malaysia (Idzuafi Hadi Kamilan, 2019) (Muhamad Sayuti, 2021).

Terdapat pelbagai bentuk model pejabat Perkhidmatan Penyelidikan Parlimen yang dijadikan panduan negara-negara di dunia. Ada negara yang mengasingkan Bahagian Penyelidikan dengan Perpustakaan, ada yang menggabungkan bahagian penyelidikan bersama Perpustakaan Parlimen dan ada juga yang hanya mewujudkan Perpustakaan Parlimen sahaja tanpa adanya Bahagian Penyelidikan sepertimana negara-negara di dalam Kesatuan Eropah (Ida Kelemen, 2015)

Cadangan menginstitusikan Bahagian Penyelidikan Parlimen akan membolehkan kawalan pengambilan kakitangannya sendiri khususnya berhubung kait penyelidik yang pakar dalam sesuatu bidang yang khusus. Pada masa yang sama, institusi Penyelidikan dan Latihan Parlimen ini boleh dibesarkan dengan pertambahan jawatan penyelidik, penubuhan *Parliamentary Budget Office* di bawahnya, seksyen latihan, perpustakaan Parlimen, dan sebagainya.

Walau pun bersifat institusi penyelidikan Parlimen yang bebas namun Yang di-Pertua Dewan masih di bawah kawalan Yang di-Pertua Dewan. Laporan tahunan berhubung aktiviti, penggunaan kewangan penyelidikan dan aktiviti lain yang diaudit harus dibentangkan setiap tahun dan dilaporkan di bawah Jawatankuasa Pilihan Khas Parlimen berhubung Perpustakaan dan Penyelidikan Parlimen. Aspek tata kelola yang baik ini turut sama diamalkan di CRS, UK dan Australia.

Perkhidmatan perpustakaan / penyelidikan dalam Akta perkhidmatan Parlimen

Kakitangan Parlimen merupakan kakitangan yang kebiasaannya adalah kakitangan bersifat "*close service*". Usaha mengembalikan Akta Perkhidmatan Parlimen penting agar pentadbiran Parlimen boleh menentukan pengambilan kakitangan Parlimennya sendiri berdasarkan keperluan mereka (Idzuafi Hadi Kamilan, 2019). Contohnya kakitangan penyelidikan Parlimen yang harus mempunyai ratio bersesuaian dengan jumlah Ahli Parlimen (Dewan Rakyat dan Dewan Negara) harus diberi pertimbangan (Muhamad Sayuti, 2021). Seksyen Perpustakaan Parlimen tidak pernah mengalami proses pertambahan

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kakitangan sejak diwujudkan pada tahun 1960 an.

Bagi memperkukuh jawatan pustakawan dan penyelidikan Parlimen yang bebas maka dicadangkan jawatan ini harus dikanunkan di bawah Akta Suruhanjaya Perkhidmatan Parlimen jika diwujudkan kembali. Dengan cara ini, penyelidik Parlimen tidak perlu gerun dengan tekanan mana-mana pihak sekiranya membantu mana-mana Ahli Parlimen sama ada penyokong Kerajaan mahu pun pembangkang.

Kewangan Penyelidikan Parlimen

Dengan pertambahan sumber manusia termasuk kakitangan yang profesional dan berpengalaman maka akan memerlukan pertambahan kewangan bagi membuat aktiviti dan latihan. Laporan *Congressional Research Services* Amerika Syarikat pada tahun 2019 melaporkan sebanyak USD 125 juta dibelanjakan bagi operasinya manakala Perpustakaan Parlimen Australia membelanjakan AUD15.6 juta pada tahun 2018/2019 untuk memastikan bahagian ini beroperasi. Dengan penggunaan teknologi maklumat yang semakin meluas, usaha mendigitalkan dokumen di Parlimen Malaysia memerlukan pertambahan perbelanjaan yang besar. Hal ini termasuk bagi melanggan jurnal yang relevan bagi menjadikan Penyelidikan Parlimen Malaysia pusat rujukan penyelidikan berhubung Parlimen dan badan perundangan di kalangan negeri-negeri di Malaysia.

Produk Penyelidikan Parlimen

Produk dan perkhidmatan penyelidikan Parlimen tidak harus bersifat konvensional seperti nota perbahasan, nota ikhtisar, nota isu semasa dan analisis Rang Undang-undang. Terdapat pelbagai produk penyelidikan dan perkhidmatan yang telah disediakan bagi membolehkan Ahli Parlimen dapat menjalankan tugas mereka dengan mudah dan cepat. Dengan penggunaan media sosial yang meluas pada hari ini maka terdapat produk dan perkhidmatan penyelidikan Parlimen di beberapa buah negara luar telah direka dalam bentuk infografik, podcast, twitter dan sebagainya.

Kualiti Produk Penyelidikan Parlimen

Semakan Kualiti Produk Penyelidikan Parlimen boleh dilaksanakan dalam empat peringkat kawalan kualiti. Ini termasuk draf produk penyelidikan Parlimen di semak secara penyelidik sendiri, setelah itu melalui proses semakan oleh rakan sekerja, ketiga melalui proses mengedit dan terakhir membuat pembetulan (*proof read)* (UK Parliament Handbook, 2017).

Beberapa buah negara seperti amalan di Congressional Research Services (CRS) Amerika Syarikat atau di Parlimen UK menjemput pakar luar (ahli akademik) menilai dan memberikan maklum balas terhadap produk penyelidikan Parlimen yang disediakan. Dengan memberikan produk penyelidikan bagi disemak pakar luar akan memberikan jaminan kualiti produk penyelidikan Parlimen yang disediakan penyelidik Parlimen. Dengan cara ini juga Ahli Parlimen akan yakin untuk menggunakan produk penyelidikan

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Parlimen tersebut memandangkan produk tersebut telah melalui proses kawalan kualiti yang ketat sehingga disemak pakar luar.

Latihan

Selain Bahagian Penyelidikan Parlimen berperanan menyediakan bantuan dan perkhidmatan penyelidikan melalui produk penyelidikan Parlimen, perkhidmatan lain yang boleh juga ditawarkan termasuklah latihan berkala dan berstruktur melalui seminar kepada Ahli Parlimen, penyelidik Ahli Parlimen dan Dewan Undangan Negeri dan masyarakat awam. Peranan yang sama telah dimainkan oleh *Congressional Research Services* (CRS) di Amerika Syarikat, Perpustakaan *House of Commons* UK dan Perpustakaan Parlimen di Australia. Ini kerana Parlimen tidak mempunyai kemampuan untuk menggaji semua pakar di luar Parlimen. Oleh itu, kaedah lain yang boleh dilaksanakan adalah memanfaatkan penyelidikan di luar melalui perkongsian maklumat bersama ahli akademik / pakar di dalam Parlimen. Pada masa yang sama juga, hal ini selari dengan idea penubuhan institut latihan bagi Ahli Parlimen yang telah diwar-warkan Yang di-Pertua Dewan Negara (The Star, 2021)

Pada masa yang sama juga, Bahagian Penyelidikan Parlimen Malaysia dari semasa ke semasa menerima latihan daripada badan antarabangsa seperti *Westminster Foundation for Democracy (WFD)* dan sebagainya. Pada tahun 2017, Penyelidik Parlimen menerima latihan dalam program *Being An Effective Parliamentary Researcher* anjuran *Westminster Foundation for Democracy (WFD) pada 11 Oktober 2017.* Pada tahun 2019, *Workshop on Comparative Analysis of Parliamentary Research Units and Research Methodologies* dianjurkan oleh *Malaysia Reform Initiatives* (MARI), USAID dan Kedutaan Amerika Syarikat di Kuala Lumpur telah diadakan pada 12 hingga 14 Februari 2019.

Pada masa yang sama, Penyelidik Parlimen seharusnya telah mempunyai kepakaran tertentu yang diperlukan Ahli Parlimen. Antara bidang kepakaran yang boleh dibangunkan termasuklah di dalam bidang undang-undang, ekonomi, hal ehwal wanita dan sebagainya.

Penyelidik Parlimen harus digalakkan menyertai program fellowship di Parlimen lain bagi menajamkan pengalaman seseorang pegawai Penyelidik. Terdapat pelbagai program fellowship yang ditawarkan Parlimen luar negara secara percuma seperti program Internsip Parlimen Tahunan di Parlimen India, program Fellowship Penyelidikan Parlimen di bawah Parliamentary Institutes of Cambodia, program Fulbright, Amerika Syarikat dan sebagainya.

Pangkalan Data Parlimen Malaysia (E-Prs)

Parlimen Malaysia telah membangunkan *e-parliamentary research service system* (e-PRS) bagi menambah baik kaedah penyampaian komunikasi dan maklumat di antara Ahli Parlimen dan penyelidik. (DR 14.7.2020). Selain menjadi medium penyampaian komunikasi dan perkongsian maklumat di antara Ahli Parlimen dan penyelidik, wajar sekiranya produk penyelidikan Parlimen tertentu dikongsi kepada masyarakat. Hal ini

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signifikan produk penyelidikan yang terbuka dikongsi untuk dibaca penyelidik dan masyarakat awam umumnya adalah selari dengan institusi Parlimen di abad ke-21 sebagai sebuah institusi Parlimen demokratik yang bersifat telus, bebas dan inklusif.(David Beetham, 2006)

Antara ciri lain perkhidmatan penyelidikan Parlimen adalah Ahli Parlimen boleh mendapatkan data atau maklumat yang diberikan dengan kadar segera. Jika permohonan Ahli Parlimen adalah berhubung dengan data / statistik yang boleh diperoleh di Internet atau dari agensi Kerajaan maka seharusnya maklumat ini boleh diserahkan dalam tempoh kurang 1 hari. Pada masa yang sama, keperluan untuk menggubal Akta Kebebasan Maklumat bagi digunakan penyelidik Parlimen akan memberikan manfaat yang besar untuk digunakan Ahli Parlimen.

KESIMPULAN

Reformasi Perkhidmatan Penyelidikan di dalam Parlimen merupakan inisiatif reformasi parlimen efektif yang harus dilaksanakan segera bagi memastikan Parlimen boleh menjalankan fungsi khususnya di dalam menyemak badan Eksekutif.

Oleh itu bagi memastikan Reformasi Bahagian Penyelidikan Parlimen dapat dijalankan maka sokongan semua pihak untuk menjayakannya harus diberikan pelbagai pihak. Hal ini kerana dengan usaha memperkukuh dan reformasi Bahagian Penyelidikan Parlimen akan membolehkan peranan Parlimen khususnya di dalam semak dan imbang dapat dijalankan dengan lebih efektif dan efisyen. Dengan cara itu, mutu perbahasan dan peranan Ahli Parlimen di dalam Dewan dan dalam sistem Jawatankuasa Pilihan juga mampu dipertingkatkan.

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KEPERLUAN AKTA PERKHIDMATAN PARLIMEN DIWUJUDKAN SEMULA DI MALAYSIA: SUATU PENGENALAN

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ABSTRAK

Parlimen merupakan institusi yang sangat penting dalam pembinaan sesebuah negara. Sebagai institusi yang dianggap keramat, Parlimen berperanan untuk menjalankan fungsi-fungsi sebuah institusi yang komited kepada pengawasan terhadap kuasa eksekutif pihak kerajaan dan menjadi saluran menyampaikan pandangan serta aduan daripada masyarakat menerusi wakil-wakil dipilih ke Dewan Rakyat. Dewan Negara pula berperanan sebagai pengawas kepada keputusan Dewan Rakyat. Oleh itu, institusi Parlimen memerlukan sistem pentadbiran Parlimen yang bebas dan cekap supaya boleh memberi perkhidmatan kepada ahli-ahli Yang Berhormat tanpa mengira latar belakang kepartian. Selepas Akta Perkhidmatan Parlimen 1963 dimansuhkan pada tahun 1993, tidak terdapat undang-undang khusus mengenai perkhidmatan Parlimen. Ini menyebabkan kakitangan Parlimen tertakluk di bawah Skim Perkhidmatan Am Persekutuan. Namun perubahan masa dan keadaan menyebabkan terdapat keperluan untuk mewujudkan semula undang-undang Perkhidmatan Parlimen. Makalah ini akan menerangkan tentang keperluan untuk mewujudkan semula undang-undang Perkhidmatan Parlimen bagi memastikan institusi Parlimen dapat diperkasakan dan bersifat bebas supaya memberi manfaat kepada kualiti perwakilan Parlimen di Malaysia. Beberapa buah negara seperti United Kingdom dan Australia akan dijadikan sandaran mengenai keperluan mewujudkan semula Akta berkaitan Perkhidmatan Parlimen. Makalah ini akhirnya mencadangkan bahawa Akta ini perlu diwujudkan semula bagi memastikan semak dan imbang dapat dilaksanakan dengan lebih baik dan saksama.

Kata kunci: Kebebasan Parlimen, Kuasa Pengawasan, Perkhidmatan Parlimen, Perbandingan Perkhidmatan Parlimen

PENGENALAN

Badan Perundangan merupakan salah satu cabang Kerajaan, selain Eksekutif dan Kehakiman, yang memainkan peranan penting dalam menggubal undang-undang negara selaras dengan Perlembagaan Persekutuan. Parlimen juga berperanan sebagai mengawal dan memeriksa badan eksekutif dan dengan syarat tertentu memeriksa badan kehakiman. Kewujudan Parlimen menjamin kebebasan kuasa Eksekutif dihadkan dan mempertahankan hak asasi daripada ancaman pelbagai pihak. Oleh sebab itu, bagi memastikan kebebasan institusi Parlimen, kebanyakan negara mempunyai undang-undang berkaitan Perkhidmatan Parlimen bagi memastikan Parlimen dapat berfungsi dengan baik dan bebas daripada pengaruh Eksekutif. Makalah ini akan menghuraikan kepentingan Malaysia mewujudkan semula Akta Perkhidmatan Parlimen selaras dengan kewujudan di negara-negara Komanwel seperti United Kingdom, dan Australia.

AKTA PERKHIDMATAN PARLIMEN

Akta Perkhidmatan Parlimen mempunyai pelbagai struktur dan bentuk di negara masing-masing. Setiap negara Komanwel mewarisi sistem daripada Westminster dan mempunyai keunikan tersendiri dalam aplikasi berkaitan perkhidmatan Parlimen. Terdapat dua bentuk utama akta perkhidmatan parlimen yang diamalkan di dunia, iaitu pertama, berasaskan pendekatan berasaskan Suruhanjaya "*Commissioner-based*" contoh di United Kingdom dan Australia dan kedua bertaraf "*administrative based*" seperti di Kanada. Walau bagaimanapun, kertas kerja ini akan menekankan pendekatan berasaskan Suruhanjaya seperti struktur yang diamalkan di United Kingdom dan Australia dan perbandingan dengan Malaysia.

United Kingdom

Perjalanan perkhidmatan Parlimen berlangsung dengan disokong oleh statut yang khusus untuk memastikannya teratur dan efektif. Di United Kingdom, terdapat tiga akta utama iaitu House of Commons Administration Act 1978, Parliamentary Corporate Bodies Act 1992 dan House of Commons Commission Act 2015. Ketiga-tiga Akta ini memainkan peranan yang penting dalam urusan pentadbiran dan pengurusan House of Commons United Kingdom (Rogers & Walters, 2019).

Akta utama untuk mentadbir perkhidmatan Parlimen di United Kingdom dikenali sebagai House of Commons Administration Act 1978. Laporan Bottomley pada tahun 1973, menyatakan cadangan penubuhan Akta ini adalah bagi memperkemaskan pentadbiran House of Commons supaya lebih seragam dan mempunyai koordinasi yang lebih baik (Ryle MT, 1981). Selain itu, bagi urusan penubuhan bahan korporat bagi hartanah membabitkan House of Commons, satu Akta dikenali sebagai Parliamentary Corporate Bodies Act 1992 telah diwujudkan. Manakala House of Commons Commission Act 2015 telah menjelaskan

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peranan House of Commons Commissioner daripada segi aspek komposisi dan fungsi-fungsi berkaitan (Rogers & Walters, 2019).

Satu keunikan yang terdapat di dalam House of Commons Commission Act 2015 ialah komposisi ahli-ahli luar dari parlimen seperti pakar-pakar bidang tertentu dipilih menganggotai Suruhanjaya (Commission) tersebut. Menurut Seksyen (1) 4 Akta berkaitan, seramai empat orang ahli dilantik bukan dari Minister of Crown yang terdiri daripada pakar-pakar bidang tertentu yang boleh menasihat Suruhanjaya berkaitan apa-apa sahaja isu dalam perkhidmatan Parlimen (Rogers & Walters, 2019).

Australia

Perkhidmatan Parlimen Australia tertakluk di bawah Parliamentary Service Act 1999. Akta ini dibaca bersama-sama Perlembagaan Australia, Public Service Act 1999, Fair Work (Transitional Provisions and Consequential Amendment) Act 2009, Charter of Budget Honesty Act 1998 dan Public Governance, Performance and Accountability Act 2013. Akta pertama, Parliamentary Service Act 1999 ini mempunyai keunikan tersendiri kerana menerapkan dalam Parlimen Australia nilai-nilai seperti komited, etika, penghormatan, akauntabiliti dan tidak bersifat berat sebelah seperti terkandung di dalam Seksyen 10 Akta berkaitan. Sebagai tambahan, Seksyen 10A Akta berkaitan menekankan tentang perkhidmatan yang menekankan perkembangan kerjaya (career-based service) dan berteras kualiti kerja dan pembuatan keputusan berasaskan merit.

Australia mempunyai sistem sokongan sosial dan profesional bagi setiap ahli Parlimen, Senator dan bersifat bebas daripada eksekutif menurut Seksyen 9. Berlainan dengan United Kingdom, peruntukan berkaitan Suruhanjaya Perkhidmatan Parlimen (*Parliamentary Service Commission*) telah dimasukkan di dalam Seksyen 39 dan 40 Akta terutamanya berkaitan fungsi-fungsi Suruhanjaya seperti memberi nasihat kepada "*Presiding Officers*' berkaitan amalan dan praktis Parlimen termasuk memberi laporan dan menjalankan inkuiri dalam perkara berkaitan kepentingan awam. Presiding Officers ini merujuk kepada President of Senate dan apa-apa berkaitan termasuk *Clerk of the House, Speaker House of Representative* termasuk *Clerk of the House* menerusi Seksyen 7 (Parliamentary Service Act 1999, 1999).

Public Governance, Performance and Accountability Act 2013, adalah statut penting yang menyokong kedudukan Parlimen Australia sebagai institusi yang bebas dan bertanggungjawab. Akta ini bertujuan untuk mempertingkat pencapaian sektor awam dan memperbaiki kualiti maklumat yang disampaikan kepada Parlimen bagi menyokong peranan Parlimen mengawal aktiviti dan perbelanjaan kewangan negara. Tanggungjawab yang dikenakan oleh akta kepada agensi kerajaan untuk membuat pelaporan memudahkan Parlimen untuk menjalankan semakan. Tugasan ini dijalankan oleh *Joint Committee of Public Accounts and Audit* yang merupakan jawatankuasa kewangan awam dalam Parlimen.

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PERKHIDMATAN PARLIMEN DI MALAYSIA

Malaysia pernah mempunyai undang-undang Perkhidmatan Parlimen sebelum 1993 yang dikenali sebagai Akta Perkhidmatan Parlimen 1963. Rang Undang-Undang telah dibentangkan oleh YTM Tunku Abdul Rahman Putra Al-Haj pada 11 Mac 1963 bertujuan untuk menyediakan syarat-syarat kelayakan dan perkhidmatan bagi staf perkhidmatan Parlimen. Rang undang-undang tersebut telah diluluskan di Dewan Rakyat pada 12 Mac 1963 tanpa perbahasan dan di Dewan Negara pada 15 Mac 1963.

Akta Perkhidmatan Parlimen 1963

Akta Perkhidmatan Parlimen 1963 mempunyai 8 seksyen utama yang menjelaskan tentang peranan dan fungsi berkaitan termasuk kakitangan, penubuhan Jawatankuasa Penasihat Perkhidmatan Parlimen dan membuat perundangan subsidiari berkaitan hal ehwal Parlimen. (Akta Perkhidmatan Parlimen 1963, 1963)

Dalam aspek kakitangan, Seksyen 4 telah memperuntukan kuasa melantik kakitangan di bawah kuasa Speaker Dewan Rakyat dan Dewan Negara. Kedua-dua jawatan ini telah dilantik oleh Yang Dipertuan Agong menerusi peruntukan Perkara 65 Perlembagaan Persekutuan. Dalam aspek pengurusan gaji dan pencen, Seksyen 6 menjelaskan kuasa-kuasa berkaitan adalah di bawah Jawatankuasa Penasihat Perkhidmatan Parlimen yang dilantik.

Jawatankuasa Penasihat Perkhidmatan Parlimen telah ditubuhkan di bawah Seksyen 5 dan dianggotai oleh Yang di-Pertua Dewan Rakyat selaku Pengerusi, Yang di-Pertua Dewan Negara, masing-masing seorang ahli dilantik Dewan Negara dan Dewan Rakyat oleh Perdana Menteri, seorang ahli Parlimen Parti Pembangkang yang dilantik oleh Yang Dipertua Dewan Rakyat, seorang pegawai Perbendaharaan atau wakil dan seorang Pegawai Perjawatan dan wakilnya.

Dalam aspek perundangan subsidiari, Seksyen 7 telah mewujudkan bagi memastikan kawal selia dilakukan terhadap Parlimen termasuk urusan pelantikan, syarat perkhidmatan, kenaikan pangkat dan tatatertib perkhidmatan Parlimen. Undang-Undang kecil ini boleh dibuat oleh Yang Dipertuan Agong setelah berunding dengan Jawatankuasa Penasihat. Peraturan-Peraturan Perkhidmatan Parlimen 1983 telah diluluskan di bawah Seksyen 7 mengandungi perincian seperti disebutkan berkaitan Perkhidmatan Parlimen.

Walau bagaimanapun, Akta ini hanya digunakan selama 29 tahun sebelum dimansuhkan pada 20 November 1993 melalui Akta Perlembagaan (Pindaan) 1992 [Akta A837] (Kertas Dewan Rakyat 26/92, 2012). Pemansuhan Akta berkaitan menurut Wan Junaidi (2013) berlaku kerana terdapat pertentangan di antara Speaker Dewan Rakyat dan kakitangan Parlimen termasuk masalah dalaman dan isu-isu berkaitan. Hanya pada tahun 2005, Tan Sri Shahrir Samad, Ketua Whip Kerajaan yang merupakan ahli Parlimen Johor Bahru ketika itu telah mencadangkan agar Akta ini diperkenalkan semula (Penyata Rasmi Parlimen, Dewan Rakyat, 2005). Selepas 2018 semakin ramai ahli Parlimen termasuk perbahasan

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Ahli Parlimen seperti YB Dato' Seri Dr Wee Ka Siong, YB Dato' Johari Abdul, dan YB Dato' Dr Hasan Bahrom, memahami betapa pentingnya akta ini diwujudkan semula bagi memastikan institusi Parlimen dibela, bersifat neutral dan kebajikan kakitangan dapat dibela (Penyata Rasmi Parlimen Dewan Rakyat, 2018).

KESIMPULAN

Oleh sebab pemansuhan Akta berkaitan, terdapat pelbagai usaha telah dilakukan untuk mengembalikan Akta tersebut. Kewujudan semula Akta ini membolehkan semangat perlembagaan atau '*constitutionalism*' seperti pemisahan kuasa, semak dan imbang dapat dijalankan dengan lebih teratur dan saksama. Sudah tiba masanya Malaysia mempunyai Akta Perkhidmatan Parlimen seperti negara-negara lain bagi memastikan kebebasan dan integriti Parlimen dalam menjalankan tanggungjawab selaras dengan Perlembagaan Persekutuan.

PENGHARGAAN

Kertas Kerja ini merupakan sebahagian hasil penyelidikan bertajuk 'Kajian Penyelidikan Berhubung Mengembalikan Undang-Undang Perkhidmatan Parlimen di Malaysia' di antara penyelidik-penyelidik dari dari Institut Reformasi Politik dan Demokrasi (REFORM) bersama-sama Bersih & Adil Network (BERSIH 2.0) dan dibiayai oleh Malaysia Reform Initiatives (MARI).

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GOOD GOVERNANCE AND CONSTITUTION

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ABSTRACT

Many countries advocate good governance, but what exactly is it, how does it manifest itself in different countries, and what principles do they use to carry it out? We've all witnessed power abuse; some people get punished, while others are not. The Constitution reflects many standards and values, such as how it protects what is right through the expression of ethical principles. It manifests itself in principles such as the rule of law, equity and equality, procedural fairness, and personal liberty, among others. The western approach to crisis management is sometimes noteworthy because it symbolises what is right in terms of moral ideals. Whilst Islamic approach are more holistic. Nonetheless, this parameter is not always observed. This paper attempt to highlight how Malaysia use constitutional ideas that are morally inspired to generate effective administration, as well as how failure to do so leads to bad governance.

Keywords: good governance, virtue-based governance, ethics, corrupt, morality

INTRODUCTION

The rampant abuse of power is unbelievable. It is manifested in many forms. We've witnessed a terrible displayed of power that goes bizarre. As is the case with the Covid-19 programme, which has a lower impact in terms of its effectiveness. (Dr Ardis, VOKAL Media, 2021). Even the international bodies have made a firm standing in the face of this problem, although the authorities have turned a deafening ear to the people's agony (EbMCsquared, 2021). Many are perplexed by the term abuse because it lacks clear definition (Hadi Azmi, 2021). On the philosophical side the word abuse is so undefined and so culture bound interpretation that no one understand where it starts, where it ends. What is interesting is that study showed there are 2 different types of abuse the functional abuse is to stir outcome and punish transgressors and the dramatic abuse, is to satisfy the power needs of the perpetrators (Vaknin, 2013). Abuse is domination of victim's existence. Abuse is the coping strategy employed by the abuser trying to reassert control over their target by subjugating their victim. A method of killing the person gradually and unnoticeably.

That is why more often than not people including the authority refuse to intervene. The suffering of the victim of abused is portrayed in European refugee crises where the victim of the Democratic People's Republic of Korea (DPRK) was punished for selling a television that had been given to him as a gift by the country's leader, Kim Il-Sung. He was forced to sell the television due to financial issues. The mistake was not removing the label indicating that the item was a gift from Kim Il-Sung. In the DPRK, he is revered as a godlike

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figure, therefore selling that gift might be dangerous (Human Rights Council, 2014). Besides that, there's the propensity of people to avoid the unpleasant situation, they would rather skirt the unsavory state or tend to avert their eyes to unpleasant thing. This give rise to why some bad people did not get punished despite being abusive and disrupting civilization (Human Rights Council, 2014).

Abuse is also rampant in liberal and democratic society its all-pervasive. For example, the government's financial handouts have not been enough, leading to ground-up initiatives like the White Flag campaign. The suicide rate has also hit record highs, with financial difficulties among one of the issues victims experienced. A total of 468 suicides were recorded from January to May (MSN, 2021). Instead of merely announcing another special Covid-19 task force with no specific plan of action in sight, the health ministry must take full responsibility for the MCO 3.0 and full MCO disaster due adverse treatment. Unlike countries like Philippine's, India and Indonesia who has taken ivermectin as alternative remedies. The purpose of this paper thus is to explain how the correct exercise of constitutional rights can help promote good governance.

GOOD GOVERNANCE IN BRIEF

Good governance is a topic of considerable importance. It refers to a set of specific activities or processes, and a comprehensive grasp of its genuine meaning is based primarily on what the terms "good" and "governance" signify. Nonetheless, the two concepts are not new; they have existed since the dawn of human civilization.

Let's take a look at some of the mainstream perspectives on governance that a number of foreign representatives and institutions have accepted, according to the United Nations Development Programme (UNDP), governance is the exercise of economic, political, and administrative authority to manage a country's affairs at all levels, including the techniques, processes, and institutions through which persons and groups express their concerns, exercise their legal rights, fulfil their responsibilities, and arbitrate their disagreements (Masatsugu Asakawa, 1999). While the term "governance" means different things to different people, the Asian Development Bank prefers to interpret it as the way authority is exercised in the administration of a country's economic and social investments (Masatsugu Asakawa, 1999).

