Pertanika Journal of

SOCIAL SCIENCES & HUMANITIES

JSSH

VOL. 29 (S2) 2021

A special issue devoted to
National Law in the Era of Industrial Revolution 4.0

Guest Editors
Zuhairah Arif Abdul Ghadas and Ida Madieha Abdul Ghani Azmi

PERTANIKA
JOURNALS

A scientific journal published by Universiti Putra Malaysia Press

Pertanika Journal of Social Sciences & Humanities
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PERTANIKA JOURNAL OF SOCIAL SCIENCES & HUMANITIES

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The *Introduction* explains the scope and objective of the study in the light of current knowledge on the subject; the *Materials and Methods* describes how the study was conducted; the *Results* section reports what was found in the study; and the *Discussion* section explains meaning and significance of the results and provides suggestions for future directions of research. The manuscript must be prepared according to the journal's **Instruction to Authors** (http://www.pertanika.upm.edu.my/Resources/regular_issues/Regular_Issues_Instructions_to_Authors.pdf).

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   Comments to authors are about the appropriateness and adequacy of the theoretical or conceptual framework, literature review, method, results and discussion, and conclusions. Reviewers often include suggestions for strengthening of the manuscript. Comments to the editor are in the nature of the significance of the work and its potential contribution to the research field.
3. The Editor-in-Chief examines the review reports and decides whether to accept or reject the manuscript, invite the authors to revise and resubmit the manuscript, or seek additional review reports. In rare instances, the manuscript is accepted with almost no revision. Almost

without exception, reviewers' comments (to the authors) are forwarded to the authors. If a revision is indicated, the editor provides guidelines to the authors for attending to the reviewers' suggestions and perhaps additional advice about revising the manuscript.

4. The authors decide whether and how to address the reviewers' comments and criticisms and the editor's concerns. The authors return a revised version of the paper to the Chief Executive Editor along with specific information describing how they have addressed the concerns of the reviewers and the editor, usually in a tabular form. The authors may also submit a rebuttal if there is a need especially when the authors disagree with certain comments provided by reviewers.

5. The Chief Executive Editor sends the revised manuscript out for re-review. Typically, at least 1 of the original reviewers will be asked to examine the article.

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AN INTERNATIONAL PEER-REVIEWED JOURNAL

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43400 UPM, Serdang, Selangor, Malaysia.
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Fax: +603 9679 6172
E-mail: penerbit@upm.edu.my
URL: http://penerbit.upm.edu.my

ABSTRACTING AND INDEXING OF PERTANIKA JOURNALS

The journal is indexed in SCOPUS (Elsevier), Clarivate-Emerging Sources Citation Index (ESCI), BIOSIS, National Agricultural Science (NAL), Google Scholar, MyCite, ISC. In addition, Pertanika JSSH is recipient of "CREAM" Award conferred by Ministry of Higher Education (MoHE), Malaysia.

Pertanika Journal of Social Sciences & Humanities
Vol. 29 (S2) 2021

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Preface

A strong and supportive legal framework and eco-system is quintessential to businesses. Modern, up-to date, world-standard rules and simple transparent procedures are key to facilitating businesses. The ease of doing business not only promotes efficiencies but would attract business and in the long run retain investment in the country. In 2020, Malaysia was ranked by the World Bank Group at no 12th out of 190 economies in terms of ease of doing business. The indicators signified that Malaysia is at par with other economies in terms of regulatory good practices. However, it was reported that more needs to be done on legal rights and enforcing contracts, which in Malaysia took a relatively longer period compared to other countries.

Malaysia has also scored high at 27th out of 63 countries in the World Competitiveness Ranking 2020, an index prepared by the Institute for Management Development Malaysia. Among factors that improve competitiveness is streamlined procedures, monitoring agencies, and reducing red tape. Whilst simplifying legal rules, policies and procedures play a big role in this, Malaysia also must compete with other countries in the region that has more attractive eco-system for investment such as China.

This noble aspiration stood as the main objective in organizing the International Conference on Law and Globalisation 2019 (ICLG 2019) from 28-29 July 2019 held at University Sultan Zainal Abidin together with Malaysia Productivity Corporation (MPC). The vision is that countries must simplify working processes to improve productivity. Adopting global Good Regulatory Practice (GRP) is also imperative and this can be achieved by either introducing new regulations or reviewing existing regulations. This special issue contains a collection of papers presented at the Conference, covering issues involving public law such as the role of the 'Rukun Negara' as the glue that binds the nation. It then dwells into the right of the asylum seekers, the position of deviant teachings, the right to health and in this information era the position of internet and information regulation.

Just like a beautiful garden that requires constant care and tending to, the legal eco-system, as the backbone of the country's business ventures is also in continuous need of refinements. Issues in the private law domain such as unfair terms in contractual obligation, computation of damages for nursing care, the role of commercial arbitration and the law of trusts are just a few, of many issues, that are given special attention in this special issue. All these changes reiterate that legal norms and institutions need to keep up with changes, and

with the current Covid19 pandemic, these changes need to happen much sooner as most of the legal principles as we know it are becoming obsolete with the disruption caused by the pandemic. Even though the conference was held before the pandemic and the issues discussed were pre pandemic, but all these issues are still relevant post pandemic.

Guest Editors

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 1 - 16 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

An Analysis of Inconsistent Methodology to Compute Permanent Future Nursing Care Costs in Personal Injury Claim

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ABSTRACT

Restitutio in integrum has been the underlying basis of assessment for damages under the corrective compensation scheme of the law of tort. This doctrine commands restoration of the claimant to the pre-existing condition prior to the commission of the tort. While this basis of assessment has no apparent problem in respect of pecuniary part of the claimable damages in a personal injury claim, however, from another side of the spectrum, there is an inconsistent methodology as to how to precisely calculate the 'price' of pain or even future loss. As a result, judicial activism plays its part in promoting its creativity of solution to the problem, leading to inconsistent methodology on this spectrum of damages that bears diverse output. The objective of this paper is to highlight the flaws of the inconsistent methodology for the assessment of permanent future nursing care. The method used for this research is by tracing the relevant authorities that use the various methods of computing the multiplier and analysing the outcome of each method. The findings revealed anomalies of output as each method produces different output without any qualification on why a particular method is chosen. This flaw in the computation of the multiplier for future losses other than related to loss of earnings should not remain viable as there is no consistency of the output based on similar factual circumstances. One of the solutions for this debacle is to forgo lump sum payment altogether and move towards structured settlement payment.

Keywords: Damages, future nursing care, personal injury

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.01

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

Tort law compensates past, actual and future losses not only in the form of economic changes in a person's life but also for non-pecuniary suffering or adversities which are not measurable in a meaningful monetary sense. However, all these losses are still usually compensated by way of damages in the form of a lump sum monetary award based on the legal doctrine of restitutio in integrum (Cane, 2013). This legal doctrine commands restoration of the claimant to the pre-existing condition prior to the commission of the tort, and it has been the underlying basis of assessment for damages under the corrective compensation scheme of the law of tort. Ahangar (2009) had defined damages as the sum of money given to the claimant as compensation for loss or harm caused by the tortfeasor. In tort, the threshold of damages is the whole extent of loss sustained by the plaintiff (McConnel v. Wright, 1903), which reflects the tort the principles of 100% compensation for the loss suffered.

Damages for personal injury claim under the law of tort in Malaysia has its genesis from the common law of England. For instance, the principles in the assessment of general damages for pain and suffering is not statutorily regulated but are formulated based on judicial principles and precedents, assisted by an assortment of guides and schedules for computation of the award. However, some of the heads of the general damages has been modified and codified by statutory provisions. For instance, the judicial prerogative to decide on the multiplier for the damages for future losses in respect of loss of earning and loss of was wrested from the judiciary in 1984 by the amendment to the Section 7(3) and Section 28A of the Civil Law Act, 1956.

The relevant portion of Section 7(3) of the Civil Law Act, 1956 (as amended 2019) with respect to computing the multiplier for future loss states that: -

"(iv)in assessing the loss of earnings (emphasis added) in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall—

a. …
b. …
c. …
d. take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty-one years and fifty-nine years at the time of his death, the number of years' purchase shall be calculated by using the figure 60, minus the age of the person at the time of death and dividing the remainder by the figure 2."

This provision specifically provides for calculating the multiplier in respect of loss of earnings of the deceased person in a dependency claim, and none other. For calculating the loss of earnings in respect of personal injury claim which does not result in death, the same method is repeated

in Section 28A(2)(d) of the Civil Law Act, 1956. The statute is silent on how to compute other continuing future losses or expenses which does not relate to the loss of earnings. Thereby, the Judges are at their liberty to devise the methods for the other kinds of continuing future losses and expenses; such as permanent future nursing care or medical expenses.

The statutory law mentioned above prescribes the arbitrary multiplier of 16 years for those who aged 30 years and below and a variable multiplier for those aged between 31 to 60, by deducting the prescribed age limit of 60 years with the claimant's age and divide by half. It should be noted that the Civil Law (Amendment) Act, 2019, has only recently revised the age limit for future loss of earning and loss of dependency claim to 60 years in line with the rise of the public service retirement age. This statutory amendment was gazetted on 31 May 2019 and came into operation on 1 Sept 2019 (Federal Government Gazette, 2019).

The criticism levied on this statutory prescription centred mostly on the notion that the methodology for the statutory multiplier is arbitrary. It defeats the very fabric of tort law compensation; on the principle of providing 100% damages or compensation for the loss suffered (Lewis & Morris, 2012). However, despite this criticism, one positive outcome is that it provides a consistent methodology for constant output.

This paper focusses on the inconsistency of the judicial methodology being currently applied in Malaysia in respect of computation of damages for future losses and expenses which are not statutorily regulated. The spectrum of future losses damages which are excluded from the statutory purview includes continuing or permanent future nursing care costs or permanent future medical expenses.

MATERIALS AND METHODS

One of the basic concepts of tort damages for a personal injury claim is that the damages award typically takes the form of a lump sum monetary sum. The Court awards the damages in a lump sum, once and for all. Except in exceptional and rare situation, this lump sum damages award or settlement is fixed and final without the possibility of increment or decrement in the future even when there are changes to the claimant's situation. (Cane, 2013).

The Court would not belikely to have any predicaments of finding the actual amount of loss for pecuniary expenses which have been incurred prior to the trial, except to substantiate the amount with sufficient evidence of loss. However, for continuing expenses or losses, it appears that the Court would likely need to have the sixth sense of foresight in order to be able to determine the continuing and future losses accurately; for it to comply with the tort compensation requirement of providing 100% compensation of all losses suffered. In practice, part of this problem has been alleviated by the statutory prescription, but some of the head of future damages are still left for the Court to decide.

For a better appreciation of the issue, this paper adopts the facts of John s/o Netchumayah v. Marimuthu (1985) for a hypothetical scenario in a personal injury claim. The 30 years old plaintiff was involved in an accident and suffered permanent quadriplegia. It was clear that he would never be able to walk again and was greatly dependent on others for his living vicissitudes. Prior to the accident, the plaintiff earned as a cinema operator for $580 a month. Due to the accident, he was incurring costs for nursing care at $200 a month and continuing for the rest of his natural life. From the facts, excluding the scope of special damages from the discussion in this paper, the claimable head of general damages are as follows: -

a. Pain and Suffering;
b. Loss of Future Earnings; and
c. Continuing Future Expenses for Nursing Care.

For item (a) head of damages, i.e. the assessment of the quantifiable damages sum for the pain and suffering for the claimant's injuries and residual sufferings would be by way of judicial trends and precedents (Ali et al., 2017). Assessment of damages for pain and suffering is assisted by the Compendium of Personal Injury Awards produced by the Bar Council's Task Force, which are currently in its 4th version in 2018 and is published every 3 to 4 years since 2007 (Task Force to Review Compendium of Personal Injury Award, 2018). The Malaysian Compendium tries to emulate the English's Judicial College Guidelines, which is currently in its 15th edition in 2019, published biennially since 1992 (Judicial College, 2019).

For item (b), the provision of a fixed multiplier for loss of future earning is governed under the Civil Law Act, 1956 in the form of Section 28A(2)(d). Loss of earnings can be in the form of pre-trial damage and post-trial damage. Pre-trial damage is considered as special damages as the pecuniary amount of losses can be specifically assessed since it has occurred. However, post-trial damage required the Court to predict future loss, and thus, it falls under the category of general damages (Abel, 2006).On the aspect of the interests, the category of damages carries a different proportion of interests; the interests for special damages commences from the date of loss while for general damages, it commences from the date of claim (Mahdzir, 2017). The Civil Law Act, 1956 also placed a cap of the claimable age for future loss of earnings at 55 years. The Act also prescribed a two-tier level of assessment; persons below the age of 30 and those who are between 30 and 55 (Awang et al., 2017). However, this age limit has now been increased to 60 years vide the Civil Law (Amendment) Act, 2019. Thus, the task of predicting the multiplier has been taken away from the Court's discretionary power. What is left is only for the Court to find the appropriate multiplicand based on the available evidence that has been tendered in the Court; taking into account deduction of expenses incurred while working. Thus, in

such a scenario, the Court may deduct some apportionment from the full income amount of $580 as the multiplicand, before using the fixed multiplier of 16 years multiplier as provided under the Act.

For the head of damages under item (c), all other future losses and expenses such as future costs of surgery, medications and nursing care also fall under the general damages. However, this head of damages is not being mentioned in either sections 7(3) or 28A of the Civil Law Act, 1956, nor was it being reviewed in the recent amendment to the Act in 2019. Thus, the computation of the multiplier for this future loss is left at the Court's discretion. The judicial activism of the Court's discretion has led to the inconsistent methodology of various approaches being adopted by the courts to assess this type of future damages. The assessment of the multiplicand is based on factual evidence available while the assessment of multiplier requires evaluation of expert evidence in terms of the disability suffered as well as determining and predicting the future consequences for the claimant. Without a prescribed methodology to assess this spectrum of future loss, the Court is left to rely on its judicial activism on this spectrum that leads to a multitude of methods with contrasting results.

The problem of quantifying the multiplier would only exist in cases where there is evidence of continuing and permanent future loss or expenses, as in the nursing care costs or medical costs for permanently disabled persons, as in the cases of paralysed and comatose claimants. If the medical experts only prescribed a specific shortened duration for the nursing care or medical requirement, the problem of assessing the multiplier would be eased as the specified duration would be used as the multiplier figure; without the need to consider the full lifespan multiplier (Husaini, 2019).

The question follows how to calculate this spectrum of damages; to calculate for future losses at the present value to abide with the tort compensation principle of 100% lump-sum compensation for past, present and future losses.

PREDICTING FUTURE LOSSES

Future losses and expenses which are excluded from the purview of the Civil Law Act, 1956 statutory provisions, included continuing permanent nursing care costs, medical costs, medication expenses and other permanent continuing requirements pertaining to the life and health of the permanently disabled claimant (Husaini, 2019). A claim for nursing care occurs when the claimant becomes permanently disabled due to the tort and thus requires continuing services to be rendered to him in attending to his daily needs (Kandiah, 1996).

In contrast to future loss of earnings and loss of dependency which are regulated by the Civil Law Act, 1956, the assessment for permanent future nursing care or medical expenses has been left to fend for itself by the legislators; allowing the Court to apply its discretion on the assortment of methods to calculate the years' purchase for loss of future permanent nursing care costs. Judicial

activism has created various approaches in the assessment of this spectrum of damages. The Court in Bujang Mat & Anor v. Lai Tzen Hai & Anor (2004) has even acknowledged and endorsed the existence of 5 distinct methods which has been used by the Malaysian Courts to calculate future losses in respect of permanent future nursing care costs or permanent future medical costs.

One may ask why it is difficult to compute the damages when it only requires the Court to find how much are the claimant's future losses are for the whole of his natural life span. While it seems easy to be said, but in legal reality, that very fabric of assessment entails variables which could not be accurately predicted with 100% certainty (Chan et al., 2012). For instance, one cannot predict the natural life span of a person since many possible contingencies may happen in the future. The assessment of individual mortality is guided by actuarial assumptions based on the general statistics of a particular jurisdiction. For instance, the mortality rate of a citizen in Malaysia in 2019 is 74.5 years (Department of Statistics Malaysia, 2019). Still, it does not necessarily ascertain that a Malaysian citizen could not live beyond that prescribed aged or work beyond the statutory age limit. An example can be seen in the like of Malaysian own former prime minister, Tun Mahathir Mohamad, who became the Malaysian 7th Prime Minister at the age of 92 years old.

This predicament is compounded by the fact that tort compensation requires the Court to assess the full 100% damages by a lump sum payment at the present value for the claimant. Thus, since most of the future losses have not yet occurred when the Court makes its finding, the Court needs to consider accelerated payment issues in its computation. Accelerated payment involved the Court to consider that the claimant is given a lump sum money for losses which have yet to occur and thus, the Court normally consider a discount, which is known as a discount rate in the UK, when allowing a lump sum payment for prospective future losses. This contingency and acceleration payment consideration has seen the UK courts allowing a discount rate of up to 4.5% to 2.5% a few years back in the UK (Fairgrieve & Gauci, 2017). However, since 27 February 2017, this discount rate has dipped to a negative percentage of -0.75% for the first time (Government Actuary's Department, 2017). It was assumed that the claimant would not make sufficient investment returns based on the lower risk investment vehicle such as Index-Linked Government Stocks (ILGS) (Wells v. Wells, 1998). Furthermore, the expenses suffered may have escalated much more in the future based on the inflation fluctuations.