> "The term governance, as widely used, comprises all aspects of the way a country, organisation, or other institution is governed," says the International Monetary Fund (Masatsugu Asakawa, 1999). The United Nations Economic and Social Commission for Asia and the Pacific, on the other hand, prefers to refer to it as "the process of decision-making and the process by which choices are implemented" (Masatsugu Asakawa, 1999).

Serious human endeavor including the administration of human affair signifying both essence, mind and intellect. Governance should be the main point from which the meaning

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of the other phrases is derived. In a nutshell, "good governance" or "virtue-based governance" is defined as "the intellectual and practical process of obtaining excellent results within the scope of a truthful and just system (Mortimer J. Adler, 1997).

GOVERNANCE AND CONSTITUTION

Virtues can also be recognised in the constitutional setting, such as how people are allowed the right to speak. The right to speech is provided in Article 10(1)(a) of the Federal Constitution which states that subject to clauses (2), (3) and (4), every citizen has the right to freedom of speech and expression. The right to free speech is also present in parliamentary privilege, which carries with it the notion of ethical behavior. Ethical in the sense that members of the house are free to carry out their duties as parliamentarians as efficiently as possible without influence of outsiders. In other words, privileges are intended to insulate Members of Parliament from harassment or intimidation of legal action taken against them in the course of their duties as legislators (Noor Farihah, 2020).

Procedural fairness, for example, is also a notion that can be used to demonstrate good governance. The late Justice Abdoolcader defined procedural fairness as including not only legal but also jurisdictional errors; The court stand as arbiter in holding the balance between individual and between the state and the individual and will not have the slightest hesitation to condemn or strike down any statutory shelter for bureaucratic discrimination, any legislative refuge for the exercise of naked arbitrary power in violation of any of provision of the constitution and equally any executive action purported to be made thereunder (Wu Min Aun, 1999).

Art. 8 right to equality discussed in Tan Tek Seng v Suruhanjaya Perkhidmatan (1996) 1 MLJ 261 defines procedural fairness by requiring public authorities to observe the procedural fairness responsibility to all citizens and to explain reasons for their choices. Adjudicators are also obligated to explain reasoning for their decisions in the Hong Leong v Liew Fook Chuan [1997] 1 CLJ 665.

Good governance also includes administrative fairness. Administrative justice, according to H.W.R Wade, is the connecting thread between the Rule of Law and good governance; without it, bad government is prevalent (H.W.R Wade, 1963). Natural justice, participation, democracy, efficiency, fairness, openness, and cost effectiveness are just a few of the concepts that administrative justice embraces.

However administrative justice also faces hurdles, as it usually does. Legal remedies, for example, frequently elicit antagonistic responses rather than empathetic and constructive responses to the victim's condition. Judicial review is inadequate. Aside from the leave requirement, the approach to procedural fairness is sometimes ambiguous and uneven. All of this obstructs the route to justice (Simon Halliday, 2004). Lack of administrative justice also includes abusive act like using state funds to oppress and cripple people's lives through inadequate service and corrupt machinery. People who have committed suicide as a result of the lockdown, for example, are kept anonymous. The number of people who

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die as a result of vaccination is likewise kept hidden under the guise of other consequences. It's also perplexing that people who died as a result of vaccination aren't being compensated (FMT Reporters, 2021). A disclaimer that shields the hospital and the relevant ministry from liability in the case of a vaccination-related complication or death is likewise improper (FMT Reporters, 2021). Total lockdown, rather than targeted lockdown, puts people's lives in jeopardy. The government and its leaders can be replaced, but the lives and livelihoods lost as a result of the Covid-19 are irreplaceable (The Star, 2021). This is all part of a poor government that is unfit for people in any era.

When it comes to effective government, the Islamic concept has already laid the groundwork on which the traditional understanding of governance is built. Since efficient administration entails the fulfilment of divinely entrenched fairness principles, Islam has a better understanding of governance. This godly norm is full of ethical behaviour. In Islam, the term ethics has a broader and deeper meaning. In Islam, the term ethics refers to the inviting of mankind to acquire praiseworthiness and dispositions, while prohibiting them from gaining those that are evil; the disciplining of one's mind; the development of good qualities and attributes of the mind or soul; as well as the execution of correct or right activities as opposed to erroneous or incorrect ones. In short, excellent manners; good education; good breeding; politeness; and courteous accomplishments are all examples of ethics in action (Syed Naquibb Al Attas, 1965).

Ethics can also refer to the rules of behaviour, or the standards on which behaviour is based. In this sense, ethics is a code, or a set, of principles by which people live. In fact, according to philosophers like Aristotle (384-322 B.C.) "ethics" is a theoretical study, or a particular branch of philosophy which deals with morals and consequently expounds certain theoretical theories. These ideas seek to answer problems such as "How should man act?", "What is the good for man?", and so on (Richard Popkin, 1986).

A conversation about ethics was also uncovered by Al Jurjani, a well-known Muslim scholar (Al-Jurjani, 1998). He summarises ethics as justice and good governance as a middle ground between the extremes of excess and insufficiency. In the sense of striving to be right and straight, and inclining towards what is genuine, the struggle is indefinite. In one section of the narration, the struggle was described as "speaking justly" in front of oppressive rulers, while in another line, it was described as "speaking the truth" in front of the tyrant (Ibn al-Manzur, 1992). The polar opposite of justice is injustice. Originating from a breach and exceeding any boundary as a result of giving in to one's desires. The act of forsaking the straight path in one's journey to the ultimate destiny, which is the reverse of justice and the source of injustice, is known as transgression. Justice, according to Ibn Manzur, also refers to not being pushed down by one's emotions to the point of being unjust in one's judgement. In this view, establishing justice requires a concerted effort to eliminate, or at the very least prevent, any instances of unfair placing (Ibn al-Manzur, 1992).

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DEMOCRACY AND GOOD GOVERNANCE

Allowing citizens to elect their preferred leaders through a democratic process is also a part of good government. However, the manner in which it is obtained will decide the direction of governance, whether it is good or bad.

The role of ethics in the governance process is important because implementing ethics in the governance process entails governing within the constraints of truth and fairness, also known as virtue-based governance, with the goal of achieving an overall positive outcome in the national interest and stability.

As depicted in the text of al-Fakhr ibn Tiqtiqa, leaders must neither neglect nor be ignorant of the rights of their subordinates, but ought rather to be just, righteous and equitable, and act in the best interests of all. It is very important for leaders to liberate human capabilities, so that every citizen can participate positively in the system of governance. Governing the community is indeed a collective responsibility. Leaders need to remind themselves that the governed possess the right be governed as free men, as human beings governed consent. Even for the minority or dissenting groups, there must be the protection of their rights as long as they act in a peaceful, civil, and legitimate way according to the due process of law within the framework of the basic laws of the community. What is most important is that a leader ought to prepare his people to contribute through their intelligent and meaningful participation as citizens, in peaceful cooperation (Ibn al-Tiqtiqa,1990).

Only a man who possesses this quality would be able to fulfil his aim of being a competent and democratic leader who practises excellent governance; without which, integrity will definitely suffer.

Kai Ka°us also describes the benefits of insights and virtue, as well as the need of not choosing fame over truth, which is also a key to successful good governance.

> Inquire into the nature of mankind's wisdom and virtues if you are persuaded that you can secure name and fame without wisdom or merit, then remain without them; but, otherwise, acquire merit. Never be ashamed to learn or listen, that you may be delivered from shame. Study the faults and merits of the virtuous and see where their good and evil and their successes and failures lie. Then, from the midst of it all, seek out what will benefit you, yet avoid those things which will bring other men to harm. Accustom yourself to acquiring wisdom and merit and learn those useful arts of which you are ignorant. Socrates says that there is no treasure better than virtue, no honour more glorious than knowledge, no ornament more beautiful than modesty and no enemy worse than an evil character (Ibn al-Tiqtiqa, 1990).

In a nutshell, for democracy to function properly, morality and sound judgement guided by divine principles are extremely needed for accurate decision-making and good

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governance as it is undoubtedly an important factor of success.

CONCLUSION

The mainstream concept of good governance is to do the right thing in all elements of administering a country, whether democratically or constitutionally, but the Islamic definition is far greater. In order to achieve good governance, the criteria of adab and good consequence, virtues, proportionality, equity, and justice must all be met. Any political turmoil that emerges must be resolved via this indication. In reality, how well these criteria are applied is a crucial indicator of success or failure. Good governance is the polar opposite of abuse. As a matter of fact, success in achieving good governance is determined by the fulfilment of the above-mentioned requirements of justice, wisdom, equity, and proportionality. If these principles are not followed, the country will shatter and disintegrate. The best way to keep the constitutional spirit alive thus is to adopt excellent governance. Because only a mindful functioning government can preserve the Constitution's spirit.

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CONTROL MECHANISM OVER SUBSIDIARY LEGISLATION IN MALAYSIA: AN OVERVIEW

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ABSTRACT

Only a small portion of the laws all over the world are made directly by the legislature or the Act of Parliament (primary legislation). The rest of the laws were made through delegated legislation, subordinate or subsidiary legislation. The term delegated legislation is used to denote that subsidiary legislation itself made by the administrative agency in pursuance of power delegated by the legislature. This system and the growth of delegated legislation in all democratic countries cannot be denied and impliedly the wide discretionary powers are given by the legislature to the administrative agency or administrative authorities to make laws. Using qualitative methods and descriptive approach in legal studies, this paper will discuss about the control mechanism of subsidiary legislation applicable in Malaysia and whether the available tools or mechanism control and safeguard are sufficient and enough to avoid the element of bias and abuse of powers by administrators when enacting the law. The paper concluded that the available mechanisms currently being implemented less effective and less effectual. Further improvement in controlling the subsidiary legislation is needed to govern the process and procedure of the law enacted by the executive.

Keywords: Subsidiary Legislation, legislature, administrative authorities, control mechanism.

INTRODUCTION

The system of delegated, subordinate or subsidiary legislation is in place in all democratic countries including Malaysia and be considered as part of modern administrative process. The need for subsidiary legislation or the executive law making cannot be denied because it has now come to be regarded as useful and indispensable technique of modern government.

According to Professor Jain (2013), the term delegated legislation is use to denote: first; subsidiary legislation itself made by the administrative agency i.e. the exercise by a subordinate agency of the legislative power delegated to it by the legislature and second; exercise of the power by the agency i.e. the subsidiary rules themselves which are made by the subordinate agency in pursuance of the power delegated to it by the legislature known as rules, regulations, bye-laws, orders etc.

Generally, the legislature is not able to cope with the legislative function fully. Besides legislating, the legislature discusses the budget, holding debates etc. Therefore, through

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delegated legislation, legislature can save time by focusing to broad principles in the law it enacts leaving the details for the administrative agency to formulate the relevant law. Furthermore, the complex and technical legislation related to socio-economic matters should be dealt with by the experts specialised in the subject matter and not by the legislators themselves (Jain, 2011).

There are also many occasions when there is a sudden need of legislative action. In order to handle the urgency and emergency situations such as terrorism attack, natural disaster, breakdowns of internal law and order or epidemic, subsidiary legislation is the answer since it doesn't need to go through the fires of scrutiny in both Houses of Parliament (Shad Saleem Faruqi, 2016; Thompson & Gordon, 2017). The administrative agency enables to take action at short notice by promulgating necessary rules and regulations according to the needs and situations. (Jain, 2011).

The wide discretionary power is given to the administrative authority to enact the subsidiary legislation. The power mandated in the hands of these authorised bodies comprising of civil servants could also result in maladministration such as abuse of powers, illegality and bias (Muhammad Syahlan, 2018). A few cases were filed in court challenging the validity of subsidiary legislation. Latest example, during this pandemic Covid-19, the government has passed many rules and regulations which restrict the movement of citizens and to support the economy and health facilities, public money has been spent on a vast scale without presented for democratic scrutiny and questioning by members of Parliament (Fox, Russell, Cormacain & Tomlinson, 2021). This situation occurs in most of the country in the world including Malaysia.

Acknowledging these situations, thus, this paper attempts to highlight and discuss about the control mechanism of subsidiary legislation applicable in Malaysia and whether the available tools or control mechanism are sufficient and enough as a safeguard to avoid the element of bias and abuse of powers by administrators when enacting the law.

This paper is based on qualitative and descriptive approach in legal studies which involves library-based method. An analysis is made based on various literature materials from books, articles, journals, Acts of Parliament and a few decided cases from Malaysia and commonwealth countries.

DEFINITION AND THE NEED FOR SAFEGUAD

Subsidiary legislation is part of Malaysian legal sources that supplements the legislative function of Malaysia legal system. According to Justice Hashim Yeop Sani in the case of *S Kulasingam v Commisioner of land, Federal Territory* [1982] 1 MLJ 204:

> There is nothing to prevent Parliament from delegating power to legislate on minor and administrative matters and for this very reason, we have in addition to statutes, innumerable subordinate or subsidiary legislation having the force of law. Without these subordinate or subsidiary

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> legislation, the Government machinery will not be able to function effectively".

The statement above shows that the implementation of subsidiary legislation is important as it may smoothen the administration by the executive in the country. For everyone statute passed by Parliament, there are on average 15 to 20 pieces of subsidiary legislation framed by the executive under the authority of that statute. The administration in any country cannot function effectively without it. Subsidiary legislation is as important as parliamentary legislation because it is not deals with minor matters. It can impose taxes, fines and levies (Shad Saleem Faruqi, 2016).

According to Section 3 of the Interpretation Act 1948 and 1967(Act 388), subsidiary legislation is defined as meaning:

> "any proclamation, rule, regulation, order, notification, bye-law, or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect".

The definition emphasises two aspects of subsidiary legislation. First, it is made under an Act of the legislature. Second, it has legislative effect. The term such as, orders and notifications, are also used for administrative acts as well. Therefore, not every order, notification etc is subsidiary legislation. It is so only if it has legislative effect; if it is not legislative in nature, it is not subsidiary legislation and can be regarded as administrative in nature (Jain, 2011). We cannot deny that subsidiary legislation is necessary and desirable provided that it is subject to proper controls and safeguards (Le sueur & Sunkin, 1997).

FINDING AND ANALYSIS

Types and effectiveness of Controls Over Subsidiary Legislation

The main concern now is not the question on whether the subsidiary legislation is desirable or not, but what controls and safeguards can be introduced so that the legislative power conferred on the administration by the legislature is not misused and misapplied (Jain & Jain, 2013).

The control on delegated legislation may be operate at two levels. First, control at the point of delegation of power by the legislature to the executive. Second, a control mechanism may be devised to operate at the point of, or after the exercise of power of delegated legislation by the administrative authority. Both levels of controls are important because they are supplement to each other. Control of the first stage might affect the efficacy of the control at the second level (Jain, 2011).

There are certain procedures and institutions exist to control, regulate and supervise the executive in its law- making role that is judicial control, legislative control, procedural

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controls like publication controls and consultations with affected interest.

(a) Judicial control:

The subsidiary legislation or the executive law making are subject to judicial review controls. This is mentioned in the dictum of Eusoff Chin J in *Kerajaan Malaysia v Wong Pot Heng* [1992] 2 MLJ 885:

> Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, e.g., from the administration with the executive authority of Malaysia vested in the cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguards for such subsidiary legislation are essential and courts are part of such safeguards.

Judicial control is considered as the first and important place in the scheme of control mechanism (Jain & Jain, 2013). The court in Malaysia review over the subsidiary legislation on a number of grounds. First, a question may arise as to whether the parent statute delegating power to make subsidiary legislation is itself constitutional or not. If the statute is unconstitutional then it is *non est,* and therefore cannot be the source of any delegated legislation which will fail automatically. For this purpose, reference has to be made to judicial review under the Constitutional Law since the Federal Constitution in Malaysia is declared the "Supreme Law of the Federation". The second ground exercise by the court is that the parent statute or enabling legislation may be constitutional but the subsidiary legislation made thereunder may be unconstitutional. References has to be made to Constitutional Law to assess whether the regulation in question infringes a constitutional provision. If this situation happens, the court will strike down delegated legislation if it comes into conflict with or does not confirm to a constitutional provision (Jain, 2011).

The last ground for review is when the subsidiary legislation is *ultra vires* the parent Act. i.e., it goes beyond the powers conferred by the parent Act on the authority making delegated legislation. It can be substantive *ultra-virus* or procedural *ultra-virus*. The substantive *ultra vires* refers to the scope, extent and range of power conferred by the statute to make subsidiary legislation. The efficacy of substantive *ultra-virus* is very dependent on the phrasing of the delegated provision and is indirectly subjected to the vagueness of the terms used in statute in conferring the power to make subsidiary legislation. If the power is delegated by the statute in very broad and general terms, *ultra vires* would then be rendered useless as it would be very difficult to regard any regulation as falling outside the rule – making power (Jain, 2011).

Procedural *ultra vires* is where the parent statute may lay down certain procedures for the subordinates' legislator to follow while making subsidiary legislation. If the subsidiary legislator fails to follow those procedures, it may result in making the subsidiary legislation *ultra vires.* Therefore, the effectiveness of procedural *ultra vires* relies solely on whether the procedure that is to be followed is either mandatory or merely directory. It will rely on

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the parent act and interpretation of the courts to decide. If it is found to be mandatory, procedural ultra vires can be applied and would indeed be an effective form of a judicial control mechanism as the application is straightforward. If the rule is directory, then the court cannot interfere because the subsidiary legislation is not *ultra vires*. In the case of *Wong Keng Sam v Pritam Singh Brar* [1968] 2 MLJ 158, Wee Chong Jin CJ stated that the disobedience of a directory procedural rule only results in an irregularity not affecting the validity of the subsidiary legislation made.

The executive law making involved the discretion of the administrator to make laws, therefore a rule may be challenged on the ground of *mala fides* of the rule making authority. All powers need to be exercise in good faith. The subsidiary legislation can be challenged if the rule is proven as unreasonable since the legislation never intended to give authority to make unreasonable rules and thus it is *ultravires.* The Court of Appeal in holding Section 15(5)(a) of the University and University Colleges Act 1971 to be unconstitutional in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 stated:

> "In my judgment, I fail to see in what manner that s 15(5)(a) of the UUCA relates to public order or public morality. I also do not find the restriction to be reasonable… The impugned provision is irrational. Most university students are of the age of majority… Clearly the provision is not only counter-productive but repressive in nature."

However, the courts do not act on their own motion or initiative (Jain, 2011) The judicial control will only take effect if the validity of the subsidiary legislation is challenged in proceedings *inter parties*, either by one party with *locus standi* to enforce the law against another party or brought by a party whose interest are affected by the law. Only then, the court can exercise their jurisdiction to determine whether the subsidiary legislation is *ultra vires* or not. This will create doubt on efficacy of judicial review as the mechanism to control the executive law-making process. As Lord Diplock said in *McEldowney v Forde [1971] 1 AC 632 at 661*:

> The onus lies upon the party challenging…subordinate legislation to establish its invalidity'.

(b) Legislative control

The main stages in the scheme of parliamentary supervision are lying of subsidiary legislation before the legislature, scrutiny of the same by a parliamentary scrutiny committee and debate or discuss the rules on the floor of the House. The Member of Parliaments have no opportunity to scrutinise the draft legislation and give feedback or input on subsidiary legislation since subsidiary legislation is framed outside of Parliament. So, lying procedure is to submit or to lay the instrument before the Houses for the information of Member of Parliaments. There are five types of lying procedures that is laying in draft subject to affirmative resolution, laying subject to affirmative resolution,

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laying subject to negative resolution, laid in draft subject to negative resolution and lastly laying simpliciter.

However, laying procedure are uncommon in Malaysia due to paucity of parliamentary time (Shad Saleem Faruqi, 2016). Lying procedure will only applicable if such requirements written in the parent law.

With regard to scrutiny committees, The Standing Orders of each House permit the Houses to set up a Parliamentary Scrutiny Committee to investigate and monitor any activity on Subsidiary Legislation. However, Malaysia has far left behind not like United Kingdom and India where there are separate House Committees on Subsidiary Legislation to watch over the exercise of subordinate law making by the omnipotent executive.

Publication control: The purpose of publication requirements is for the public to know the law and comply with them (Wan Azlan, 2006). The axiom 'ignorance of law is no excuse' applies legitimately only when the law is properly publicised. It would be unfair to make people liable for breach of a regulation when it was never published or brought to their notice. Publication of Subsidiary Legislation is important because it has the same legal force and effect as a statute.

In Malaysia, there is no general statutory provisions requiring publication of Subsidiary Legislation. It much depends on whether the enabling Act mandates Gazette publication. Since majority of statutes do not require publication of regulations made thereunder, reference need to be made to the Interpretation Acts 1948 and 1967(Act 388) under Section 18(2) which provides that publication in the official Gazette of the Federation 'shall constitute sufficient notice' of any matter required to be published in the Gazette by or under any federal law. Ignorance of what is published in the Gazette cannot be a defence to plead lack of knowledge or notice of such law.

(c) Consultations:

A statute may require the administration to have a consultative procedure before finalising subsidiary legislation. It may mandate prior consultation with named interest, NGOs or representative groups. In Malaysia however, this consultative technique is not mandatory like in USA under the Federal Administrative Procedure Act. Malaysia has no general statutory provisions making consultation a part of the process of subsidiary legislation. The consultation process will only be used if the term of consultative procedure prescribed in the parent act.

CONCLUSION AND SUGGESTION

This system and the growth of delegated legislation in all democratic countries cannot be denied and impliedly the wide discretionary powers are given by the legislature to the administrative agency or administrative authorities to make laws. The above discussion shows that the available mechanisms currently being implemented are less effective and

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less effectual. Further improvement in controlling the subsidiary legislation is needed to govern the process and procedure of the law enacted by the executive. Although the validity of delegated legislation can be questioned in court through the process of judicial review, but we cannot rely mainly to the judicial control because it will only take effect when the case was brought to the court for review. Therefore, a joint select committee of the two Houses must be established to scrutinise the subsidiary legislation and all Acts of Parliament delegating legislative power should provide lying procedures and consultation process. It will be an advance if we can suggest a specific law to govern the process and procedure in enacting the subsidiary legislation in Malaysia, so that the legislative power conferred on the administration by the legislature is not misused and misapplied.

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INVESTMENT DISPUTES IN THE ENERGY SECTORS: THE ROLE OF FAIR AND EQUITABLE TREATMENT STANDARD

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ABSTRACT

The growing global demand for energy makes this sector attractive to foreign investors. The proliferation of foreign investment in the sector causes a substantial impact on human health, national security, the environment, and human rights. Yet, the States mostly depend on foreign investors as public finance is inadequate to achieve the infrastructure objectives and maximum economic benefit of this sector. This sector is considered a strategic character for the economies concerned with a national security dimension, leading to a myriad of regulatory restrictions imposed by host countries on their use and development, which resulted in a significant increase in international investment disputes in recent years. The foreign investors mostly base their claim on two grounds: the requirement of the fair and equitable treatment (FET) standard and the prohibition on expropriation. Due to the vague and unpredictable interpretation by arbitration tribunals, the FET standard remains the most controversial and invoked investor protection standard. The article purports to find a pattern of how the tribunals determine a balance between host states' regulatory rights and investors' claims of FET standards in light of the jurisprudence of arbitral tribunals in energy investment disputes. It will address the questions; how the host states' regulatory measures affect the FET standard and how the tribunals interpret it under relevant bilateral and multilateral investment treaties (i.e., ECT, NAFTA). The article finds that the tribunals have not yet developed a coherent approach or standard of review for this sensitive sector and highlights the need for a coherent standard of review.

INTRODUCTION

The energy sector has been a prolific ground for investment disputes due to the growing global demand for energy. According to statistics by the International Centre for Settlement of Investment Disputes (ICSID), of the total cases ever registered under the ICSID Convention, 42 percent are either oil, gas, and mining, or power and energy related (ICSID, 2021), ICSID's latest statistics show that 43 percent of new cases registered in the financial year 2021, falling in those sectors (ICSID,2012). These industries, often referred to as the 'extractive industries, are owned by nation-states and are usually deemed a strategic character for the economies concerned, leading to various restrictions imposed by countries on their use and development (Cameron & Stanley, 2017). States are always explicit in exercising national sovereignty over energy resources for economic and environmental ground. Yet, the vast capital investment essential to find and extract them has meant that states mostly depend on foreign investors to take the lead by acquiring rights granted by the host state in return for specific benefits as public finance alone will

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not be able to achieve an infrastructure objective of this magnitude (OECD, 2015). Because of the special relationship between a sovereign state and its natural resources, the significance revenues derived from those resources to the public, the precariousness of commodity prices and currency, and the very long-term nature of these investments, this sector is very vulnerable to the regulatory changes, and point of political interest (Rivkin, Lamb & Leslie, 2015) thus differs from other sectors. (Friedman, Prager & Popova, 2019)

THE LINK BETWEEN ENERGY SECTOR AND FAIR AND EQUITABLE TREATMENT STANDARD

As this sector is inevitably getting the attention of foreign investors, strong stability is consistently pursued in the relationships among the host states and foreign investors. Most of the energy dispute arbitrations base their claim on two specific provisions of the treaty; the requirement of the fair and equitable treatment standard to foreign investors offered by the host states and the prohibition on expropriation. Fair and Equitable Treatment Standard is the most regularly used standard of investment protection in international investor-state disputes "present in almost every single claim brought by foreign investors against the host State." (Small, 2012). The purpose of this standard, as it has been applied in IIAs and arbitral practice, as a tool intended to fill gaps that may be left by the more specific standards, to obtain the level of investor protection inked by the treaty parties. (Dolzer & Schrewer, 2012) As the IIAs do not define the scope of the FET, consequently, this means that defining the scope of standards of protection is left mainly to the practice of international investment arbitral tribunals.

Overall, scholars have tried to focus on the absence of a definition of FET and identify the elements of this standard though they all agreed on them not to be exhaustive. It is to be noted that very few works have been done on the role of FET in the disputes in energy sectors. These also do not expansively discuss and analyse how the current investment tribunals have treated the standard of FET in those disputes in energy sectors. With that aim, it endeavours to contribute to the existing literature on the FET standard, as interpreted by the current investment arbitration tribunals on disputes in the energy sector. The article purports to find a pattern of how the tribunals determine a balance between host states' regulatory rights and investors' claims of fair and equitable treatment standards in light of the jurisprudence of arbitral tribunals in energy investment disputes. It will address the questions; how the host states' regulatory measures affect the fair and equitable treatment standard and how the tribunals interpret it under relevant bilateral and multilateral investment treaties (i.e., ECT, NAFTA). In doing so, this paper offers an overview of the concluded investment disputes in the energy sector since 2010 where the investors claim the violation of the FET standard and shows the outcome of those cases and whether the FET standard has been breached or not. Selective cases under BITs and other multilateral treaty mechanisms like ECT and NAFTA will be discussed where this paper will mainly focus on the jurisprudence of arbitration tribunal in interpreting the fair and equitable treatment in the energy sector.

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RESEARCH QUESTIONS

1. What are the contents of the Fair and Equitable Treatment Standard as determined by the ISDS tribunal?
2. What has been the interpretation of the Fair and Equitable Treatment Standard in the investment disputes in the energy sector?

RESEARCH METHODOLOGY

This research will be primarily doctrinal with some aspects of empirical research. Regarding my first research question, I have looked at the primary and secondary sources on Fair and Equitable Treatment Standard and analysed it by watching the application by ISDS tribunals. Regarding the second research question, I have looked into the website of Investment Policy Hub by UNCTAD, which locates and analyses essential investment treaty law materials, and searched the website using two keywords: Energy Disputes and Energy Charter Treaty. I have illustrated in a table that offers an overview of the concluded investment disputes in the energy sector since 2010, where the investors claim the violation of the FET standard. It shows the outcome of those cases and whether the FET standard has been breached or not. Given the time constraint, randomly, five energy dispute cases were selected, both ECT and non-ECT cases. The paper analyses the cases and lastly provides an observation on the role of fair and equitable treatment standard on the outcome of the Disputes.

FINDINGS

In the following table, I have illustrated the outcomes of concluded energy investment dispute where FET has been invoked since 2015 due to the space constraint. My Original paper will show the concluded disputes since 2010.

Table 1- Concluded Energy Investment Disputes since 2015

YEAR OF INITIATION	TITLE OF THE CASE	DECIDED IN FAVOUR OF	FET BREACHES FOUND OR NOT FOUND
2016	Glencore International and C.I. Prodeco v. Colombia (I)	INVESTOR	FOUND
2015	9REN Holding v. Spain	INVESTOR	FOUND
2015	Baywa. Re v. Spain	Pending (decision on liability)	FOUND
2015	Belenergia v Italy	State	NOT FOUND (DISMISSED AT MERIT STAGE)
2015	CEF Energia V. Italy	INVESTOR	FOUND
2015	Cube Infrastructure v. Spain	INVESTOR	FOUND

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2015	Foresight and Others v. Spain	INVESTOR	FOUND
2O15	Greentech and NovEnergia v. Italy	INVESTOR	FOUND
2015	JKX Oil & Gas and Poltava v. Ukraine	INVESTOR	DATA NOT AVAILABLE
2015	Novenergia v. Spain	INVESTOR	FOUND
2015	OperaFund and Schwab v. Spain	INVESTOR	FOUND
2015	SolEs Badajoz v. Spain	INVESTOR	FOUND
2015	Stadtwerke München and others v. Spain	STATE	NOT FOUND (DISMISSED AT MERIT STAGE)

(Sources: The mapping has been conducted with the data from Investment Policy Hub by UNCTAD)

OBSERVATIONS FROM THE CASE STUDIES AND MAPPED CASES

The abovementioned mapping of the investment dispute cases in the energy sector shows out of 64 cases (since 2010) where the investors claimed the breach of FET, the breach of the FET in 29 cases. Even in a few disputes where the cases decided in favour of investors, the tribunal found no breaches of FET. So, the scenario is almost fifty-fifty.

The outcomes of the investment arbitration disputes show unpredictability, and little originality in this sector, like other sectors. The decisions and rationale behind coming to a particular decision are inconsistent and uncertain and interpreted both very narrowly and broadly. Thus, finding a pattern based on the outcomes of the cases is difficult.

Regarding the link between FET and Energy sector, the arbitral tribunals acknowledged that as the development in this sector is in direct correlation to the governmental support and specific regulatory frameworks, investors seek guarantees from the government before investing in this sector and base their claims mostly on the fair and equitable treatment standard if any dispute arises.

Under NAFTA, there is a low probability that renewable energy investors will be able to win their FET claims meeting high thresholds, Whereas the interpretation under ECT has been broader.

The tribunals have not yet developed a coherent approach or standard of review to find a balance between the rights of the host states and the interests of the investors. The interpretations of the tribunal largely depend on the language or construction of the BIT, and the tribunals list key elements and apply them to a specific set of facts.

CONCLUSION

Under the current framework of international investment law, due to its vague and ambiguous nature, it does not seem to offer a legal certainty either for investors or for host states. The picture in the energy sector is not different. In the energy sector, this lack of clarity creates uncertainty and provides no clear-cut answer about the outcome of the

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disputes. As this sector is socially and politically sensitive and the government inevitably takes regulatory measures in this sector; thus, a coherent and comprehensible standard of review must be developed to determine whether the action is just, reasonable and equitable. Another thing is the decisions of the tribunals are largely dependent on the wordings of the BIT; therefore, it is crucial to articulate the FET provision more precisely. The criticisms against the overall ISDS mechanism and the significant growth of investment disputes in this sector are all the more indicative of the importance of timely and judicious action.

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CLIMATE CHANGE: LEGAL FRAMEWORK OF WILDLIFE CONSERVATION IN IRAQ

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ABSTRACT

The global changes in climate and extreme weather have already begun to affect people and nature around the world. The changing climate impacts wildlife species, the habitat destruction, over exploitation of wildlife as well as disease. Currently 54% of Iraqi cultivated land faced challenges due to desertification. While the percentage of dried marshlands in Iraq turns into 90%. Since the country is wealthy with biodiversity, this precious heritage needs the urgent call and attention to scale up efforts for establishment of sustainable Protected Areas and of eco system of wildlife under climate change scenarios. The focus of the paper is to examine existing legal framework on the process of conservation of wildlife in Iraq and identify the legal barriers for the purpose of saving and protecting the survive wildlife. The paper adopts the qualitative doctrinal methods by analysing the environmental legislation such as "Law No. 27(2009) for Environment Protection and Improvement and Law of Wild Animals Protection No. 17 of 2010" in Iraq. Based on the discussion, the paper concludes that the current legal frameworks in Iraq on conservation of wildlife are insufficient to response the climate change. Further, the enforcement is weak and the commitment and poor coordination between relevant institutions also become challenges to protect wildlife in Iraq.

Keywords: legal framework, Wildlife protection, climate change, Iraq

INTRODUCTION

Currently, many countries encountered with difficulties due to confluences of COVID-19 such lockdowns, economic crises, further; the risks from climate change accelerated the burden on governments and societies. For instance, as increasing droughts, desertification, floods and unprecedented wildfires in the United States, Australia in 2020, Italy and Turkey in 2021 among others, which expected to bring more instability, conflicts. (IMCCS,2021) and wildlife catastrophe.

The global changes in climate and extreme weather have already begun to affect people and nature around the world. In particular, increases in temperature, precipitation patterns change, runoff, floods, drought, desertification, snowmelt and glacier melt among others irrefutable evidence for such discernible change in climate (Pinsky et al., 2018; Scheffers & Pecl, 2019). However, these events definitely have dire consequences on our

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ecosystem components such as water, air and soil, which lead to environmental disaster due to water scarcity, food security, and trans boundary water conflicts. (Singh, Mishra, Chowdhary& Khedun, 2014). Furthermore, the wildlife will face more threats of extinction.

The study discusses the existing Iraqi legal framework to protect wildlife under climate change scenario. Thus, qualitative doctrinal approach adopted to examine current wildlife related legislations and institutional arrangement for preserving wildlife from threats of climate change.

THE THREAT OF CLIMATE CHANGE ON WILDLIFE

Over the past 100 years of twenty century, the average of earth's temperature has increased about 0.6° C. which significantly influenced animals and plants on the planet.(Root et al., 2002).Greenhouse gas emissions from anthropogenic factors have resulted in alteration of physical and chemical features of ocean, which cause risks for marine species. (Poloczanska et al., 2016). However, current huge plastic consumption encountered entire ecosystem to unprecedented threats comprising carbon and nutrient cycles alteration, habitat changes in soils, sediments, and marine life, biological impacts on endangered species; eco-toxicity, and other dire social consequences.(MacLeod, H. Arp.,& Tekman, 2021).

In addition, the impact of climate change has been observed in terrestrial, freshwater, and marine ecosystems, species are altering genetically, physiologically, morphologically, and phonologically. (Scheffers et al., 2016). Moreover, climate change has significant impacts of on biodiversity hotspots (Trew & Maclean, 2021), consideration of these impacts of biological diversity redistribution is essential, yet it not sufficiently takes into account in most mitigation and adaptation strategies, including the "United Nation's Sustainable Development Goals".(Pecl et al., 2017). Therefore, some study calls for revising of the very definition of 'sustainability' under climate change scenario. (Scheffers & Pecl, 2019).

The implication of climate change for wildlife has been observed over the world including "Africa, Europe Asia, North America, Central and South America (Latin America), Australia and New Zealand". For instance, only in Africa huge extinctions in both plants and animals' species as over 5,000 plant species may be influenced due to changing in climate, which mostly as a result of habitats loss. (Singh et al.,2014).

Certainly, adaption of wildlife management to climate change is essential. To do so, mechanisms that should be developed including laws and regulations, management plans and polices, long term censorship and reporting for indicator species, trans boundary coordination, public participation, and implementation of international conventions etc. (Food Agriclutre Organization [FAO], 2012).

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METHODOLOGY

To address the research question whether the Iraqi legal framework for wildlife management safely, sufficiently prepared to face climate change or not? The study adopted qualitative doctrinal approach in order to examine the legal framework through content analysis of current wildlife protection legislations. The library-based data gained from such books, journal articles, websites etc.

LEGAL FRAMEWORK TO PROTECT WILDLIFE IN IRAQ

Based on the announcement by the Ministry of Planning (MoP), Iraq population for 2020 was about 40,150,000 (MoP, 2021). Iraq located in southwest Asia and northeast the Arab world, lies between the latitudes 29 and 37 and the longitudes 38° and 48° (Elaiwi et al., 2020). Iraq is part of the Middle East and North Africa (MENA region). The region has arid climate which is predicted to be the most vulnerable area in the world that face the impacts of climate change particularly higher temperatures and intense heat waves, desertification etc.,(Issa, Al-Ansari, Sherwany& Knutsson, 2014; Salman, Shahid, Ismail, Chung, & Al-abadi, 2017). In arid and semi-arid areas, temperature increases will definitely speed up desertification, which will in later affect the agriculture in the southwest region of Iraq (Hassan & Nile, 2020).

Currently Iraq experiences water stresses due to internal factor as a result of mismanagement of water and external factors such trans boundary water project by Turkey and Iran coincide with climate change consequences such rising temperatures, growing desertification, decreasing precipitation, shifting distribution patterns and higher evaporation (Zarei, 2020; Issa et al., 2014). Therefore, vulnerability of climate change in Iraq, which certainly bring wildlife catastrophic if not take rational instant measures to mitigate its impacts, however, illegal hunting and trading of wild animals and birds including endangered species such mammals consider other challenges for wildlife. (Raza, Fadhel, Ararat, Kh Haba& Salim, 2011).

Thus, the study takes a close look at the Iraqi constitution, enforceable relevant laws and institutional responsibility to safeguard wildlife from both anthropogenic factors such as illegal hunting, trading and climate change impacts such drought, high temperature and desertification among others which are currently Iraq faced.

Constitutional safeguarding for Wildlife

Iraqi constitution of 2005 highlighted the responsibility of the government to preserve the environment and its bio logical diversity. Para 2, Article 33 stated that,

> "The State shall undertake the protection and preservation of the environment and its biological diversity."

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Based on that, the Iraqi state has the constitutional mandate to protect environment and its biodiversity. Moreover, based on the Article 114 of Iraqi constitution the development of environmental policy will be practice together by Federal government with regional government or governorate that not joined with any region. Based on that, some legislation has been issued.

Wildlife legislations in Iraq

Iraq has joined some important international conventions, such as, "Convention on Biological Diversity" (CBD) in 2009 and the "Convention on International Trade in Endangered Species of Wild Fauna and Flora" (CITES) in 2014. However, legal protection for wildlife at national level under climate change scenario should take into consideration both humans made factors such as illegal hunting, trade and climate change factors (which also consequences of mankind's factors), such as rise temperature, severe drought, desertification etc.

In Iraq, the "Law of Wild Animals Protection No. 17 of 2010" has been issued in 2010, which replaced the "Law of Wild Animals and Birds No. 21 of 1979". Based on Para 1, Article 2, wildlife considers as a national wealth that should be protected by people and relevant government institutions from any harms. Further, according to Para 2, Article 2 of the purpose of this law "Wild Animals" includes "Wild Animals (mammals) and Birds" -non-pets-. This law has 23 articles, which mainly concern about regulating haunting with little or no concerning about trade in species. (Raza, et al., 2011).

However, the "Law No. 27 of 2009 of Protection and Improvement of the Environment", at Section Seven, Article 18 dedicated to protecting biological diversity. This Article provides protection for wildlife including the birds, land and water animals that are threatened or likely to be threatened with extinction from human intervention except based on law and regulation. (Para 1and 2, Article 18). Based on above provisions, Iraqi legislature prohibited any damage of biodiversity or fishing, hunt and trade the birds, land and water animals that are faced threat of extinction or likely to be threatened.

Additionally, forest as crucial segment of wildlife has been protected legally in Iraq. The specific law issued to protect forest, which is called "Forests and Trees Law No. 30 of 2009", which is abolished the previous Iraqi "Forest Law No.75 of 1955". The Law has some objectives such protection, improvement, maintenance and grow of forest, environmental protection and combat desertification (Article 2). Based on the Law No.30 of 2009 consider natural and manmade plants, wild and water animals among others are part of forest. This law covers variety of forest, trees, plants and other component of biological diversity. The law prohibited deals with plant and animal genetic from natural forests and artificial forests except based on license from related institution. Since, the existing provisions concerning about internal human factors such as hunting or trading, whereas external factors are seriously damaged wildlife habitats. To illustrate that, military activities at the boundary of Iraq with Turkey and Iran continuously cause to wildlife destruction of Iraq, without any consideration by the Iraqi government. However, current pressure due to

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impacts of climate change on wildlife poses contributed to loss biodiversity and extinction of wild flora and fauna. Therefore, it is noted in all existing legislations that such external factors not carefully take into account, it is necessary to give meticulous consideration to climate change impacts upon wildlife, whether to mitigate or minimize such devastating impact or adoption with current situation and make urgent action to survive Iraqi wildlife from the current deadly droughts, desertification and high temperature.

Moreover, the study believes the governmental response towards these threats still not adequate. Although, some steps have been taken. For example, to protect aquaculture two instructions were issued, one of them to control breeding of fish through using water ponds and floating cages in 2014 and 2015 respectively, which to support fish production and decline the pressures on the native fish species in water environment. The second is about hunting named "Instructions in Marshlands No. 2 of 2017", to develop biodiversity protection in this crucial era. (MoHE,2018). Thus, more attentions and actions are needed by the governmental institutions to efficiently manage wildlife, which is part of valuable heritage of Iraq.

INSTITUTIONAL RESPONSIBILITY TO PROTECT WILDLIFE IN IRAQ

The paper focus on the relevant environmental institutions such as, "Ministry of Environment and Health" and the "Environmental Protection and Improvement Board" in Iraq.

Ministry of Health and Environment (MoHE)

The "Ministry of Environment" (MoE) in Iraq, based on the "Law of Ministry of Environment No.37 (2008)" has the legal mandate as a main environmental institution to preserve and improve Iraqi environment. The Ministry has the objectives to protect and improve environment in order to preserve public health, natural resources, biological diversity inter alia. However, in 2015 the Iraqi Council of Ministries issued a decision to merge the "Ministry of Environment" with the "Ministry of Health", the decision came after finical crises and unstable security. Despite positive side of the decision to minimize burden on the government administratively and financially, however, the decision had been criticized because Iraq suffer from environmental catastrophe after 1980 till now due to war and other socioeconomic factors, these problems such as various pollution and climate change (Al- bedery,2018). Therefore, the existence of MoE in climate change era is necessary for Iraq to participate effectively in management of 18 proposed Protected Areas to save wildlife from environmental disaster particularly the unprecedented impacts of desertification, droughts, high temperatures and other climate change related consequences on human and whole wildlife.

Governance of Protected Areas (PAs) in Iraq

Based the old Environment Law of 1997 Protected Areas was under governance of the Ministry of Irrigation and Agriculture, but after the establishment of the Ministry of

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Environment (MoE) in 2010, this law abolished. In recent years the "Regulation No.2 of 2014 for Protected Areas" has issued, which created a new institutional framework to manage PAs, based on that, "Agricultural Protected Areas (APAs)" put under authority of the "Ministry of Agriculture" and of "Natural Protected Areas (NPAs)" under the MoE. Thus, two committees have been established under the MoE.

1) National Committee for Protected Areas (NCPA):

The NCPA was established in 2008 to be responsible for planning and management of Protected Areas in Iraq. The committee lead by the MoE with existing of member representatives from other eight ministries and one NGO.

2) Iraq National Marshes and Wetlands Committee (INMWC):

INMWC was established in 2008 to assist the Government of Iraq in its implementation of national Ramsar Convention on Wetlands. Iraq ratified the convention in October 2007 and entered into force on February 18, 2008. The INMWC managed by the Ministry of Water Resource (MoWR) with members form other ministries. Therefore, it is crucial to provide more supports and coordination by the relevant governmental institutions to these committees. Particularly, it is urgently required reestablishment of the independent ministry for environmental to actively perform its roles based on above mentioned legislations.

The Board for Environment Protection and Improvement (BEPI)

This board has been established based of Article 3 of the "Law No.27 (2009) for Environmental Protection and Improvement", it linked to the "Ministry of Environment" and has its chairman. Based on Article 4 the structure of the board comprise of the Minister as a president, technical undersecretary as Minister vice- precedence, general director from the Ministry as member and rapporteur, number of representative from other Ministries including member from the "Ministry of Agriculture, Water Resources, Science and Technology, and Health among others" (Article 4).

Even though, the Board equipped with some roles to accomplish its objectives in protecting and improving Iraqi environment. Simultaneously, the board still has lack of clear robust executive powers in respective of its functions. For instance, Article 6 highlighted the Board's authorities. It can present advice, opinion, about environmental issues, environmental national planning, coordination with other ministries about their policies and activities, and it can give its opinion about environmental legislations. Therefore, it is appeared as a Board of consulate agency instead of not as decision maker or executive authority.

Based on discussion made above, despite of insufficiency of environmental legislations regarding negative consequences of climate change on Iraqi wild flora and fauna, however, the existing environmental institutions not provided with efficient legal authority to face

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such challenges in one hand. There were poor enforcement and coordination by whole governmental agencies to curb anticipated climate threats, on the other hand.

CHALLENGES FOR WILDLIFE PROTECTION IN IRAQ

Iraq is the rich country for having varieties of wild flora and fauna, despite well-known cultural heritage (MoHE, 2018). The country has some Protected Areas (PAs), which is totally as of April 2019 covered only 2% of Iraqi land. However, list of 19 other PAs has been proposed including the "Mesopotamia Marshlands National Park", which will increase the land area to 8.5%. (UNDP,2020).

There are some challenges for PAs and Wildlife protection, some of these related to the threats of the PAs in Iraq in one hand, which are, "unsustainable fishing and hunting, land mines, oil extraction and mining activities, desertification, agricultural pollution and runoff, infrastructures construction." (Al-Lami,2012). One the other hand, there are some considerable barriers still face the implementation of the PAs project in Iraq, which are "Weakness of legal framework, Financial mechanism, Lack of technical experience, Lack of coordination between ministries (horizontal) and between national local government (vertical), Lack of information available, Lack of control and enforcement of existing laws, Lack of trans boundary coordination and Lack of public awareness". (Al-Lami,2012). Although, the Regulation No.2 of 2014 for PAs has been issued, which shape institutional arrangement of managing and planning of PAs under authority of MoE, still after more than seven years of issuance of the new legislation and planning for about 18 proposed PAs, little progress has been made, this might be due to the fact that till now most of these challenges exist, which definitely accelerated the threats of Iraqi national heritage and flora and fauna.

CONCLUSION

Climate change's influences have been clearly affected environment over the world including Iraq. Currently, despite rising temperature, desertification of about 70% of agricultural land. Furthermore, current environmental catastrophe, which mainly outcome of most vulnerability of Iraq to impacts of climate change, faced Iraq's wealth wildlife to threat of extinction. However, little progress has been done to establish Protected Areas under climate change scenario. Further, existing legal framework still not comprehensively take into account Climate change threats in one hand, on the other hand lack of enforcement, institutional fragmentation, poor coordination, financial and technical support accelerated the problem of wildlife extinction. Therefore, it is recommended to wider Climate change adoption into Iraqi national environmental law and policy, through development of climate change legislations particularly, those related to the Wildlife conservation, provide more financial, technical and rising awareness in order to combat the impacts of current drought and high temperature.

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THE PROTECTION OF FDI AGAINST EXPROPRIATION IN BANGLADESH

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ABSTRACT

For any foreign investors, protection of their investment is a primary concern in host states. National legislation and any BITs usually provide legal security to them so that they can exercise their desired economic freedom in host countries. Without legal safeguards of their investments, they will not be motivated to invest their capital further. Like other host states, generally, national laws and BITs of Bangladesh significantly provide guaranteeing to investment protection against expropriation. Th is paper will discuss the existing legal framework in relation to expropriation of FDI in Bangladesh. In this relation, the Constitution of Bangladesh, FDI legislation, various ICSID cases, BITs and conflicts between Bangladesh and foreign investors are discussed. It also covers issues and challenges of expropriation in Bangladesh. Findings show that expropriation arrangements in Bangladesh are not up to the international standard and require significant development. Recommendations are provided for consideration.

Keywords: foreign direct investment, expropriation, bilateral investment treaties, Bangladesh, nationalisation.

INTRODUCTION

There are foreign individuals or companies who likes to invest their capital into a foreign land in order to increase their wealth. In doing so, they prefer any host state, which could offer them best suitable protection for their investment. They try to avoid those states where there is risk of expropriation, legal uncertainty, political disturbance, terrorism, undeveloped infrastructures and so on. Amongst these, legal safeguards of their invested properties are foremost requirement for the maximisation of business profits. Therefore, legal protection through national legislations or bilateral agreements is significant to attract their capital investment and also motivate them for further investment in host states.

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The foreign investors require maximum protection of their investment in a host state like Bangladesh; but most importantly they require protection against expropriation and protection through dispute settlement mechanism. Usually, these protections are guaranteed through FDI legislation and BITs. Given the importance of legal protection of FDI, this paper will explore how far the protection against expropriation is established in the existing legal framework and BITs of Bangladesh.

DEFINITION OF EXPROPRIATION

As noted by Asante, "the standards prescribed by traditional international law with respect to alien property are predicated on the basic assumptions prevalent in a liberal regime of private property, in particular the inviolability of private property and sanctity of contract" (Asante, 1981). Therefore, a compulsory taking of foreign property amounts to expropriation or nationalisation giving rise to compensation. There is a great deal of literature on defining what constitutes a 'taking of property', commonly known as expropriation or nationalisation (Schachter, 1984).

Article 10(3) of the 1961 Draft Convention on State Responsibility set the modern tone to the definition of expropriation or taking of foreign private property in the following words:

(a) A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference, use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.
(b) A 'taking of the use of property' includes not only an outright taking of property but also any unreasonable interference with the use or enjoyment of property for a limited period of time.

THE LEGAL PROTECTION AGAINST EXPROPRIATION IN BANGLADESH

There are two areas that we need to analyse for the legal protection of FDI against expropriation in Bangladesh. These are: (a) the Constitution of the People's Republic of Bangladesh; and (b) the Foreign Private Investment (Promotion and Protection) Act 1980 (FPIA 1980).

Article 42 of the Constitution of Bangladesh states that "subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by the authority of law". From the wording it is clear that Article 42 reflects on the prohibition of arbitrary and forced expropriation applicable to the citizens only; it does not extend to any foreign investors or FDI. In order to be safeguarded against expropriation through the Constitution, foreign investors need to obtain citizenship in Bangladesh. To do so, they are required to invest an amount that is equivalent to US$500,000.00 or by transferring US$1,000,000.00 to any recognised financial institutions (non-repatriable)

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(National Industrial Policy, 2010). However, the reality is that foreign investors are not interested to obtain Bangladeshi citizenship to receive protection against expropriation. Rather they prefer or require legal certainty to be safeguarded. Therefore, the government of Bangladesh could look into other host countries Constitutions for guidance. For instances, Article 157 of the Constitution of the Socialist Republic of Sri Lanka has manifested its legal responsibility for protection against expropriation through a constitutional guarantee by recognising the BITs as part of its national law for the protection and promotion of FDI.

However, a number of constitutional provisions in relation to expropriation are general and non-qualified. For example, Article 5 of the Constitution of the Republic of Croatia states that the property may, in the interest of the Republic of Croatia, be restricted and expropriated by law. Therefore, in case of Bangladesh, if the government is willing to provide constitutional guarantee against expropriation, it should amend the Constitution through Parliamentary proceedings. In doing so, the word 'every citizen' have to be replaced by 'every individual' or 'every person' and should include foreign investors or foreign investments.

Even though the Bangladeshi Constitution do not have any specific provision to guarantee against expropriation of FDI; nevertheless, section 7 of the FPIA 1980 states as follows:

> Foreign private investment shall not be expropriated or nationalised or be subject to any measures having the effect of expropriation or nationalisation except for public purpose against adequate compensation which shall be paid expeditiously and freely transferable.

From the wording of section 7 above, there are three key legal elements that require discussions: (a) expropriation or nationalisation; (b) public purpose; and (c) adequate compensation. It also appears that both direct and indirect expropriation of any foreign assets is prohibited but is possible with two conditions. If two conditions such as public purpose and payment of adequate compensation to foreign investors are fulfilled, then any foreign owned assets can be expropriated by the government of Bangladesh. However, in section 7 or in the whole Act, there is no mention that due process should be followed, and expropriation must be non-discriminatory (Amco v Indonesia, 1983).

The FPIA 1980 does not define expropriation or nationalisation. So, it is not actually clear whether it refers to direct or indirect expropriation; or both. The legislators should have clearly defined this in the Act. In Saipem v Bangladesh (2007) case, based on a BIT between Bangladesh and Italy, claims arising out of the actions of the State-owned entity Petrobangla and of the courts of Bangladesh allegedly aimed at sabotaging an ICC commercial arbitration proceeding and the subsequent non-enforcement of the award concerning the breach of a contract concluded between the claimant and said State-owned entity for the construction of a long-distance gas pipeline. The ICSID has decided in favour of Saipem, which was based on indirect expropriation in the light of an expropriation provision.

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Apart from the Saipem case, there are two ongoing cases, where expropriation might have happened in future. These are disputes between BTRC and Grameenphone; and between BTRC and Robi. In 2019, the BTRC audited GP's book and claims that it has unearthed financial discrepancies amounting to almost BDT 12,579.96 crore (USD1.5 billion) from its inception until June 2015. Thereafter, the BTRC issued a demand letter to GP and given two weeks to pay the dues (BDT8494.01 crore/USD 1 billion to BTRC and BDT4085.94 crore/USD48 million to NBR). The review petition was filed after the apex court on 24th November 2019 had directed GP to pay BDT 2,000.00 crore (USD23.5 million) to the BTRC within 3 months (23rd February 2020) against the claim of BDT12,579.96 crore (USD1.5 billion). However, on 24th February 2020, GP paid BDT1000.00 crore (USD11.76 million) to the BTRC following the order of the Appellate Division (Daily Star, 2020).

On 31st July 2019, BTRC issued a demand letter to Robi claiming to payment of BDT867.23 crore (USD1.02 billion) including BDT197.21 crore (USD23 million) to the NBR as missed or under payments over a 19-year period, detected after a throughout audit. On 25th August 2019, Robi filed a case against the payment demanded by BTRC with a lower court and sought temporary injunction on the demand letter, which was turned down. Robi then filed an appeal with the High Court on 22nd October 2019 seeking temporary injunction on the BTRC's letter seeking payment. On 5th January 2020, the High Court has ordered Robi Axiata Limited to settle BDT 138 crore (USD16.2 million) of BTRC's audit claim in five instalments. On 14th January 2020, Robi paid its first instalment of BDT276 million (USD3.2 million) to the BTRC and is due to pay rest of the amount (Rahman, 2020).

In future, if expropriation or nationalisation occurs both MNEs may claim adequate compensation as per section 7 of the FPIA 1980. In such a case, however, if the government could prove that the public purpose as mentioned in section 7 of the Act, then paying adequate compensation to the MNEs may be justified. But public purpose is not even defined in the Act. Generally, it refers to 'public interest', which means taking property for a 'social purpose or legal purpose and general welfare that may extend to the consideration of public health, safety, morals or welfare' (James v United Kingdom, 1986). So, any expropriation for public purpose will depend on whether it is arbitrary and discriminatory in character or politically motivated (Lybian American Oil Company Limco v. Lybia, 1981).

Even if the government could prove that it has expropriated the foreign assets for public purpose, then last issue shall arise is to pay 'adequate compensation' to the investors. Another issue to be considered is how to determine the market value of the property in case of expropriation or nationalisation. Moreover, section 7 of the Act only states that the 'market value of investment expropriated or nationalized immediate before the expropriation or nationalization. There is no statutory explanation in the Act as to how the 'immediate past market value' will be calculated, either by deducting the resulting increase in value or adding the resulting decrease. If these are not taken into consideration, the amount of compensation awarded would be more likely higher than the losses being compensated for (Nakib, 2014). The expropriation or nationalisation issue are often used in the BITs. Bangladesh has so far signed 31 BITs with different countries (UNCTAD, 2021).

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All the BITs have specific clause regarding expropriation or nationalisation, which generally followed Hull formula instead of Calvo doctrine for compensation.