INCONSISTENT METHODOLOGY

The first method is by applying the direct multiplier envisaged by the statutory provisions in the Civil Law Act, 1956, i.e. adopting a fixed 16 years multiplier for claimants aged under 30. Authorities that had adopted this methodology were influenced by the Supreme Court case of Marappan & Anor v. Siti Rahmah bte

Ibrahim (1990) in which the Court assumed that the legislature had taken into account the contingencies and accelerated lump sum payment factors when legislating the set multiplier. As such, the Court deemed bound by the set multiplier and declared that there was no need for any legislation to repeal what was merely a matter of practice when refusing to apply the annuity tables approach trend.

This decision caused much debate since the Supreme Court had not sufficiently rationalised the fixed multiplier for damages which were not mentioned in Section 28A of the Civil Law Act, 1956. However, since the decision emanated from the highest Court at that point in time, it had created a binding precedent and was followed by the courts since 1992 in Chandran v. Mohammad Razali bin Jaafar (1992) to the more recent cases of Kanan a/l Subramanian & Anor v. Aman Syah bin Abadzyuid (2002), Marimuthu a/l Velappan v. Abdullah bin Ismail (2007) and Syarizan bin Sudirman (a Child Claimed Through the Father and His Attorney Sudirman bin Selamat) & Ors v. Abdul Rahman bin Bukit and Anor (2010).

The second method is found in the precedent of the case of Zamri Md Som & Anor v. Nurul Fitriyaton Idawiyah Nahrawi (2002), which applied a direct multiplier but not limited to 16 years. The High Court while mentioning the case of Marappan & Anor v. Siti Rahmah bte Ibrahim (1990) in its deliberation merely compared that in the latter case, the claimant aged 23 years was awarded based on a multiplier of 16 years for the post-trial damages and considered 20 years would be appropriate for a 10years old claimant in the current case. How the figure is arrived at is anyone guesses. In another case of Wong Li Fatt William (an infant) v. Haidawati bte Bolhen & Anor (1994), the High Court had applied a direct multiplier of 10 years for a 3-year-old claimant after taking into account elements of accelerated payment and inference of reduced life span of the claimant. Thus, this second method is simply a figure based on the judicial perception, which was varied from Court to Court and judge to judge.A judge is entitled to select the years' purchase at his discretion, which may be speculative at the end. Authorities are not in uniformity as far as the numbers of years' purchase are concerned, and they do not help to draw a clear, distinct and authoritative conclusion (Dass, 1975).

The third approach is adopting a direct multiplier after by taking into account the balance lifespan of the claimant. The High Courts in Ng Chun Loi v. Hadzir & Ors (1993) and Tan Ah Kau v. The Government of Malaysia (1997) had utilised this approach in the assessment of permanent future nursing care costs. The courts made no deductions for contingencies when making an award in respect of costs of nursing care. A more recent High Court decision which supports this approach is the case of Intan Nirwana Sdn Bhd & Anor v. Srimahendran Lingam Maniam & Anor; Nayanasegar Haruskrushna (Third Party) (2011) in which the Court adopted a 40-years multiplier without any contingency deduction. The Court in that case even rationalised that the

decision not to deduct 1/3 for contingencies was not erroneous as indicated in the case of Bujang bin Mat & Anor v. Lui Tzan Hai & Anor (2004). However, there is a recent High Court decision of similar jurisdiction which had refused to apply this approach, as in Rosli bin Saad & Anor v. Salmiah binti Mat @ Mehat (2018).

The fourth approach is a bit more deliberate; the Court considers the life expectancy of the claim at the time of the accident and deducts1/3 for contingencies and accelerated lump sum payment, and a apply direct multiplier before calculating the output. The 1/3 deduction has no economic or actuarial foundation, but merely a judicial practise to take into account the early gains for accelerated payment or other contingencies, such as early death. In Chandra Sekaran a/l Krishnan Nair & Anor v. Ayub bin Mohamed & Anor (1994), the High Court had agreed to adopt this approach in awarding the claimant who was permanently paralysed as the Court considered that it was the "common law" approach without mentioning the source of the precedent common law. Some of the cases which adopted this approach included the Court of Appeal in Wong Kuan Kay v. Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Appeal (2015) and the High Court in Chan Yun Seng v. Zakaria Awang (2019).

The fifth approach is also using the life expectancy minus age at the time of the accident to determine the appropriate base multiplier. However, in contrast to using a 1/3 reduction for contingencies and accelerated payment as in the fourth approach, the Court utilises annuity tables with no deduction for calculation of the output. This approach adopted a method which was initially used by the Indian Courts to assess future losses by using annuity tables. The table uses the basic financial concept of present value, i.e. the current value of future loss sum given at a specified rate of return. Future loss sum is reduced at the discount rate, and the higher the discount rate, the lower the present value of the future loss sum. The rate of return applied in Malaysia has been fixed at 5% interests per annum on the annual varying depreciating capital.

For example, if the future loss is $1,000 a month, the annual loss will be $12,000 and adopting a five years' purchase or multiplier, this will amount to $60,000. However, since the loss of the next five years has not yet occurred, it would not be just to award the claimant the full $60,000 for the loss which has yet to occur. As such, using the basic financial concept of the present value of $60,000 for the next 5 years at the rate of return of 5% per annum, the present value is only$51,953.72.In another perspective, this sum if invested at a rate of 5% per annum will yield interest, but the interest will be insufficient to make up the annual loss of $12,000 per annum; hence, withdrawals from the capital will be necessary to make up the annual loss sum of $12,000. See the illustration in Table 1.

Table 1

Present value calculation for future loss

YEAR	REDUCING CAPITAL SUM	ANNUAL LOSS $1,000 a month for 5 years purchase	INCOME ON INVESTMENT At the rate of 5% per annum on the reducing capital	CAPITAL REDUCTION / WITHDRAWALS
1ST	51953.72	12,000.00	2597.69	9402.31
2ND	42551.41	12,000.00	2127.57	9872.43
3RD	32678.98	12,000.00	1633.95	10366.05
4TH	22312.93	12,000.00	1115.65	10884.35
5TH	11428.57	12,000.00	571.43	11428.57

This annuity table is based on the rate of return of 5% per annum on reducing capital. However, this 5% rate of return was based on the standard investment return at that time when the table was presented by Messrs Murphy & Dunbar way back in the 70s (Dass, 1975). The same rate of return has been used even until now despite the fluctuation of the rate of return throughout the years. There is also no judicial guide for the changing of the annual return rate being practised by the Malaysia courts. Cases that had adopted this approach among others are Inderjeet Singh v. Mazlan bin Jasman (1995) and Yu Mea Lian & Anor v. Government of Terengganu & Ors (1997).

All these approaches are considered valid under the law despite its multifariousness. The High Court in Bujang Mat & Anor v. Lai Tzen Hai & Anor (2004) while acknowledging these different methods used in the computation for permanent future nursing care, had still to choose only one of the approaches and merely applied the fourth approach, i.e.by taking the balance lifespan with 1/3 contingencies for accelerated payment. It was unfortunate that the Court did not indulge itself in specifying whether this approach was the valid approach compared to the other. The Court iterates that any of the approaches may be used to determine the multiplier in the assessment of permanent future nursing care or future medical expenses. With due respect, the Court in Bujang Mat should have taken the opportunity to adopt the best-reasoned approach on the issue once and for all when it realised the ambiguity of having a multitude of approaches in calculating permanent future nursing care/ medical expenses (Husaini, 2019).

DIVERSITY OF THE OUTPUT AWARDS

Analysis of the output of each approach bears contrasting results. This paper is applying the factual background of Marappan & Anor v Siti Rahman bte

Ibrahim (1990) as a hypothetical example; which involved a 23-year-old claimant and a multiplicand for the nursing care costs at $350 for the whole life expectancy. The mortality rate of the claimant is assumed by way of national mortality statistics at 74.5 years (Department of Statistics Malaysia, 2019). The analysis of the output awards is tabulated in Table 2.

From the above, using all the valid and legally endorsed judicial methodology in computing future losses such as nursing care costs, the range of award may be between $42,000.00 up to $216,300.00 based on the same factual background and applying the same rate for the multiplicand. Each approach appears, for the time being, to be valid methods in assessing permanent future nursing care or medical expenses and could not be discounted as flawed. However, the contrasting results definitely imply a flawed judicial output as a consistent output could not be obtained on the same factual situation. For the claimants, they would choose the method which results in the highest output while for the defendants, on the adverse. However, this is far from realities in practice, as it remains the prerogative of the Court to utilise the appropriate multiplier based on any of the approaches as reflected

Table 2

Output awards for each approach

APPROACH	DETAILS	MULTIPLICAND ($)	MULTIPLIER	OUTPUT AWARD ($)
1	The direct multiplier of 16 years	350	16 years	67,200.00
2	The direct multiplier not limited to 16 years	350	Flexible: 10 to 20 years	42,000.00 – 84,000.00
3	The direct multiplier of remaining life span	350	74.5 years – 23 years = 51.5 years	216,300.00
4	1/3 deduction from the remaining life span	350	74.5 years – 23 year – 1/3 = 34.3 years	144,900.00
5	Annuity table calculation from the remaining life span	350	74.5 – 23 years = 51.5 years and calculated using annuity tables	77,191.83

in the cases cited earlier; which leads the parties merely hoping for the best outcome for their benefit.

This different output creates a problem for the legal professionals of the industry. The claimant would insist on the highest possible award and would expect the highest output method to be used for the computation of their claim. However, can the claimant's legal representative confidently and assertively assure his or her client that it would be so when the Courts are also using other approaches as the "correct" approach? On the other perspective as well, the defendants, which are usually represented through the intermediary of an insurance company in a personal injury claim involving a motor accident, also cannot assure of their actual risk, when the range can triple from the lowest risk amount.

CRITICISM OF THE METHODOLOGY

The simple analysis above reveals different results to the same factual situation. Each approach results in contrasting monetary sum. There is no prescribed condition for any of the approaches to be applied for a particular set of facts. It appears for now that everything goes. However, it is also not viable to have a particular set of criteria to entitle the claimant to apply a specific approach, which bears the highest output, since each method produce a different outcome.

The existence of diverse approaches to calculating the multiplier in permanent future nursing care is not an anomaly which could remain viable to be left on its own. It is not plausible to have a divergent of calculation, which results in contrasting outcome. This inconsistency of methodology would affect the credibility of the judgment; if the same case is presented before a different court, it can produce a different outcome. This credibility of judgment is not caused by an error of judgement but is rather endorsed by precedents (Husaini, 2019).

A PRAGMATIC PROPOSAL

One of the possible solutions for this debacle is for the Court to take cognisance of the flawed and inconsistent outcome if the various methods of assessment of the future losses are to remain. The Court may adopt a single approach rather than endorsing all approaches in order to achieve a consistent output in a similar fact situation. This may be an immediate and possible resolve based on the current legal scenario without the need for legal reform or legislative intervention. The case of Marappan being a Supreme Court case may have laid a foundation for a stricter guideline on the computation of the multiplier in this circumstance based on the doctrine of binding precedent. Though many authorities seem to deviate from the precedent, it should remain binding for all courts below. However, it is proposed that permanent future nursing care or permanent future medical expenses and the calculation thereof would be timely included in the statutory provision, as an independent section, similar to section 7 and section 28A(2)(d) of the Civil Law Act, 1956, rather than mere back riding

a provision which it was not meant to be (Husaini, 2019). However, all the methods of assessment are not without its fallacies as none of the approaches could meet the actual tort compensation of 100% damages for the loss suffered in the maxim of restitutio in integrum (Husaini, 2019).

The UK adopted a much more scientific approach by using Actuarial Tables (which are usually called as Ogden's Tables, taking the name of the first chairman of the committed which drafted the Actuarial Tables), which was first published in 1984 by the UK Government Actuary's Department: now in its 8th edition, published in 2020 (Government Actuary's Department, 2020). The development of the Actuarial Tables in the UK is not an easy assignment and was constructed based on the statistical data of the local jurisdiction (i.e. the United Kingdom) as compiled regularly by the Office of National Statistics, UK. The first edition was merely based on the mortality rate at that time. Each edition has improvements and updated schedules based on current situation and developments and even includes contingencies other than mortality factor in the actuarial calculations, which were updated and improved from time to time as new editions to the Actuarial Table are published (Hasim, 2016; Mohamad et al., 2012)

While this actuarial approach may be a viable solution to achieve the concept of tort compensation of 100% damages in a lump sum award, Malaysia cannot simply adopt the UK Actuarial Tables to its own shores without modification and statistical data of the local jurisdiction. However, the UK Actuarial Tables could be the guide for Malaysia to develop its own Actuarial Tables. Malaysia needs to set up a committee which would be responsible from time to time to review and develop the Actuarial Tables as need be based on the current situation at a particular time. The UK committee that is responsible for the development of the Actuarial Table: Personal Injury and Fatal Accident Cases were formed from a group of actuaries, law members, members from insurance companies and even academicians, who are experts in claims, personal injury and negligence areas (Mohamad et al., 2012).

The above solutions are based on the lump sum award framework. Whilst a lump-sum payment offers a once-and-for-all payment, and a clean break is often attractive to both sides, it has long been recognised that this form of the award is unsatisfactory in its ability to deliver on the restitution objective of damages (Cropper & Wass, 2009). Thus, a structured payment for future losses could be the option for paying common law damages for future losses, thereby eradicating totally the need to predict a suitable multiplier for future losses. This concept of structured payment was adopted from the United States as a means of converting a lump sum into periodical income throughout the lifespan of the victim. The Court in the UK approved the first structured settlement in 1989 but was not widely used despite its advantages (Lewis, 1994).

The structured settlement payment would enable seriously injured claimants to receive regular payments which could be guaranteed to last for their lifetime (Cropper & Wass, 2009; Lewis, 2010) rather than having a large lump sum payment which may either be under-compensated if the claimant's mortality prolonged and vice versa. There are many other advantages of the structured payment which have been detailed by other authors (Cropper & Wass, 2009; Lewis, 1993, 2006).

The unsatisfactory nature of the lump sum payment for tort compensation was raised by the House of Lords in Wells v Wells (1998) before the Damages Act 1996 was amended in 2005 whereby the structured payment award was recognised as one of the forms of damages award for future pecuniary loss in respect of personal injury (Section 2, Damages Act 1996) if the Court was satisfied that the continuity of payment under the order can be fulfilled by the defendant. Since the real payor of the judgment for most of the personal injury claim especially in relation to motor vehicle accident would be the insurer under the compulsory motor insurance requirement provisions, the claimant would rest assured of the continuity of payment under the structured settlement award. In the UK experience, the adoption of structured settlement payment was initiated by the Court even before the statutory codification. Thus, the Malaysian Courts may also award in such manner based on their own inherent powers provided under the Courts of Judicature Act, 1964.

RESULT AND DISCUSSION

There exists no strict rule or guide as to the computation for permanent future nursing care costs. Upon perusal of the trend of awards by the courts, as highlighted above, it is quite clear that there are various methods available. This spectrum of damages has been excluded from statutory regulations in the 1984 amendment of the Civil Law Act, 1956 and again in 2019 amendment of the same Act. The question follows as to whether it should remain that way or is it high time to regulate the assessment of permanent future nursing care, similar to the damages in respect of future loss of earnings and loss of dependency. If left at this pace, the computation of damages, especially in the arena of multiplier for permanent future loss in respect of medical treatment and nursing care, would be left at the whims and fancies of the presiding judges without real certainty whether that computation is right or wrong. However, even if legislation intervention is used to standardise the computation of the multiplier, a reliable method for the computation of that multiplier needs to be properly determined under the principle of restitutio in integrum rather than having a simplistic legislative arbitrary dictation of the multiplier figure as in the current section 28A of the Civil Law Act, 1956. Another viable option which complied with the tort restitution principle is the structured settlement payment award which may be initiated by the Court on its own powers.

CONCLUSION

The judiciary is aware of the multiple methods to calculate the permanent future expenses or losses such as future nursing care and medical expenses but had not streamlined the methods into a common output for the like cases. The doctrine of binding precedent further compounds the problem wherein the courts are bound to follow past precedents, but it appears that past precedents are no consensus on the method and adopt various methods as a valid way of assessing this type of permanent future losses. The notion of justice does not prescribe the like cases to be treated differently to produce a different result. The precedents do not impose any conditions on how the various methods are applied to particular cases. Thus, various methods that produce different awards are a flawed justice on its own and cannot be allowed to continue. The legislature should take action as it once did in 1984 regarding the calculation of loss of earnings. While the legislative arbitrary multiplier may not be in tandem to the doctrine of restitutio in integrum, a mechanism such as the Ogden's Tables used in England may provide a better solution. If the legislature neglects to take heed, the judiciary could still provide a solution by only adopting a single assessment method for this purpose rather than endorsing all. There is also the structured payment mechanism under the purview of the judiciary's tools to avoid altogether with the complication of predicting the future.

ACKNOWLEDGEMENT

We are grateful to Mr. Ting Kong Hock and Professor Dr. Richard Hyde for their insightful discussions and supervision especially pertaining to the United Kingdom's experience on the subject matter. Special thanks and appreciation to Professor Dr. Zuhairah Ariff Abd Ghadas for supporting us in this research work.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 17 - 28 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Prospect and Legal Challenges of Medical Tourism in Relation to the Advance Medical Directive (AMD) in Malaysia

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ABSTRACT

People fly for several reasons. One of the goals is to obtain medical attention. This idea is known as "medical tourism." In defending this concept, the notion of medical tourism is one of the prospects of increasing industries that have rapidly grown in Malaysia and other countries. One of the factors that led to this trend is the propensity to pursue better medical care at a lower cost. Around the same time, certain patients in modern society have begun to provide input on their medical care in cases where they are unable to give consent. Advance Medical Directive (AMD) is a particular directive containing the desires of a knowledgeable patient regarding his or her future medical plans if he or she becomes incompetent or unable to make any decisions regarding his or her body. However, the concern that arises in the sense of medical tourism is whether there are applicable laws in Malaysia that will ensure that the AMD of patients is enforced. The art of AMD is still relatively new in the country and, as a result, the legal status on the AMD is still vague and uncertain. The purpose of this article is, therefore, to define the laws that can be applied in relation to AMD in the context of medical tourism. The approach used in this article is qualitative. It found that Malaysia did not have a clear

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.02

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ISSN: 0128-7702
e-ISSN: 2231-8534

legal framework for AMD within the scope of medical tourism. This article concludes that this legal challenge can be overcome by means of the special AMD regulations on medical tourism in Malaysia.