FINDINGS

From the above discussions, it appears that the Constitution of Bangladesh does not guarantee compensation against expropriation for foreign investors. However, the FPIA 1980 does but still lacks to define clearly about expropriation, public purpose, market value, adequate compensation. Section 7 of the Act is based on Hull formula, which goes against the national interest of Bangladesh. In this regard, Saipem case is a good example. In this study, two commercial disputing cases have been discussed. Both cases involve MNEs and against the same parties (BTRC and NBR) with the same issue. These two cases may lead to expropriation or nationalisation in future. So, it remains to be seen, what the MNEs (GP and Robi) would do to protect their property or investments in Bangladesh. The BITs of Bangladesh also rely on Hull formula and provide more protection to foreign investors than protecting its own national interest.

RECOMMENDATIONS

Based on the findings, a fair, steady and balanced expropriation or nationalisation procedure is required to balancing the competing interests of both government and foreign investors. In this relation, the followings are recommended:

(a) in the national FDI legislation (i.e., the FPIA 1980), a precise substantive procedure for expropriation or nationalisation should be introduced with comprehensible definition of various terms.
(b) the FDI legislation or the BITs should be based on Calvo doctrine in order to protect national interest.
(c) under FDI legislation (the FPIA 1980), the prerequisite for the exhaustion of local remedies can be imposed as a condition if the state party lodges the allegation with a domestic competent court for the breach of contractual obligation by the investors. If the BITs have provision regarding the prerequisite of the exhaustion of local remedies among contracting state parties, the investors of the contracting state should conform with this.
(d) the 'rule of law' is very important for any country. Any trial including involving MNEs should be conducted with fairness, equality and justice. It must be free from any kind of political involvement and biasness.

CONCLUSION

As it appears that expropriation clause in section 7 of the FPIA 1980 still require more improvement to maintain international standard, the above-mentioned recommendations could be taken into consideration by the government. As Bangladesh is a major player in international trade nowadays and require more FDI for its economic growth; the government must provide legal security for such investments including the option of

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settling commercial disputes through international arbitration standard. When a dispute arises in relation to expropriation, the foreign investors should not view the government as a competitor, rather try to resolve the issue through mutual discussion and peaceful settlement. It is hoped that by taking into consideration of the recommendations', Bangladesh will become an attractive destination for foreign investments.

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PROGRESSIVE REGULATION ON VIRTUAL ASSETS TO MITIGATE MONEY LAUNDERING RISKS IN BANGLADESH

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ABSTRACT

This article examines how the objective to fight against money laundering concerning virtual assets can be achieved through progressive regulation of financial innovations. This was empirical legal research exploring how some of the socio-legal considerations might have implications for virtual asset regulation in a developing jurisdiction where it was still under an implicit ban. This study demonstrated that Bangladesh's regulatory responses to virtual assets are obstructive and primarily based on misconception rather than lack of utility. The research showed that unregulated virtual assets might facilitate money laundering in an economy that is highly prone to corruption. Progressive regulatory measures are required to control potential risks. This is the first study interpreting the socio-legal factors that may be relevant in choosing a suitable regulatory approach toward virtual assets in the context of Bangladesh, an emerging economy. This paper covers the preliminary issues on adopting convertible virtual assets in Bangladesh's economy. Further research is required to investigate the matter from the perspective of a non-convertible one. The results of this study will help ensure more informed decision-making based on contemporary social, legal, and economic factors concerning the regulation of virtual assets.

Keywords: Virtual asset, convertible virtual asset, money laundering, corruption, cryptocurrency, progressive regulation, Bangladesh.

INTRODUCTION

Despite its wide acceptance as digital representation of value, cryptocurrency's legal status still remains doubtful in many jurisdictions. Even more perplexing is the regulators' implicit ban which does not often explain what elements of illegality are involved in its possession and transfer. This unregulated status has created opportunities for criminals to exploit ambiguities within the domestic legal systems. They often move illicit funds using this value transfer platform to or through jurisdictions with ineffective legal and institutional framework. Specially, the financial system of countries with high level of corruption and where there is a higher demand of illegal fund transfer services are particularly vulnerable to this risk. One of such jurisdictions is Bangladesh where cryptocurrency is under implicit ban.

Recently Police have made few arrests in connection with illegal transactions of bitcoins in Bangladesh (The Daily Star, 2021). However, this simple incident bears considerable regulatory importance as it forms part of a series of conflicting developments around virtual assets regulation in this country. On the one hand, the central bank imposed an

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implicit ban on virtual assets because of their alleged criminal nature (Bangladesh Bank, 2014 and 2017). On the other hand, the Information and Communication Technology Division (ICTD) of the Ministry of Science and Information & Communication Technology in their National Blockchain Strategy indicated to opening the market for cryptocurrencies in a restricted fashion for research, innovation, and promotional purposes (ICTD, 2020, p. 41-46). This simultaneous awareness of opposing views of two important public agencies indicates that the amount of confusion among policymakers about the utility of virtual assets is high.

This turmoil has eventually rendered the virtual assets, a financial innovation highly vulnerable to money laundering (Albrecht et al., 2019, pp. 212-214), effectively unregulated. Consequently, the number of illegal virtual assets service providers is rising in Bangladesh, as is evident from regular police actions against these entities (The Daily Star, 2021 & 2019, Mowla, 2018). Financial Action Task Force (FATF) Recommendations 15 urges jurisdictions and financial institutions to identify and assess the money laundering or terrorist financing risks that may arise with financial innovations like virtual assets. In the second round of the Asia/Pacific Group on Money Laundering (APG) Mutual Evaluation Report (MER, 2009), Bangladesh received a partially compliant (PC) rating for its level of compliance with this Recommendation (APG, 2009 pp. 169-171), and a C (compliant) in the third mutual evaluation (APG, 2016, p. 137). However, this apparent progress does not have any bearing on how successfully they are regulating virtual assets. Recommendation 15 was not amended until October 2018 to include virtual assets as a new technology in the financial sectors to be brought under anti-money laundering regulations.

To keep virtual assets out of regulation could be risky for Bangladesh, which has consistently been rated as one of the most corrupt jurisdictions by Transparency International (Jamil, Askvik & Hossain, 2016, p. 103), and where the illicit financial outflow is an enduring problem (Lintner, 2019). Under these circumstances, the regulators cannot operate in ignorance or a policy vacuum when handling an easily accessible financial innovation like virtual assets. Then again, the question remains on the factors that should or should not influence the decisions in this regard.

The post 9/11 legislative and military developments acted as the catalyst for enacting anti-money laundering and counter financing terrorism (AML/CFT) laws worldwide. Likewise, numerous pieces of legislation are now being enacted or amended to remain compliant with global AML/CFT standards despite many jurisdictions' apparent lack of expertise in applying them (Haq, 2013, pp.5-6). Suppose the jurisdictions want an AML/CFT system that complies with global standards, fits their unique socio-legal scenario and produces desired results. In that case, it is essential to find ways to shift away from this ongoing approach.

Therefore, '[h]ow much regulation of a particular activity is appropriate? Does the nature of the activity being regulated, or the characteristics of a country, influence the optimal choice?' (Shleifer, 2005, p. 439)—are some of the questions worth considering. Focusing on these questions may help us understand if '[…] the level of regulation we observe [is] in fact an outcome of efficient social choice, or […] other factors [are] as or more

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important' (Shleifer, 2005, p. 439). This paper argues that neither a ban nor a mechanical application of global AML/CFT measures may be the right approach; rather, progressive regulation on virtual assets that fits in the unique context of Bangladesh is the safest way to govern this emerging financial sector.

The first part of the paper will investigate the most prominent emerging regulatory approaches worldwide on virtual assets to understand the basis of progressive regulation. The second part will apply that framework to the case of Bangladesh, whose regulatory responses promote misuse of virtual assets, and discuss the role of the progressive regulation to control such abuse. The researchers used the terms 'virtual asset', 'virtual currency,' 'crypto,' and 'cryptocurrency' interchangeably. The terms refer to an asset that exists purely in the electronic form without the control of a central authority, nevertheless convertible to pay for goods and services in a real-world financial transaction.

CONCEPTUALISING PROGRESSIVE REGULATION ON VIRTUAL ASSETS

Progressivism, by its nature, is committed to democratic values to introduce social change. Progressives argue that the imposition of artificial barriers or limits in planning and experimentation is counterproductive, meaning that they contribute more to an ineffective system of modern policymaking than an effective one (Ceaser, 2012, p. 177). The idea suggests that the best way to effect changes in the human condition is to ensure sustainable development in science and social science in general. In essence, it is a political philosophy promoting such public policies that support positive social changes, and this is where one may observe a convergence between progressivism and progressive regulation. One can understand the concept of progressive regulation of virtual assets from its connection with disruptive technologies that can alter how people behave and how society and businesses operate today.

To understand the global legal landscape surrounding virtual assets, the Library of Congress surveyed 40 jurisdictions and regional organizations in 2014 where some form of regulatory initiatives on cryptocurrency exists. This number rose to 130, indicating a rapid expansion of cryptocurrency when they repeated the survey (excluding the United States) in 2018 (Library of Congress, 2018). From the perspective of the legal status of cryptocurrency, one can divide these regulatory initiatives into two broad categories—progressive and obstructive regimes. The first category represents a positive regulatory attitude. They have neither banned cryptocurrencies nor gave them the status of legal tender but recognized them as assets. On the other hand, the obstructive regime has assumed a wait-and-see policy by way of imposing an implicit or explicit ban. The primary focus of this paper is on the first category.

Dealing with anonymity

Arguably cryptocurrency is the next big thing loaded with numerous positive attributes, making it difficult to ignore as an asset. At the same time, there is a congenial relationship between financial crime and cryptocurrency (Brito & Castillo, 2013, p. 24). In the AML/CFT

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regime, the focal point of significant concern about cryptocurrency was anonymity—something rooted in cryptography but highly incompatible with any AML/CFT regime. Therefore, this was one of the initial regulatory challenges about cryptocurrency the regulators had to manage.

Initially, FATF advised its members on new or developing technologies in financial transactions that might favour anonymity and increase money laundering risks as early as their second version of Recommendations (FATF, 1996, p. 4). With the rapid development of computer-based financial services and the subsequent development of Bitcoin in 2009, FATF introduced its first guidance on a risk-based approach to virtual currencies in 2015. An essential feature of this guidance is adopting the terms 'virtual currency payments products and services'. These terms relate to virtual currencies (centralised and decentralised) as a means of payment and their growing interactions with 'new payment products and services and traditional banking services. This was significant progress from FATF's original stand in 2013 guidance where the phrase 'decentralised digital currency' was used only once and without any explanation (FATF guidance, 2013, p. 3).

The 2018 FATF plenary meeting amended Recommendation 15, replaced 'virtual currency' with 'virtual asset' (centralised and decentralised), and added a definition of 'virtual asset service providers' (VASPs) to the glossary. FATF incorporated the new changes in 2019 guidance for a risk-based approach to virtual assets and virtual asset service providers. One of the core intentions of this attempt was to suggest some comprehensive solutions to the longstanding issue concerning anonymity. Therefore, FATF called for a regulation of VASPs through licensing or registration regime (FATF guidance, 2019, p. 5). This proposal reflected similar actions already suggested by the Commonwealth Working Group (after this CWG) on Virtual Currencies.

Established in 2015, this working group prepared a report on the prevalence and impact of cryptocurrencies and technical guidance on the prospective regulatory measures that could be implemented in the member jurisdictions to respond to the growth of virtual assets. The report urged the members to make a 'positive determination' on the legality of cryptocurrencies and awareness-building among the people on probable risks (CWG, 2019, p. 1). Based on similar practices elsewhere, the working group suggested introducing a registration and licensing regime for the virtual asset service providers to facilitate information gathering and provide a higher level of transparency in the transactions. This initiative strongly advocated for a progressive regulatory regime. It urges members to begin with a lighter set of measures and a simple registration process so that the licensing regime does not become too costly for start-ups. Simultaneously, this would also help gather relevant data to develop higher standards over time (CWG, 2019, pp. 20-21).

Likewise, at the European Union (EU) level, the 4th Anti-Money Laundering Directive required that both exchange services providers between virtual currencies and fiat currencies and custodian wallet providers must come under a licensing and registration regime [Directive 2015/849, Art 47]. The purpose was to understand the growth of this industry so that any subsequent measures could be designed accordingly. This Directive

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did not impose any reporting obligation on anyone dealing in virtual assets, which was set when the 5th Anti-Money Laundering Directive was adopted, extending the scope of the previous one [Directive 2018/843, Art 8].

All jurisdictions where virtual asset services can operate at the national levels introduced some form of registration and licensing regime, coinciding with any of the group regulatory developments or preceding it. For example, under section 5 (h.1) (iv) the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (SC 2000, c. 17) of Canada, all money service businesses, including VASPs are obliged to register with the Financial Transactions and Reports Analysis Centre of Canada. Similarly, the Securities and Exchange Commission of the United States (US) requires registration of any virtual currencies traded in the US (Hacker, et. al., 2019, p. 119). This is enforced by the registration and Customer Due Diligence regime laid down by FinCEN (Lessambo, 2019, p. 27).

This discussion indicates that progressive regulation initially offers a balanced style and encourages a risk-based approach so that disproportionate focus on risk campaigns does not undermine the benefit of innovation. Despite the alleged high money laundering risk, FATF, too, has recommended seeing how AML/CFT regulations of virtual assets could be made compatible with non-AML/CFT regulations. FATF encouraged the jurisdiction to consider this proposal if they had not already banned cryptocurrencies for other policy considerations like consumer protection. While FATF is primarily concerned with AML/CFT regulatory matters directly implicated by virtual asset payment mechanisms, they concurrently stress the cryptocurrency's potential to grow into a significant part of the regulated economy through its widespread adoption (FATF guidance, 2015, p. 9).

Substantive areas of progressive regulation

While incidents like the taking down of BitInstant in 2014—one of the top New York-based bitcoin exchanges—due to their connection with the infamous Silk Road made many people sceptical about cryptocurrency (Pagliery, 2014, p. 187), today, not all jurisdictions see the growth of cryptocurrency as a threat (Library of Congress, 2018). Instead, there is a de facto global consensus regarding the correctness of crypto regulation to encourage innovation and mitigate the risks (CWG, 2019). This harmony is sporadic yet robust and growing in favour of controlling the threats through progressive regulation. For brevity, the researchers have divided the substantive area into two broad categories, AML and non-AML.

Both pieces of the FATF guidance issued in 2015 and 2019 stressed VASPs' inability, which is primarily caused by the problem of anonymity, to conduct any proper identification of traders of virtual assets in the blockchain network (FATF guidance, 2015 & 2019). Therefore, virtual assets succeeded in securing a special place on the recent FATF agenda on account of the rapid growth of anonymity-enhanced cryptocurrencies and for the fact that the VASPs pose greater ML/FT risk by acting as points of gateways to the fiat currency financial system (FATF guidance, 2019, p. 6-8).

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Accordingly, AML/CFT compliance risk associated with cryptocurrency has grown into one area where shared concern and action are evident. The 2018 Library of Congress survey revealed how this concern is gradually attracting the attention of most jurisdictions worldwide (Library of Congress, 2018). The 2019 Commonwealth working group report on virtual currencies emphasized the same issue. The report identified 'criminal activity (AML/CFT)' as a significant cryptocurrency issue (CWG, 2019). One can trace this trend in the EU region, especially after introducing the 5th Money Laundering Directive (Council Directive 2018/843). The leaders of G20 further strengthened this global commitment when, in December 2018, they declared, "[w]e will regulate crypto-assets for anti-money laundering and countering the financing of terrorism in line with FATF standards, and we will consider other responses as needed [emphasis added]" (CWG, 2019).

Non-AML/CFT regulatory issues of the virtual asset have attracted more attention in recent years, mainly due to cryptocurrency's gradual attainment of 'asset' status. Anyone can see how the "other responses as needed" were carried out in the 2018 FATF plenary meeting and subsequent amendment to Recommendation 15, which finally declared cryptocurrency 'virtual asset'. However, this amendment is preceded by the international organization of securities commissions (IOSCO) sponsored Research Report on Financial Technologies (Fintech), 2017. IOSCO mentioned a crypto asset as a private asset which 'can represent an asset such as a currency, commodity or security' (IOSCO, 2017).

As previously mentioned, the Commonwealth report encouraged its member jurisdictions to make a 'positive determination' on the legality of cryptocurrencies. The report unpacked the terms 'positive determination' further by encouraging members to make necessary regulatory arrangements for issues like the legal status of cryptocurrency, taxation, criminal activity (non-AML/CFT), consumer protection, social benefits, and international cooperation, among others (CWG, 2019, pp. 10-11).

However, probably the most significant element of this report is its emphasis on technology neutrality (CWG, 2019, p. 1). This essentially means regulation shall neither negatively affect technology development nor improperly discriminate between technologies (Koops, 2006, pp. 82-84). In the context of blockchain-based virtual assets, technology neutrality means that both the wording and the effect of regulation shall help explore more opportunities (Koops, 2006, pp. 80-81) in the underlying distributed ledger technology. Progressive regulation expressed in technical neutrality can help accomplish this objective by providing sustainability and required legal certainty to the underlying technology behind virtual assets instead of obstructing innovations (Koops, 2006, pp. 97-98).

The 2018 European Parliament resolution on distributed ledger technologies and blockchains further affirmed the concept of progressive regulation on virtual assets. The resolution stressed that the possibility of alternative methods of transfer of value using cryptocurrencies and the prospect of integrating them within the European payment system could be examined (European Parliament 2018, art. 27). This outcome reflects the Framework Directive on a common regulatory framework for electronic communications networks and services adopted in 2002. One of the regulatory principles this Directive

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adopted was that regulations would be technologically neutral to promote effective competition. Such an approach also removes the restriction, encourages investment, and ensures maximum users' benefit in choice, price, and quality (Directive 2002/21/EC, Article 8).

At the national level, various regulatory treatments are available. For example, the US internal revenue service classifies virtual currencies as 'property' for federal tax. Both the United Kingdom and Singapore, among other commonwealth countries, have also set out their position on the income tax treatment of cryptocurrencies (CWG, 2019). In New Zealand, if the initial coin offers (ICOs) of virtual assets have certain characteristics that categorize them as 'financial products,' government will regulate them under the Financial Markets Conduct Act 2013. Otherwise, they will fall under consumer protection laws (Library of Congress, 2018).

At least on one occasion, a specific aspect of the regulation of cryptocurrency was tested in the court, which helped shape the position of this asset. In Skatteverket v David Hedqvist a Swedish national requested a preliminary decision from the Swedish Revenue Law Commission to establish if the applicant should pay Value Added Tax (VAT) on the purchase and sale of cryptocurrencies. When the matter eventually went to the Court of Justice of the European Union, it was held that 'those transactions [were] exempt from VAT under the provision concerning transactions relating to 'currency, banknotes, and coins used as legal tender' (Skatteverket v. David Hedqvist, paras 58 (1-2).

Dedicated or shared regulatory regime?

Several approaches have been put forward across the jurisdictions to regulate the use of cryptocurrency. These include bringing it either within the scope of the existing AML/CFT laws or non-AML/CFT regulatory regimes or both. New legislation is in place in some jurisdictions, although many believe consolidating and streamlining current rules may serve the purpose. Of the jurisdictions that the Library of Congress surveyed, 16 of them regulate cryptocurrencies under tax laws, 12 jurisdictions bring them under the AML/CFT regulatory regime, and five jurisdictions apply a combination of both. While 15 jurisdictions have imposed an implicit prohibition, eight have placed an outright ban. The only regulatory step they took was to educate their citizens through cautionary notices on the probable drawbacks of trading in cryptocurrencies (Library of Congress, 2018).

A broader and more generic approach is also preferred where the jurisdictions' focus is less on what cryptocurrency has to offer as an asset than on why it is more than just an asset. Many jurisdictions have begun to shift their focus from regulating cryptocurrency to accommodating blockchain. Countries like Spain, Belarus, the Cayman Islands, Luxemburg (Library of Congress, 2018), and China (Khatri, 2020) are focusing on creating a cryptocurrency-friendly regulatory regime to attract investment in rising technology companies working in this area (Library of Congress, 2018).

The task of deciding on the legal status of virtual assets comes concurrently with choosing the right regulatory approach. The above analysis indicates that the experience is mixed, and there is no one size fits all solution to this problem. As the Commonwealth working group explained, the decision depends on how broadly the financial regulations of jurisdictions are drafted. Jurisdictions with a 'non-prescriptive or outcomes-based system' of financial regulation may find themselves already covering virtual assets to a reasonable extent than the jurisdictions where regulations use precisely defined terms (CWG, 2019).

The following sections will analyse the socio-legal context of Bangladesh and examine to what extent the growing progressive regulatory approach—what has been done, how it has been done, and the reasoning behind it—could be applicable in Bangladesh.

INACCURATE RISK PERCEPTION OF MISUSE OF CRYPTOCURRENCIES IN BANGLADESH

Some recent developments indicate inconsistent claims on the risk perception of misuse of cryptocurrencies in Bangladesh. One example could be the cautionary notices Bangladesh central bank issued in 2014 and 2017 warning the citizens of various criminal and financial risks associated with cryptocurrencies (Library of Congress, 2018). These communications show that the apex regulatory body for the country's financial system is concerned about cryptocurrencies. Then again, the latest round of APG mutual evaluation report rated Bangladesh 'C' (compliant) (APG 2016, p. 176) for its highest level of compliance with FATF Recommendation 15- new technologies, without making any references to cryptocurrencies. Suppose these imply that the problem is negligible and not worth mentioning even on such a highly relevant document. How would one interpret the regular crackdowns on illegal crypto traders around the country (Dhaka Tribune, 2021, The Daily Star, 2021 and 2019, Mowla, 2018)?

There are virtual asset service providers in Bangladesh, but authorities neither officially accept this fact nor develop any effective regulatory measures. Since cryptocurrency is readily available nowadays, therefore, it is expected that some curious persons may try to see what it is all about. Both cautionary notices from the central bank carried this view and warned citizens about possible adverse effects of curiosity. However, the recent arrests made in connected with bitcoin trading revealed that the problem is more severe than having harmful curiosity.

A group of 12 persons, including a mastermind allegedly involved in illegal crypto trading, was arrested in the capital Dhaka and many computers were seized (Dhaka Tribune, 2021, The Daily Star, 2021). Later they confessed, under the disguise of an online marketing company, they conducted various illicit activities, including bitcoin scamming (Dhaka Tribune, 2021), credit card fraud, and providing illegal fund transfer services to casino-goers and dishonest businesspeople (The Daily Prothom Alo, 3 May 2021). In a post-arrest press conference, the law enforcers claimed they had enough evidence to suggest the cartel had been facilitating the illegal trafficking of drugs and weapons through their cryptocurrency payment system (The Daily Ittefaq, 2021). Founded in 2013, this cartel subsequently colluded with money launderers and credit card hackers from Pakistan,

Nigeria, and Russia and used several local bank accounts for their illegal transactions (The Daily Prothom Alo, 5 May 2021).

Unregulated cryptocurrency could be abused to facilitate several other predicate offences in Bangladesh. According to the latest Corruption Perceptions Index (2019) published by Transparency International Bangladesh (TIB), Bangladesh is now the 14th (from lowest to highest) most corrupt country in the world (TIB, 2020, p. 3). Over the past 25 years, several landmark financial corruption cases have rocked the nation and seriously downplayed the credibility of the financial regulatory regimes. During 2010-2012 over USD454 million were swindled through loan frauds with the active cooperation of the bank owners (Quibria, 2019, p. 98). In 2017 Bangladesh made international headlines following the Washington-based Global Financial Integrity report that about USD81.74 billion was flown out of the country illicitly during 2006-2015 (Lintner, 2019).

A large portion of this illicitly out-flown capital is believed to be earned through corruption in various public sectors such as law enforcement, public procurement, and local government development projects (TIB, 2018-19). Unchecked and unregulated virtual assets probably have already been in use by corrupt individuals and entities. Now, the question is what measures Bangladesh has taken to regulate cryptocurrencies and the reasoning behind such steps.

A purely obstructive regulatory regime

The cautionary notices Bangladesh central bank issues, as mentioned earlier, are based on the information obtained from news media only as their contents indicate (Bangladesh Bank, 2014 and 2017), and caution against two types of risks, criminal and financial.

On criminal risks, the first notice says that Bitcoin transaction 'may involve an unauthorized exchange in foreign currencies which shall be punishable under the Foreign Exchange Regulation Act, 1947', and 'users of these currencies shall be charged with violating anti-money laundering laws' [translated from Bangla] (Bangladesh Bank, 2014). Similarly, the second notice warns that 'the transaction in this currency is neither authorized by Bangladesh Bank nor any other regulatory authorities; hence, any use of this virtual currency is neither endorsed by the Foreign Exchange Regulation Act 1947, nor the Anti-Terrorism Act 2009 nor the Money Laundering Prevention Act 2012', because 'transactions in virtual currencies with an anonymous peer may amount to involuntary breaches of anti-money laundering and anti-terrorism-related laws' [translated from Bangla] (Bangladesh Bank, 2017). The language of these communications left the citizens in doubt if they would mean an outright or implicit ban on virtual assets. In legal documents, the word 'may' used in the second notice is more like a 'suggestion' than 'command,' which one could presume from the term 'shall'—a more robust expression of assertion—used in the 2014 notice.

The notices do not explain any ML/FT risk factors, such as risk arising from anonymous funding. Also, no provisions of the Anti-Terrorism Act (ATA) 2009 and the Money

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Laundering Prevention Act (MLPA) 2012 indicate that mere transaction of cryptocurrency may constitute a crime unless such money value transfer involves any predicate offence. Also, none of these Acts provide any provisions on how they could incriminate a person under these laws for probable violation of foreign exchange-related rules [section 2 (u), MLPA 2012; section 2 (21) ATA 2009].

Likewise, as it appears, the central bank assumed cryptocurrency as (unauthorised) foreign currency or exchange. However, they did not explain precisely how trading in cryptocurrencies might violate any provisions of the 1947 Act. The foundation of this assumption is the purest kind of fallacy in that cryptocurrency does not qualify as foreign currency within the meaning of this Act, which provides: "foreign currency" means any currency other than Bangladesh currency" [section 2 (c)]. Besides, as Yuneline, (p. 213 2019) explained, 'cryptocurrency does not fully meet the three basic characteristics of a successful currency' because its 'function as a store of value is limited by high price volatility', among others.

Similarly, the Act further states:

> "Foreign exchange" means foreign currency and includes any instrument drawn, accepted, made, or issued under [clause (13) of Article 16 of the Bangladesh Bank Order, 1972] all deposits, credits and balances payable in any foreign currency, and any drafts, traveller's cheques, letters of credit and bills of exchange, expressed or drawn in Bangladesh currency but payable in any foreign currency" [section 2 (d)].

Moreover, under Article 16 (13) of the Bangladesh Bank Order, 1972, only Bangladesh Bank can include new instruments in the existing list of foreign exchanges with prior government approval.

Therefore, if Bangladesh Bank had not 'drawn, accepted, made or issued' cryptocurrency as foreign exchange, then it is not foreign exchange within the meaning of the 1947 Act. Accordingly, a crypto trader may not be charged with violating the restrictions on dealing in foreign exchange (section 4). It may be noted here that the Police did not arrest the alleged mastermind of the cartel detained in May 2021 under any of these laws. They made the arrests under section 23 (fraudulent activities using electronic means) of the Digital Security Act, 2018, as well as under section 465 (forgery) of the Penal Code 1860 (The Daily Prothom Alo, 5 May 2021). Therefore, there is no legal basis for claiming that the transaction in cryptocurrency is illegal in itself.

On financial risk, the content of these notices is straightforward. Here the focus is not on illegality, but dangers associated with anonymity. In a blockchain network where the cryptocurrency exists, the receiver of a transaction, for instance, cannot instantly and quickly see a sender's real name and physical address. The sender's information will be reduced into an ID on a receiver's side due to varying degrees of anonymity the network provides, making a transaction pseudo-anonymous. Therefore, the cautionary notices

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warn citizens about probable financial risks arising from anonymous transactions (Bangladesh Bank, 2014) and unavailability of legal recourses (Bangladesh Bank, 2017) if there is a violation of rights. On a positive note, Bangladesh's National Blockchain Strategy adopted a proposal to explore the potential positive use of cryptocurrencies in the future (ICTD, 2020, pp. 41-46). However, the report does not offer any elaboration on the proposed project.

What appears here is probably an expression of xenophobia against unknown financial innovation. Whether it is the excuse of criminal risk or financial, this is the pseudo-anonymous nature of virtual assets all concerns of the central bank revolve around. Nobody seems to know how the transactions in cryptocurrency 'may involve an unauthorized exchange in foreign currencies which shall be punishable under the Foreign Exchange Regulation Act, 1947' or how the 'transactions in virtual currencies with an anonymous peer may amount to involuntary breaches of anti-money laundering and anti-terrorism-related laws.' Therefore, the alleged criminals are being indicted for such stand-alone crimes, which may not have any connections with cryptocurrencies whatsoever.

There is a minor factor as well that influenced the decision of the regulators. In the second round of mutual evaluation, Bangladesh's average level of compliance with all 40 FATF Recommendations was lower than 'partially compliant' (Haq, 2013, pp.86-87), which increased significantly over the next few years (APG, 2016, pp. 175-180, APG, 2009, pp. 167-174). Many of these positive achievements would look waned if Bangladesh received a lower rating for Recommendation 15, negatively affecting the ratings for other related Recommendations. FATF guidelines exempt a jurisdiction from taking any further anti-money laundering measures against a financial activity if the jurisdiction has already banned such activity based on assessed risk and legal tradition (FATF methodology 2013, p. 12, 23, & FATF 2019, p. 13). Therefore, instead of allocating resources to regulate something unknown, Bangladesh leveraged the central bank's implicit ban on cryptocurrency to reduce any negative weight on the scale by avoiding questions on virtual assets during the evaluation. The fundamental purpose of this defensive approach was to appear compliant rather than being compliant in an absolute sense.

The obstructive approach in crypto regulation in Bangladesh is founded on false premises. First, the concerns on probable illegality of crypto transactions have little or no basis, at least under the existing laws. Second, labelling the pseudo-anonymity of cryptocurrency as an inherent disqualification, as if regulators can never cure it. It is challenging to conclude within the scope of this paper if this fallacy is committed intentionally or inadvertently. However, authorities took the risk of keeping virtual assets unregulated, and seemingly, the gamble paid off, at least in the form of a higher evaluation rating and by allowing regulators to allocate resources to other areas of pressing concerns.

A probable way out

When it comes to making specific recommendations, the options are many, and selecting a few from the abundance of excellent yet untested proposals in a developing country could

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be tricky. The concerns Bangladesh central bank raised about the pitfalls of trading in cryptocurrencies are not baseless. Along with the risk of severe currency volatility and loss of interest on deposits, virtual asset runs the risk of not being accepted by banks and not being accorded the protection afforded by them and merchants (Girasa, 2018, p. 15-16). Besides, numerous cases of fraudulent dealings in cryptocurrency could not be reversed (Moore & Christin, 2013, p. 25-26). Nevertheless, Bangladesh relied on the presumption of illegality and unsubstantiated financial risks to ban cryptocurrency. Combined, they lead to a speculative risk in that the implicit ban was a conscious choice and was not just a result of uncontrollable circumstances. Therefore, adopting this obstructive pseudo-regulatory mechanism against cryptocurrency in a total legislative vacuum is a questionable choice.

Is outright ban an option? The recent crackdown on cryptocurrency trading has virtually amended the implicit ban into an explicit one. However, this approach could be counterproductive because this may drive both risk and opportunity underground, where eventually risk will grow, and opportunity will repose in cold storage. If this approach serves any useful purpose, then Bangladesh will defend the important 'C' for Recommendation 15 in the next APG mutual evaluation without much hard work. Then again, this is too little reward with too much risk.

Another available option, as suggested by FATF could be to declare virtual assets as 'property,' (FATF Public Statement, 2018), and bring the VASPs under appropriate regulatory regimes. As Low and Tan mentioned, (Low & Tan, p. 176, 2020)

> "[…] cryptocurrency had the fundamental characteristic of intangible property as being an identifiable thing of value, and that cryptocurrencies met the requirements of the House of Lords' classic definition of property in National Provincial Bank v Ainsworth [1965] 1 AC 1175 that property must "be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

Once under regulation, VASPs would also inevitably be subject to relevant AML/CFT measures. However, there is every reason to be sceptical about a mechanical application of any specific regulatory model in a country with poor digital infrastructure where 94% of the financial transactions are still cash-based (Star Business Report, 2018). Furthermore, when it comes to protecting consumer rights, this may be noted here that the legal discourse on 'admissibility of digital evidence' in Bangladesh, although growing, is still in its infancy (Deb, 2019).

Therefore, a probable response can be to assume a simple, generic, and time-neutral approach. In this case, treating cryptocurrencies as 'property' to include '[…] property of every description movable or immovable, corporeal or incorporeal, and commercial and industrial undertakings, and any right or interest in any such property or undertaking' [Constitution of Bangladesh, Art. 152(1)] could be a convenient beginning. Compared to

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various financial instruments which give rise to financial assets and liabilities for contracting parties, the status of 'property' is less complicated when it comes to tax treatment. Under the Income-tax Ordinance, 1984 (Bangladesh) 'intangible property shall be deemed to be property in Bangladesh if it is- (i) registered in Bangladesh; or (ii) owned by a person that is not a resident of Bangladesh but has a permanent establishment in Bangladesh to which the intangible property is attributed' [explanation to clause 2 (b) of Section 18]. And 'any income accruing or arising, whether directly or indirectly, through or from […] any […] intangible property' shall be deemed to accrue or arise in Bangladesh, and accordingly have tax consequences that may result in a tax liability.

CONCLUSION

Despite a growing global consensus on the need for regulations, some jurisdictions, including Bangladesh, have adopted a wait-and-see policy in the form of an implicit ban on cryptocurrencies. The study found that this tacit ban was largely based on a preconceived idea of cryptocurrency's involvement in probable criminal activities. Such an approach has undermined the potential contribution of this financial innovation in society and created opportunities for its misuse. In a completely unregulated environment, the use of cryptocurrencies for criminal purposes is on the rise in Bangladesh, where there is a growing demand for illegal value transfer services. Besides, the study further identified that the current legislative provisions regulators usually refer to may not successfully prosecute crimes and deter criminals from abuse of virtual assets. This situation encouraged the researchers to examine the basis of the implicit ban on cryptocurrency within the regulatory framework of Bangladesh and suggest a suitable way to regulate it.

Current regulatory responses to virtual assets worldwide are chaotic, the experience is mixed, and the effects are unknown. Nevertheless, there is a positive attitude toward cryptocurrencies. Regulatory trends indicate that countries favour its coexistence with other financial innovations and support its continuous growth. For instance, laws are not putting any limit on the forms of financial instruments; as the digital representation of value, cryptocurrency may assume if it is otherwise meeting the required attributes of such instruments. Laws only define the objective of the provisions designed to limit its negative externalities. The researchers argued that cryptocurrency regulation should be based on this principle so that financial innovations are not obstructed, and abuse is controlled.

This study argues that many non-prescriptive provisions are already there in the existing legal framework for the progressive regulation of cryptocurrency. Therefore, Bangladesh may treat cryptocurrency as 'property' and bring it under a registration regime within the existing legislative framework. This finding is important because it offers a primary justification for the regulators to review their present attitude toward cryptocurrencies and understand how the challenge can be met by the resources already in hand. Then again, the proposed regulatory measure is not a silver bullet. It may not apply to closed or non-convertible virtual currencies used in a specific domain only. Further research is required to investigate the matter from that perspective.

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THE LEGAL STATUS OF GAZA STRIP UNDER INTERNATIONAL LAW OF OCCUPATION

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ABSTRACT

Israel conquered Gaza Strip and West Bank in the six-day war of June 1967. Since then, both areas have been under continuous Israeli occupation until Israel chose in 2005 to withdraw its ground troops and settlements from Gaza with retaining control over Gaza's airspace, territorial sea, and borders. While West Bank's occupied status is undisputed, the status of Gaza is less apparent following disengagement. Since then, it is still an essential and contentious legal question whether Gaza should be considered an occupied territory or not. This article aims to analyse the legal status of Gaza Strip after the 2005 disengagement under the international law of occupation. The paper employed the content analysis by examining the international law of Occupation and related international agreements using a qualitative approach. As a result, it is concluded that Gaza Strip continues to be occupied territory by Israel under the effective control test that is at the basis of the law of Occupation. Therefore, the relationship between Gaza and Israel is governed by the Law of Occupation, reflected by the Hague Conventions of 1907 and the Geneva Conventions of 1949.

Keywords: Israel-Palestine conflict, Gaza Strip, International Law of Occupation, effective control.

INTRODUCTION

Over time, international law has evolved a framework that grants the occupying power the authority necessary to manage the area under its control while also codifying the rights of the occupied territory's population. Thus, one of the primary goals of international regulations on belligerent occupation is to allow residents of an occupied region to live as "normally" as possible in such circumstances (Roberts, 1990). To this effect, the recognition of the temporary nature of the occupation is required to administer the territory as effectively as possible without introducing significant changes to the existing order while also ensuring the protection of the fundamental rights of the inhabitants (Dinstein, 2019).

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Determining whether a situation is an occupation or not has ramifications for the amount of protection provided to civilians in the occupied area. This is precisely why the discussion over Israel's Occupation of Gaza has become so heated (Aronson, 2005). The West Bank and Gaza were occupied by Israel in 1967. In contrast to the West Bank, where it is undeniable that Israel continues to be occupied because of the presence of the Israeli forces, the situation in the Gaza Strip is more complicated (Darcy & Reynolds, 2010). Israel decided in 2004 to withdraw its soldiers and evacuate the settlements from Gaza Strip. It asserted that after the end of the process of disengagement, there would be no reason to claim that the Gaza Strip remains occupied territory (Cuyckens, 2016).

This paper aims to examine the legal status of the Gaza Strip according to the rules of the international law of occupation. Thus, analysing the international conventions and the relevant laws are discussed in this paper using a qualitative approach based on primary and secondary sources. The effective control status requirements have been applied to the situation in Gaza, which shows Israel continues to exert a substantial level of control over Gaza as required under the Law of Occupation.

THE CONCEPT OF OCCUPATION

As for the definition of occupation under international conventions, article 42 of The Hague Convention of 1907 defines the status of the occupation as: Territories are considered to be occupied when they are placed under the control of an invading force or military force. Expressly, the occupation is restricted to the territory over which a lawful authority has been established and may be exercised. The Hague Regulations provide in its article 42 that "the occupation extends only to the region where such power has been constituted and may be exercised". Thus, the occupation concerns only those regions where the necessary control has successfully been established.

Occupation, which has the features of an international armed conflict, is governed by the laws of war, namely the 1907 Hague Regulations, GCIV 1949, and several provisions of the 1977 Additional Protocol I to the Geneva Conventions (Cuyckens, 2016). Thus, Article 2 of the GVIV 1949, common to the conventions, has expanded the concept of occupation and includes the State of Occupation even if there are no armed forces on the ground. Further confirmation of the possibility of partial occupation may be found in Article 2 of the Fourth Geneva Convention 1949 (GCIV), which establishes that the principles governing occupation included in the Convention apply to all cases of partial or entire occupation (Ferraro, 2012).

THE INTERNATIONAL LAW OF OCCUPATION

International Law, specifically the Law of Occupation, governs the legal status of the land occupied by Israel in 1967. The legal status of the region shall either be determined directly via the application of international treaties, such as the Geneva Conventions signed by Israel, or indirectly through international customary law, such as the Hague Regulation (Bruderlein, 2004).

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The Hague Conventions

The Peace Conferences of 1899 and 1907 brought an end to a series of Hague Conventions that had been in effect for decades. In Section III (Articles 42 through 56) of the Regulations Respecting the Laws and Customs of War on Land, originally written as an annex to Hague Convention (II) in 1899 and later amended and added as an appendix to Hague Convention (IV) in 1907, belligerent occupancy is the focal point (Dinstein, 2019). It is addressed in the legislation what would happen once hostilities have ended, and occupation has begun. The laws deal with various occupation issues, from the beginning of the occupation to the obligations of the occupant, as well as limits on the occupier's behaviour (Samson, 2010). The significance of the ramifications is the change of the status of the Hague Regulations in the field of belligerent occupation, which has occurred recently. To acquire declaratory status, the Regulations' provisions – which are a mirror image of customary law – have become binding on all states, regardless of whether or not they are Contracting Parties to the Hague Conventions of 1899/1907 (Schindler & Toman, 2004).

The Fourth Geneva Convention 1949.

The Fourth Geneva Convention contained rules governing the behaviour of states toward civilian populations during times of war and clauses defining the duties of governments toward civilian populations in the case of an occupation (Roberts, 2005). In order to prevent a recurrence of the terrible events of World War II, the Convention's main objective was to offer these individuals with more protection than was given by the Hague Regulations at the time of the war. As a result, according to Article 154 of the Geneva Convention (IV), the Convention is considered to be "supplementary" to the Hague Regulations (Dinstein, 2019). (Dinstein, 2019).

Civilians in occupied areas who find themselves "in the hands of a Party to the war or Occupying Power of which they are not nationals" are referred to as "protected people" under the Fourth Geneva Convention (Article 4, GCIV 1949), and their rights are outlined in the Convention. Their rights are inviolable and cannot be renounced (Article 8, GCIV 1949). Any such renunciation would be null and invalid, regardless of whether the individual decision of his or her own free will or as a result of compulsion by the occupying authority (Roberts, 2005).

Among the obligations stated in GCIV 1949 in occupied territories are the following:

(a) "The protection of protected persons' honor, family rights, religious convictions, and practices, as well as manners and customs" (Article 27, GCIV 1949).
(b) "Prohibiting destruction of any property unless "necessary" to the military operation" (Article 55,56, GCIV 1949).
(c) "The obligation of ensuring food and medical supplies for the population, as well as maintaining medical services" (Article 55,56, GCIV 1949).
(d) "The obligation to facilitate the functioning of institutions devoted to the care and education of children, as well as taking any necessary measures to help identify

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children, to assist orphaned children, and to provide preferential treatment to "children under than fifteen years, expectant mothers, and mothers of children under seven years "(Article 50, GCIV 1949).

Additional Protocol I

In 1977, the Geneva Conventions were supplemented with an Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I Additional to GCIV 1949) and Protocol II, which is devoted to non-international armed conflicts. Some of the clauses of Protocol I deal with occupied territories; meanwhile, it does not supersede the Geneva Conventions (including Convention (IV)) but rather supplements them. However, occasionally, the Protocol explicitly overrides earlier Geneva norms. For instance, when the Protocol expressly amends or repeals Geneva provisions relating to the belligerent Occupation (Dinstein, 2019).

INTERNATIONAL OCCUPATION LAW AND EFFECTIVE CONTROL OF GAZA STRIP

To demonstrate occupation factually, the effective control test provided in International Regulations must be fulfilled. This is because occupation establishes a particular scenario where practical geographical control is in the hands of the occupying power. At the same time, the sovereign title remains in the hands of legal authority (Ferraro, 2012). The effective control test may assist in determining whether or not this transfer of (temporary) power has taken place. This is critical because the occupier must be allowed to execute the rights and obligations ordinarily vested in the legitimate power but suspended temporarily by the fact of Occupation (Cuyckens, 2016).

Specifically, Article 42 of the Hague Regulations of 1907 states that the exercise of authority in a territory must meet three conditions in order to be effective: the territory must be placed under the authority of the hostile army; the state in power must exercise the functions of government in the territory; (Zwanenburg, 2007) and the occupier's authority must be exclusive of the authority of the established government (Roberts, 1984). Fourth Geneva Convention 1949 is consistent with the Hague Regulations. It affirms that the occupation is connected to how a Power performs government duties in the purportedly occupied area, which is a condition of recognition (Article 6, GCIV 1949).

The effective control test of a territory refers to a scenario in which a territory is deemed occupied and is put under the authority of a hostile army. The occupation is limited to the area over which such power has been constituted and may be exercised, and not beyond. Despite the language of the Hague effective control test, however, occupational status is not relinquished due to a lack of direct military presence. Based on the Nuremberg Tribunal, effective control is maintained as long as the occupier can re-enter the occupied territory at will to regain control of the region (Amditis, 2012).

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THE EFFECTIVE CONTROL TEST AND THE POST-DISENGAGEMENT SITUATION IN GAZA

As part of its Revised Disengagement Plan, which was implemented on June 6, 2004, Israel withdrew its armed forces and evacuated all of its settlements from the Gaza Strip. In Gaza, the absence of Israeli ground forces implies that the region is no longer under the authority of the invading force (Hollinder, 2005). Nonetheless, Israel's continued military incursions into Gaza, as well as its control of the region's boundaries, provide compelling evidence that Israel is still in control of the area. Boots on the ground are sometimes a fair proxy for control over a region. However, nothing in the Hague Convention makes them a precondition for finding occupation in a given situation or situational context (Stephanopoulos, 2006). Until now, Israel continues to carry out several essential government tasks, such as the following:

The Border and Crossings

Currently, the primary crossings from Gaza are Karni (north-east), a closed cargo terminal for security reasons after Hamas took over in 2007. While Erez (north) is the only pedestrian crossing, Rafah (south) is the only central crossing point into Egypt, which Egypt and Hamas currently control. Following disengagement, Israel and the Palestinian Authority signed the Agreement on Movement and Access (AMA) on November 15, 2005, handing over control of Rafah to the Palestinians and Egypt and increasing traffic via the Erez and Karni crossings, as well as the Agreed Principles for Rafah Crossing (APRC), which expands on the AMA (O'Callaghan et al., 2009). As a result, Israel's actions on the Gaza border do constitute "effective control." The Agreements grant Israel absolute authority over "external security", which includes the Israel-Gaza border. Therefore, border control is a function of government, and the Israeli government exercises the organising and monitoring of the Gaza Strip's borders and displaces Gaza's government.

Gaza's infrastructure, electricity, water.

The Occupation of Israeli in Gaza caused the dominance to overpower, petroleum, and telecommunications shown "effective control" has been exercised. The Agreements state that the fuel supply must adhere to Israeli safety and security requirements, that the Palestine Electric Company must generate a portion of Gaza's power, and that the Israeli Electric Company must generate the balance." Thus, providing power is an Israeli attempt to exercise the role of government in Gaza (Samson, 2010).

In terms of water, there are three significant sources of natural fresh water in the Occupied Palestinian Territory: (I) the Jordan River, (ii) the Coastal Aquifer, and (iii) the Mountain Aquifer. The Jordan River is the primary source of natural fresh water in the Occupied Palestinian Territory. In spite of the fact that the Jordan River forms the eastern boundary of the Occupied Palestinian Territory, Israel has prevented the Palestinians from drawing any water from it since the occupation began in 1967 by declaring its river banks a closed military zone and destroying Palestinian pumping stations and irrigation ditches, among other measures (Obidallah, 2008). Although the Coastal Aquifer exists under Gaza, its

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availability as a source of drinking water for Gazans has been severely impacted by over-pumping and the infiltration of seawater and sewage into the groundwater. Located predominantly on the West Bank, the Mountain Aquifer also spans the 1949 Green Line, which runs through it (Al Khatib et al., 2009).

Following Israel's armed occupation in 1967, Israel assumed complete authority over all Palestinian water consumption and development under military administration. Military Order No. 92 (issued in August 1967) delegated to the Israeli military control of all water resources in the seized territories. Israel's 2005 disengagement does not eliminate any control of Israel on Gaza concerning water supply and sewage removal, indicating "effective control" of those functions (Messerschmid, 2011).

Taxation and Population Registry in Gaza

Israel and the PA are responsible for determining, regulating, levying, and collecting their respective income taxes, property taxes, municipal taxes, and fees. In addition, Israel transfers to the Palestinian Authority income taxes received from Palestinians employed within Israel and income taxes collected from Palestinians employed in settlements (Samson, 2010).

Following the Agreements, the Palestinian Authority (PA) is given authority over "population registry and documentation" in the Gaza Strip, which it then exercises for its population. Israel, however, is permitted some involvement in monitoring the registry and identification cards due to Israel's security concerns about who enters its territory. As a result, Israel frequently supplants the PA's authority and control over the registration and the PA's ability to collect taxes - a piece of evidence that "effective control" exists (Tilley, 2012).

Security Considerations and Right to Re-enter Gaza

According to the Nuremberg Tribunal, effective control is maintained as long as the occupier can re-enter the occupied territory at will to regain control of the region (Amditis, 2012). Israeli statements and admissions regarding the continued exercise of control and supreme jurisdiction over Gaza's airspace, naval waters, transportation of people and goods, and finally, Israel's frequent military operations within the borders of Gaza itself have all confirmed that Israel meets these occupational requirements (Btselem, 2011). For instance: Operation Cast Lead (2009), Column of the Cloud (2012) (Cohen et al., 2017), and Operation Protective Edge (2014) are all recent examples of military operations (Pennington, 2020).

CONCLUSION

As a result of Israel's "Disengagement" Plan 2005, Gazans remain under the effective command and control of the Israeli military. Even though Israel claims to have removed its permanent military presence from the Gaza Strip, Israeli soldiers maintain the capacity

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and right to invade the territory at any time. Furthermore, Israel maintains control over the airspace, coastline, and borders of Gaza. According to the Plan, Israel has the unilateral authority to decide whether or not Gaza would open a seaport or an airport. Additionally, Israel maintains complete control over all border crossings, including the border between Gaza and Egypt. Furthermore, Israel continues its military activity along the Gaza Strip's coastline". Taken together, these powers mean that all goods and people entering or leaving Gaza are subject to Israeli control. Finally, Israel will prevent Gazans from engaging in international relations. Accordingly, Israel effectively controls Gaza administratively and militarily.

Israel remains the Occupying Power of the Gaza Strip under international law. Gaza remains occupied territory in the wake of the Israeli withdrawal, and Israel continues to bear obligations to the territory according to the Fourth Geneva Convention and the Hague Convention. As a result of the Hague Convention of 1907 and the Fourth Geneva Convention of 1949, when a nation enters a state of war outside its borders, it incurs occupation obligations. These obligations can only be discharged if the conflict is brought to close and military control over the conquered territory is terminated.

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MEDIATION AS A SOLUTION IN RESOLVING INTERNATIONAL BUSINESS DISPUTES DURING COVID-19

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ABSTRACT

While parties enter into a contract with the best of intentions, disputes can be inevitable. It can be in many forms, such as contractual disputes or even financial disputes. Once disputes occur, the parties might have to resort to litigation. However, litigation is a burdensome procedure that can be time consuming and costly, especially in cases involving international businesses, where the parties are from different countries. Thus, it is necessary for parties to find another alternative that can effectively resolve the potential disputes. One of the alternatives is alternative dispute resolutions (ADR), which include mediation. There are strong reasons to consider mediation as a method of resolving disputes in international businesses. The paper adopts qualitative method in examining mediation in general, its advantages compared to litigation and the stages involved in resolving disputes. Based on these discussions, a suggestion will be made on how mediation can be applied effectively in resolving international business disputes, especially during Covid-19 pandemic. The paper recommends online mediation as a way of doing it. It is hoped that the paper will serve as a reference for parties who are interested in this topic.

Keywords: Mediation, Online Mediation, Alternative Dispute Resolution (ADR), International Business Disputes, Covid-19.

INTRODUCTION

International business disputes exist as a result of the global marketplace that contributes to the economic growth as it opens the door for consumers to obtain different products and services from all around the world. As the marketplace becomes global, disputes such as on logistics, product quality and even payment issues will be inevitable. When this happens, most parties will try their best to avoid litigation, as they most definitely will face different challenges, especially relating to private international law issues. Furthermore, litigation is a formal process that is costly and takes longer time to settle.

Therefore, it is important to have other risk management strategies to resolve international business disputes. This is important to ensure the smooth operation of international businesses, consequently impacting the global marketplace and lead to

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economic growth across the world. One of the strategies is by adopting an alternative disputes resolution method that is efficient and enforceable. Alternative dispute resolution (ADR) refers to "… a range of procedures that serves as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party" (Brown and Marriot, 1999; Mohamed Ishak and Nik Azahani, 2016). According to Benesch (2011), ADR consists of various procedures, such as negotiation, mediation, conciliation, mini trial and expert determination.

Among these options, the method that comes to mind is mediation. It has been widely used as the alternative to litigation in various type of cases (Stipanowich, 2010; Nolan-haley, 2012; Maizatul Farisah, 2016). This includes cases involving international business or trade. Furthermore, mediation has been applied in various organisations, such as the United Nations Committee on International Trade (UNCITRAL) and the World Trade Organisation (WTO).

Section 3 of the Mediation Act 2012 (Act 749) defines mediation 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." According to Folberg and Taylor (1984) and Lavi (2015), mediation is a voluntary process of identifying issues and finding options to satisfy parties wishes, with the assistance of a neutral third party that is called a mediator. Based on these definitions, it shows that mediation has a sharp distinction from litigation in the sense that parties can resolve their disputes outside the court with the assistance of a mediator.

This paper discusses some of the advantages of mediation that makes it suitable as a solution in resolving international business disputes. This discussion is important to show that mediation can be used to speed up the dispute's resolution process so that the international businesses will operate smoothly, without affecting the global marketplace. Then, the paper examines the stages of mediation in order to understand the process better. It should be noted that there is no difference between mediation that is conducted domestically or internationally. After discussing these important points, the paper focuses on the challenges of applying mediation and from that, a suggestion will be made on how mediation can be applied effectively in resolving international business disputes especially during the Covid-19 pandemic.

MEDIATION: ITS ADVANTAGES

The main aim of mediation is to resolve disputes through a fair process, using assistance from a third party who is called a mediator. Similarly, litigation primary aim is to resolve parties dispute (Bordone, 2005-2006; Lavi, 2015). The main thing that differentiates both are that in the latter, there is no involvement of a mediator. However, according to Solmaz and Siti Naaishah (2014), litigation fails to provide access to justice for all because of its burdensome, time consuming and costly procedures. In addition, parties have no rights to decide the process and the outcome of their case because the power is in the hands of judges.

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As a consequence, an alternative is needed and one of the alternatives is mediation. In the case of *Standard Trustco Ltd. (Trustee) v Standard Trust Co* [1993] 21 CBR 24, David Wong J. emphasized the advantages of ADR, including mediation and stated his hope that the public will recognize its advantages in resolving disputes. The following are some of the advantages of mediation.

A flexible process

Unlike litigation, mediation is a flexible process that allows parties to be in control of the case through active involvement in discussion and making decision (Ashgar Ali, 2010). According to Boulle (2011), the main objective of mediation is to reach the best outcome agreed by all parties because they have total control over their case. In addition, parties are not required to follow strict court procedures. Benesch (2011) listed down the examples such as the fact that parties have the right to decide the venue and time according to their needs, instead of following the court's order.

Time and costs savings

Another benefit of mediation is in the form of time and costs savings. As most of us already know, litigation is a complex process. It is time consuming and might take years before it is finally resolved. Due to that, the process is expensive. Only those who are financially well can cope with the excessive costs. On the other hand, mediation is a flexible process, involving fewer formal procedures. Instead of following the court's time, parties can schedule it according to their needs and may be completed within a very short period (Richbell, 2009). The shorter the procedure, the less money will be used in settling the case because it will reduce the legal and administrative fees (Engstrom, 2011). Furthermore, Buhring-Uhle (1996) stated that parties can put a halt to mediation if there is no possibility of settlement.

Preserve parties' relationship

Aside from the above advantages, mediation also allows parties to preserve their relationships as mentioned by Yee (2006), Benesch (2011) and Bridge (2012). Unlike litigation that is about proving fault, mediation involves addressing parties' problems in order to find the best resolution that can serve their interests and providing ways for them to move forward (Jenkins, 2004; Ashgar Ali, 2010). Parties who resort to mediation do not have to worry about their reputation at stake because the process is conducted privately and is confidential. Therefore, they are able to maintain their relationship, especially if the relationship is a long term one, such as between the parties in international business (Riskin, 1985; Travic, 2010; Bagshaw, 2015).

MODELS OF MEDIATION AND ITS PROCESS

Mediation is a process that involves a neutral third party who is known as a mediator. A mediator may adopt different models or styles of mediation. Boulle (2011) categorized four

models of mediation as follows: (1) facilitative; (2) evaluative; (3) settlement and (4) therapeutic. On the other hand, Riskin (2003 -2004) merely divided the model of mediation to facilitative and evaluative. Another scholar, Alberstein (2006-2007) stated three models of mediation as follows: (1) pragmatic; (2) transformative and (3) narrative. Nevertheless, the two most common models of mediation are facilitative and evaluative mediation. In facilitative mediation, a mediator acts as a facilitator, mostly to assist parties in procedural matters and encourages discussion between them (Boulle, 2011; Mohamed Ishak and Nik Azahani, 2016). On the other hand, the evaluative model involves a mediator evaluating the case by analysing its strengths and weaknesses (Sourdin, 2012).