Keywords: Advance Medical Directive (AMD) Arahan Perubatan Awal (APA), consent, medical ethics, medical tourism, medical law, Malaysia

INTRODUCTION

Nowadays, medical tourism has become a renowned and exclusive industry in Asian countries. Patients from other countries fly to countries such as Malaysia, Singapore, India and Thailand for medical care(Lunt et al., 2011; Wahed, 2015; Kandasamy & Rassiah, 2010). Medical tourism has fashioned because of lower costs in treatment, for more prominent access to quality and to recognized medical treatment (Horowitz et al., 2007; Gray & Poland, 2008; Ormond, 2011). In Malaysia, medical tourism is being promoted by the government to boost the country's economy. A research conducted in 2010 involving five private hospitals in Malaysia brought into being that the low cost of medical treatment, excellent medical facilities, religious similarity and cultural were the focal motivation that attracts foreign patients (Musa et al., 2012). The study included five private hospitals, KPJ Ampang Puteri Specialist Hospital, Pantai Medical Center (Bangsar), Pantai Hospital Klang, Sime Darby Medical Center Subang Jaya and Sunway Medical Center. These hospitals have been selected as a sample for study (Ministry of Health Malaysia, 2010). During the study period, 138 questionnaires were completed and returned, with a response rate of 34.5%. As a result, the numbers of questionnaires returned were 25 (Pantai Medical Centre) (Bangsar), 22 (Sime Darby Medical Centre Subang Jaya), 27 (KPJ Ampang Puteri Specialist Hospital), 43 (Sunway Medical Centre) and 21 (Pantai Hospital Klang) (Musa et al., 2012).

In Malaysia, medical tourism shows a significant growth in terms of the number of foreign patients who travel to Malaysia to gain medical treatment (Wahed, 2015). Malaysia received 921,000 international patients in the year of 2016, 859,000 foreign patients in the year of 2015, 882,000 foreign patients in the year of 2014, 881,000 foreign patients in the year of 2013, 728,800 international patients in the year of 2012 and 641,000 foreign patients in the year of 2011 as per stated by the Malaysia Healthcare Travel Council (MHTC) (Malaysia Healthcare Travel Council, 2018). The MHTC tasked to raise Malaysia's profile as the world's top-of-mind destination for world-class healthcare services, and in fact, it is an agency under the Ministry of Health Malaysia (MoH). MHTC was founded in 2009 and works to promote the overall growth of the Malaysian healthcare travel industry by coordinating industry alliances and building beneficial public-private partnerships, both domestically and abroad (Malaysia Healthcare Travel Council, 2018). In 2009, Nuwire ranked Medical Tourism in Malaysia as one of the top five destinations for health tourism

in the world (Yanos, 2008). Previously, according to the International Medical Travel Journal (IMTJ), Malaysia was also known as the "Destination of the Year" (International Medical Travel Journal, 2015). The Association of Private Hospitals Malaysia estimated that some USD$59 million in revenue came from medical tourism in 2006 (Yanos, 2008).

In Malaysia, several arrays are provided in terms of medical procedures. For example, in the case of medical procedures such as cosmetics, cardiac surgery and dental surgery, the cost is marginally lower compared to the United States of America (USA) (Luce, 2010). For example, the cost of cardiac bypass surgery in Malaysia is between USD$6,000 and USD$7,000, according to a publication by Tourism Malaysia in November 2007. Cardiac surgery in the USA could cost around USD $30,000. Malaysia draws medical tourists and investors equally for its favorable ex-change pace, political and economic stability, and high literacy rates. According to the statistics cited by Hospitals-Malaysia. org, Malaysia is providing a robust network of hospitals and clinics. The reason Malaysia has given the impression that it has an extensive network of hospitals and clinics is because 88.5% of the population live within three miles of a public health clinic or a private clinic (Yanos, 2008).

However, several legal issues have arisen because of the growth of medical tourism worldwide, including Malaysia. The main purpose of the paper is to discuss the legal issue in the field of medical tourism related to AMD, as this problem can influence patients who decide on their destination of choice for medical tourism. In this article, the topic is divided into several parts, namely the definition of medical tourism, Advance Medical Directive (AMD), result and discussion, COVID-19 pandemic and medical tourism, and the conclusion. The first section summarizes the introductory portion in which the emphasis would be on the concept of medical tourism. Then there is a debate on the legal issues that occur because of the growth of the industry.

MATERIALS AND METHODS

This article followed a pure legal research approach using a qualitative study of medical tourism and the Advance Medical Directive (AMD). Content analysis can vary from the simplest method of word counting to thematic analysis or conceptual analysis (Krippendorff, 2004). Using content review, this article analyses the trends of medical tourism, concentrating primarily on the opportunities and legal problems of the Advance Medical Directive (AMD) in Malaysia. Medical tourism is an emerging phenomenon in Asia, especially Malaysia. Without a proper and specific legal framework for the management of medical tourism, in the Advance Medical Directive (AMD), the purpose of which was to address this issue in this area. Data obtained based on primary and secondary sources, focusing on secondary sources.

THE DEFINITION OF MEDICAL TOURISM AND THE DESTINATION OF MEDICAL TOURISM

As indicated by Meštrović medical tourism implies a procedure of going outside the country of residence to receive medical care (Meštrović, 2018). It also integrates the idea of flight, but it does not astound the gravity arising from patient mobility (Glinos et al., 2011). Medical tourism is a concept that proposes relaxation to restore wellbeing, regardless of the misery endured by patients (Kangas, 2010). It also means a patient going overseas to undergo medical attention, to protect his or her health or to carry out routine medical examinations (Yap et al., 2008).To protect health, the right to protect health must be considered because it includes the most basic human rights which are the right to life (Sulaiman et al., 2018). Health tourism refers to patients who travel abroad to protect their health, such as receiving surgical medical care (Connell, 2006). It refers to people who travel to another country for at least 24 hours to cure illness, preserve fitness (such as yoga and massage), beauty (such as plastic surgery) and fertility care (Tourism Research and Marketing (TRAM), 2006).

Medical tourism is becoming a rapidly expanding industry, with countries in Asia/ Middle East, the Americas, Europe, Africa and other countries providing healthcare to people in other countries(Carmen & Iuliana, 2014; Horowitz et al., 2007). According to Patients Outside Borders, many Americans go outside the United States to seek medical attention, and the number has gradually risen over the last decade. Patients beyond Borders details that approximately 8 million patients from all over the world are pursuing out-of-country care that contributes to a global industry estimated at approximately $20 billion to $40 billion (Clements Worldwide, 2018).

Table 1 indicates that medical tourism can be divided into five major categories of destination that people travel to obtain medical care. Asia/Middle East, the Americas, Europe, Africa and other countries are the major categories of medical tourism destinations. Malaysia, which is part of the Asian nations, is affected as a medical destination for visitors. The division of categories shall be as shown in the Table 1.

In the sense of Malaysia, more than half a million medical tourists are coming to Malaysia every year, looking at the prospects of the medical tourism industry. For people looking to find help and assistance outside their home country, Malaysia is ranked as one of the most health-friendly countries. The Medical Travel Efficiency Alliance has called the Prince Court Medical Center in Kuala Lumpur the first in the hospital ranking for "Patients without Borders" (Clements Worldwide, 2018). According to Clements Worldwide, two requirements have attracted Americans, i.e., most of the population of that country is English-speaking and the country has a strong infrastructure (Clements Worldwide, 2018).

In addition, the most common procedures that people undergo on medical tourism trips include cardiac surgery, cosmetic surgery, and dentistry (such as for

Table 1

Medical tourism destinations

Asia/Middle East	The Americas	Europe	Africa	Other
China	Argentina	Belgium	South Africa	Australia
India	Brazil	Czech Republic	Tunisia	Barbados
Jordan	Canada	Germany		Cuba
"Malaysia"	Colombia	Hungary		Jamaica
Singapore	Costa Rica	Italy		
South Korea	Ecuador	Latvia		
Philippines	Mexico	Lithuania		
Taiwan	United States	Poland		
Turkey		Portugal		
United Arab Emirates		Romania		
		Russia		
		Spain		

*Source: Carmen and Iuliana (2014); Horowitz et al. (2007)

general, restorative and cosmetic). Other health and care programs that are often registered include cancer (often high acuity or last resort); reproductive (fertility, IVF, women's health); orthopedics (such as joint and spine; sports medicine); weight loss (LAP-BAND, gastric bypass); tests, scans, second opinions and health screenings (Clements Worldwide, 2018). In Vitro Fertilization (IVF) context, Malaysian hospitals are a big player, and the cost of IVF is 20% lower than many other western hospitals. Physical and blood work that can be considered as costly in the USA is also significantly low-priced in Malaysia.

Advance Medical Directive (AMD)

AMD can be used as a document describing the types of care that the patient will be allowed to receive and those that are not allowed when the patient has been impaired (Zainudin et al., 2015). AMD (also known as "Arahan Perubatan Awal" (APA) in the Malay language) makes a patient have a voice in circumstances when they no longer have control over what is being done to them (Zahir et al., 2017a; Zahir et al., 2017b; Zahir, 2017c; Zahir et al., 2019a). As a result, AMD is a directive that empowers a patient to exercise his right to decide as to what he wishes to do to treat him wisely before he loses his mental capacity to do so (Sommerville, 1996). In short, he exercises his free right as a person until he ultimately becomes disabled (Zahir et al., 2019a. Based on the concept

of autonomy, every individual has a right to health. Autonomy has an intrinsic value and applies to communities that can manipulate their attitudes in such a way that, contrary to what is the situation, people can choose the kind of life they want to live (Glover, 1977). Beauchamp and Childress (2009) have found that respect for autonomy is related to confidentiality, privacy, fidelity and truth-telling concerns, but was most strongly linked to the impression that patients should be allowed or allowed to make independent decisions regarding their health care. In this context, he or she can also make an AMD stipulating that his/her does not want to continue treatment or to undergo any medical intervention for him/herself. The AMD was built based on the concept of autonomy.

The criteria of legally competent must be fulfilled by a patient who plans to make his AMD (Zahir et al., 2019b). An adult patient, for instance, has an absolute right as to whether to choose to allow or refuse treatment nevertheless the choice is rational or not *(Re T (Adult) [1992] 4 All ER 649).* While in the Supreme Court of Canada's seminal decision in Cuthbertson v Rasouli, 2013 SCC 53 has been made clear that physicians must seek permission to withhold life-sustaining care, except when physicians feel that the treatment is ineffective or detrimental to the patient. The New Jersey Supreme Court decision in Re Quinlan, 70 N.J. 10, 355 A.2d 647 (NJ 1976) held that if the Ethics Committee concluded that Karen Ann Quinlan would not recover consciousness despite continuing medical treatment, the health care providers involved in the care of her would not be held accountable. Consequently, any order, such as AMD, defined by a patient, which may refuse to grant authorization and which may do so, is legally binding and, in the event of a loss of that power, its decision remains effective (Kennedy & Grubb, 1998).

However, the growth of AMD legislation in Malaysia is still slow-moving (Zainudin et al., 2016). No local case relating to AMD has yet been identified. Although the registered medical practitioners of the Malaysian Medical Council (MMC) by means of Articles 17 and 18 of the Consent for Treatment of Patients have a general guideline that mentions AMD, this is still unclear and is just a soft regulation. In general, any person can decide to refuse medical treatment pursuant to Article 17 (Malaysian Medical Council (MMC), 2016). A legally qualified person has the right to make a choice in respect of his own body. For such a person, the right to refuse care always remains, irrespective of his or her reason for making such a decision, either his or her choice appears rational, uncertain, unreasonable or even non-existent. If coercion is extended to a qualified patient who has validly declined to continue care, it could lead to a battery or an attack. A medical practitioner should refrain from providing any care or treatment if there is a written order that is unequivocal to the patient specifying that such treatment or treatment should not be given under the circumstances currently applicable to the patient (Malaysian Medical Council

(MMC), 2016). This prohibition is explicitly stated in Article 18 (Malaysian Medical Council, 2016).

RESULT AND DISCUSSION

Based on literature, the phrase "tourism" and "medical" are two separate phrases but have attracted a great deal of attraction in the modern form of the tourism segment (Sarwar, 2013). Malaysia, geographically situated at the crossroads of Asia, has become a strategically lucrative market leader and a fast-growing health service provider in the Asian region (Kassim, 2009). Medical tourism across international borders has been made possible through two factors such as the affordability of air fares and the Malaysian ringgit (MYR) aspect, which is a favourable exchange rate for tourists. This has led to a good effect on the phenomenon of medical tourism combined with medical travel by visiting famous tourist attractions in Malaysia (Kassim, 2009). Despite this, two things make Malaysia a popular destination for medical tourists, i.e., modern medical facilities and affordable medical fees (Sarwar, 2013). On the other hand, the impact of medical tourism may increase the number of foreign patients who could open threats of malpractice lawsuits to Malaysian health care providers and cause a wide range of legal challenges from different countries (Kassim, 2009). Now, to a limited degree, about the regulation of medical tourism and challenges, there is no agreed legal mechanism at international level for legal remedies relating to insufficient care across international borders (Kassim, 2009).

As far as the status is concerned, a range of legal issues emerge about the growth of the sense of medical tourism. First, a patient travelling abroad to obtain medical attention may find it difficult to seek justice for AMD in the destination countries in cases involving medical malpractice due to the inadequacy of the law. For example, if the doctor does not obey the patient's instructions as set out in his AMD, it is not sufficient if the doctor must follow the patient's instructions, if the patient is legally ordered, and if the doctor may be penalised if the patient fails to follow the patient's instructions.

As regards the rights of patients to obtain legal advice and guidance on medical care abroad, there is no uniform legislation regulating them (Lunt et al., 2011). In the sense of AMD, for example, the patient may be unaware of his rights and ability to take civil action and seek damages in cases of medical negligence or medical accident if the doctor follows or refuses to obey the orders of the patient as stipulated in his AMD in Malaysia. This issue demonstrates that there is a problem with the lack of certainty and clarification of security of patients' rights in this country.

In addition, medical tourism is also faced with a problem as it has been blamed for developing a two-tier healthcare system in the countries of destination. The industry has also widened the divide between the distinctive groups that are caught between international patients versus local patients and the poor versus the wealthy (Smith et al., 2011). For example, by upgrading medical

technologies for private hospitals that offer healthcare to international and affluent local patients, as this compares with old buildings and obsolete hospital facilities for local and lower-income patients, leaving them without primary care (Kanchanachitra et al., 2011; Leonard, 2013).

COVID-19 Pandemic and Medical Tourism

There were 114,000 confirmed cases in mid-March 2020 and 4,000 deaths in COVID-19, with China, Italy, Iran and South Korea among the four main countries affected by the virus. The World Health Organization (WHO) announced that the outbreak of COVID-19 in Wuhan at the end of 2019 had reached the threshold of a global pandemic on 11 March 2020. It is an infectious disease and can spread from one person to another (Human Rights Watch, 2020). By early 2021, there are 219 countries and territories across the world affected by COVID-19. The list of countries and their regional classification is based on the United Nations Geoscheme. There are 109,140,311 coronavirus cases, 2,406,371 deaths and 81,182,759 recovered global cases have actually been registered (Worldometers, 2021). Debatably, the US is also a wild card, as the actual number of cases is elusive. The MoH has increased bed capacity in preparation for an international projection of 5,000 new COVID-19 cases daily from end February 2021 (Code Blue, 2020). Malaysia has a total of 25,456 beds for COVID-19 patients across hospitals and low-risk quarantine and treatment centres nationwide, with a 43% occupancy rate as of 23 December 2020 according to Health Minister Dr. Adham Baba (Code Blue, 2020). The fact is many primary sources of medical tourism and destination countries are affected by COVID-19 (Youngman, 2020). Youngman is looking at what this means for medical travel, and he is uncertain about the future. Over 99 countries have confirmed cases, while 70 governments have restricted travelers from impacted areas, prohibited flights to some counties, and modified visa requirements. Restrictions and virus concerns have especially badly crushed tourism in the sector (Youngman, 2020). According to Youngman, medical tourism needs to work together to respond to the recovery of this outbreak of COVID-19 (Youngman, 2020).As regards the situation of COVID-19, by providing standardized laws on AMD, it is advantageous to protect medical tourists who have legitimate and enforceable AMD who have already travelled to Malaysia.

CONCLUSION

The growth of medical tourism brings multiple benefits to people, including patients around the world. It leads to the possibility that people will have a "way in" to quality care that is unapproachable in their home countries at a lower cost, in addition to allowing immediate access to medical treatment. However, there are also legal obstacles and barriers to the growth of medical tourism, which could shake the further growth of the industry. Therefore, the article argued that some of these legal viewpoints and problems occur.

The biggest legal obstacle is the lack of a legal framework to regulate medical tourism in relation to AMD. As mentioned, the solution to this problem is to create a sound and uniform law regulating foreign patients coming to Malaysia in cases involving the compliance of their AMD. A standardized legislation is required to assist patients and to make them aware of their rights and ability to sue in cases of medical accidents resulting from medical tourism related to AMD.

Although the efforts of the Malaysian government to promote its destination appearance are very useful, there is always a "way in" for development if it wants to succeed in this field of medical tourism concerning AMD. The resolution aims to provide equal and uniform laws on AMD in the legal system to ensure quality and care for all patients, not just locals but also visitors who have come here for medical treatment purposes. By having uniform legislation on this subject, it is beneficial to attract more medical tourists to travel to Malaysia, to protect medical tourists who have legitimate and enforceable AMD to travel to Malaysia and to boost the economy of Malaysia as well.

ACKNOWLEDGEMENTS

Researchers would like to thank and appreciate Ministry of Higher Education (Malaysia) for providing the research funding under FRGS/1/2014/SSI10/UKM/02/7, FRGS/1/2014/SSI10/UKM/02/6, GGP-2020-005 and special appreciation to the research group member on your expertise, Faculty of Law of UKM, UiTM and UNISZA, and also Inovasi@UKM.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 29 - 42 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Rukun Negara as a Preamble to Malaysian Constitution

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ABSTRACT

Rukun Negara is the Malaysian declaration of national philosophy drafted by the National Consultative Council and launched on 31st August 1970. The Rukun Negara aspires to establish a substantial unity of a nation. The principles in the *Rukun Negara* serve as an integrative key to harmonious and unity of the people in ensuring Malaysia's success and stability. To realize the aspiration above, five (5) principles are presented, namely the "Belief in God"; "Loyalty to the King and Country"; "Supremacy of the Constitution"; "Rules of Law"; and "Courtesy and Morality." However, there is a postulation that Rukun Negara's inclusion as a preamble may undermine constitutional supremacy. Therefore, this paper is aimed to enlighten the matter via critical interpretation of the principles and examination of related cases in Malaysia. The conducted analyses showed that the Federal Constitution *per se* is sufficient and comprehensive to address the conflicting issues. Despite some ambiguities probed in the Constitution, its supremacy is still fully preserved and effective without including *Rukun Negara* as the preamble.

Keywords: Constitution, five principles, preamble, *Rukun Negara*

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.03

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

The British occupation of Malaya had brought the "divide and rule" policy that separated different races into different forms of social, educational, and economic settings. Malays stayed as farmers; Indians worked in estates while Chinese lived in towns as merchants. There were series of riots in Penang in 1956 and 1957, Pangkor in 1960, in Bukit Mertajam in 1966, leading

to racial conflicts on 13th May 1969. To avert the re-emergence of racial clashes, the government, through the Director of MAGERAN (National Operation Council), set up the National Consultative Council in 1970. The Council members consist of Tun Abdul Razak bin Dato Hussein as a chairman and three ministers, representatives from the state government and political parties; and representatives of different religions, professionals, public organizations; unions, and reporters. One of the Council's functions is to formulate a national ideology that restructures the nation into unity founded on the solidity of races in Malaya that can tolerate one another. The *Rukun Negara* was devised to nurture noble values of religious beliefs, loyalty to the king and country, safeguarding the Constitution, abide by the rule of law, and shaping courtesy among citizens. The citizens who abide by the above values can create national unity regardless of race, belief, and ethnicity. The *Rukun Negara* was launched by YDPA on 31 Aug 1970. The *Rukun Negara* calls upon a united nation where the diversity of religion, race, and culture is celebrated as a blessing and a source of strength. In promoting solidarity and harmony, it also calls for good behavior and warns against abusive or offensive behavior that may lead to the end of social equality, peace, and democracy. It forbids questioning the loyalty of any citizen based on race and belief. It dedicates itself to a just society in which there is an equitable distribution of the nation's wealth among all its citizen.

In commemoration of Malaysia's 60th Independence Day on 31st August 2017, the so-called G25, a group of moderate Malaysians, had suggested the incorporation of the *Rukun Negara* as a preamble in Malaysian Constitution (hereafter referred to as the Constitution) to promote nationalism and enhance protection to the people core values. G25 agreed with Muzaffar (2016) that by making the *Rukun Negara* the preamble to the Constitution, this philosophy serves as a guide to the courts and other institutions in the decision-making process on race and religious issues to preserve national unity and racial tolerance. Dr Chandra Muzaffar, the chairman of the Yayasan 1Malaysia board of trustees, had earlier proposed the *Rukun Negara* to be incorporated as a preamble to the Constitution.

MATERIALS AND METHODS

This paper intends to investigate whether the inclusion of five (5) principles of *Rukun Negara* into the Constitution's preamble will strengthen and imposing a more significant effect on the *Rukun Negara* overall. The matter deserves a detailed assessment since if the incorporation is gazetted, the *Rukun Negara* will be part of the nation's law (legally bound) and, inconsequently, may jeopardize the constitutional supremacy. This paper is based primarily on library research through interviews with certain scholars and adopted a systematic qualitative content analysis approach (QCA). Using this approach, the secondary data was extracted

through primary method in which the data generated from existing, naturally-occurring repositories of information such as newspapers, historical and official government documents or reports were collated, analyzed, and interpreted to cater to the problem as mentioned in the above statement.

DISCUSSIONS AND RESULTS

"A preamble is an introductory and explanatory statement in a document that explains the document's purpose and underlying philosophy" (Zakariah, 2017). Preambles are defined as "opening statements that express the aims and objects, dreams and demands, values and ideals of a nation" (Faruqi, 2017). Contextually, a preamble is an opening speech or brief introductory statement and guiding principles towards a united nation. In many countries, the preamble has been used "increasingly, to constitutionalize unenumerated rights" (Orgad, 2010). In these countries, the courts rely on preambles as a source of law and aid for constitutional interpretation. However, in India, during Kesavananda Bharati vs. State of Kerala (1973), the majority of the judges of the Supreme Court of India agreed that the preamble was a part of the Constitution; however it was not any source of power. On the other hand, it plays a vital role in interpreting the provisions of the Constitution. The significance of the preamble has been indicated in several decisions of the Supreme Court of India. It was akin to introducing the statute and very useful to comprehend the policy and legislative intent. A preamble is unenforceable in the court of law. However, it positively brings out and states the objects that the Constitution seeks to establish and promote and aids the legal interpretation wherever uncertainty is likely to be found. Likewise, in the U.S.A, Justice Harlan (1905) in Jacobson v. Massachusetts (1905) stated that "It has never been regarded as the source of any substantive power conferred on the Government of the United States, or any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted". It means that the preamble may never be a source of law. This will be positioned in Malaysia if the *Rukun Negara* becomes a preamble in the Constitution.

It can be concluded that a preamble cannot be regarded as the source of any substantive power conferred on the Government or any of its departments. A preamble provides significant help in interpreting the Constitution when words are ambiguous, but if the language of the Article is sufficiently explicit, it is not to be interpreted in the light of the preamble in preference to the obvious meaning thereof. The following paragraphs argue that the Constitution is self-manifestation; without the *Rukun Negara,* it can sufficiently settle constitutional issues that incite disputes among races and religious backgrounds in Malaysia. The *Rukun Negara* or the National Principles of Malaysia comprises five (5) fundamental domains or "The Principles" itself, namely "Belief in God," "Loyalty

to the King and Country," "Supremacy of the Constitution," "Rules of Law" and "Courtesy and Morality."

Kepercayaan kepada Tuhan / Belief in God

The first principle of the *Rukun Negara* is the belief in God. It is the heart of Malaysia's self-development and a standard to social life by all Malaysians who are multiracial and multireligious. This principle reveals that Malaysians nurture the belief in God, which means that Malaysia does not recognize any ideologies that oppose God's existence or so-called atheism. Belief in God can drive society in numerous good ways; for instance, society can uphold the religion's pure values. Suppose the community adheres to the teachings and what has been preached by their scholars piously. In that case, they will be able to attain a harmonious and prosperous life. Through religious ties, man acts as a responsible person and always maintains peace and harmony for their nation, all according to the pure values taught by their religions. Furthermore, people with religion tend to be always grateful in their lives; thus, a positive and healthy way of life is efficient for the sake of their nation's development.

The Constitution positioned Islam as the religion of the Federal. Simultaneously, it allows all individuals to practice their faiths in peace and harmony in Malaysia. The reason for such position could be examined through the intention of the framer of the Constitution back in 1956 when the Reid Commission was set up for this purpose. Article 3(1) of the Constitution was implemented due to tolerance between Malays as the original ethnic and Chinese and Indian as a migrating ethnic before independence. It was a consensus agreement of Malays, Chinese, and Indian ethnics. Article 3(1) also becomes an instrument that permits all non-Muslim to practice their religions without prejudice. The said article is vital for preserving harmonious relationships in a plural society. Our Constitution is not just a document; in fact, it is "a social contract and peace agreements" (Faruqi, 2008). Islam is declared as the religion of Malaysia without neglecting the liberty to practice other beliefs. For that, Article 3 provides a balance sheet that protects the liberty to practice other religions without fear or restrictions.

Placing Islam as Malaysia's official religion has a significant effect. In fact, in the case of Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & 2 Ors. (2005), it was held that "the provision in Article 3(1) was substantial and had a far wider and meaningful purpose than a mere fixation of the official religion and ruled that it has had significantly impacted the concept of religious freedom as well as the use of public funds for the advancement of Islam. Since Islam is the main and dominant religion in the Federation, it is a duty of the state to safeguard, uphold and promote Islam" (p. 296). The Federal Court positioned Islam as the religion of the Federation; nevertheless, Malaysia does not discriminate against people of other religions as they are allowed to practice their religions as long as they

obey the laws and not do things that disturb the rhythm of the lifetime of the Malaysian population.

Article 11 guarantees to "every person" in Malaysia, and not merely Malaysian citizens, the right to profess, practice, and propagate his religion. As opposed to citizen, a person would include permanent residents, migrant workers, tourists, international students, asylum seekers, and refugees while within Malaysia. However, the state is not playing an active role in protecting refugees or their rights. Instead, the United Nations High Commissioner for Refugees (UNHCR) since 1975 and other NGOs, including religious-based organizations, have played a crucial role in the Malaysian government to protect refugee rights (Ahmad et al., 2017). It does not protect every practice of religion. It is only the religion's integral practice, which is obligatory or mandatory on its followers, to invoke constitutional protection. In Abdul Hakim Othman & Ors v. Menteri Dalam Negeri Malaysia (2018), the High Court decided that "the onus was on the applicants to establish that practicing the ideologies of *Hizbut Tahrir* was an integral practice of the religion of Islam and was therefore protected by Article 11(1) of the Constitution. In the present case, there was nothing in the affidavit affirmed by the applicants to show that practicing the ideologies of *Hizbut Tahrir* was compulsory or an integral practice of Islam" (para. 31 & 32). Therefore, the practice of the ideologies of *Hizbut Tahrir* did not become an integral practice of the religion of Islam and was not protected by Article 11(1). Further, "based on the *fatwa* issued by the State of Selangor, it was established that practicing the ideologies of *Hizbut Tahrir* was contrary to the true teachings of Islam following *Ahli Sunnah Wal Jamaah*, and amounted to deviant teaching and practices. In the circumstances, the findings of the Fatwa Committee and the *fatwa* issued by the State of Selangor, which formed the basis of the decision of the ROS and the Minister, was legal and constitutional" (para. 33, 34 & 37).

Freedom of faith is secured for all religions; everyone has the right to adopt and practice his religion and propagate it (ILBS, 2017). Every religious group has the right to managing its own religious activities, establishing, maintaining institutional organizations for religious purposes or charity, acquiring and owning property, as well as holding and administering it according to the law (ILBS, 2017). Hambali et al. (2008) elaborated that "the right to religious freedom as stated by Article 11 of the Constitution has for so long functioned as the pulse of racial unity and harmony in Malaysia" (p.88). Today, however, the sense of respect and tolerance between races is hardly appreciated by the new generation due to education and society discrepancy. Many platforms should be initiated to overcome the gap. It is forbidden for a Muslim to force any non-Muslim to accept Islam because professing the religion is a matter of preference. Forcing non-Muslim into accepting Islam will only harm others' feelings and sensitivities. At the same time,

practicing own religion should be allowed as long as it brings peacefulness to society and the world (Yusob et al., 2017).

In conclusion, the first principle of "*Kepercayaan Kepada Tuhan"* in the *Rukun Negara* defines the full understanding of the people's fundamental right to profess any religion in Malaysia. It portrays that the people in Malaysia believe in God. Through proper religious beliefs, it will lead the nation as a great country. Although Islam has been declared an official religion of the Federation, other religions and beliefs can be practiced in peace and harmony in Malaysia. Any discrimination based on religion is condemned. The *Rukun Negara* drafting committee conscious of the importance of religion and belief in God in human life because the absence of religious belief will undermine people's character and country. Making it as a preamble of the Federal Constitution may indirectly recognize the importance of the solidarity of members of the community towards their respective religious teachings and at the same time may be redundant since the principles have been already incorporated in the provisions of the Constitution.

Kesetiaan kepada Raja dan Negara / Loyalty to the King and Country

Malaysia adopted constitutional monarchy with Yang di-Pertuan Agong (hereinafter mentioned as YDPA) as the Head of State. Regarding the second principle of the *Rukun Negara,* namely "*Kesetiaan kepada Raja dan Negara*," the principle seems to be aligned with some of the provisions laid down in the Malaysian Constitution. Loyalty to the king and country means that every citizen should be dedicated, faithful, honest, and sincere to YDPA as head of the country and to the *sultan* as head of the state where they live in. This is crucial because the royal institution is one of the master keys to Malaysia's stability. The King or YDPA is the head of the monarch in the federal. The phrase supreme head of Malaysia under Article 32(1) of the Constitution evidently places the YDPA as the supreme leader of the country; hence, when people devote their loyalty to the YDPA or the King, they are presumed as faithful to the nation itself.

The YDPA is the caretaker of the rights of people of all races in Malaysia. He must safeguard the unique position of the Malays and natives of the States of Sabah and Sarawak. In addition, the YDPA must protect the other communities' legitimate interests in the country as well. Protection of these rights is stated clearly in the Constitution and further reinforced in the social contract agreement made during *Merdeka* (Independence) to afford citizenship to the non-citizen migrants before the *Merdeka* Day. This informal bargain was then incorporated into the Constitution. As a result, it was agreed that "new state would be Federation of Malaya, the YDPA as head of state, Islam as the state religion, and Malay as the national language" (Crouch, 1996). The YDPA, as the head of religion, plays an important role in Malaysia. The YDPA is the Commander in Chief of the Armed Forces and responsible for appointing several

essential positions in Malaysia. He is given the power to appoint the Prime Minister, the ministers and deputy ministers and the attorney general, Chief Justice, Court of Appeal President, Chief Judge of Malaya, Chief Judge of Sabah and Sarawak, Federal Court, Court of Appeal, and High Court Judge (ILBS, 2017). Moreover, in the oath taken by a new YDPA at his coronation, "he will promise to faithfully perform his duties in the administration of the country based on Malaysia's law and constitution and to protect the Islamic religion" (Zainal, 2017).

The roles played by the Malay Rulers and the YDPA are in line with articles in Constitution. The significance of the principle is to ensure that the Malaysians give their full loyalty to the King as the "symbol of unity of the people in a multiracial nation" (Nor et al., 2015). "A loyalty devoted to the king also means the loyalty to the country itself" (Muslim & Umar, 2017). In conclusion, Malay Archipelago faced bitter experiences to the extent that some of the sultanates in the region collapsed due to imperialism's political pressure. However, once it was declared that YDPA is the supreme head of the Federation, it binds the people to express their affection to the King and the *Sultans* at the state level. Any disaffection against the YDPA would mean disloyalty to the country and Article 32(1) of the Constitution.

Keluruhuran Perlembagaan / Supremacy of the Constitution

Malaysia in 1957 adopted a written and supreme charter. The Constitution is the supreme law of the Federation (ILBS, 2017). Constitutional supremacy means the government's inferiority whereby the legislature's power to make law is ceded to the requirements of a Constitution. Under *Keluhuran Perlembagaan*, it becomes an obligation for all the people to accept, obey and uphold the Constitution. The Constitution provides that "the Federal Constitution is the supreme law of the land and any law passed after the *Merdeka* Day which is inconsistent to the constitution shall be void to the extent of the inconsistency" (ILBS, 2017). The law passed by the Parliament or any State Legislature is valid if it is coherent with the provisions of the Constitution. It covers all pre- and post-independence legislations. The Constitution states that law passed before *Merdeka* Day will be valid as long as it is consistent with the Constitution and continues to be in force on and after Merdeka Day until repealed by the competent authority empowered by the Constitution (ILBS, 2017). The modification to conflicting laws must be made to ensure the validity of that law.

State law must be consistent with the Constitution or federal law. The law that is incompatible with federal law shall be void as stated in Article 162(2) and Article 75. Article 162(6) states that "the court or tribunal may apply the provision of any existing law which has not been modified on or after *Merdeka* Day to make it consistent with the provisions of the constitution." Article 128 of the Constitution provides that the Federal Court has the power of determining the validity of the legislation.

The court may declare a legislative or judiciary as *ultra vires* and void if they are inconsistent with the Constitution (ILBS, 2017). This is to prevent the abuse of power. In the latest case of Letitia Bosman V. PP & Other Appeals (2020), the Federal Court held that "the Penal Code is a law that codifies most criminal offenses and punishments in Malaysia and s. 302 has been there in the Straits Settlement Code since 1872. Being a pre-Merdeka law, s. 302 of the Code could not be declared void or invalid pursuant to art. 4 of the FC. Any inconsistency between this provision and the FC can only be removed by invoking cl. (6) of art. 162. For any legislation passed after the Merdeka Day, the court's power to strike down for inconsistency with the FC stems from cl. (1) of art. 4 of the FC" (paras 13-15 & 17).