As mentioned, mediation is a flexible process where there is no specific procedure or time limit that should be observed. Yet, there is a common stage that has been followed. Normally, the stages are divided to (1) pre-mediation, (2) mediation, and (3) post-mediation as stated by Gitchell and Plattner (1999). Firstly, parties are allowed to have minimal contact to discuss procedural matters, such as choosing the venue and time for mediation and to choose a mediator during pre-mediation (Bridge, 2012). The next stage is during mediation. According to Astor and Chinkin (2002), this stage starts with an opening statement by a mediator. The statement mostly contains the summary of the dispute, the relevant issues together with the mediator's role. Then, parties will deliver their opening statements consisting of what the case is all about, the merits of their case or even stating their anger and frustrations. After all the opening statements are made, parties will meet up in a private meeting, which is known as caucus, where each party will privately meet with the mediator to identify the issues, their needs and opinions.

After finishing the discussions, the result might be either positive or negative. It can be positive if the parties manage to get a settlement. If this happens, parties have to put the settlement in writing and sign it in order for it to become binding as discussed in *Sabah Forest Industries Sdn Bhd v Mazlan bin Ali* [2012] MLJU 238. Whereas parties might proceed to bring their case in the court if they fail to obtain any settlement during mediation (Gitchell and Plattner, 1999; Astor and Chinkin, 2002; Lavi, 2015).

CHALLENGES AND SUGGESTION

Previously, the paper discussed the advantages of mediation in resolving disputes, including cases on international business. The discussion is made to prove that mediation is a suitable alternative and can be applied in resolving the disputes. From the party's point of view, mediation would be a faster and cheaper alternative than litigation. Besides, international business disputes involve parties from different countries who might face other difficulties, including immigration issues and private international law issues. Court procedures can be worst for them because it involves lengthy time and lots of money. So, mediation is one of the best solutions for them to try to resolve their case as quickly as possible.

The next discussion is on the stages in mediation. These stages shows that mediation is normally conducted face-to-face to allow parties voicing out their frustrations and finding

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the best settlement. However, this might prove to be difficult in today's current situation especially if the case involves parties from different countries. Not only that they might face challenges in the form of immigration issues and private international law issues, but parties might also not even be able to travel to other countries for mediation due to the Covid-19 pandemic that has been killing millions of people over the world. In fact, this pandemic is considered as a massive global health threat that impact human lives (Wahed, 2020).

Therefore, there is a need to find an alternative way on how to conduct mediation. One of the suggestions that can be adopted in ensuring the effectiveness of mediation in international business disputes is through online mediation. In other words, it is suggested that mediation can be done remotely. Instead of having to travel to different countries to mediate, parties can mediate through different medium, via video conferencing, such as using Skype, Zoom or WebEx. Online mediation is one of the forms of online dispute resolution (ODR). It reflects the normal or what we call traditional mediation that is conducted face-to-face. This means that the applicable stages are similar in both traditional mediation and online mediation with the exception that the latter is conducted remotely. As in traditional mediation, parties in online mediation retain their autonomy in making decisions (Lavi, 2015). Through online mediation, parties in international business can further save their time and costs as they do not have to travel to other countries to mediate their case. This is the suggestion that can be adopted in order to ensure the effectiveness of mediation in international business disputes.

CONCLUSION

In conclusion, mediation is a suitable alternative in resolving disputes, including those involving international business. This is based on its advantages compared to litigation. Mediation is recommended in settling international business disputes because of its flexible nature that allows speedy and less expensive settlement, leading to the potential of reducing backlog of cases. It also gives the power to parties to decide their case and possible remedies without interference from a third party, at the same time preserving their existing relationships. These advantages show that mediation is a good alternative for parties who wish to settle their international business disputes. It is also suggested that mediation can be conducted remotely in order to avoid other challenges from happening, such as travelling restrictions due to Covid-19, immigration issues and private international law issues.

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BANGLADESHI MIGRANT WORKERS ON THE FRONT-LINES OF COVID-19 EPIDEMIC: A SOCIO-LEGAL APPROACH TO ENSURE THEIR RIGHTS

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ABSTRACT

The global shutdown resulting from the COVID-19 pandemic led the manpower industry to go through the toughest time in its history. As a result, Bangladeshi workers, on whom the wheel of the economy of Bangladesh is heavily dependent, are facing racism and systematic abuse of human rights across the Gulf Corporation Council (GCC) countries. Even prior to the pandemic they are either exploited or not provided the working conditions and remunerations that they were promised. In this context, this study focuses to address the violation of human rights of migrant workers including their families due to the after-effect of COVID-19 epidemic and to identify the barriers they are facing in GCC countries. Using the quantitative and qualitative research method, this study will explore whether there is any legal solution for those migrant workers and their families, and what sorts of rights need to be protected under National and International laws. In addition, this study will also focus on the responsibilities of their home and host states to fulfill them. Based on the findings, this study will provide various recommendation that could be considered by the Government of Bangladesh either by building skilled workers or by improving the enforcement of existing legislation or by bilateral investment treaties (BITs) with the Gulf State.

Keywords: Migrant workers, COVID-19, domestic or irregular migrants, kafala system, violation of rights.

INTRODUCTION

The People's Republic of Bangladesh, located in South Asia, despite having a higher economic growth in recent years, failed to offer its citizens enough employment possibilities and for that reason, heavy unemployed and poor people started to move Gulf Corporation Council countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) for better economic opportunities and support their families financially. Thus, Bangladesh is considered one of the largest labor-sending countries in the world with 4.5 million Bangladeshis, who outside the Gulf States to work either in construction or mining, agriculture, tourism industry, domestic work, and other unskilled labor (BMET, 2020).

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However, Migrant workers refer to a person who, by leaving his origin country, lives in a state temporarily or permanently intending to work in that country where he is not a citizen. "Article 2(1) of the International Convention on the Protection of all Migrant Workers and their families has defined migrant workers as a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national" (UN Convention, 1990). These workers make a significant contribution to the development of Bangladesh by sending remittances to its economy, which plays an essential role in strengthening foreign reserve and keeping the nation's economy dynamic. But since the COVID-19 spread worldwide, the job market in the Gulf state has collapsed, and thousands have become undocumented who are more vulnerable in this situation. On the other hand, the pre-existed kafala system hit the migrant workers hardest in this challenging period of COVID-19. Therefore, if this situation persists for a long time, then the plight of the economy of Bangladesh will be in dire straits.

COVID-19 WAR IN THE GULF STATE AND VIOLATION OF HUMAN RIGHTS

We know that to expand its gulf economy further, the Gulf Corporation Council (GCC) depends heavily on the migrant labor. However, since the corona virus pierced their territory, these states face so many unanticipated issues in their region that have placed migrant laborers in the worst environment. The most vulnerable migrants during this situation are those who came to the country on leave and could not go back despite having legal work permits and papers, those who could not migrate even after completing all the procedures and those migrant workers who have lost their jobs and stayed in the destination countries especially domestic workers and irregular migrant workers. Inadequate health care, worse economic conditions, and overcrowded living conditions are the main reason which put them at greater risk of infection. They frequently live in overcrowded and unhygienic dormitory-style labor camps. In addition, they often tend to share communal bathrooms and kitchens that are often unsanitary and insufficient for them, and these kinds of situations have made them prone to Covid-19 (Amnesty International, 2020). For example, till July 2020, more than 40 thousand Bangladeshis have been affected in six GCC countries, according to the BRAC survey (Weeraratne, 2020). On the other hand, Bangladesh government does not verify the cause of death of any Bangladeshi worker. Even in case of any unusual death, the embassy of Bangladesh has no concern. In this situation, if the government does not take appropriate action, they could fabricate the reason for death in this coronary period.

Further, all migrant workers are intimately linked to the renowned kafala system in the Gulf States, which adversely affected them throughout this particular time. It was systematically abused even before the epidemic and established a sort of enslavement. Many employers took advantage of this control by taking passports, forcing them to work excessively for hours, and neglecting their wages which led to thousands of workers fleeing their employers and becoming undocumented (Times of India, 2020). Thus, they do not have the right to move, travel, or change work, the right to health care, etc. which may lead them feeling forced to work in any situation due to the fear of losing their pay or their job. Hence, they may have to choose between their health and wage during the epidemic.

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In addition, Gulf state's labor law does not cover the domestic workers which put them at greater risk and thus, they are excluded from the key protections and legal aid such as, limits to working hours and restrictions on salary deductions, rest days and mechanisms for resolving labor disputes. Some workers had even been subjected to physical and sexual abuse (Aoun, 2020).

However, to respond to the crisis, the GCC countries have forced and pressured Bangladesh to repatriate their migrant workers, which could overwhelm the country's economy amid this situation (Sorkar, 2020). In some cases, employers have sent them back, promising to take them back if the situation is normal. But unfortunately, nobody knows when this situation will be regular and migrant workers will return to work. And those workers who remain in the Gulf states have survived by taking loans from their fellow mates and relatives. Again, in their own countries, the migrants, particularly those who tried to return to their jobs, are misled due to the fake test report, high airfares and flight scarcity (Saddif, 2020). By taking advantage of this situation, a cycle is looting crores of money in the guise of recruiting at Shahjalal International Airport's third terminal from expatriates stranded in the region who want to travel outside (Shomoy TV, 2020). Hence, our irregular migrant workers and their families are passing their days in deep distress. In this circumstance, the situation will become a humanitarian disaster unless the host government offers aid.

LEGAL ASPECTS REGARDING THE PROTECTION TOWARDS THE RIGHTS OF MIGRANT WORKERS INCLUDING THEIR FAMILIES

There are two areas that we need to analyze for the legal protection of migrant workers and these are international documents and our National Constitution. However, there are so many international documents where the rights of the migrant workers have been described as a human right and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 is one of them. It is directly relevant to the migrant workers where it has described so many rights for them such as-right to life, prohibition of torture or cruel, inhuman or degrading treatment, prohibition of slavery, freedom of thought, conscience and religion, right to security, freedom of expression etc. In Article 5, it is said that the Convention shall protect both the documented and non-documented migrant workers. But the surprising thing is that the Gulf states, did not ratify this Convention, which implies that the gulf government is not obligated by international laws to safeguard the rights of migrant workers (Aminul, 2020). Therefore, there is no solid legal or institutional framework developed in the host countries to protect them and in that case, their rights will not be realized in the real sense

On the other hand, in our national Constitution, the preamble firmly declares that the aim of the State is to establish a society free from exploitation based on the rule of law and underpinned by the respect for fundamental human rights and freedoms. They can enjoy right to life, right to liberty and security of a person, freedom from slavery or torture, the right to equal protection of the law and freedom from discrimination, freedom from arbitrary arrest and detention, and freedom of association, religion and expression etc. In addition, as Bangladesh has signed this Convention, it has endorsed the principles laid

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down in the 1990 Convention by enacting the Overseas Employment and Migrants Act, 2013 (Haider, 2020). According to this Act, all the workers, including domestic workers, are guaranteed fundamental labor rights. And equality and non-discrimination are the essential features of the Act. They have the right to legal remedy, and they can access labor courts, mobile courts, and other courts and the Bureau of Manpower, Employment and Training (BMET) (Overseas Employment and Migrants Act, 2013). In Article 34 of this Act, 2013, the local police, TNO, elected local representatives, Ministry of Expatriate Welfare and Overseas Employment and other related ministries, were empowered to file cases against culprits. But it is unfortunate that till now, no such cases have been filed under this law. Politicians, local level government representatives, administration, and law and security forces have conveniently shut their eyes and let such a heinous crime happen (Tasneem, 2014). Despite having these different international and national laws, policies, and treaties, violation of the rights of migrant workers is still there due to the proper implementation and enforcement of these laws and policies.

STATE RESPONSIBILITIES TOWARDS MIGRANT WORKERS

Protecting migrant workers, including their families, is the core responsibility of their home and host state. According to the 1990 Convention, as per Article 7- the state parties shall respect and ensure all the migrant workers and including their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind, article 83 - state parties shall ensure that migrant workers whose rights have been violated shall have an effective remedy, article 84 - shall adopt the necessary measures to implement the provisions of the Convention, article 73- it shall submit regular reports to the Committee on Migrant Workers on how the rights are being implemented. However, as Bangladesh has ratified this convention, it has more significant responsibilities towards them.

Recently, the Bangladesh government has taken certain measures to provide loans to returnee migrants to help them start their enterprises. In the Gulf, foreign missions were also directed to give emergency food aid to migrants in need. Additional services were provided to Bangladeshi migrants living in Saudi Arabia by utilizing an IMO app where they can contact and be connected to registered Bangladeshi expatriate doctors in Saudi Arabia (Sohel, 2021). Though we have seen some beneficial changes in recent years, the infringement of rights has not yet been curtailed due to the improper implementation.

Again, Qatar and Saudi Arabia, have made groundbreaking changes to its labor laws to give fair rights to the expatriates. According to the amended law, the workers can change jobs without a No Objection Certificate (NOC) which was required earlier. The minimum wage for workers has been fixed at one thousand riyals and another eight hundred riyals for accommodation and food. In Qatar, the changes apply to all migrant workers but in Saudi Arabia, it applies only in some cases which let the kafala system still be there.

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FINDINGS

From the above discussion, it has been found that, in the gulf states domestic workers are excluded from the labor protection. As such women employed in domestic service are particularly vulnerable. Though recently Saudi Arabia has reformed their labor law, but it also excluded the domestic workers within the new reformation. Gulf Corporation Council countries did not ratify the International Convention on the Rights of Migrant Workers and their Families, 1990 which is directly related to the rights of the migrants irrespective of their legal status. While the kafala system provides the state with an important means of monitoring labor flow, but these policies can infringe the rights of workers as they are often used to deny them justice and basic protection. On the other hand, the government of Bangladesh has introduced many impressive plans for the migrant workers in distress during the COVID-19 pandemic but unfortunately there is no such implementation of their plans in the real sense.

RECOMMENDATIONS

Based on the findings, the government of Bangladesh needs to discuss in various UN forums and convince the gulf states to ratify the International Convention on the Rights of Migrant Workers and Their Families,1990. As an origin country Bangladesh government should expand public awareness raising programs for prospective domestic migrant workers. On the other hand, the Gulf states should extend labor protection to the domestic workers as well as irregular workers. The notorious kafala system in the Gulf state must be either reformed or abolished so that workers visas are no longer tied to individual sponsors, and they are able to transfer their employment or leave the country without losing legal status. Finally, the government of Bangladesh must ensure the strong implementation of existing laws and regulations available to the migrant workers as well as they need to execute all the plans properly taken for the migrant workers by paying special attention to whether the migrants in distress are getting the governmental relief during the coronary situation or not.

CONCLUSION

Our flourishing economy is built on the shoulders of migrant labor. Creating qualified personnel is the only way so that they can be able to get employment in different places. On the other hand, to protect the rights of migrant workers, including their families, the Gulf government needs to ratify the 1990 UN Convention, which is relevant to them. In addition, their labor law protection should extend to domestic workers and irregular migrant workers who are more vulnerable in any economic shutdown. Therefore, the government of Bangladesh must make long-term strategies to safeguard their workers in other countries and set out a comprehensive plan to protect them so that Bangladesh can sustain its foreign reserve and address the economic shock in the future.

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IMPACT OF CLIMATE CHANGE ON HUMAN'S FOOD CHAIN SYSTEM

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ABSTRACT

Climate change nowadays a global threat which is driven by the human induced greenhouse gases emissions and changeable pattern of the global weather. Though there have been previous periods of climatic change, since the mid-20th century humans have had an unprecedented impact on Earth's climate system and caused change on a global scale. Consequently, this is affecting the whole food system of the throughout the world. The utilization of the international legal framework and protocols will have an impact on the human's food system. This paper intends to focus on the utilization of the legal frameworks and protocols to erase the impact of climate change of food system. By using the quantitative research method due to the pandemic situation, this study will explain the broaden uses of the Kyoto protocol, Polluter Pays Principle and shall discuss various method that will help these principles to erase the negative impact of climate change globally. Based on the findings this paper provides recommendations which could be considered by the developed country to use the legal and social protocols for improving the impact of the climate change of food chain system of humans.

Keywords: climate change, greenhouse emissions, livestock production, Kyoto protocols, polluter pays principle.

INTRODUCTION

Climate change has become one of the hot topics around the world. This climate is changing the whole world common system in different sectors, and it has become a threat over the global food system. As we Climate is the primary determinant of food productivity. The fundamental role of food system in human welfare is beyond expressive and nowadays it has been an issue of concern. The food system of human lives is directly concern with the climate. Climate change is expected to influence in the production and supply of the food. Soil production, water, Crop, and livestock production are directly affected by changes in climatic factors such as temperature and precipitation and the frequency and severity of extreme events like droughts, floods, and windstorms. In addition, carbon dioxide is fundamental for plant production; rising concentrations have the potential to enhance the productivity of agro ecosystems. Food production systems are managed ecosystems. Thus, the human response is critical to understanding and estimating the effects of climate change on production and food supply. The paper will focus the

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devastating food chain system of the human beings and the threatening situation of this climate change over the human food system.

CLIMATE CHANGE AND FOOD SYSTEM OF HUMANS

Climate is defined as long term weather pattern that describe a region. Climate change (Jyoti, Gokhran, 1992), (National Action Plan on Climate Change, 2008) refers to a change in the state of the climate that can be identified by changes in the mean and variability of its properties and persists for extended periods decades or longer (IPCC 2001).Climate change (Nas 2001), (Parikh, Parikh , 2002) could occur naturally as a result of a change in the Sun's energy or as a result of persistent anthropogenic forces such as greenhouse gases, sulfate aerosol or black carbon (Mitra, 1996) to the atmosphere or through land use change. According to the fourth report of UN IPCC (2007) on climate change, it is indisputable that global warming has serious impacts on the earth, and it is very likely that the increase in greenhouse gas emission by anthropogenic activities has caused global warming since the mid-20th century. Global climate change is overpowering the food production of the world. Agriculture production is directly dependent on weather and climate change. Possible changes in rainfall rates, change in temperature and CO2 concentration are expected to significantly impact crop growth. Worldwide food production is little cautious with successful adaptation and adequate irrigation due to brunt of climate transformation (IPCC, 1998). Whereas most tropical regions are likely to experience production losses due to rising temperatures.

CLIMATE CHANGE ON AGRICULTURE SECTOR

Climate change and agriculture are interrelated processes, both of which take place on a global scale. Climate change affects farming in several ways, including through changes in average temperatures, rainfall, and climate extremes (e.g., heat waves), changes in pests and diseases, changes in atmospheric carbon dioxide and ground-level ozone concentrations, changes in the nutritional quality of some foods and changes in sea level.

Climate change is already affecting agriculture, with effects unevenly distributed across the world. Future climate change will likely negatively affect crop production in low latitude countries, while effects in northern latitudes may be positive or negative. Climate change will probably increase the risk of food insecurity for some vulnerable groups, such as the poor. For example, South America may lose 1–21% of its arable land area, Africa 1–18%, Europe 11–17%, and India 20–40%.

CLIMATE CHANGE'S EFFECT ON SOIL PRODUCTION

Soil seems to be more important for modern human societies than ever before to meet the global demands for food and fiber for increasing population from limited soil resources. The tropical countries are in most vulnerable situation due to the climate system and poor soil system and farmers are living below the margin. The effects of climate change on soils are expected mainly through alteration in soil moisture conditions and increase in soil

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temperature and CO_2 levels as a result of climate change. The global climate change is projected to have variable effects on soil processes and properties important for restoring soil fertility and productivity. The major effect of climate change is expected through elevation in CO_2 and increase in temperature. Soil formation is controlled by numerous factors including climatic factors such as temperature and precipitation. These parameters of climate influence the soil formation directly by providing biomass and conditions for weathering. Main parameters of climate that directly influence on soil formation are sum of active temperatures and precipitation-evaporation ratio. They determine values of energy consumption for soil formation and water balances in soil, mechanism of organic-mineral interactions, transformation of organic and mineral substances and flows of soil solutions. Stable progressive climate warming lead to irreversible changes in mineral matrix of soils. Changes in external factors of soil formation (temperatures and precipitation) will lead to transformation of internal factors (energy, hydrological, biological). The climate change will increase energy of destruction of soil minerals resulting in simplification of mineral matrix due to accumulation of minerals tolerant to weathering. It will lead loss of soil function for fertility maintenance and greater dependence of on mineral fertilizers.

CLIMATE CHANGES EFFECT ON CROP INDUSTRY

Dry season below temperatures would slow down or even damage crop growth that will decline crop production (Mendelsohn 2014; Mahindra 2011). Data published by the National Geographic predict that by 2050, climate change will have force global production of corn to reduce by 24%, while rice, potatoes, and wheat will have fallen by 11, 9, and 3%, respectively (Sarah Moore 2020). Given that along with soybeans, wheat, rice, and corn provide two-thirds of the human caloric intake, such a significant reduction in yields of these crops will undoubtedly severely impact global food security. Currently, figures estimate that crop yields are already being affected by climate change. Global rice yields are, at present, estimated to be falling by 0.3% per year, global wheat yields are estimated to be falling faster, at 0.9% per year (Raza, Razzaq, 2019). While some studies have reported a beneficial impact of climate change on certain crop yields, it is evident that the overall impact is negative. A study by Boyer uncovered that the world's crop yield has dropped by a huge 70% since 1982 as a result of climate changes. Another study revealed that only 3.5% of global cultivated areas are safe from this impact**.**

CLIMATE CHANGES EFFECT ON WATER SECTOR

Climate change adversely effecting on the water system around the world. The global climate change crisis is inextricably linked to water. Climate change is increasing variability in the water cycle, thus inducing extreme weather events, reducing the predictability of water availability, decreasing water quality, and threatening sustainable development, biodiversity and enjoyment of the human rights to safe drinking water and sanitation worldwide (UN Water Policy 2019). The science is clear: the global climate change crisis is increasing variability in the water cycle, thus reducing the predictability of water availability and demand, affecting water quality, exacerbating water scarcity, and

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threatening sustainable development worldwide. These impacts disproportionately affect poor and vulnerable communities and are compounded by contributing factors, including population increase, unmanaged migration, land-use change, reduced soil health, accelerated groundwater extraction, widespread ecological degradation, and biodiversity loss (UN Water Policy 2019).

LEGAL AND SOCIA PROTECTION TO DECREASE THE EEFECT OF CLIMATE CHANGE ON HUMANS' FOOD SYSTEM

Environmental law has a unique opportunity to set requirements on what steps are necessary to mitigate the effects of climate change to protect us. It's possible to mitigant the whole situation and give a solution to the problem but it is complex to use those suggestion and make a harmful environment. Environmental law governs how human beings interact with their environment. It covers a wide variety of topics such as air quality, water quality, waste management, chemical safety, contaminant clean-up and hunting and fishing. Many of these areas are relevant to climate change, namely, air quality. Concerning more recent changes, the Supreme Court ruled in 2007 that the EPA needed to determine if carbon dioxide and other greenhouse gases were harmful pollutants under the Clean Air Act (Emily, 2019). They now regulate them as such. Of course, this type of law doesn't always occur at the level of the Supreme Court. According to this the environmental law and the international courts are making changes to create a better lifestyle and better future without the threat of the climate change.

Basically, Climate change is not surrounded only for the food system change of the humans or effecting the livestock production. It is now a global issue, and many countries are considering it with a serious note. To prevent the carbon emission and emission of the green house, many international organizations create different legal framework and agreements to prevent this type of carbon emission.

THE KYOTO PROTOCOL

The Kyoto Protocol is an international treaty which extends the 1992 United Nations Framework Convention on Climate Change (UNFCCC) that commits state parties to reduce greenhouse gas emissions, based on the scientific consensus that (part one) global warming is occurring and (part two) it is extremely likely that human-made CO_2 emissions have predominantly caused it (UNFCCC, 2014).

- The Protocol is based on the principle of common but differentiated responsibilities: it acknowledges that individual countries have different capabilities in combating climate change, owing to economic development, and therefore puts the obligation to reduce current emissions on developed countries on the basis that they are historically responsible for the current levels of greenhouse gases in the atmosphere.
- The main goal of the Kyoto Protocol is to control emissions of the main anthropogenic (human-emitted) greenhouse gases (GHGs) in ways that reflect

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underlying national differences in GHG emissions, wealth, and capacity to make the reductions (Grubb, m 2014).

THE PARIS AGREEMENT

The **Paris Agreement** is an agreement within the United Nations Framework Convention on Climate Change (UNFCCC), dealing with greenhouse-gas-emissions mitigation, adaptation, and finance, signed in 2016. The Paris Agreement's long-term temperature goal is to keep the increase in global average temperature to well below 2 °C (3.6 °F) above pre-industrial levels; and to pursue efforts to limit the increase to 1.5 °C (2.7 °F), recognizing that this would substantially reduce the risks and impacts of climate change. This should be done by reducing emissions as soon as possible, in order to "achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases" in the second half of the 21st century.

- The basic aim of the Paris agreement is to be maintaining the temperature into 2°C, to adapt the increasing situation of the climate change and greenhouse gas emission and balancing the finance of the world between climate change and greenhouse gas emission (UNFCCC, 2015).

The Paris agreement is one of the most significant agreement which keeps a control over the climate change issues over the countries and formally sets a target of the carbon emissions and keeps a record. Though this agreement cannot force the countries (Globe and Mail 2015), but the targets should set by the countries, and they must keep track record whether they are crossing it or not (Kinver 2015). After 2020 presidential election United States withdraw form this Paris agreement stated that there is such nothing about climate change (BBC, 2020).

THE POLLUTER PAYS PRINCIPLE

The Polluter Pays Principle imposes liability on a person who pollutes the environment to compensate for the damage caused and return the environment to its original state regardless of the intent.

The polluter pays principle is basically used for those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment. For example, a factory is producing a potentially poisonous substance which is creating greenhouse gas and damaging the environment, so this factory should be responsible for their actions, and they will have to pay this price. It is a guiding principle for creating a sustainable development environment (Grantham Research Institute of Climate Change, 2018). The polluter pays principle can be applied to greenhouse gas emitters through a so-called carbon price. This imposes a charge on the emission of greenhouse gases equivalent to the corresponding potential cost caused through future climate change, thus forcing emitters to internalize the cost of pollution. It is a safer way to minimize the emission of greenhouse gas and creating a pressure towards the emitters for paying money.

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FINDINGS

The agricultural sectors per year emit 20% greenhouse gas, but it was totally ignored by the whole system, and it is helping the climate change and destroying its own system. The food security is only surrounding towards the agricultural sectors and the crop yields, but this food insecurity has impacted the human health and increasing the human diseases. Environmental law can suggest the whole concept how to clear the harmful impact of climate change, but no one want to go through the whole complicated process. The right to food only explains that food is the necessity of the human to live but didn't include that food insecurity is increasing by the climate change. Food and agriculture organization only works for the right of the agricultural side not their exploitation by the climate change. The Kyoto protocol under UNFCCC, is all sufficient to reduce the greenhouse gas emission and carbon emission but it is also failed and there is no news to retrieve it back. United States resigned from the Paris agreement, whose basic aim to set the world temperature in to 2-degree Celsius. After not taking seriously this agreement by the most powerful states, the whole concept of the climate change is become a joke to everyone. Impact of climate change over water is only explains the glacier melting not the topic of the safe water issue. The impact of the climate change is literally overshadowed by the recent threat towards the whole world COVID 19, and everyone is normalizing the concept of the climate change. Humans is more affecting the world more than the climate change; the food sector and the livestock production is equally harmful for the world, and it also emit the equal amount of the gas and carbon and it is neglecting by the scientist and the given importance to the impact of the climate change.