The doctrine of constitutional supremacy means that the Constitution must guide every act of the Legislative. According to the rule of law related to constitutional supremacy, the judiciary must make sure that Parliament legislates according to the constitutional framework and all its agencies administer the legislation. By virtue of constitutional supremacy, the courts act as the final arbiter to issues related to the constitutions, and the judiciary is expected to demonstrate judicial dynamism to protect the Constitution. They may refer to the *Rukun Negara* in interpreting the constitutional issues without the need to put it as a preamble.

Kedaulatan Undang-undang / The Rule of Law

Kedaulatan undang-undang, or the rule of law, is the fourth Rukun Negara, which means that the government and the nation's citizens are obliged to obey the law. According to *Frandberg (2014),* the rule of law implies the government's accountability, equal access to justice, an effective judiciary and clear law, generally stable law, and protection of human rights. In Malaysia, the rule of law may be inferred from provisions for judicial review whereby all governmental actions may be reviewed by the High Court as stated under Articles 4 and 128 of the Constitution (ILBS, 2017). Dicey (1897) said that the rule of law consists of three aspects: the absence of arbitrary, equality before the law, and the primacy rights of an individual. The first aspect of the rule of law is the absence of arbitrary. In this aspect, it concerns about a person is free from any liability unless there are laws and punishments for such an action. A person shall be punished if only he has breached some laws. The second aspect of the rule of law is which equality before the law means no one is above the law. All citizens are accords equal protection under the law. The Constitution declares that "every person is entitled to have equal protection of the law and is equal before the law" (ILBS, 2017). Article 8 (1) guarantees that a person in one class should be treated the same way as another person in the same class. Courts have a vital role in determining that the laws passed by Parliament are consistent with the Constitution. The last aspect of the

rule of law is the predominant rights of an individual. This means that every person is granted freedom of liberties as stated in the Constitution from Articles 5 until 12 of the Constitution.

However, the rights are restricted, and a person is not allowed to trespass the limitation imposed by the Constitution. Every right is limited, which also means that the freedom given is not the absolute one. In the latest Federal Court decision of Letitia Bosman V. PP& Other Appeals (2020), the accused was charged, convicted, and sentenced to death by the High Court for the offense of murder under s. 302 of the Penal Code. The law makes it mandatory for courts to impose the death penalty for all offenders under ss. 39B of the DDA and 302 of the Code. The Court of Appeal affirmed the convictions and sentences of all the appellants, and they appealed to the Federal Court on the issue of the constitutionality of the mandatory death penalty. The issues raised by them were whether: (i) the power to determine the measure of punishment, namely, the mandatory sentencing provision is inconsistent with the judicial power in Article 121 of the Constitution and violates the doctrine of separation of powers; (ii) the mandatory death sentence violates the right to a fair trial under Article 5 (1) of the Constitution and violates proportionality principle sheltered in Article 8 (1) of the Constitution. The Federal Court held that "the right to a fair trial is a constitutionally guaranteed right. When the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial within a reasonable time by an impartial tribunal established by law. However, the right to a fair trial as enshrined in cl. (1) of art. 5 is not absolute and is subject to qualifications, which lie in the phrase 'save in accordance with law'" (paras 118, 131 & 132). Therefore, the constitutional rights as guaranteed under articles of the Constitution can be taken away in accordance with the law. The above discussion concluded that all aspects of the rule of law had already been rooted in the Constitution.

Kesopanan dan Kesusilaan / Courtesy and Morality

The fifth principle of *Rukun Negara* is courtesy and morality. This means a person is ows responsibility to act in good behavior and morality towards each other in society members regardless of their status. According to *Oxford Dictionary* (n.d), 'courtesy' is defined "as the showing of politeness in one's attitude and behavior towards others." While 'morality' supports the distinction between right and wrong or good and bad behavior. The principle of courtesy and morality is aimed at controlling one's behavior and cultivating noble character, as well as a polite life order for the well-being of every Malaysian citizen. It serves as a guide to the behavior of society. It is maintained and developed accordingly with the character of the nation and pure values. This courtesy and morality principle allows the nation to build a better and liberal motion in accepting the practice other religions, races, and cultures in the

life of people of a multiracial country with respect and without discriminating against each other.

Parliament may enact any law to safeguard morality in Malaysia. Article 10 of the Constitution provides for freedom of speech, as well as the right to assemble peaceably and without arms that include the right of processions or pickets because a procession or picket is an assembly in motion. However, the right to assembly must be walled by restraints because freedom of speech may either be a way to tell the truth and encourage intellectual discourse, or it may be an instrument of malice and hatred. Faruqi (2015) noted that sources of pornography, racial bigotry, and promoters of anarchy, treason, and blasphemy often employed the Constitution as a shield behind which to hide. The media consistently confuses between matters of public interest and matters in which the public has a morbid or hidden interest. For this reason, all legal systems and societies, including Malaysia, impose some restraints on freedom of speech to secure the community's broader interest.

In Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun (2000), Eusoff Chin CJ in Federal Court decision said:

> *"... freedom of speech is not an absolute right. Freedom of speech is not a license to defame people. It is subject to legal restrictions. An absolute or unrestricted right to free speech would result in persons recklessly maligning others with impunity, and the exercise of such right would do the public more harm than good. Every person has a right to reputation, and that right ought to be protected by law"* (p. 737).

Article 11 of the Constitution stresses the liberty to practice religion in the Federation. It means that one cannot criticize other peoples' practices of religion. People may argue that the fifth principle's inclusion will open floodgates for people to convert, especially from Islam to other religions. The conversion cases are going to increase due to the generality of the fifth principle of *Rukun Negara*. Though the principle seems to be in general, it is inappropriate to say that the making of *Rukun Negara* as the preamble of the Constitution makes it easier to do so. This is due to the enforcement of Article 121 (1A) of the Constitution, which prevents the intervention of the Civil Court with Syariah Court in a certain specified matter. This specific provision itself does not allow the intervention of two jurisdictions of two different courts. It can be concluded that the principle of *kesopanan dan kesusilaan* or courtesy and morality is not contravening with the provisions of the Constitution. Indeed, it is the best way to promote and encourage other people to behave with good behavior. Nevertheless, it should not become a preamble to the Constitution.

This paper holds that the *Rukun Negara* should not be a preamble of the Constitution. It should be noted that drafting the Constitution and the *Rukun Negara* is different in many ways. The draft of

the Constitution was drafted by the Reid Commission to help the Federation of Malaya to gain independence in 1957. For the Rukun Negara, it was made due to riot that happened in May 1969 to enhance the spirit of harmonious society and encourage peace towards Malaysia's citizens, which consists of various diverse communities. It means the government and the citizens of the nation are bound by the law and are obliged to act not contrary to any law which has been passed. It shows that if the *Rukun Negara* is made as a preamble to our Constitution, it can never reflect the desire and intention of the Constitution. The rule of law in *Rukun Negara* will not have the same effect as Constitution since the initial intention of establishing them is already too much different. Suppose Rukun Negara is still insisted to be the preamble of the Constitution. In that case, it will be only possible if it had been drafted during the time of the Constitution drafting as both might share the same view and intention of its creation. In other words, it is safe to say that the current position of *Rukun Negara* is valuable as a medium of engaging and encouraging unity rather than being adapted as a preamble of the Constitution.

A national survey was conducted by KAJIDATA Research from 10 to 18th July 2017 to assess the level of pride of being a Malaysian. A total of 1,041 registered voters in Malaysia comprising 54.7% Malays, 24.6% Chinese, 7.3% Indian, 6.2% Bumiputera Sabah, 6.1% Bumiputera Sarawak, 0.6% Orang Asli and 0.6%. Respondents were selected based on random stratified sampling along with ethnicity, gender, age, and state according to national demographics. The results indicated that Malaysians believe that unity was one of the vital building blocks of the nation. A total of 98.3% of the Malaysians stated their satisfaction as a Malaysian and with 85.9% responded that the *Rukun Negara* could be the foundation that promoted and fostered unity. The most interesting finding is that 59.6 % of the respondents were aware of the concept of constitutional monarchy in Malaysia. On the other hand, only 16% were not aware and 24.4% were not sure of the constitutional monarchy. Malaysia is a Federation of sovereign states headed by *Sultans*. The *Sultans c*onsented to form the Federation of Malaya in 1948 through Federation Agreement 1948 (the Agreement). The Agreement converted the Malay rulers into constitutional monarchs formally. Fernando (2014) contended that through a close examination and analysis of the primary constitutional records, the rulers battled a hurled war to safeguard their position, status, and their constitutional powers from being erased. The Agreement gave the Conference of Rulers a chapter in the Constitution. Without a doubt, most of Malaysia's current Constitution is based on the 1948 Agreement.

Introducing a preamble that manifested people's wishes and inspirations might cast aside the noblest hope and desire of the sovereign states enjoin to the Federation. In other words, the formation of this nation does not result from the wishes of the people residents in Malaya but was strongly

dependent on the consensus of the Malay Rulers. While the nature of a preamble is a kind of expression of inspiration of the people, the nation declared that the YDPA is the Supreme Head of the Federation. The Constitution imposed on the supreme head of the Federation to profess an oath that might differ from the *Rukun Negara*. The insertion of a preamble in a constitution usually focuses on the people's aspirations. The *Rukun Negara* aspires the harmonious racial relations, while the formation of the Federation is a result of the lust and attacks by western imperialism and communism in South East Asia.

CONCLUSION

Malaysian Constitution is almost complete and comprehensive. Though there is some vagueness left in the Constitution, it is still open for interpretations without including the *Rukun Negara* as the preamble. Moreover, if the *Rukun Negara* is incorporated into the Constitution, it may cause confusion in enhancing and enforcing the law. The ideology embodied in the Malaysian Constitution may be contrary to what has being drafted and indented in the National Principle or the *Rukun Negara*. Besides, the nature of the *Rukun Negara* is just a mere campaign for unity but is opened to abuse by certain group of people with their hidden agenda. For example, the word liberal in the introduction to the *Rukun Negara* might suggest something contradictory to Article 3(1) as Islam is accepted as the country's ideology, and Article 37(1) that states the strong commitment by the king to uphold Islam at all times. It is unreasonable to place the *Rukun Negara* as the preamble to the Federal Constitution after 63 years of the Constitution being enforced as it will undermine constitutional supremacy in Malaysia. If this happened, it might open floodgates for people who are dissatisfied with the existing provisions in the Constitution, law, and regulations to challenge it. If the preamble is employed as part of the Constitution, it shall prevail over the ordinary law and regulations, and eventually, the latter will override the existing provisions. Finally, the Rukun Negara's spirit has been included and explained by few provisions in the Federal Constitution, and the differences are very much clear and obvious why the *Rukun Negara* will undermine the constitutional supremacy. Both have distinctive features and should continue as they are. Finally, the most important thing is that Malaysians must respect the provisions of the Constitution and each other's rights as part of the obligation to the social contract agreed in forming Malaysia as a nation. All of these are to be done, and if all Malaysians continue doing so, Malaysia will continue being a peaceful and prosperous country with racial harmony where people are free to regulate their livelihood according to their determination.

ACKNOWLEDGEMENT

We gratefully thank the Dean of Faculty of Law and International Relations, UniSZA, Professor Dr. Zuhairah Ariff Abd Ghadas for her assistance and support, and Dr.

Aminuddin bin Mustaffa, Deputy Dean (Research and Development) of Faculty of Law and International Relations, UniSZA, for comments that significantly improved the manuscript.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 43 - 57 (2021)

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Protection of Best Interest: A Study on Children Working in the Entertainment Industry in Malaysia and Their Right to Education

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ABSTRACT

In Malaysia, there is no law prohibiting children from working in the entertainment industry. Malaysia only provides general law on the employment of children and young persons in the entertainment industry. There are possibilities that children in the entertainment business will endure neglect and exploitation. Their working environment may expose them to possible harms, physically as well as psychologically. Like other children, child performers must have adequate access to education. However, their right to education is affected since the nature of their work impedes them from attending school at times. This study discussed the effects of working in the entertainment industry towards children, especially on hard access to education. The relevant laws in the Malaysian legal framework was be construed. The recent amendment to *The Children and Young Persons (Employment) Act 1966*; known as *The Children and Young Persons (Employment) (Amendment) Act 2019* which came into force on 1st February 2019 would be discussed. Under Article 3 of the *United Nations Convention on the Rights of the Child 1989* (CRC), which emphasises the protection of the best interest of children all over the world; this study recommends a proper guideline to be implied upon the players in the entertainment industry. This guideline will be a part of the child protection policy, drafted specifically for children working in the entertainment industry. This study shows that law, policy, and legal enforcement are needed to fully protect children from risks and harm, including their right to education.

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.04

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Keywords: Child protection, children, education, employment, entertainment industry, rights of the child

ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

In the Malaysian entertainment industry, the number of children entertainers or celebrities is growing day by day. Many children tend to join the show business since reality television programmes have become so popular. The participation of children in the entertainment industry started a long time ago. Due to the rising demand of the industry, many production companies are inviting children to participate in TV shows – singing competitions, game shows, beauty pageants, and so on. Children too are excited to be a 'star' and they put in great efforts to join the entertainment industry. Wealth and fame are the two main factors that encourage them to participate in the entertainment industry. A survey by Adecco Malaysia in 2014 estimated that about 12% of Malaysian children (between 7 to 14 years old) wanted to become actors when they grow up. They were both excited and keen to create a name for themselves in the entertainment industry ("Survey: Acting", 2014). Their ultimate focus was to become young superstars and enjoy the state of being a celebrity like their adult counterparts.

At some levels, these performers earn even higher than their parents or guardian. As a result, they become too delighted with their earnings and tend to neglect their education. They may think that school is not as important as their career in the show business. Their right to education has been violated by their involvement in the entertainment industry. To make things worse, even without them realising, some of them are exploited by adults – the industrial player or their guardian. This scenario infringes their basic rights as a child. This infringement of rights is contrary to Article 3 of *The United Nations Convention on the Rights of the Child 1989* (CRC) which stipulates that in every decision made relating to children, the best interest of the child shall be a major concern. All parties, including family members, community, and government officials are responsible to design policies that will not ruin nor infringe their rights. Betcherman et al. (2005) stated that the best interest principle under Article 3 of the CRC is the primary consideration and needs to be reflected in the policies and legislation affecting children.

MATERIALS AND METHODS

This study adopted a qualitative approach where data were collected through library research and content analysis. The study also analysed various texts such as statutes, journals, reports, and books. This paper mainly discusses the analysis of the provisions in *The Children and Young Persons (Employment) Act 1966* (CYPEA) and *The Education Act 1996* (EA). It also explores the approaches adopted by jurisdictions in the United Kingdom, United States, Australia, and Europe to protect the interests of their child performers. Reference is also made to various international instruments on the protection of rights and interests of children such as *The United Nations Convention on the Rights of the Child 1989* (CRC) and *The Universal Declaration of Human Rights 1949* (UDHR), and other relevant instruments.

CHILD ENTERTAINER: EFFECTS OF INVOLVEMENT IN THE ENTERTAINMENT INDUSTRY

Children in the entertainment industry have been exposed to several types of mistreatment and exploitation. Sand (2003) and Fortin (2003) stated that child entertainers might suffer physical harm, psychological issues, and sexual abuse because of their working conditions and environment. This scenario is grave as children are often exposed to dangerous or unhealthy situations when working with adults. They may suffer an injury during a filming session or performance, and they may be subjected to constant pressure which can lead to depression. Besides, they may be exposed to unhealthy activities like smoking, dating, or even drug abuse. Weston (2005) said that if the physical, mental, emotional, and social development of a child or young person were threatened, it could be considered that the children work is exploitative. This can be worse if there is a lack of minimum standards of law governing these children at the workplace. The children working in the entertainment industry are likely to be exposed to exploitation if their workplace is less or unconducive.

At one point, it is undeniable that the involvement of children in the show business is due to the expectations from parents. According to Sand (2003), some parents are looking for a bright splendour through their children and want them to be identifiable personalities than being educated persons. The keenness to see kids this way may be as early as when the child is still a baby. Siegel (2000) said because of the eagerness of parents, babies were effortlessly being the victim of monetary abuse in the entertainment industry as their parents have wanted them to work since birth. In this sense, the baby is always manipulated in commercial advertisements like television, beauty pageants, acting, and others that deem to have babies, toddlers, and kids as part of those shows. This kind of exploitation comes from the parents themselves who fail to put the best interest of the child as the primary concern. As far as children's rights are concerned, if the best interest principle is the sole concern to be protected by the parents, it is not the best solution as the child may be manipulated and exploited (Salim & Abdul Ghadas, 2012). According to Anderson et al. (2011), the law should play its role to safeguard the welfare and interests of children working in the entertainment industry.

Several physical consequences have triggered a major impact on child performers. The physical consequence is that the children in show business may be affected physically – distressed body growth, fatigue, and physical vulnerability (Pham & Dinulos, 2014; Sand, 2003). The dangerous and hazardous conditions may affect the children's health and safety. Most of the time, these children may be exposed to smoke ashes, the damaging effects of cosmetic products, unconducive filming locations, direct rays from cameras and stage lighting systems, chemical elements used during filming or performances, peculiar working hours, and many other things that

can disrupt them physically. Psychologically, Wykes (2010) highlighted that stress, premature adults, and potential public criticism were some of the psychological effects suffered by child performers. It can be stressful for children to deal with the nature of the entertainment industry as they are still young.

There were several mishaps involving children in the entertainment industry in Malaysia over the years. One such incident involved a child actor who suffered from an illness. She did not receive formal education after her parents got divorced due to a financial crisis. The girl spent days starving while battling the illness (Chua, 2020). A lot of people in the entertainment industry were puzzled by the situation and were eventually questioning where did the girl's savings go (Mohamad, 2020). This has led to much raising concern over the unprotected interest; welfare and the infringement of child celebrities' rights.

On another occasion, a child actor admitted that some parents, including his, decided to give up their jobs to manage the stardom of their children. At the end of the day, the families would depend entirely on the income earned by these child celebrities (Ariffin, 2019). If the children have no job, the family members will suffer and the children would live under pressure. This will lead to economic exploitation as the responsibility to provide for family never lies on the children's shoulders. Some parents want their children to become celebrities and they said there's nothing wrong with exposing and promoting the involvement of children in the entertainment industry to earn money for the family (Mohamad, 2017).

There is no legal dispute citing the infringement and violation of child entertainers' rights in Malaysia. However, this does not mean that their best interest is fully protected. These children are embroiled in injustice where their rights and interests are highly prejudiced. There are possibilities that child entertainers are lacking knowledge and information on their rights. In some cases, things are often disregarded due to a lack of awareness. In other jurisdictions, there are reported cases involving child celebrities' exploitation. One of the prominent factors is economic exploitation from their guardians. In the United States, Coogan Law was enacted in 1939 in California which required employers to set aside a portion of the child's wages into a blocked account. This is to evade any financial abuse by the guardians. This law was enacted after child actor, Jackie Coogan sued his parents for squandering his earnings of almost four million dollars. Unfortunately, the court decision was not in his favour on the basis that being a child, his earnings belonged to his parents (Peterson, as cited in Heller (1999), p.1). Post Coogan Law, in the case of *Warner Brothers Pictures Inc. v Brodel* in 1948, the Court still favoured the entertainment industry when deciding a contract, giving the employer six separate options to extend the terms of the defendant's employment for additional periods between the minor and Warner Brothers. But in 2004, the law

had been reviewed and it provided better protection to the rights and interests of children. The current laws require that at least 15% of the child's earnings be placed in trust accounts. Nevertheless, Ayalon (2013) said that there was still defectiveness in the current law. For example, the paucity of legal protection to protect the child's earning are not required to be placed in the trust account, and the appointment of the trustee creates an inherent conflict of interest between the parents and the child. In the case of *Suleman v Superior Court*, the petitioner (a leader in an organisation, established to protect the financial interest of minors working in the entertainment industry) was held to be unprecedented as he cannot remove the infant's mother as the guardian of their estate (Ayalon, 2013).

In respect of education, child celebrities have a greater tendency to skip schools. Aziz M. Osman, a Malaysian actor, producer, and film director said that his studies were affected when he started his acting career at the age of 13. He decided to discontinue producing a popular TV series when he noticed that the child actors who worked for him skipped schools due to filming (Razak, 2014).

THE LEGAL FRAMEWORK OF CHILD EMPLOYMENT IN THE ENTERTAINMENT INDUSTRY

In Malaysia, *The Children and Young Persons (Employment) Act 1966* (Act 350) (CYPEA) is the main statute governing the employment of children. CYPEA aims to regulate any labour of children and young people since they are part of the vulnerable group. However, the CYPEA is only applicable to Peninsular Malaysia as it is enforced by the Peninsular Human Resource Department. For Sabah, the provision of the CYPEA is provided under the Labour Ordinance (Sabah Cap. 67); enforced by the Sabah Human Resources Department. Meanwhile, Sarawak is governed by the Labour Ordinance (Sarawak Cap. 76); enforced by the Sarawak Human Resources Department.

The CYPEA firmly forbids the employment of children or young persons in hazardous work that may be dangerous to life, limb, health, safety, or morals. It came into force on 1st October 1966 to regulate the employment of children and young persons in Peninsular Malaysia. This act was then amended in 2010 followed by the latest amendment in 2019, known as *The Children and Young Persons (Employment) (Amendment) Act 2019* which came into force on 1st February 2019. Considering the scope of CYPEA, the employment of children in the entertainment industry cannot be generalised as child labour as the law permits such employment.

The CYPEA was initially drafted based on international instruments such as *The United Nations' Declarations on the Rights of the Child 1959*. This declaration is also known as the Geneva Declaration of the Rights of the Child. 30 years later, *The United Nations Convention on the Rights of the Child 1989* (CRC) took place. Although at the international level, child labour has been the focus of various conventions and recommendations, it was doubted

that Malaysia has reached the standard of enforcing the law effectively thus prejudicing the best interest of a child. Malaysia ratified *The United Nations Convention on the Rights of the Child 1989* (CRC) in 1995 to uphold its commitment to the protection and welfare of children. One of the four general principles enshrined in *The United Nations Convention on the Rights of the Child 1989* (CRC) is that the best interest of a child must be a primary consideration in all actions and decisions concerning the child. Malaysian law should be in line with the International Labour Organisation (ILO) Conventions i.e. *The Minimum Age Convention 1973* and *The Worst Forms of Child Labour Convention 1999* to ensure the welfare of our young workers is protected. Through the recent amendment of CYPEA, the legislators claimed that the laws are now in line with the International Labour Organisation (ILO) standards of child employment (Carvalho & Rahim, 2018).

The CYPEA differentiates a 'child' from a 'young person'. The latest amendment of the CYPEA in 2019, as seen in Section 1A, states that a 'child' refers to a person below the age of 15, whereas a 'young person' refers to a person who is 15 years old or above but below the age of 18.

Child performers in Malaysia are governed by the CYPEA. In the recent amendment of CYPEA, children are permitted to do light work' – any form of work that is not detrimental to physical or mental health. It also means that the work should not prejudice children's attendance at school including places that teach religion, their participation in vocational orientation or training programmes approved by the competent authority, or their capacity to benefit from the instruction received. We can see that the new amendment to the CYPEA gives priority to the attendance of children at school; which is in line with children's rights to education. However, it seems very general, since the nature of a child celebrity's job often requires them to skip school especially, when they have filming sessions far away from home. Here, a proper guideline is needed to govern their welfare, especially their education.

Section 2(2) (b) of the CYPEA enables a child to engage in any employment in public entertainment, on the condition that a licence is obtained. A licence from the Director-General of Labour is required if an employer intends to hire a child to work in public entertainment.

In the Third Schedule of CYPEA, Regulation 5 of *The Children and Young Persons (Employment) Regulations 1966* stipulates that the licence to be issued under Section 7 shall provide, among others, that every performance must not exceed four hours in duration, and a child or a young person shall not take part in any performance which is dangerous to life, limb, health or morals.

As regards the above regulation, it is applied to the employer and employee, i.e. the licence holder and the child entertainer. In safeguarding the right to education, the regulation is still general, as the CYPEA does not provide specific methods on how to ensure the efficiency of the education

of a child entertainer can be carried out, especially when they are unable to attend school.

The Minister has the power to determine whether a child can be employed or not. Section 3 of CYPEA stated that the Minister can make an order to forbid any child or young person from being employed if he thinks that the employment would be harmful to the interest of the child. Thus, the CYPEA generally allows children in Malaysia to be engaged in employment provided that the job or work must not be dangerous to their life, limb, health, safety, and morals.

For the working hours, the CYPEA prohibits a child employee from working at night or more specifically from 8 p.m. to 7 a.m. However, this condition does not apply to child performers. The working hours for children employed in the entertainment industry are quite flexible; they can perform or shoot at night. A child is required to have a 30-minute break for every three consecutive hours for a maximum of six hours a day. If a child is attending school, he cannot work exceeds seven hours per day (including the time he spends attending school). A child also is not permitted to commence work without having had a period of not less than 14 hours break from work. For the number of working days, a child cannot work for more than six days in any period of seven consecutive days.

The general application of the Malaysian legal framework has exempted the entertainment industry from having to adhere to the strict laws on the working hours of a child or young person, as prescribed in the CYPEA. Although the CYPEA has been amended several times, it does not fully protect the best interest of children in the show business. We may have the law, but our biggest concern is whether the implementation of the law is effective to cope with the practice of the entertainment industry. Therefore, there is grave justification for the Malaysian authority to incorporate comprehensive guidelines to govern industrial players in the show business, primarily to protect and safeguard child entertainers. The main obstacle that may be faced by Malaysian authorities is the manpower to enforce the law aptly. When children, as a vulnerable group, are part of the workforce in the entertainment industry, we need a specific body or authority to control and monitor the industry players, as well as to strictly observe the laws and regulations imposed. In terms of administration and enforcement, Section 9 of the CYPEA states that the Director-General of Labour and other officers appointed under section 3 of the Employment Act 1955 (EA) to carry out the provisions of the EA, shall also be charged with the responsibility to uphold the principles denoted under various provisions of the CYPEA.

RESULTS AND DISCUSSION

Best Interest of the Child Principle: Its Relation to Child Entertainers

The United Nations' Declaration on the Rights of the Child introduced the best interests of the child principle into human

rights in 1959 (Geneva Declaration). It can be said that the best interest principle is an international human rights law with some historical implications. The spirit of the Geneva Declaration was inserted into Article 3 of the CRC in the first paragraph, which states that 'all actions concerning the children, whether taken by public or private welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration.'

The best interest of the child is the paramount deliberation; wherein 54 articles in the CRC contain rights related to every aspect of children's lives – rights to survival, development, protection, and participation (Kahar & Zin, 2011). In this statement, it should be noted that the survival of every child, including child entertainers, has to be based on the best interest of the child principle. In every decision affecting this vulnerable group, the best interest principle should be the key consideration.

How to define the best interest of the child principle? There are no specific definitions given for this term. However, it can generally be related to certain types of rights and protections available to children. Shariff (2018) stressed that the best interest of the child principle is associated with the rights and freedom including the gratification of special protection and opportunities; amenities to facilitate the child to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner. The matters of social security and right to education, sufficient healthcare, food and shelter, special treatment for the disabled, love and understanding of parents are examples of the applications of the best interest of the child principle.

As mentioned above, education is the right that needs to be protected. In the case of child entertainers, every state should reinforce its child protection policy to never discriminate against children's access to education. Other rights should also be protected. For instance, the right to be managed by a legal and approved agency, right to play, right to be treated as a child, right to be heard, and any other rights relevant to their position as child entertainers. Nonetheless, the rights and protection of the best interest of the child are not well known to the community at large (Ibrahim & Abd Ghadas, 2017).

Lack of information regarding the best interest principle will only expose the children to many possible threats. It is the responsibility of the government to make sure that this best interest principle is spread to every level within the society. The national child protection policy should also be circulated among citizens. We need to educate children about their rights to create an early awareness among them about their rights, welfare, and interest. Educating the public on the need to safeguard children's rights and welfare will allow a successful practice of the child protection policy. Article 3 of the CRC should be highlighted to show the importance of the best interest of child principles. Fortin (2003) pointed out that the articles in the CRC are interrelated, as Article 3 of the CRC supports all other

provisions, which necessitates all other principles to be implemented in the child's best interest.

Child Entertainers and Their Right to Education

Child workers are vulnerable due to the employment status and they are oblivious whether the employment status is tied to legal protection, level of wages and conditions, the enforcement of regulations, and right to education (Anderson et al., 2011). This statement confirms the vulnerability of child workers, including workers in the entertainment industry. They are innocent, naive, immature, and inexperienced to deal with anything in life. Thus, the legislator has to come out with a legal policy to provide comprehensive protection to them. Concerning their right to education, Article 28 of CRC provides that a child employee should be able to reach the highest standard of education appropriate to their capability.

Vickes (2011) indicated that child employees tended to have problems finding a balance between studies and work. In Malaysia, this is very common. Child celebrities with busy work schedules normally face difficulties paying full attention to studies. This would affect their right to receive proper education as there is no regulation to provide on-set tutors or teachers to compensate for the amount classes they have skipped. Even though Industrial Revolution 4.0 or IR 4.0 (2018) stresses using technology in education, and the learning process can be done virtually; student engagement with the school and teachers is still important. How can child performers adapt to all the challenges in the education world, if they are constantly absent from school?

In line with IR 4.0 (2018), students need to understand how to associate, employ and apply different information in diversified circumstances, and how to facilitate a better understanding to develop their learning abilities. New ways of communication should be created to stimulate critical thinking and complex problem-solving, apart from acquiring the skills to be creative, innovative, and flexible. These skills and competencies need the full participation of the children working in the entertainment industry. But the question is, how prepared they are for this? They may be left behind in terms of education and will never be able to excel in it since their focus is on the show business.

Under international law, the right to education is guaranteed by Article 26 of *The Universal Declaration of Human Rights 1949* (UDHR). All human beings cannot be denied the right to education. Besides, Article 26(1) of UDHR states that education shall be made free at the elementary and fundamental stages and that elementary education is compulsory. Article 28 of CRC also mentions children's right to education. It should be noted that the UDHR, *The International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR), and the CRC obliges the state to provide free, compulsory primary education. Several other treaties reaffirmed the right to education. In 1951, the Convention Relating

to the Status of Refugees or also known as *The Refugee Convention 1951* or the Geneva Convention of 28 July 1951, confirms the right to education for all including refugees. Apart from that, the UNESCO Convention against Discrimination in Education was held in 1960, guaranteeing the right to education for all human beings. It was then followed by the International Covenant on the Elimination of All Forms of Racial Discrimination in 1965 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979, discussing the right to education for women among other things.

In Malaysia, two main statutes govern the education system i.e. the *Federal Constitution 1968* and *The Education Act 1996*. The Federal Constitution guarantees the right to education in Article 12 by protecting students against discrimination in terms of admission to public schools and the payment of fees. All public schools must use the national curriculum that indicates the knowledge, skills, and values that students are expected to gain at the end of the respective duration of their education. This is stated in Section 18 of *The Education Act 1996*. On the other hand, Section 29A of *The Education Act 1996* states that in Malaysia, primary education is compulsory. Parents and guardians are responsible for enrolling their children in compulsory primary education for 6 years (standard one to six). In violation of this, parents can be fined up to RM5000 or jailed for a maximum of six months or both upon conviction.

For the children working in the entertainment industry, there is a likelihood that they will neglect school due to their commitment to the show business. Their shooting time might take place at night, or they have a performance at night, or their shooting area is too far from home; all these will be factors that possibly cause them to skip schools. Some might suggest that these children may undergo home-schooling instead, but the practicability of this remains in question. Concerning this, the education Minister, as stated in Section 29A (3) of *The Education Act 1996,* may exempt a pupil or a class of pupils from attending compulsory primary education, subject to several conditions. As far as schooling is concerned, child entertainers in Malaysia have several options to access education. Some go to private schools or afford home-schooling and many attend public schools.

Practices in Other Jurisdictions

In respect of the right to education, the practices in other countries should be referred to. Their experience can serve as a guideline to protect the educational rights of child entertainers in Malaysia. There are laws governing child employment as early as the 1930s in the United Kingdom. In 1968, *The Children (Performances) Regulations* were enacted. This was followed by *The Children (Protection at Works) Regulations 1998* and *The Children (Performances) (Amendment) Regulations* in 2000. One of the provisions states that a licence holder must provide an approved registered matron/chaperone to take care of the child's

welfare at all times during the employment. It includes accommodation, transport, food and drink, premises, and other necessary arrangements. If the authority feels that the education of the child (as advised by the headmaster of the school) might be affected and if no proper supervision is provided by the licence holder as required by the law, the licence shall not be granted. If a longer period is required for the duration of employment, the licence holder must also provide a competent private tutor to teach the child for at least three hours a day (Arrowsmith, 2001).

Regulation 13 of *The Children (Performances and Activities) (England) Regulations 2014* states that the licence holder must make sure that the arrangements for the child's education (during the legal tender of the licence approved by the licensing authority) are carried out. As stated in paragraph 3 of Regulation 13, the licensing authority shall not approve any arrangements for the education of a child by a private teacher, if the conditions required by this regulation are not fulfilled. The licensing authority must be satisfied that the child will receive education for not less than six hours a week, and for not more than five hours on any such day (Rothwell, 2016). Subsequently, the lesson will be properly taught by the private teacher who must be a reliable person to teach the children. Rothwell (2016) further stated that the licensing authority should approve the arrangements for the education of a child by a private tutor if they were satisfied that the child would receive education not less than three hours on each day on which the child would be required to attend school (if he or she is a pupil). The duration must not be less than six hours a week and more than five hours on any working day.

In Australia, working children are governed by *The Child Employment Act 2006* and *The Child Employment Regulation 2006*. These laws protect children from performing any work that may be harmful to their health or safety, physical, mental, moral, and social development. The law also aims to protect the education of the children and certifies that the work will never impede the children's education or schooling. The Guide to the Employment of Children in the Victorian Entertainment Industry including the Mandatory Code of Practice (Victoria State Government, 2019) states that if a child's school has granted an exemption without a tutoring stipulation, the employer must ensure that the child receives two hours of tutoring per day when they miss more than nine days of school while working. Tutors must be registered as a teacher in Victoria through the Victorian Institute of Teaching and are appropriately qualified to teach the child in question. Tutoring is generally 10 hours per week or as specified by the school principal and the employer must provide an exclusive and conducive area for tutoring purposes. The law also states the maximum working hours per day and the maximum number of working days per week for some age groupings (Cotter, 2012). Specific employer obligations are also part of the austere conditions of an employer to ensure the welfare of the child is not jeopardized

– inclusive of travel arrangements, duty to take care of accommodation, food and drink, and amenities. Enforcement of these provisions shall be carried out by inspectors who monitor, ensure compliance and investigate for any such contravention of the law (Cotter, 2012).

Besides the United Kingdom and Australia, Sand (2003) said that the European Council Directive 94/33/EC of 22nd June 1994 on the protection of young people at work was also concerned with child performers' education. Article 5 of the directive states that if children are employed for performing in cultural, artistic, sports, or advertising activities, prior authorisation must be obtained from the competent authority. The authorisation comes on the conditions that the engagement in employment shall not be harmful to the safety, health, and development of children, and shall not affect their attendance at school.