RECOMMENDATIONS

The system of the polluter pays principle should be mandatory for the developed, developing, and underdeveloped country. The main objective of this principle is to target those country who emit a lot of carbon and green house and collect money from them in exchange of this emissions. Those who run the high gas emission factory must pay the money in exchange of this. Polluter pays principle must maintain by the developed country and UN and UNFCCC must pressurize them for this, because if the developed country follows this principle, then developing country will pay according to them, and the emission of the carbon gas by the factory will come to a maintained situation. The system of the Kyoto principle should be brought back. It has the power to stop and minimize the emission of the carbon and greenhouse gas. The failure of this principle means the failure of those effort who wants to stop the climate change impact. The international courts and ICC must make new laws regarding the food security and make strong punishment for those country who try to destroy the agriculture industry due to their emitted gas. The food and agricultural organization must make new regulation towards the food insecurity due to the climate change and must present it over the UN assembly. Lawmakers must give thought to the necessity, fairness, and cost-effectiveness of their regulations, which is not always simple. But the cost which is bring the environmental law strong then the cost is worth. New laws should be regulated and should be made by the developed country and should

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punish those wrongdoer people regarding climate change, this will prevent others from creating carbon and greenhouse gas.

CONCLUSION

Climate change is now a crucial topic all over the world. The side effects of the climate change and greenhouse gas emission is an open book for everyone. The topic of climate change is now become a boring one, because everyone we know that it exists, but we cannot do anything with that. This normalizing situation of the climate change is hitting us badly. Food is the basic rights of human beings; no people can survive a day without food. Nowadays climate change is hitting its impact over the food system and destroying the soil crop and water. The destroying nature of the climate change is changing the lifestyle and impacting two most important sector of the life food system of humans. The uses of the failure protocols and the conventions can bring a light and life towards this neglecting part. International laws and conventions must give focus on the rejected protocol which can really bring a change in the rate of the carbon emissions and greenhouse gas. The use of the polluter pays principle can be an effective way to stop the emitters for emitting the greenhouse gas, which will create a pressure on them regarding this. After all the support of the international laws, conventions, and the developed countries we can really make a greenhouse effect less world which will be a healthier one.

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ADDRESSING THE ESCAPE-CLAUSES IN THE ROME STATUTE: A CASE STUDY ON THE ICC AND THE 2021 PALESTINIAN SITUATION

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ABSTRACT

The Israel-Palestine territorial conflict has been a long-standing discord in history, dating back to more than 100 years. Despite various aims to reconcile this territorial conflict, the outcome has not been a positive one. With escalating tensions between the two States, and the perpetual use of lethal force by the Israeli government, in the Palestinian territories, the ICC has been compelled to intervene and to declare the initiation of an investigation into the Situation in Palestine, under Article 18 of the Rome Statute. Notwithstanding, the Rome Statute contains various preventive clauses, for instance, the "principle of complementarity", certain conditions for the Court's jurisdiction; furthermore, non-cooperation by the Israeli government since it is not a party to the Statute, which continue to bar the Court from conducting an over-arching investigation into the Situation in Palestine.The main objective of this paper is to analyse these escape-clauses in the Rome Statute, and to what extent they restrict the ICC in guaranteeing eternal justice for the Palestinians; as the Court's investigation would only be advantageous if it thrives in holding Israel accountable for its war crimes, through a fair trial process that would put an end to the sufferings of the Palestinians in perpetuity. On that note, the author aims to address these restrictions and how the ICC can work around these preventive clauses to ensure prosecution of all the war crimes, either in its Court or in the domestic courts of the State parties.

Keywords: Conflict, Jurisdiction, Rome Statute, ICC, Principle of Complementarity

INTRODUCTION

On 3rd March 2021, the Office of the Prosecutor (OTP), Fatou Bensouda issued a statement, declaring the initiation of an investigation in the situation in Palestine, pursuant to Article 18(1) of the Rome Statute, which will cover every crime committed by the Israeli armed forces in the territories of Palestine, given that they satisfy the definition and criteria of crimes specified in Article 5 of the Rome Statute.

Although the Palestinian authorities had referred the situation to the ICC in 2014, and the Court attempted to initiate an investigation then, the Court could not go forward due to failure to establish its jurisdiction, in the situation; as Palestine had not been recognised as a State and hence, it could not be a party to the Rome Statute. On the other hand, Israel had signed the Rome Statute on December 31st, 2000, but did not ratify it. Consequently, Palestine became a state party from 1 April 2015.

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Subsequently, the issue of jurisdiction on the basis of non-recognition of Palestine was resolved and in 2020, the OTP declared the establishment of jurisdiction over the Occupied Palestinian Territory. Nevertheless, the fact that Israel is not a party to the Rome Statute, still remained as a hurdle for the ICC, in subjecting Israel accountable for its war crimes.

In addition to the above, another significant hurdle remained for the ICC, i.e., *the 'principle of complementarity'*, since the Israeli judicial system already makes provision for punishing those accused of war crimes, the ICC could not have jurisdiction over certain alleged Israeli violations; however, the OTP emphasised that she would continue to review the authenticity of the relevant domestic proceedings in Israel, that remain ongoing.

In light of the recent declaration by the OTP to initiate investigation, this paper focuses on analysing the current preventive clauses which are likely to hinder the ability and efficacy of the International Criminal Court (ICC) in serving justice to the Palestinians and ensuring global peace and order; furthermore, this paper will highlight the myriad of ways in which the ICC may work around such clauses and yet ensure accountability of the perpetrators.

RESEARCH OBJECTIVE

The primary reason behind selecting this area of research has been the fact that, in the recent times, Israel has left no stone unturned in committing grave crimes against the Palestinians, by killing them, abusing their human rights, unlawfully occupying Palestinian territories, over the years – the most horrific incident has been on the holy month of Ramadan in 2021, when Israeli forces attacked unarmed Palestinians worshipping in the holy Al Aqsa mosque; and the conflict continued for a period of two weeks, that resulted in implausible losses for the Palestinians. Subsequently, the ICC has been compelled to intervene and declared to investigate in the situation; and as much as it is apparent that Israel has clearly violated many international laws and is continuing it; owing to the fact that there are certain escape-clauses in the Rome Statute that Israel might attempt to rely on to escape accountability, it is pertinent to ensure that the ICC can successfully proceed with its investigation by paving its way around these escape-clauses.

In analysing this topic, the author will first briefly discuss the situation in Palestine and the evidence of war crimes committed by the Israeli government in the Palestinian territories, the issue of the Court's jurisdiction in the conflict; the principle of complementarity and to what extent it can bar the Court from conducting an over-arching investigation; and finally, the author will attempt to suggest some ways in which the ICC can overcome or work alongside these hurdles

CRIMES COMMITTED BY ISRAEL

The United Nations Independent Commission of Inquiry, appointed by the UN Human Rights Council, on the 2014 Gaza conflict had gathered substantial information pointing to the possible commission of war crimes by both Israel and Palestinian armed groups. During the 2014 hostilities, firepower was used in Gaza, with more than 6,000 airstrikes

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by Israel and approximately 50,000 tank and artillery shells fired. In the 51-day operation, 1,462 Palestinian civilians were killed. During the Israeli ground incursion into Gaza, hundreds of people were killed, and thousands of homes destroyed. In the West Bank including East Jerusalem, 27 Palestinians were killed and 3,020 injured between June and August 2014. Israel continued in 2015 to enforce severe and discriminatory restrictions on Palestinians' human rights, and to build unlawful settlements that would facilitate the transfer of Israeli civilians to the occupied West Bank. Later in 2018, Israeli forces' repeated use of lethal force in the Gaza Strip against peaceful Palestinian demonstrators would also amount to war crimes, Human Rights Watch observed. Israeli forces killed more than 100 protesters in Gaza and wounded thousands with live ammunition.

LATEST CLASHES

The recent clashes emerged during the holy month of Ramadan 2021, when Israel Armed Forces (IAF) attacked Palestinians worshipping at the holy Al-Aqsa Mosque, and at least 163 Palestinians and six Israeli police officers were injured. Following this, the clash lasted for almost 11 days and at least 240 Palestinians were killed by the Israeli forces; there was an uproar of condemnation of the Israeli actions, from around various parts of the world and consequently, a ceasefire was then agreed between Israel and the Palestine. Notwithstanding, Israel had apparently violated the ceasefire within less than 24 hours of its declaration.

ICC's JURISDICTIONAL ISSUE

One of the significant hurdles that has stood on the way of the ICC in initiating the investigation, in the situation in Palestine, has been the issue of "jurisdiction".

On one hand, Palestine was not recognised as State; and hence, it could not be a party to the Rome Statute; on the other hand, although Israel signed the Rome Statute on December 31st, 2000, it did not ratify the Statute.

Nevertheless, Palestine became a state party with effect from 1 April 2015. On this point, it is apposite to outline the process that led to Palestine becoming a state party to the Rome Statute. On January 2009, the Palestinian government had turned to the ICC, declaring its acceptance of the ICC's jurisdiction; however, the ICC could not accede to such a declaration as there were speculations regarding the statehood of Palestine. In situations that involve question of statehood, ICC has the authority to seek guidance from the UN General Assembly. Subsequently, on the grounds that, Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies; Palestine was granted the status of "observer", by the United Nations General Assembly. In November 2012, the UN General Assembly passed a resolution granting Palestine the status of a non-member observer state.

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On December 31, 2014, the Palestinian government made its second declaration (under Article 12(3) of the Rome Statute) to the ICC voluntarily recognising the jurisdiction of the ICC; and the second declaration was subsequently accepted. On January 2, 2015, Palestine ratified the Rome Statute.

THE ISSUE OF "COMPLEMENTARITY"

The most impactful hurdle for the ICC, to be discussed in this paper, is the *"principle of complementarity".* The establishment of the ICC's jurisdiction and statehood of Palestine does not necessarily imply that Palestine can institute legal proceedings against Israel, in the ICC, for prosecution. This is due to a number of reasons: firstly, the ICC is a criminal court, and it does not hear lawsuit; secondly, the decision to bring a criminal case lies with the OTP and not with any particular state party. The only option for Palestine is to refer the "situations" to the ICC prosecutor, and request for investigation. Consequently, Palestine had submitted a declaration granting the court retroactive jurisdiction on June 13, 2014.

Furthermore, under the rule of complementarity as laid down in Article 17 of the Rome Statute, the ICC is unlikely to have jurisdiction over numerous alleged crimes committed by Israel on the grounds that these crimes have already been investigated and prosecuted in good faith by a national court (here, Israel), which deprives the Court of jurisdiction over these crimes. Hence, for the ICC to exercise its jurisdiction, it would have to demonstrate that the Israeli courts have been inefficient or perhaps acted in 'bad faith' in prosecuting the war criminals.

The burden and standard of proof, in complementarity, lies with the OTP to rebut the presumption of good faith. The Appeals Chamber has noted that the inadmissibility test should be based on the question of whether the relevant state is investigating the same overall conduct that is being examined by the ICC. The principle of complementarity has often been regarded as a fundament of the Rome Statute; and is commended for various reasons, mainly, the principle protects state sovereignty, it slims down the crimes that need to be investigated by the ICC; and particularly, it promotes accountability as state parties are mandated to comply with their obligations to investigate and prosecute ICC crimes.

Nevertheless, in the current situation of Palestine, if Israel succeeds in relying on the principle of complementary to strike down the investigation initiated by the ICC, it will defeat the spirit of the Rome Statute – which is to prevent incidents of international war crimes, ensure accountability of those responsible and serving justice to the victims of such heinous crimes.

FINDINGS

Thus, from the above discussions, numerous issues can be deduced; first, the non-ratification of the Rome Statute by Israel is likely to hinder the jurisdiction of ICC in

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investigating the war crimes in Palestine; second, the principle of complementarity is likely to be a 'handy weapon' for Israel, in stripping off the ICC's jurisdiction, in the situation. Having identified these issues, the author attempts to provide her recommendations, on how the ICC may work alongside these hurdles, in the following section.

RECOMMENDATIONS

On the plausible argument by Israel of its non-ratification of the Rome Statute, it can be counter-argued that, according to Article 12 of the Rome Statute, it is immaterial whether Israel is a state party to the Rome Statute, the ICC has the universal jurisdiction to prosecute crimes committed by nationals of member states, also crimes committed on the territory of member states, even if those responsible are citizens of a country that is not a member of the Rome Statute. At the Rome Diplomatic Conference, it was concluded that the core crimes within the ICC's jurisdiction-genocide, crimes against humanity, and war crimes-were crimes of universal jurisdiction under customary international law. Thus, the drafters of the Rome Statute did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction, hence, ICC may exercise such universal jurisdiction only upon a referral by the Security Council or the consent of the state in which the crime was committed.

Now moving on to the issue of *"complementarity",* although the ICC is unlikely to have jurisdiction over numerous alleged crimes committed by Israel; howbeit, the issue of building settlements in the occupied territories has not been summoned by the Israeli courts, so that could be a more likely target for an ICC prosecution; hence, such a case could be taken up by the ICC; additionally, a case will be rendered admissible if it aims at evading justice, in the domestic courts. Furthermore, according to the Chambers of the Court, the test for determining complementarity is "two-fold" – if it is established that a relevant investigatory activity is ongoing, in the state concerned, there must be an assessment whether there is any element unwillingness or inability; moreover, there must be concrete evidence of such investigations, at the national level, as opposed to some "future planned or scheduled" investigations. Notwithstanding such investigatory activities, as it is apparent with respect to Israeli settlement activities as well as alleged Palestinian crimes during the 2014 Gaza conflict, the ICC Prosecutor can only conclude that there is an element of "inactivity," and on this basis proceed to a full investigation.

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RIGHTS OF RAPE VICTIMS IN BANGLADESH: LAW AND PRACTICE

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ABSTRACT

Rape is one of the most heinous forms of violence against women around the world. People are getting more civilized and educated but this gruesome crime is increasing in an alarming rate. Moreover, it is the least reported crime in the world and sadly Bangladesh is no exception. This social misdeed is creating a society that disregards women and children's rights and safety. As an effect, victims are blamed in most cases and rapist get away through the loophole of the law. Thus, there is an unending suffering of victim, and their families are humiliated or disgraced in the society. The purpose of this research is to show how the rights of rape victims are protected in Bangladesh. The paper has been made on both qualitative and analytical research methods by using secondary sources of data. This paper is also going to manifest in what extent those provisions are applicable in a practical way. This study also evaluated various Bangladeshi laws and tried to find out the barriers to execute them. The paper has identified many loopholes in the existing legal system and provided recommendations to stop this despicable social illness.

Keywords: Rapists, child rape, government, suicide, patriarchy.

INTRODUCTION

The term "Rape" is a small word that comprises only four letters, but the effect is even bigger. The Bengali meaning of this word is "Dhorshon". In a country like Bangladesh, it is one of the prohibited words. Day by day it is turning into a social pandemic. Rape is a type of sexual assault in which one or more individual forces sexual contact on another individual without consent. It is an unlawful sexual activity. The definition of rape has been stated in Penal Code, 1860. Section 375 of the Act mentioned five circumstances to define a crime as Rape. If any person performs any act among those five, he is said to commit rape. The definition is as follows-

> A man is said to have committed "Rape" who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions. First, against her will. Second, without her consent. Third, with her consent when her consent has been obtained by threatening to kill or hurt her. Fourth, with her consent when the man knows that he is not her husband, and she gives her consent thinking that he is the man to

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whom she believes she is lawfully married. Finally, having sexual intercourse with a girl under 14 years of age is also considered rape.

The starting point of rape law in Bangladesh is section 375 of the Penal Code 1860, passed during the British colonial era. As a product of its time, section 375 of the Code narrowly defines rape to be a gender specific crime (Huda, 2019). Bangladesh got its independence in 1971 and it made its own constitution in the year 1974. The Constitution ensures equality and non-discrimination as fundamental rights (The constitution of people's republic of Bangladesh). Under it, rape law has been reformed thrice by three different governments as part of their valuable efforts of introducing legislation on violence against women. In Bangladesh, the rape related provisions are mainly included in two acts. These acts are: (a) the Penal Code, 1860 (b) Nari O Shishu Nirjaton Domon Ain, 2000.

PROBLEM STATEMENT

"Dhorshita" this is the word that a girl gets stamped with, when she is raped. So here, all the social attention, hatred, negative comments are only for victims rather than the rapists. As a result of this situation, victims choose to stay silent on this matter. And also, they hardly have support of their family. Even sometimes the scenario is- their own family blame them for it. They taunt them. This makes their life more miserable. In Bangladesh and most Asian countries, the victim is often blamed to get raped. The people here held the victim liable for causing its own suffering. Thereby, rights of victims are hardly protected. These social circumstances violate victim's right. At the same time, rapists roam freely using social position and political power. The power of money often saves them. As a result, instead of being protected, the rights of victims are violated. There are many kinds of myth which are generally made of some social presumption. Some of them has been created from social culture and some are just made-up stories by media. The society is fond of carrying those beliefs. Another important thing is the "rape culture". It believes that victims play a significant role for getting raped." Rape culture" is all about some social nonsense which does not allow rape to be seen as a sexual assault. (Myths vs Realities, 2017).

After that, there are loopholes in the present provisions regarding rape. Rapists use those loopholes and get away. The definition of rape is still 150 years old (Huda, 2019). Also there, rape within marriages is not recognized. So according to this, a married woman cannot ask for legal help if she is raped by her own husband (Tithila, 2020). Rather the society would laugh her off if she does so. However, this definition does not support enough to provide legal assistance to women who have been victims of such incident. So, criminal can easily escape by using these grounds. Even till this time, no noteworthy example of victim being punished can be found.

Most of the time, justice is denied because of lack of evidence. A delay in somebody reporting a rape can cause difficulties. This delay makes it difficult to secure forensic evidence, such as semen, and any physical injuries such as bruises or scratches may have healed or faded. Earlier, the rape laws in the country were dominated by the regressive

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laws passed in the British colonial era. The punishment for rape as stipulated in section 376 of Penal Code, 1860 ranged from a term of ten years with a maximum life imprisonment and fine. Only in extreme cases where the victim died as a consequence of committing rape, the defendant would have been convicted with death penalty. But now government assumes that imposing death penalty for rapists will drastically lessen the commission of crime due to the fear of extreme punishment. Therefore, it is a timely initiative for Bangladesh to walk in this line considering the uncontrollable rate at which rape is increasing. However, there are also a number of other valid reasons which are also liable to make the country unable to uproot this jeopardy. These include questioning on the basis of character of the rape victim, lack of victim protection measures, reluctance of police officers to file the case, lack of evidence, victim humiliation, political backing and of course a lengthy trial often resulting in the case being settled. (Awwal, 2020)

RAPE VICTIM'S RIGHTS IN LAW VS IN REALITY

Now a days, we hear so many of rape related news that we cannot figure out which one we should mourn first. Here, victim blaming is a common scene when a girl is raped. The people in the society held the victim liable for causing her own suffering. It feels like she invited them to rape her. The dull-headed narrow-minded people often allege their cloths, frank behavior, staying outside of home etc. They do not even bother to understand it is about one's intention to rape. When the intention is bad, no dress can make it pure, be it a burqa or a jean or a veil. Question is canning those people justify child rape on the basis of those reason. No reason can justify rape. By putting a wall of those reasons, they simply add more suffering for the victims. This needed to be stopped.

The physical wounds after rape are visible and can be cured. But the mental injury leaves a permanent mark that can neither be seen nor be cured like physical one. The trauma after rape can destroy that victim. The wound is deeper. This trauma leads to fear, shame, loneliness, nightmares and so many unpleasant things. The victim and her close people become the sufferer of it. No place in the world seems safe to her. So, this is the common scenario, a rape victim goes through in Bangladesh.

According to a report by Dhaka Tribune, Bangladesh saw 1093 rape cases in 10 months in year 2020 (Mamun, 2020). If the rights of the victim would have been protected and laws were enforced against rapists, this would not be the case. So, in reality the law is not enforced properly. From examination to trial, in this whole process the victim is harassed brutally. Because of this fear, many rape cases remains unreported. Considering the fact that sexual violence is still treated as a taboo in Bangladesh and that the girl victims are held socially responsible for the violence they undergo; it is rational to infer that the actual number is far higher. The insufficiency of evidence, incompetency of the investigating officer, lack of coordination with prosecutors, inadequacy on part of the prosecution, delay in trial, reluctance of witnesses to testify, numerous adjournments, pending status of cases for a lengthy period, are some of the root causes that lead to low rate of accusation and lack of justice. All these contribute to make the victims lose confidence in the justice system. In many cases, victims and the families do not dare to report because somehow,

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they get sure justice will nowhere to be seen. As part of national measures, all these issues need to be properly addressed.

The number of child rape is also increasing as well. On July 5, 2019, a seven-year-old child, whose body was found in an under-construction building at Dhaka's Wari was raped before murder. Test results and other examinations confirm that the victim, Samia Afrin Sayma, was raped and then strangled with a rope. Sayma was found dead on the eighth floor of the building where a construction work was going on. As she was missing for hours, her parents, who are residents of the same building, conducted a search inside the unfinished flat and found the body. Later it was found that, the culprit was one of the neighbors of Saima's family (The Daily Star, 2019). Examples like this are so many. It is alarmingly on the rise. Rape is deprivation of women's rights. Physical and emotional torture during or after the incident of rape hamper their rights and dignity. Every day, about 10 women on average are violated, many of them as young as six years of age. Many of those girls commits suicide to get away from disgrace and social humiliation.

Section 376 of the Penal Code, 1860 states about the punishment of a rapist. It states life imprisonment as a punishment for rape. Again, a careful reading of section 9 of the Nari-o-Shishu Nirjatan Daman Ain, 2000 says that a fraudulent promise to marry to induce consent in sexual intercourse can be criminalized as rape. Furthermore, the outdated provision section 155(4) of the Evidence Act, 1872 allows questioning the character of rape victims to challenge her integrity. There is no rape shield law to protect her from this severe disgrace. It seems like the law prioritize victim's identity than the rapists. The social arrangement of Bangladesh at least indicates that. Additionally, rape within marriage has not been criminalized yet. This is the absolute result of patriarchy in Bangladesh.

That is how the rape laws in Bangladesh tried to protect rape victim's right. The Bangladesh government has now taken new measures to use the death penalty as punishment for rape, after widespread protests in response to several recent gang rape cases. But capital punishment cannot be a solution to rape. It is also nowhere to be seen protecting victim's rights. Rather it can encourage the culprit to murder their victims to avoid the risk of getting arrested.

FINDINGS

At first, the very noteworthy criticism is there are loopholes in the definition of Rape. This is not yet been updated. Since Penal Code is a procedural law, provisions here needed to be upgraded with years. The law mentioned about only women and there is no mention about female children, transgender. Further, rape within marriage has not been defined here.

The judicial system of Bangladesh is ineffective and fragile. The Nari O Shishu Nirjatan Daman Ain, 2000 provides specific time limitations for investigation, trial and disposal of the rape cases. But these are not enforced properly. Even no action is taken against police when they extend the duration deliberately. A prescribed time is placed to investigate and

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dispose of rape cases within 180 days which are never followed in practice. When the rape survivors ask for justice before the courts, rapists belonging from influential backgrounds may use their political power to force the victims to withdraw their cases. Now it is the time for Government to make a change in the provisions of law to hold the inquiry by judiciary. It should have been done earlier.

RECOMMENDATIONS

Based on the findings, these recommendations have been suggested. This is not must that the rape victims must be women always. Even men or transgender can fall a victim to it. So, while defining rape only "WOMEN" should not be used. Only death penalty cannot be an absolute solution to this crime. Before ensuring punishment against criminal, judiciary must protect the victim's right with the help of legislation. For this a proper legislation need to be formed. Furthermore, rape survivors need a discrimination free transparent definition. Survivors should be given a witness protection system as their lives remain at a stake. Their rights to be compensated should be state's liability. The judiciary has to keep in mind that during trial, the victim is not harassed by irrelevant questions regarding her character and lifestyle. It is often said as 'a rape victim face thousands time rape in the court. Thinking of narrow-minded people have to be changed. That's why psychosocial counselling support to the perpetrators and the society is very necessary. So counselling method should be applied towards people to protect women in the society. In year 2018, Bangladesh Legal Aid and Service Trust (BLAST) started a rape law reform campaign. As part of this campaign, they hold a series of expert consultation seminars and meetings with relevant stakeholders, such as lawyers, academics, judges, law enforcement officers and activists. They are working on how to reform rape related provision in order to protect victim's rights (Rape Law Reform Now Campaign, 2018).

CONCLUSION

All in all, it can be said that, in this country of patriarchy, rape is often used as a tool to suppress women. Men rape women because of power. They consider women as weaker gender. So, they commit rape to prove their superiority. Each and every stage of this rape trial procedure promotes patriarchy. A woman's dignity possesses no value in existence of patriarchy. Even if, enacting the laws, there is a drop of gender biasness. The laws need to be amended in order to bring in contemporary and certainty with the human rights' instruments and international standards. Public awareness is necessary to protect the society from rape incidents and the punishment process should be transparent to give protection to the women. Victim's right to seek justice is not ensured in Bangladesh and the rapists do not fear to commit this offence for the inequality in the society. It is high time to move our concentration towards protecting victim's rights instead of raising questions about their credibility, character and dignity. Society should unmask the rapists. The rapists are not made in just a day. They are the product of patriarchy-based society.

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FORCEFUL MIGRATION OF ROHINGYA REFUGEES FROM MYANMAR TO NEIGHBORING COUNTRIES: A HUMANITARIAN CRISIS

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ABSTRACT

In this global era, the Rohingya Muslims of Myanmar are deemed to be the most inhumanly tortured minority of the world. The culture of racial persecution is indulged by the decades of chronic insurgency between the Myanmar Government and the Rohingya Muslims regarding the religious and ethnic variance. However, it is also argued that Rohingya crisis in not confined to religion but comprises economic and political issues equally. They have been refused their human rights and faced security dilemma. The methodical abuse of human rights of the Rohingya by Myanmar military junta has made compulsion to thousands of Rohingya to flee the country. Subsequently, forcing thousands to reside as a refugee, mostly in Bangladesh, while others flee to countries like Malaysia, Singapore and Middle East. The Government of Myanmar has enacted laws to deny the citizenship of these Rohingyas and in short, they are labelled as foreigners. This paper highlights the measures adopted by the global community for preventing this mass killing. This research portrays the means and method of the Government of Myanmar to suppress the Rohingyas. This paper looks into all sorts of violation of human rights and humanitarian disaster suffered by the Rohingya and the subsequent humanitarian aid received from international community.

Keywords: Violation of human rights, Rohingya, Refugee, Humanitarian aid, Ethnic minority

INTRODUCTION

Myanmar, a least-developed country is located in Southeast Asian region. It was proclaimed as Burma by the 1947 Constitution. Later on, the name was mutated to Myanmar by the then military junta. As per the 2008 Constitution, the country's official name is "The Republic of The Union of Myanmar" (Mohajan, 2018). The population of Myanmar is near about 54.5 million people which is equivalent to 0.7% of the entire world population. Among the most diverse countries of the world, Myanmar is a significant one. Throughout the country's history, settlers from numerous ethnic groups have roamed around the great horseshoe of mountains which covered the Irrawaddy River plain. The 1974 Constitution of Myanmar vindicated seven ethnic minority states namely, Chin, Kachin, Karen, Kayah, Mon, Rakhine (Arakan) and Shan as well as seven divisions, which are largely colonized by the majority Burman population (Smith 2002). It is estimated that these minority groups comprise at least one-third of Myanmar's population and occupy half of the land cover (Smith & Allsebrook, 1994).

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The British annexed Myanmar during three wars that took place between 1824 and 1886. The British colonization on Myanmar sustained for more than 60 years. Before the intervention of British in Myanmar, inter-ethnic harmony was well observed, until the unbidden meddling of British ruling in the nineteenth century. During the British rule, ethnic traits stuck between various communities, hazardously augmented by the divide and rule tactics of the colonial government. This kind of division posed the different ethnic groups on enormously isolated paths towards economic and political enhancement, resulting in number of sectarian violence in their history. Nevertheless, the historians of Myanmar have always raised their fingers towards the British for indulging ethnic minorities during colonial rule and had indiscriminately deranging outcomes for ethnic minority aspirations, as lands of ethnic groups were parted into individual political districts, and none was governed on the basis of nationality (Faye, 2021).

The Rakhine state is situated at the west coast of Myanmar and one of the poorest regions of the country having an area of 14,200 sq. mi. There are around 3.8 million people living in Rakhine where 59.7% are Buddist, 35.6% are Muslim (Rohingya) and the rest belongs to other religious groups (Mohajon, 2018). The origin of Rohingya is rooted to various ethnic groups such as Arabs, Moghuls and Bengalis. The British ruling in Arakan induced in many of the Arakanese Buddhist growing hatred against the Rohingyas and targeting them as foreigners. It is argued that British imperialism has resulted this hatred against Rohingya Muslims. Later on, the military junta of Burma has adopted the policy. However, it is noteworthy that the Rohingyas did not suddenly settle in Arakan, but history reveals that they were successors of the Arabs who arrived 1200 years back. Since after independence, the Rohingya Muslims had gone through human rights abuses like mass killing, rape, torture and it is being practiced till today. These have given rise to a chronic refugee crisis in neighbouring country Bangladesh. As of late, gigantic number of Rohingyas remains uprooted depending on humanitarian aid to survive, while many also undergo barbarian repression by the border guard of Myanmar (Abdelkader, 2013).

The Citizenship Act of 1982 sanctioned the legal omission of the Rohingya, turning human rights and humanitarian condition of the Rohingya into worse. Officially the Act figures out 135 domestic races that wield for citizenship. The exclusion of Rohingya disaffirmed the entire privilege of citizenship which is named as "nonindigenous ancestry". As per this Act, the Rohingya can only have Foreign Registration Cards which are disapproved by many educational institutions and employers. Thus, these Rohingyas are deprived of their right to achieve property, marry and freedom of movement though such rights are guaranteed by international law (Faye, 2021). Besides, Rohingya crisis in not confined to religion but comprises economic and political issues equally. The Rohingyas were considered to be advanced in economic development by the Buddhists of Myanmar and they believed that their cultural standard is beneath than that of the Rohingya. This tied with the hideously entrenched Islam phobia in Rakhine and Myanmar being clasped by Islamic countries, such as Malaysia, Indonesia and Bangladesh. It was a fear in the mind of the Buddhists that the Rohingya might fight against Myanmar if the country takes part in war with any Islamic country. These reasons have indulged the discrimination, exploitation and deprivation of the Rohingyas in Myanmar (Mohajan, 2018).

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The communal war taking place on Muslim regions that are in the northern region state: Maungdaw, Ratherdaung and Bathidaung Township. The earlier decades witnessed that the Rohingya ethnic groups endured massive oppression in Rakhine that resulted genocide and ethnic cleansing (Mohajan, 2018). Moreover, the Rohingyas suffer other forms of human rights violations such as land confiscation, mosque destruction, forced labour and extra-judicial executions (Faye, 2021).

MIGRATION OF ROHINGYA FROM MYANMAR TO BANGLADESH

The Myanmar military junta by abusing human rights of thousands of Rohingya had left no other way for them but to flee the country. Following this, these Rohingya Muslims were forced to reside as refugee, mostly in Bangladesh, while others flee to countries like Malaysia, Singapore and Middle East. It has never been expected for Bangladesh to take this large number of refugees and but such approach from Bangladesh relieved from their agonies (Pamini, 2013). Many migrants have been refused shelter to refugee camps and they often lived in severe poverty in villages and slums near Cox's Bazar and Teknaf. They are unknown and at times marked as economic migrants by the policy makers in Bangladesh (Holloway & Fan, 2018).

Myanmar and Bangladesh share a border of 168 km but unfortunately the bilateral relationship between these two nations is disturbed by security and political issues. For instance, the Rohingya refugees crossing the border started to reside in camps of bordering Cox's Bazar district of Bangladesh. The Myanmar Government has clearly expressed its' a strict standing not to legalize the citizenship of these Rohingyas and in short, they are marked as foreigners (Pamini, 2013). Besides, the Rohingya refugees are dying to be sent back to Myanmar as they think that they would be subject to further brutal persecution. The menace of being tortured has been expressed by the refugees and Bangladeshi foreign Minister has put the issue while visiting Myanmar. Although the Government of Bangladesh wants the Rohingyas to be repatriated because the domestic resources would be drained yet push back to them will be inhumane in respect of the Rohingya crisis. Still, Bangladesh authority is charged with forced repatriation, though the country indicates it as voluntary repatriation. Moreover, the UNHCR has raised that this was the direction of the Government of Bangladesh in some cases (Pamini, 2013).

The 1977 Nagamin census in Myanmar was initiated for screening out foreigners and registered citizens that produced the persecution of Rohingyas resulting flee of 200,000 people from Myanmar to Bangladesh in 1978. Within a period of only 4 months, from December 1991 to March 1992, a massive departure of more than 300,000 Rohingyas fled oppressed in the Arakan State (Ullah, 2011).

Negotiations took place for several times between the Government of Myanmar and Bangladesh and for over 12 years, 226,576 Rohingyas were successfully repatriated to Myanmar. Nevertheless, the oppression was not stopped and Rohingya Muslims were still suffering in the hands of the military. In 2009, around 1000 Rohingya encroached to Bangladesh just in 3 days claiming the intolerable torture they had gone through in

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Myanmar. They were evicted from their homestead and threatened not to return. For instance, Rohingyas were forced out of their houses and the military-built army barracks clearing those spaces (Ullah, 2011).

Notably, Bangladesh could not ensure proper protection as UNHCR was not able to provide sufficient assistance. For instance, the average size of household inside the camps is within six to seven people regardless of the family size. Besides, the UNHCR standard policy of 15-20 litres of water for each person daily was a major crux due to extensive number of people. The time for availability of the tap water was limited to 2 hours in a day but in most cases, it was not even open for 2 hours and thus was not adequate for everyone who resided in the Kutupalong camp.

In addition, in 2001 unassuming primary education was introduced in the camp and the operation of school started with 5532 children. The Rohingya Muslims were not however, permitted to look for employment outside the camp but only few of them started small trade outside the camp. It is noteworthy that young female Rohingyas started prostitution as the limitation on their movement brought various negative issues on their standard of life. These illegal actions have pampered an inflated rate of pregnancy and birth rate outnumbering the ratio of deaths and repatriation if amalgamated in last few years (Faye, 2021).

CONCLUSION

The Rohingya can be treated as the most brutally persecuted minorities in the history of world. In spite of humanitarian aid, not much assistance has been achieved from aid institutions. They have been deprived of basic human rights ranging from state to social authorities. Security is placed as a prime priority for everyone but in this global era, Rohingya Muslims face the dilemma of security. With very tiny assistance from the global community, Rohingyas are a huge burden for a least-developed country like Bangladesh. It is noteworthy that Bangladesh has adopted the best possible means for the sake of Rohingya refugees. Notwithstanding, equal assistance must come from Myanmar responding to the claim of the global community. Besides, more active role should be played by the non-government organizations to deal with the crisis in respect of the humanitarian repercussion in the Rohingya crisis. In spite of the deranging situation faced by the Rohingya, more arrangement will somehow reprieve the condition for the thousands of refugees residing in feral conditions. At this point, it can also be suggested that domestic host communities sheltering Rohingya refugees must receive assistance and be made aware of the assistance provided and calm the pressure. Lastly, stakeholder from both national and international shall come forward to assist community involvement between refugees' communities.

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TOWARDS DEVELOPING ANTI-DISCRIMINATION POLICY AT THE WORKPLACE: RECONNOITRING THE NOTION OF EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS TREATIES

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ABSTRACT

Discrimination at the workplace based on the grounds of gender, race, age, religion etc. is a problem that creates barriers to employment. Employment discrimination is apparent at all levels of employment, including at the time of application, hiring, performing the job and during termination. Whilst many countries have outlawed employment discrimination through legislations, there is no specific legislation enacted in Malaysia to combat employment discrimination. The absence of explicit legislation and provisions on discrimination at the workplace has left a vague legal position in Malaysia. Hence, developing a specific policy framework on anti-discrimination is crucial for the protection against discrimination at the workplace. In meeting this end, the government may well draw references from the provisions of international human rights treaties that provide legal foundation on the notion of equality and anti-discrimination. These international treaties are significant as they represent the consensus and consciousness of the States in promoting equality and non-discrimination. Accordingly, this paper seeks to reconnoitre the notion of equality and non-discrimination under selected international human rights treaties, and accordingly reassesses their contextual application towards developing anti-discrimination policy at the workplace in Malaysia. The study mainly employs traditional research method by examining and explaining the relevant laws found in the primary data, in particular the international Conventions. The study finds that the international human rights treaties participated by Malaysia provide the needed legal foundation for promoting equality and combating discrimination,

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though their application is restricted to certain groups of people, namely women, child and persons with disabilities.

Keywords: child, Convention, disabilities, employment, women

INTRODUCTION

Discrimination based on the grounds of gender, race, age and religion is a problem that creates barriers to employment. The so-called employment discrimination is common in Malaysia (Atikah, 2018) and is apparent at all levels of employment, including at the time of application, hiring, performing the job and during termination. People are deprived of getting access to employment when they are denied jobs, confined to certain occupations, offered with lower pay and refused promotion or salary increment solely based on their 'physical appearance' such as sex and colour of skin, vis-à-vis their capabilities and abilities in performing jobs.

Many countries, including the United States, the United Kingdom, Canada, Australia, and the European countries have outlawed employment discrimination through legislations. For instance, the United Kingdom enacted the Equality Act 2010 in an effort to reduce socio-economic inequalities and eliminate discrimination in all aspects of life, including the in the area of employment as provided under Part 5, Equality Act 2010. Meanwhile in the United States, there are numerous legislations enacted outlawing discrimination in the area employment. The list of the Federal laws includes Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990 (Hentze and Tyus, 2021).

Comparatively, there is no specific legislation enacted in Malaysia to combat employment discrimination. By and large, discrimination, unfair and unfavourable treatments take place on a regularly basis in the workplace in Malaysia. Records from the Ministry of Human Resources (2014) showed various complaints on discrimination were received including sex and racial discrimination, victimisation, sexual harassment, unfair wages and lack of facilities for performing prayers, which were commonly classified as "unfavourable" or "unfair treatment". In fact, some of the cases on employment discrimination had appeared before the court for trial and adjudication. For instances, the courts were asked to deal with gender discrimination at the workplace in the like cases of Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor. [2005] 2 CLJ 713, Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and Ors [2012] 1 CLJ 769, and Airasia Berhad v Rafizah Shima binti Mohamed Aris [2014] MLJU 606.

The absence of explicit legislation and provisions on discrimination at the workplace has left a vague legal position in Malaysia. Developing a specific policy framework on anti-discrimination is crucial for the protection against discrimination at the workplace. Existing anti-discrimination legislations from different countries could provide useful tools for Malaysia in developing its own anti-discrimination policy for combating employment discrimination. However, the ground works should not be limited to drawing references

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from other domestic legislations; rather it is similarly important to consider the provisions from international treaties that provide legal reference to anti-discrimination. These international treaties are significant as they represent the consensus and consciousness of the States in promoting equality and non-discrimination. Moreover, if Malaysia endeavour to develop anti-discrimination policy, the government should ensure that the proposed policy conforms to the accepted practices and standards as evidenced in the international treaties.

Based on the above premise, this paper seeks to reconnoitre the notion of equality and non-discrimination under selected international human rights treaties participated by Malaysia. This is followed with a discussion that reassesses their contextual application towards developing anti-discrimination policy at the workplace in Malaysia.

THE LEGAL CONNOTATION OF NON-DISCRIMINATION AND EQUALITY UNDER INTERNATIONAL LAW

Equality and non-discrimination are regarded as the most fundamental human rights principles and "the starting point of all liberties" (Baderin, 2003). Human rights, in particular the principles of equality and non-discrimination, are recognized under the Charter of United Nations (UNC). The preamble to the UNC commences with the most resonant words, which read: "the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, [...]." In committing towards this end, the United Nations shall promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 1(3), UNC). Likewise, in the spirit of maintaining equality among the people, members of the United Nations have pledged themselves to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Arts. 55(c) and 56, UNC).

Following the creation of the United Nations in 1945, the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948, which embodies the universal respect for human rights. In its preamble, the UDHR declares the inherent dignity, equality and absolute rights of all human beings as the main foundation of justice and peace in the world. The UDHR, which is composed of 30 Articles, promotes and protects two groups of human rights, namely (i) civil and political rights, and (ii) economic, social and cultural rights. According to Article 2, the enjoyment of these rights is equal to all individuals without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

One of rights recognized under the UDHR is right to work that shall be enjoyed equally by all persons. In this context, Article 23 specifically guarantees the rights of everyone to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration for himself and his family, as well as to form and to join trade unions for the protection of

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one's own interests. In furtherance, the UDHR also recognizes other rights that are associated with the right to work. For instance, Article 24 acknowledges individual's right to rest and leisure, including working under reasonable hours and entitlement to certain periodic holidays with pay. Meanwhile, Article 25(1) recognizes a person's right to security in the event he/she is being unemployed.

The above exposition shows that equality and non-discrimination shape the international standards in the treatment of individuals. This international standard applied across all aspects of the human life, including in the area of employment as incorporated in the UDHR. However, the UDHR falls short of an international Convention that carries the force of law (Hamid, 2019; Cassese, 2005). On a positive note, most of the UDHR provisions were incorporated into legally binding international human rights treaties. Majority of these treaties were not signed nor acceded by the Malaysian government. Out of 27 international treaties on human rights (including Optional Protocols and Amending Treaties) deposited with the United Nations, Malaysia participated only in eight of those international agreements (United Nations Treaty Collection, n.d.). They are the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) (and its Amending Treaty), the Convention on the Rights of the Child 1989 (CRC) (and its Amending Treaty and two Optional Protocols), and the Convention on the Rights of Persons with Disabilities 2006 (CRPD).

On this premise, the following will explore the international human rights treaties participated by Malaysia, namely CEDAW, CRC and CRPD, to reconnoitre the legal concept of equality and non-discrimination.

Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)

CEDAW is a distinguished Convention that seeks to outlaw discrimination against women by promoting and ensuring equal rights of men and women in the enjoyment of economic, social, cultural, civil and political rights. The Convention entered into force on 3rd September 1981. It has drawn an overwhelming number of participations from 189 States Parties. Malaysia acceded to CEDAW on 5th of July 1995, nearly 14 years after the Convention had entered into force.

The term 'discrimination against women' as used in CEDAW is defined as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (Article 1, CEDAW). In this context, CEDAW brings new perspectives in human rights law by redefining the role of men and women as well as recognizing equal participation of men and women in all fields to achieve complete development of a country and maximise growth of the prosperity.

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Article 2 embodies Member States' commitments towards eliminating all forms of discrimination against women. Generally, the States Parties agree to pursue by all appropriate means and with immediate effect a policy for the elimination of discrimination against women under several strategies, namely:

(a) by incorporating the principle of the equality of men and women in the national constitutions or other necessary legislations, whilst ensuring the principle are practically respected and implemented.
(b) by adopting appropriate legislative and other measures, including necessary sanctions in the prohibition of all forms of discrimination against women.
(c) by establishing legal protection of the rights of women on an equal basis with men and ensuring that the national tribunals and other public institutions can effectively protect women against any act of discrimination.
(d) by refraining, and ensuring the public authorities and institutions, from engaging in any act or practice of discrimination against women.
(e) by taking all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.
(f) by taking all appropriate measures, including through legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.
(g) by repealing all national penal provisions that constitute discrimination against women.

In principle, CEDAW regulates for several crucial provisions that outlaw discrimination against women whilst conferring equal treatment on women, including in the area of employment, whether in the public or private sectors. According to Article 7(b), each State Party must take appropriate measures to ensure equal participation from women in holding public office and in the performance of all public functions at all levels of the government. Likewise, women shall be granted equal opportunity with the men to represent their Governments at the international level and to participate in the work of international organizations (Article 8, CEDAW).

The main provision that eliminates discriminatory treatment against women in the area of employment is outlined in Article 11. Clause (1) safeguards equal participation of women and men by holding the right to work as an absolute right of all human beings. Both women and men enjoy the right to the same employment opportunities and shall be subjected to the same criteria for selection in matters of employment. Several basic rights that are guaranteed under Article 11(1) include (i) free choice of profession and employment, (ii) the right to promotion, job security and all benefits and conditions of service, (iii) the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training, (iv) the right to equal remuneration and benefits, (v) the right to equal treatment in respect of work of equal value and in the evaluation of the quality of work, (vi) the right to social security, especially in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work,

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as well as the right to paid leave, and (vii) the right to protection of health and to safety in working conditions.

CEDAW also recognizes the special rights of married women and women giving birth in the course of their employment. According to Article 11(2), States Parties shall take appropriate measures to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work. The specified measures promoted under CEDAW to this effect are:

(a) to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.
(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.
(c) to encourage the provision of the necessary supporting social services, such as interconnected child-care facilities, that enable parents to combine family obligations with work responsibilities and participation in public life.
(d) to provide special protection to women during pregnancy in the categories of work that are harmful to them.

On the same premise, married women shall be guaranteed with the equal rights of a married man to choose her own profession and occupation (Article 16(1)(g), CEDAW).

The other category of women that is protected under CEDAW is those living in the rural areas. In this context, Article 14(1) imposes an obligation on Member States to consider the particular problems faced by rural women and the significant roles which these women play in the economic survival of their families, especially their work in the non-monetized sectors of the economy. Considering the crucial role played by the rural women, appropriate measures must be taken by each State Party to ensure the effective application of CEDAW to women in rural areas. In particular, Clause (2) regulates that rural women shall enjoy equal participation and benefits with their male counterparts in all aspects of rural development, access to adequate health care facilities, right to organize self-help groups and co-operatives with a view to obtain equal access to economic opportunities through employment or self-employment, as well as right to enjoy adequate living conditions, such as housing, sanitation, electricity and water supply, transport and communications.

Convention on the Rights of the Child 1989 (CRC)

The CRC evidenced the positive stand of the world leaders in protecting and fulfilling the rights of children worldwide. The CRC was founded on the basis that children are not mere objects belonging to their parents and for whom decisions are made, but they are human beings and individuals with their own rights and dignity (UNICEF, n.d.). The term 'child' was defined in the Convention to mean "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Art. 1, CRC). The CRC entered into force on 2nd September 1990 and has gone on to become the

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most widely ratified human rights treaty, totalling up to 196 Member Parties. Malaysia acceded to the treaty on 17th February 1996 subject to certain reservation and declaration.

Like majority of the international human rights treaties, the CRC promotes the principle of non-discriminatory treatment, and in particular, of the children. This principle was embodied in Article 2, which reads:

> "(1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

Further, Article 4 imposes an obligation on States Parties to take all appropriate legislative and administrative actions, as well as such other measures to the maximum of their available resources to implement the rights recognized in the CRC.

The CRC guarantees a number of crucial rights that should be enjoyed by child. They include right to freedom of expression (Article 13), freedom of thought, conscience and religion (Article 14), freedom of association and freedom of peaceful assembly (Article 15), right to enjoy the highest attainable standard of health (Article 24), right to benefit from social security, such as social insurance, in accordance with the respective national law (Article 26), right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27), right to education (Article 28), as well as right to rest and leisure, to engage in play and recreational activities and to participate freely in cultural life and the arts (Article 31).

Besides guaranteeing the rights and freedoms for child, the CRC also imposes responsibilities on the States Parties to accord protection on child against various forms of ill-treatment. For instance, Article 19 requires each State Party to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, while in the care of their parent(s) or legal guardian(s). Under Article 34, the CRC requires Member States to protect the child from all forms of sexual exploitation and sexual abuse. In particular, States Parties are required to take all necessary domestic measures to prevent the exploitative use of children in prostitution or other unlawful sexual practices as well in pornographic performances and materials. Another crucial example can be found in Article 37(a), which imposes an obligation on the States Parties to ensure that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.

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The CRC does not specifically establish or guarantee the rights of child to work or employment. Nevertheless, it does regulate for protection of child against economic exploitation, particularly one that relate to the performance of work. In this context. Article 32(1) provides that: "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." In ensuring the protection of child against economic and employment exploitation, the CRC requires the States Parties to take affirmative action's covering legislative, administrative, social and educational measures. In particulars, States Parties shall provide for: (a) a minimum age(s) for admission to employment; (b) appropriate regulation of the hours and conditions of employment; and (c) appropriate penalties or any other sanctions to ensure the effective enforcement of Article 32.

Convention on the Rights of Persons with Disabilities 2006 (CRPD)

The CRPD, which entered into force on 3rd May 2008, was the most recent international human rights treaties participated by Malaysia. Having initially signed the treaty in April 2008, the government decided to ratify the same on 19th July 2010. The CRPD regulates for the rights of persons with disabilities (PWD), a group of persons classified as having "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1, CRPD). By virtue of the same provision, the States Parties are required "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1, CRPD). In this context, the CRPD handles PWD differently from the traditional approach that merely treated them as objects of medical treatment, charity and social protection to a model where PWD are recognized as subjects of human rights that are entitled to claim their rights and dignities (Toolkit, 2008).

Technically, the notion of equality and non-discrimination are widely used and promoted under the CRPD. For example, Article 3 underlines that CRPD is founded on several key principles, which include inter alia non-discrimination, respect for difference and acceptance of PWD as part of human diversity and humanity, equality of opportunity, and equality between men and women. Meanwhile, Article 4 imposes the general obligations on States Parties to ensure and promote full realization of all human rights and fundamental freedoms for all PWD without discrimination of any kind on the basis of disability. The term 'discrimination on the basis of disability' has been defined under Article 2 to mean "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".

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The general obligations imposed on Member States to promote equality and to combat discrimination on the basis of disability shall be carried out under various means and approaches. They include (i) the adoption of appropriate local legislations, policies and programmes for implementing the CRPD and combating discriminative practices against PWD, (ii) the elimination of discrimination on the basis of disability at all levels of organization or private enterprise, (iii) the promotion of research and development, particularly for developing new technologies and facilities that provide aids to the PWD, and (iv) the provision of accessible information to PWD about mobility aids, devices and assistive technologies, and other forms of assistance, support services and facilities (Article 4, CRPD).

The other key provision underlying CRPD is Article 5 that specifically regulates for equality and non-discrimination. The provision reads:

> "(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds."

Clause (3) further provides that, for the purpose of promoting equality and eliminating discrimination, States Parties shall take all appropriate steps and make necessary modification or adjustments to ensure PWD can enjoy and exercise all human rights and fundamental freedoms on an equal basis with other individuals.

Besides promoting equality and outlawing discriminatory treatment against PWD, the CRPD grants numerous rights that shall be enjoyed by PWD. Right to work and employment is one of the rights guaranteed under the CRPD as laid down under Article 27. Clause (1) provides:

> "States Parties recognize the right of persons with disabilities to work on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities."

In meeting this end, Article 27 imposes a responsibility on the States Parties to take all necessary steps, including through legislation, in safeguarding and promoting the right of PWD to work. They explicitly include:

(a) prohibiting discrimination on the basis of disability covering all matters and forms of employment, such as conditions of recruitment, hiring and

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employment, continuance of employment, career advancement and safe and healthy working conditions.

(b) protecting the rights of PWD, on an equal basis with others, to just and favourable conditions of work, which include equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, and the redress of grievances.

(c) ensuring that PWD are able to exercise their labour and trade union rights on an equal basis with others.

(d) allowing PWD to have effective access to general technical and vocational guidance, programmes, placement services and vocational and continuing training.

(e) promoting employment opportunities and career advancement for PWD in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment.

(f) promoting opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

(g) employing PWD in the public sector.

(h) promoting the employment of PWD in the private sector through appropriate policies and measures (e.g., through affirmative action programmes, incentives and other measures).

(i) ensuring 'reasonable accommodation' is provided to PWD in the workplace by making necessary and appropriate adjustments to ease out disproportionality and undue burden likely to be faced by PWD

(j) promoting the acquisition by PWD of work experience in the open labour market.

(k) promoting vocational and professional rehabilitation, job retention and return-to-work programmes for PWD; and

(l) ensuring that PWD are not held in slavery or in servitude and are equally protected from forced or compulsory labour.

DISCUSSION AND ANALYSIS

The principle of equality and non-discrimination used in the international human rights treaties referred to above, namely CEDAW, CRC and CRPD, provide valuable and compelling legal framework for Malaysia towards developing anti-discrimination policy at the workplace. As State Party to the three listed treaties, Malaysia is under obligation to inculcate and implement the provisions at the domestic level, through the formulation of local legislations, policies and various other measures and initiatives.

However, the connotation of equality and non-discriminatory used in the above three international human rights treaties are limited in their application, centring only on three specialised groups of people, namely women, child and PWD. For instance, CEDAW focuses on promoting equal treatment of men and women and eliminating all forms of discriminatory treatment against women in various aspects of life, including in the area of employment. Comparatively, CRC focuses on recognizing certain rights for children, which

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shall be enjoyed by them equally without discrimination of any kind, irrespective of the child's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Meanwhile, the CRPD seeks to protect PWD as part of human diversity and humanity by ensuring their full and equal enjoyment of all human rights and fundamental freedoms. Accordingly, any discrimination on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others shall be condemned and outlawed under CRC.

Essentially, all three treaties make reference to the promotion of the right to work or employment, although their coverage might differ from one another. CEDAW promotes equal treatment of men and women in the area of employment, by guaranteeing, inter alia, freedom of women to choose a profession, right of women to promotion and job security, right to receive training, right to equal remuneration, right to safety working conditions, etc. In furtherance, CEDAW also recognizes the right of married women to work and the right to give birth during employment. Accordingly, any act of dismissal on grounds of pregnancy or of maternity leave or on the basis of marital status shall be outlawed. From a different perspective, CRPD guarantees the right of PWD to work or to be given opportunity to gain a living by work, on equal basis with other individuals. On this basis, CRPD specifically outlaws any discrimination on the basis of disability in all aspects of employment, such as conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions. Rather, the PWD shall enjoy the rights on an equal basis with others to just and favourable conditions of work, equal remuneration for work of equal value, safe and healthy working conditions, etc. Unlike CEDAW and CRPD, reference to employment is limited in CRC. Whilst CRC does not specifically guarantee the rights of child to work, it does regulate for the protection of child against economic exploitation, particularly relating to the performance of work. This include imposing a duty on the State Parties to set up a minimum age for employment and to fix appropriate working hours.

Equality and non-discrimination are an issue that is not only confined to women, child and PWD; but individuals are also vulnerable to be discriminated on the basis of race, colour, language, religion, political national or social origin, particularly in the field of work and employment. These discriminating factors may not be effectively regulated and covered under CEDAW, CRC and CRPD. In developing an anti-discrimination policy at the workplace, reference to other international human rights treaties is similarly crucial as they provide a much wider context and application on the notion of equality and non-discriminatory treatment of individuals, including in the area of employment. These leading international human rights treaties include the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and the International Covenant on Civil and Political Rights 1966 (ICCPR).

For instance, ICERD commits all State parties to abolish all forms of racial discrimination and to encourage understanding amongst all races. In particular, Article 5 requires State

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parties to guarantee the right of every individual without distinction as to race, colour, or national or ethnic origin in the enjoyment of economic rights, which includes, inter alia, rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.

In other example, the ICESCR obliges member States to ensure the equal right of men and women to enjoy certain economic, social and cultural rights (Article 3, ICESCR), which shall be accorded to all without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 3, ICESCR). By virtue of Article 6, the ICESCR recognizes the right to work for everyone without discrimination. Meanwhile, Article 7 guarantees the enjoyment of every individual to just and favourable conditions of work, in several key areas of concerns, such as to fair wages and equal remuneration for work of equal value, to safe and healthy working conditions, to equal opportunity for promotion, as well as to rest, leisure and reasonable limitation of working hours.

CONCLUSION

Towards developing anti-discriminatory policy at the workplace, it is compelling for the government to consider and appropriately implement the provisions underlying the international human rights treaties, like CEDAW, CRC and CRPD, to which the government has become a Party to. These treaties provide a good starting point and basic legal foundation for the government to initiate its own local policy on combating discrimination at the workplace. Furthermore, they incorporate the internationally accepted practices in promoting equality and combating discriminatory treatment at the workplace, in particular involving weaker persons such as women, child and PWD. However, considering their limited application to certain groups of people, CEDAW, CRC and CRPD may have carry minimal influence and impact in the construction and development of our local policy.

Therefore, it is similarly encouraging for the government to draw references to other universally accepted international treaties, namely ICERD, ICESCR and ICCPR, that regulate for equality and non-discrimination at a much wider context and application. A cross-reference to few international human rights treaties not participated by Malaysia shows an inclusive international legal framework for the regulation of equality and non-discriminatory treatment of individuals, including in the area of employment. Moreover, discrimination at the workplace occurs on various factors including race, religion, political opinions, etc. Besides, the proposed anti-discriminatory policy would have been broadened to cover a much extensive subject-matter and conform to the standards accepted by countries worldwide.

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