CONCLUSION

A standard guideline needs to be implemented to protect the rights of child entertainers in Malaysia. Though Malaysia has the legal framework related to child employment, it does not cover the legal protection available to child entertainers. Children who are working in the entertainment industry need specific guidelines to regulate their activities. Their rights, welfare, and interests must be safeguarded as they are part of the vulnerable group. They need additional protection as they are likely to be exposed to exploitation, manipulation, discrimination, and other problems that may affect their lives. Their right to education must also be preserved by guiding them on how to access proper education despite the nature of their work. Additionally, Malaysia should have a clear child protection policy to promote the best interest of the child principle, one that reaches everyone in the entertainment industry. The spirit of Article 3 of the CRC must be disseminated to create awareness among the public regarding children's rights. To conclude this, it is the duty of all players in show business and the government as well as the society to protect the rights of all children. To ensure success, the enforcement of law should be stricter and adheres to the guidelines provided by relevant authorities. Although there are existing regulations or codes of ethics to promote best interest principles among players in the entertainment and the public at large, the lack of enforcement may expose children to continuous exploitation.

ACKNOWLEDGEMENT

We thank Mrs. Rabiatul Adawiyah for assisting us with technical issues and Dr. Aminuddin Mustaffa, the deputy dean of the Faculty of Law and International Relations, UniSZA for his comments to improve this manuscript. We would also like to express gratitude to the dean, Prof. Dr. Zuhairah Ariff Abd Ghadas for her continuous support throughout the completion of this paper.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 59 - 74 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Information Regulation: A Measure of Consumer Protection

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ABSTRACT

Consumers have been identified as one of the drivers of economic development in Malaysia. They come from different educational levels, age, geographical area and economic status. All of those discrepancies pose several problems, and the most significant issue is the possible information vulnerability where it affects consumer decision-making. Consequently, when wrong decisions are made, they can incur substantial financial and emotional losses. It is therefore necessary to analyse the most appropriate mechanism for safeguarding Malaysian consumers from any potential knowledge vulnerabilities that could compromise their interests. Accordingly, this paper will scrutinize the theory of information regulation as a mechanism to mitigate consumer disadvantage and fix Malaysian consumers' knowledge vulnerability by analysing the existing academic literature on the theory of information regulation as a specific tool to protect consumers' interests in Malaysia. This specific approach of regulation which requires all the essential information concerning a particular product to be provided by the sellers, traders, producers and manufacturers at the pre-purchase phase is hoped to be the best protection measure for consumers in Malaysia.

Keywords: Consumer detriment, consumer protection, e-consumer, information regulation

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.05

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INTRODUCTION

Consumers represent the vast economic group and play an important role in the mixed economy system, a system which combines elements of both socialism and free market. This system allows consumers to have choices in a market with a variety of freedoms and interventions by the government. Almost two-thirds of all spending in the mixed economy system

ISSN: 0128-7702
e-ISSN: 2231-8534

in this world is contributed by consumers. Consumer movements are not well-organised and their views are often not heard though they are an important player in the economy. This is a result of weak bargaining power of consumers.

Consumers come from various ages; aged, adults, youngsters and children. Some of them live in urban areas while the others come from rural areas. They are of different financial and economic character; rich, middle and poor. Consumers' educational background either well-educated, educated and illiterate also may differ from one to another. Consumers that are well-educated, financially secure, living in metropolitan cities and young people will have better access to product knowledge available on the market relative to uneducated, elderly and old consumers (Ghapa, 2019). According to Cartwright (2001), limited access to acquire information at pre-purchase phase and failure to understand information provided by the traders or sellers may detriment consumers' interests from making an informed decision and place the consumers at risk.

In a special message delivered in the Congress on Protecting the Consumer Interest in 1962, President John F.Kennedy stressed out that;

> '[The] rights [of the consumer] include . . . the right to be informed—to be protected against fraudulent, deceitful, or grossly misleading information, . . . and to be given the facts he needs to make an informed choice.' (Legrand Jr., 1986; Kotler, 2009).

He emphasized that there were four basic rights that a consumer was entitled to; the right to be heard, the right to safety, the right to be informed with correct and sufficient information and the right to make an informed choice. However, when they have been supplied with insufficient information about a particular product in the market, it will expose them to many risks including unfair trade and fraudulent transaction. Besides, inadequate information acquired by the consumers will impede them from making an efficient decision. Consequently, they may suffer tremendous financial as well as emotional loss. To put it another way, consumers are unlikely to contract in their best interests.

Traditionally, consumers walk from one retail store to another buying goods for their personal or domestic consumption. However, digital age or also known as 'internet age' has changed many things in the business to consumer (B2C) transaction including the nature of the business, the mode of transaction, and the behaviour of consumers (Reinartz at el., 2019; Hagberg et al., 2016). Consumers in present days are facing complex and wide-ranging challenges, particularly due to online shopping trend. According to a press release by the National Consumer Complaints Centre (NCCC), the highest number of complaints received by the National Consumer Complaints Centre (NCCC) in 2014 and 2015 were online shopping or

e-commerce. The same thing happened in year 2019 when e-commerce sector recorded the highest number of complaints with a total of 10,615 complaints (Bernama, 2019). Surprisingly, there were 1,731 complaints lodged by the consumers related to online purchases during the Movement Control Order (MCO) period (TheStar, 2020).Most of the complaints were related to failure to provide adequate information on business terms and conditions (National Consumer Complaints Centre, 2017).

Today, it is possible for consumers to do everything in a few clicks using their smart devices. In the current market, the advent of technology and internet results to the mushrooming of e-commerce platforms such as Happyfresh, Fashionvalet, Shopee, and Lazada. As a result, consumers can easily shop goods for their personal or household consumption without leaving their home. Digital consumers spend a tremendous amount of money on online shopping via their gadgets.Data from Statistas Digital Market Outlook survey shows that Malaysians spent more than US$6 billion online in 2018, with purchases of consumer goods already outweighing spend on travel (Kemp & Moey, 2019). Furthermore, more than 26 million Malaysians use the internet today, and data from GlobalWebIndex_(2019) shows that 80 percent of users between the ages of 16 and 64 are already shopping online. Even the way that businesses interact with their consumers keeps expanding rapidly, where the mediums of interaction between market players have changed a lot. Smartphones, computers, laptops and tablets make significant changes in the way consumers interact with retailers. In a report produced by Kemp and Moey (2019), 37 percent of online users made an online purchase via a laptop or desktop computer, whereas the number of Malaysian online users who made online purchase via phone reached almost 62 percent.

Consumer behaviour is also witnessing a phenomenal change as people strive to align their shopping behaviour with emerging technological opportunities. About 91 percent of Malaysian consumers nowadays do a lot of research and reading before making any decision to buy a particular product (Kemp & Moey, 2019). They read product descriptions and ingredients, search the information from the sellers or traders' website, compare prices, and check reviews given by the other consumers before doing online purchase. However, not all consumers exercise their rights to get essential information about a particular product before making their decision to purchase. There are consumers who can access the information of a product but reluctant to read that information. Besides, there are vulnerable consumers (due to age and education) who have limitations in accessing relevant information in relation to a particular product. There are consumers that do not even know their rights as consumers. And even in certain circumstance, there are consumers who are limited by insufficient information from the sellers. In the worst scenario, there are sellers, traders or suppliers who are trying

to hide information about their products from consumers' knowledge. Considering that today's market is very competitive with millions of goods available for consumer use, appropriate and reliable information needs to be delivered to consumers. It is therefore necessary to ensure that a method can be used to track the information given by traders, to prevent the traders from omitting information and to ensure compliance with the provision of information, after all, protects Malaysian consumers' interests.

MATERIAL AND METHODS

The main objective of this study was to analyse the appropriateness of information regulation as a specific protective measure for consumers in Malaysia. This study used mainly doctrinal research and qualitative analysis. This study wholly involved an analysis on the laws in the *Sales of Goods Act (SOGA) 1957* and the *Consumer Protection Act (CPA) 1999* as well as the discussions in commentaries, newspapers, textbooks, journals, and official documents. This study also explored the approach adopted by UK laws to protect the interests of their consumers. Accordingly, reference is also made to the *Consumer Protection from Unfair Trading Regulations (CPUTR) 2008, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCR) 2013*, *Consumer Rights Act (CRA) 2015*.

RESULT AND DISCUSSION

Legal Definition of Consumers

The term consumer carries various meaning in a different context (Howells & Wilhelmson, 2017). Generally, all human can be considered as consumers (Kennedy, 2017), because human beings are consumers by default and consumption is a fundamental requirement to human survival and endurance (Khan, 2011). Reifa and Hornle (2009) claimed there was no standard and consistent definition of a consumer. They said further that consumers could differ from individuals, groups of people, organisation or institutions that purchase goods or services for a personal and domestic purpose and could consume them for dual purposes. As a result, we can see that there are many regulations in different countries which have similar interpretation of consumer despite the nature of the consumer being very distinctive.

There is no specific interpretation for the term consumer from the Shariah perspective. According to Khan (2004), this is because, compared with the Shari'ah law adopted more than a thousand years ago, this concept is considered very new (Khan, 2004). Nevertheless, from a thorough analysis of the primary sources of Shariah law (Quran, Hadith, Ijma' and Qiyas) and works of the Muslim jurists, it is found that the general principles and rules for the protection of consumers have been described in detail by the Muslim jurists in various topics of fiqh such as liability (ḍamān), contracts ('Uqūd), fraud (Tadlīs),

uncertainty (Gharar), hoarding (iḥtiḳār), the law of options (Khiyārat), and ombudsman (Ḥisbah) explaining consumer's safety from adulteration, deception, concealment of defect etc (Khan, 2011). However, there is no specific attention given by the Muslims jurists to interpret the term consumer.

In the United Kingdom (UK), consumer definitions differ according to the legislation in question (Alhusban, 2014). For example, the *Consumer Protection from Unfair Trading Regulations (CPUTR) 2008* adopts a narrow definition of consumer and defines consumer differently from the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCR) 2013* and other consumer protection legal frameworks (e.g. The Package Travel Regulation). By virtue of Article 2 of CPUTR 2008, any individual who in relation to a commercial practise is acting for purposes which are outside his business is considered as a consumer. Whilst, the CCR 2013 defines a consumer as an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession. Similar to the *Consumer Rights Act (CRA) 2015*, which interprets a consumer as a natural person and who acts outside trade, business, craft or profession (sec 2, *Consumer Rights Act 2015*). It is clearly illustrating that the term 'consumer' carries different meaning from the eyes of CPUTR 2008 and CRA 2015. The terms' wholly or mainly' (which do not exist in previous legislation, nor the EU Consumer Rights Directive 2011) expand consumer protection to include contracts where individuals receive products or services for business and personal use (so long as personal use predominates) (Manko, 2018).

The *Consumer Protection Act (CPA) 1999* is the principal law which regulates consumer protection in Malaysia. It defines a consumer as a person who 'acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purposes, use or consumption; and does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of resupplying them in trade; consuming them in the course of a manufacturing process; or in the case of goods, repairing or treating, in trade, other goods or fixtures on land (sec 3(1), *Consumer Protection Act 1999*).

Consumer Detriment from Misinformed/Uninformed Choice

The academic scholars claim that until now there has been no universally accepted definition of 'consumer detriment'. The Office of Fair Trading (OFT) has commissioned several researches on consumer detriment and in several events, it tried to define the term of consumer. It was found that the early OFT concepts tended to concentrate on the loss of consumer welfare due to information asymmetric problems. A paper published in London Economics in 1997, for example said that;

> 'consumer detriment can be identified as the loss to consumers from making misinformed or uninformed choices. …

> however, … not every case of choice made with less than the maximum information potentially available constitutes a detrimental choice' (Office of Fair Trading, 1997).

The above statement describes that misinformed or uninformed choices is part and parcel of consumer detriment. However, in the Final Report for DG SANCO, the Europe Economics (2007) suggests that consumer detriment should be divided into two main categories; (i) personal detriment and (ii) structural detriment. The Consumer Strategy Group (CSG) Ireland describes the downside to consumer detriment as:

> 'The loss or damage experienced by customers when purchasing goods or services that do not meet their requirements are faulty, over-priced or sub-optimal in some way' (Thorun, 2016).

The above definition is closely related to the personal detriment. According to Thorun (2016), personal detriment is particularly focuses on ex-post outcomes for those consumers who have a bad experience after consuming a particular product.

In a simple word, consumer detriment can be understood as the loss suffered by a consumer as a direct result of purchasing goods or services not meeting the required requirements. Every year, about millions of consumers suffer from many form of consumer detriment (Office of Fair Trading, 1997) such as when the consumers buy the product or service at overprice or when the consumers buy a particular product which does not meet the optimum expectation and preferences. The detriment of consumer may happen in a 'dense market' with complex products. Moreover, consumer detriment may also happen when the consumers purchase a product or service at poor quality especially when it involves durables and other experience goods.

The cause of the detriment and its consequences may differ from one case to another (Ghapa, 2019). Sometimes it can be sellers who withhold important information, present evidence to manipulate weaknesses in the way consumers interpret information and analyse it, or deliberately deceive consumers. Consumer detriment may lead to economic loss, work loss and/or leisure time, stress and other psychological distress and even injury or death caused by hazardous product use. The circumstances discussed above demand for a specific measure to protect the consumers' rights for getting essential information from the traders and sellers before making any decision. Essential information relating to a particular product or service received by the consumers before a purchase is vital for them in protecting their interests. In addition, consumers need to know whom they are dealing with particularly when they are purchase goods using online platform or when they have no experience with a new trader. Moreover, they need to know about the contract terms and conditions under which the service is provided. This is vital because consumers need to know about their rights, obligations as well as remedies available in the case where the

sellers or traders breach the terms agreed between them.

In order to safeguard the rights and interests of vulnerable consumers in the current market, it is significant to produce well-informed consumers. Conceptually, well-informed consumers are referred to consumers who have more confidence when making decision to purchase (Office of Fair Trading, 1997) and capable of making sensible decisions. Being an informed consumer is advantageous to the economy, market and consumers (Carrigan & Attalla, 2001; Department for Business Innovation and Skills, 2011). For example, when the consumers acquired a set of adequate and accurate information about a particular product, they will able to make informed decision or choice with full understanding on what the reasonably expected consequences may happen. In other words, an informed decision can be said to have been made based upon a clear understanding of the facts, implications, and future consequences of an action.

Information Regulation: A Measure to Minimize Consumer Detriment

Imperfect information in the market may prevent efficient outcomes. There are several ways that could be used to solve this problem. Self-regulation is one of the approaches that we can employ to protect the consumers from inadequate or lack of information. However, this measure does not promise an efficient outcome because the implementation of that regulation is solely in the hand of industry. Thus, an appropriate and meaningful mechanism is therefore significance for an efficient outcome.

In current digital society, there are continuing demands for more government action to protect consumers. Regulation is amongst the most common mechanism employed by the government including UK, Australia and Malaysia to protect consumers' interests. Literally, regulation is characterized as a collection of rules developed by the government to regulate the social behaviour accompanied by procedures for monitoring compliance and power for enforcement. Information regulation can be the most appropriate measure to fill any gap of information or correct market imperfection due to information failure (Rahman et al., 2017). Besides, it could protect consumers from economic loss as well as emotional distress. Each and every regulation imposed by the government has its own objective, role and function. Depending on the objectives that have been set up by the government, information regulation can take place in many forms. Traditionally, information could be made available to the consumers through several techniques including scoring system, consumer education efforts and information disclosure (Ramsay, 2012). Depending on the circumstances, each of these solutions may provide consumers with the most effective remedy. This study paid special attention to the regulation through the provision of information as the best approach for protecting consumer interests in Malaysia.

There are several valid explanations why information provision should be implemented as a basic mechanism to protect the rights and welfare of consumers. One is that consumers are not properly aware about the design, quality and ingredient of the goods on the market. Xavier (2008) claimed that regulation by information provision was perceived as a means of increasing the amount of information obtained by the less educated consumers to a greater degree than by those consumers who were already able to access, understand and process the requisite information. When the amount of information provided to the consumers allows them to make an informed decision, undoubtedly it will help them to protect their interests. However, it should be noted that providing information in large amount or also known as information overload may place consumers in confusion. Therefore, it is significance for the sellers and traders to provide the essential information within a reasonable capacity. The question is how to measure the amount of information that should be supplied to the consumers? Is there any specific measure or tool that can be used to measure the information to be made available to consumers? There is no specific measure that has been designed by the professionals or academic scholars on how to measure the information that should be provided by the sellers to the consumers so far. Therefore, sellers and traders should play their part in ensuring that consumers are given a reasonable amount of essential information at all stages of the contract.

Academicians argue that regulation by information provision may mitigate consumer disadvantage and protect consumers against any harm. According to Breyer (1982) and Sustein (1999), information provision is prevalent at present and it can be recognised as another type of regulation that could be employed to protect the consumers. Regulation by information provision needs more than just a collection of facts as it anticipates the facts should be interpreted in a way that the audience to whom they are addressed will understand (Lanam, 2007). It goes further to specify all the essential information that must be provided to the consumers in a document. Regulation by information provision also has been known as an alternative regime (Sustein,1999; Breyer,1982) because it does not regulate manufacturing processes, output, price, allocation of products, or otherwise restrict the influence of individual market choices by banning products or establishing product standard as directly as traditional regulatory forms do. What it does regulate the content, communication and dissemination of information through a less rigid approach which leave consumers free to make their own choice (Beales et al., 1981).

According to Howells (2005), regulating the information that traders and sellers should provide could be the most appropriate safeguard for consumers in UK. UK government imposed many specific law requires the sellers, traders and manufacturers to provide the necessary information to the

consumers at all contract phases including pre-purchase, pre-contractual, during contract and post-contractual. If sellers or traders offer valuable information on products and services to buyers, it can help customers protect their interests by selecting the goods or services that are closest to their preferences. Consequently, consumer detriment may be diminished by ensuring goods and services are more likely to be in line with realistic consumer expectations based on reliable information. Howell also claimed that information indeed was essential for consumers and without any doubt, regulation of information provision was one of the key instruments use to strengthen consumer security standards.

The question is when is the most appropriate time to provide information to the consumers? Information provision is vital at all phases of a contract either at pre-purchase, pre-contractual, during contract or post-contractual. However, it is incredibly important to safeguard consumers' interests from any detriment due to misinformed or uninformed choice at the earliest stage, particularly at the pre- pre-purchase decision because consumers may not be able to get out of it once they purchase the product. By regulating the essential information of a particular product to be provided to consumers at the earliest phase particularly at pre-purchase stage, the law serves to fill the existing loophole, allowing the consumers to make well informed decision and to know the remedies available when the products are not in a good condition as expected. So it is not shocking that the introduction of pre-purchase information duties was a highly common consumer protection device.

Essential Information to be Provided to the Consumers

Pre-purchase information is a deciding factor for consumers when making their decisions and affects both the preferences of consumers and their trust in the goods and services available on the market (EUROPA, 2017). Consumers need at least three types of product or service information before they make a buying decision; price, quality and terms of purchase (Scott & Black, 2000). Information on the price of a particular product will allow consumers to make a comparison between products available in the market. Recently, we can see a lot of online sellers and traders promote their products using online platform without placing clearly the price. It may lead to consumer detriment when the consumers buy the overpricing products available in the market. Besides, the consumers will suffer economic as well emotional loss when consumers received a product purchased by them in a bad quality due to insufficient knowledge possessed by them at the pre-purchase decision making stage. As claimed by Beales et al. (1980), consumers cannot make rational, efficient and informed decisions when they have inadequate knowledge about the price, cost, quality or availability of the products.

Obligation to Provide Information vs. Duty to Disclose Information

When we are engaging with regulation of information provision, two responsibilities must be distinguished; the duty to provide information and the duty to disclose information. It has been noted by Sefton-Green (2005) that here a person had a duty to inform, the emphasis was on accountability with the contracting partners of that entity, while the duty to disclose appeared to imply that the entity under that obligation had anything to conceal that this obligation compeled him to reveal. Whilst the segregating line between the duties may be a fine one, it is an important distinction to be highlighted and one that should not be ignored. However, it is often a blurred distinction and one may see reference to a 'pre-contractual duty to disclose information' when the main focus is simply on transparency rather than enforced disclosure. It should also not be overestimated, as even a simple obligation to provide information can cause a person to reveal something he would have preferred to keep to himself and thereby become a duty to disclose it.

An obligation to provide information seems similar to the duty to enhance transparency by providing certain information to the other party and builds on a different set of purposes. Although this obligation also has a relation to the purpose of protecting real consent, the focus here is more generally on equipping the other party for rational market behaviour. Because information obligations are usually used in a protective way, they are often structured in detail, and the underlying aim of these rules is often to contribute to the substantive fairness of the information. In addition, they may strive to uphold informational clarity.

Consumer Protection Act (CPA) 1999 and Information Provision at the Pre-Contractual Stage

The *Consumer Protection Act (CPA) 1999* is the primary legislation passed by the Malaysian government to provide better protection for the Malaysian consumers. According to Consumer Association of Penang (2017), the rights provided under CPA 1999 will prevail over the term of any agreement agreed by the consumers. This statute applies to both goods and services. The laws which regulate the goods sector seems more advance compared to services sector. Section 3 of *Consumer Protection Act 1999* defines goods as goods including fixture, animals (including fish), vehicles and vessels, utilities and trees which are primarily purchased, used or consumed for personal, domestic or household purposes. However, that definition subject to certain limitation where the negotiable instruments, shares, debentures and money are not within it. The CPA 1999 generally covers six major consumer protection areas; the contract of sale goods and services, the supply of goods and services, the quality of goods and services, the safety of goods and services, the price and the remedies.

Part II of CPA 1999 and Section 8(a) of CPA 1999 give consumers some protection against misleading or deceptive conduct,

false misrepresentation and unreasonable claims. Where a retailer, distributor or producer is found guilty of any offense authorized under Part II of CPA 1999, the retailer shall be liable for a fine not exceeding two hundred and fifty thousand ringgit (MYR250,000) and a fine not exceeding five hundred thousand ringgit (MYR500,000) for a second or subsequent offense (sec 25 of the *Consumer Protection Act 1999*).Misleading or deceptive conduct may happen when the sellers or traders try to hide the important information related to their products from the consumers' knowledge. Nevertheless, there is no single clause requiring consumers to be provided with a piece of information by the dealers, distributors, suppliers or manufacturers. The CPA 1999 excludes some matters crucial to consumers including requirement to provide necessary information to the consumers at all stages of contract. This gap will prevent the consumers from being comprehensively protected by the CPA 1999.

As discussed earlier, adequate and accurate information is vital to be provided to the consumers at all stages; advertising stage, pre-purchase decision making, pre-contractual stage, during contract as well as post-contractual stage. However, it is found that there is no single provision in the CPA 1999 which regulate the information that should be supplied by the sellers or traders to the consumers. This is a clear gap in the existing CPA 1999 which prevent consumers from being comprehensively protected. Compared to the approach adopted by the UK, they allow the traders to include all relevant information, including the existence of the products (either goods or services), the ingredients of the product, the address and identity of the sellers, the price of the products and the payment method, etc. Providing essential information of the products available in the market could be amongst the best initiatives for assisting the consumers in making reliable and relevant purchasing decisions and becoming an informed consumer as targeted by the National Consumer Policy (NCP) 2002 and Consumer Master Plan (CMP) 2003-2013.

There is proof to say in certain circumstances, sellers, traders and manufacturers are in more dominant possession of information about their products and services (Rahman et al., 2016). As a step to prevent the sellers, traders and manufacturers from hiding any necessary information from the consumers' knowledge, the law should regulate the sellers, traders and manufacturers to provide essential information in clear, legible, understandable, and in appropriate form to the consumers. Amongst the necessary information that should be provided by the traders to the consumers at the pre-purchase phase includes characteristics of the goods or services, ingredients and substance of the goods, trading address, price of the products, complaint-handling policy and cancellation right. All of the information disclosed during the pre-purchase decision-making or pre-contractual stage and agreed between both parties will form as part of terms of the contract and binding upon both parties.

Sale of Goods Act (SOGA) 1957: Protection on Information Provision

The Malaysian Sale of Goods Act (SOGA) 1957 is one of the primary legislations that was enacted to provide protection to all buyers in Malaysia. This Act is modelled from the Indian Sale of Goods Act 1930 which has its origin in the English Sale of Goods Act 1893. The SOGA 1957 applies to all contracts for the sale of goods as defined in section 4 of the Act. Under this Act, a contract of sale of goods is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Four essential elements including seller, buyer, price and goods must exist to constitute a contract as a legally binding contact under SOGA 1957 and Contract Act 1950. Compared to CPA 1999, this Act is applicable to all buyers and does not restricted to consumers only. Therefore, the scope of SOGA 1957 is wider compared to CPA 1999.

The doctrine of caveat emptor was being adopted in SOGA 1957 to put the responsibility towards the buyer when making a contract with regard to quality and fitness of the goods (Rahman, 2018). In other words, buyer needs to have full knowledge about a particular product. There is no further provision which require the seller to provide all essential information related to the goods sold by them. This gap will place a buyer at risk due to the reason that not all buyers have adequate knowledge or information about a particular product. The doctrine of caveat emptor is no longer relevant to be practiced in this digital age as the current market is very challenging and competitive. The sellers are at dominant position compared to the buyers which allow them to acquire as much as information about a particular product but may place buyers in information gaps (Yusoff et al., 2011). Alias and Abdul Ghadas (2012) highlighted that lack or absence of information would make the incorrect choice position and would interfere with an individual's utility function, which means that the utility maximization would not be efficient. A serious lack of information not only could lead to irrational choices, but also had an impact on the ability of transactions. Therefore, it is vital for essential information of a product to be provided to all parties of the transaction at the earliest stage of a contract.

CONCLUSION

The earlier discussion revealed that the primary legislation providing protection for consumers in Malaysia, especially the CPA 1999, did not fully protect the interests of consumers. For last 15 years CPA 1999 has been applied; and in spite of having made several amendments, the crux of the legislation did not change much. Consumers need additional protection, particularly when challenges play a key role in this era of globalization in the marketplace. Several loopholes are found in CPA 1999, which excludes a number of issues that are crucial to consumers, including information that should be made available to consumers.

It is unsuccessful and inadequate to match to the current demand of protection by the consumers.

It is noted that the regulation by information provision is undoubtedly one of the main instruments available for enhancing consumer protection. Rationally, the knowledge deficit in Malaysia, i.e. lack of information is the key problem concerning the contract for the selling of goods. This issue averts consumers from making a proficient and informed decision. Some academicians such as Howells contend that the acquisition of information is the most important way of protecting consumers. Government needs to reveal relevant information about products and services on a regular basis at all levels, primarily for the purpose of instilling confidence in consumers to shop around, as well as enabling them to make choices for their maximum benefit.

Thus, this study strongly believes that 'information regulation' could overcome the aforementioned struggle and be the best consumer protection tool, especially for e-commerce consumers. In other words, the information regulation should act as a bridge to fill the holes in current laws, regulations and approaches. Therefore, it is necessary to legalize the information which should be given to consumers by sellers, traders and manufacturers in order to ensure that the interests will be secured at the first level, i.e. before concluding any sales contract with sellers and traders. The provision of clear and available information on a specific product is required to ensure the purchase process is more intuitive, open, consistent and efficient. To prevent consumers from being the victim of exploitation or fraudulent actions by sellers and traders, buyers must be aware of the quality of the product before making any purchase. Of that purpose, the most resourceful way to protect customers may be the provision of information. Apart from that, practising support self-reliance will certainly be in par of working comprehensively with the relevant State legislative instruments. Hence, the consumers will be benefited from this movement.

ACKNOWLEDGEMENT

We gratefully thank the Dean of Faculty of Law and International Relations, UniSZA, Professor Zuhairah Ariff Abd Ghadas for her support.We would also like to thank Dr. Aminuddin bin Mustaffa and Mrs. Rabiatul Adawiyah, for technical assistance.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 75 - 87 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Non-refoulement and Right of Entry for Asylum-seekers

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ABSTRACT

This article examines two questions: first, whether the Malaysian law regarding admission of asylum-seekers into its territory is consistent with international law, and second, whether the asylum-seekers who are already residing in Malaysia can be deported back to their places of origins. In answering these questions, this article analyses the legal aspects of the right to seek asylum under international law and its relation to the rule on non-refoulement. Additionally, it also examines the relevant provisions in the Malaysian legislations that regulate the admission of non-citizens into the country. This study is doctrinal legal research which is qualitative. The data used in this research was collected from library-based resources. These data were then analysed by using methods of content analysis as well as critical analysis. The article found that there are inconsistencies between international law and Malaysian law in matters concerning asylum-seeker's admission and those asylum-seekers in Malaysia should not be deported. Therefore, this study suggests that Malaysia should amend the provisions in the *Immigration Acts 1959/1963* and the *Passports Act 1966*. However, if the amendment of these legislations is not practical, it suggests that the Minister in charge of immigration affairs to make an order of exemption to the asylum-seekers so that their entry at the border would not be denied. This article shows that despite states' firm belief that they are entitled to use domestic law to deny the admission of asylum-seekers into their territory, international law provides a few mechanisms to remedy the legal loopholes.

Keywords: Asylum-seeker, deportation, Malaysia, non-refoulement, right to enter

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.06

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

Maintaining territorial integrity has been every state's top priority. States will go to a great extent to protect their boundaries, often in disregard of human rights and established rules of law. State's sovereignty is closely related to territorial integrity. As states remain sovereign at all times, they can decide who can enter its boundary and who cannot (Jennings & Watts, 1992).This powerful notion of sovereignty has created a complicated situation between states' prerogative to maintain their borders in one hand and honouring the human rights of the asylum-seekers on the other. Itis a well-established custom in international law that the asylum-seekers have the right to seek asylum (Gil-Bazo, 2015). Thus, it is consistent with the much invoked Universal Declaration of Human Rights (UDHR), under Article 14 that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." For such a right to be enforced, the asylum-seekers must first be able to enter the state's territory in order to enjoy the asylum (Hirsch & Bell, 2017).

Malaysia and Treatment of Asylum-Seekers at its Border

As a sovereign state, Malaysia has every right to guard its border against external intrusion. However, the notion of 'intrusion' sometimes blurs the line between a genuine need of the asylum-seekers to enter the state's territory for safety as provided under international law and state's legitimate interest in protecting its frontier. Malaysia's track records of treating asylum-seekers who arrived at its border are somewhat complicated. Asylum-seekers are essentially those persons whose application for formal refugee status have not yet been assessed by relevant authorities. The incident that occurred in 2015, where the Malaysian authority decided to push away those boats that were carrying asylum-seekers from Myanmar back to the open sea was nothing new (Ng, 2015). Back in the 1990s, the Malaysian government had towed boats of Vietnamese asylum-seekers back to the sea. The former premier, Mahathir Mohamad described this action as for "preventing foreign vessels from entering [Malaysian] waters" and to protect local fishermen from intrusion from foreign boats (Erlanger, 1990). The treatment of Malaysia towards asylum seekers at that time had reached the unacceptable level. The former premier even used the word "scum" to refer to the asylum-seekers who remain in the country after they had been saved (Erlanger, 1989). However, in the 1970s with the incoming of large groups of Filipino asylum-seekers fleeing the southern Philippines after a major fight broke out, they were allowed entry into the country without much conflict from Malaysia (Kassim, 2009).

This harsh treatment of asylum-seekers now, to some extent, had changed, specifically with regards to the Rohingya asylum-seekers. The Malaysian government has laid down plans to accept and help these asylum seekers and had collaborated with relevant institutions such as the office of the United Nations High Commissioner for Refugees (UNHCR) (Zulkefli, 2017).

However, the authors would reiterate the fact that this treatment is a matter of humanitarian concerns, rather than consideration of any legal obligation. This humanitarian-based reaction has been continuously relied on by Malaysia as a basis on how it should treat the asylum-seekers since decades ago, which resulted in fluctuated and inconsistent policies.

MATERIALS AND METHODS

This article uses doctrinal legal research, which is a qualitative study to prove that Malaysia is obligated to allow asylum-seekers to enter its territory and second is that those asylum-seekers who are already residing in Malaysia should not be deported. The materials for analysis were found from multiple sources in international and local literature. These sources were collected from both primary and secondary data. These include primary data such as treaties, conventions and international agreements, as well as the Malaysian law statutes. Whereas, the secondary data include materials such as books, journal articles, newspaper reports, reports published by international agencies, law reports and others. These data were then analysed by using methods of content analysis and critical analysis.

THE INTERNATIONAL LAW POSITION

Malaysia is not signatory to the core conventions of international refugee law, which are the Refugee Convention 1951 and its protocol, the 1967 Protocol Relating to the Status of Refugees. Malaysia has no plan to ratify the Refugee Convention for some vague reasons of difficulty with dealing with refugee "problems" (Palansamy, 2015), and fear that refugees will have more rights than its people, such as the right to work (Naidu, 2012). This thought is somewhat consistent with Malaysia's perspective on human rights in general which is more towards the "Asian values" which prioritise the community rights as opposed to the individual rights (Nordin, 2010). Due to this reason, many of the rights applicable to the asylum-seekers and refugees are not enforceable in Malaysia. Thus, it has caused many legal conflicts between the standards required by international law, and what the Malaysian law provided. It is especially apparent in matters concerning asylum-seeker entry into the country.

Right to Seek Asylum

Although international law does not guarantee the right to *receive* asylum, the Universal Declaration of Human Rights (UDHR) which is the foundational document on international human rights provides for the right to *seek* asylum under Article 14. Everyone has the right to seek asylum regardless of their nationalities, religious beliefs or association to any particular group. The only exception to this right is if that person has committed non-political crimes or serious crimes of international nature, such as the crimes against humanity or war crimes (Kapferer, 2008). Admittedly, this Declaration is a soft law which has no binding effect on state parties. However, many of the provisions in this document

has since achieved the status of customary international law, including the right to seek asylum. The right to seek asylum is implicit in many of the international agreements such as the Convention Relating to the Status of Refugees 1951 and many other regional conventions governing the right of refugees such as the Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 and the Cartagena Declaration on Refugees 1984.

Rule on *Non-Refoulement*

The rule *non-refoulement* flows from the right to seek asylum. The concept of *non-refoulement* means the protection of a state other than the state of nationality of the asylum-seeker by not returning him to the place where he was fleeing from persecution (Duffy, 2008). The application of this rule is also extended to the non-rejection at the frontier when there is an attempt by the asylum-seekers to enter the state's territory. It is a widely held belief that the rule has now attained a status of customary international law which requires Malaysia to observe and follow even without an explicit international agreement that provided as such (Yogendran, 2017). This rule is the very fundamental of international human rights and refugee protection. This principle operates as some form of guarantee for individuals to have access to asylum. The system works through this principle by prohibiting states from expelling the asylum-seekers when they reach the frontiers of those states intending to seek asylum. This right is supported by many universal conventions, including the regional ones.

According to Article 33 of the Refugee Convention, the principle of *non-refoulement* dictates that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Besides, Article 3 of the Convention Against Torture 1984 writes that "[n]o state shall expel, return or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture". While Article 3(1) of the United Nations Declaration on Territorial 1967, provides that "[n]o person […], shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."

In order for particular rules to become custom, it has to fulfil specific requirements. The first is that significant numbers of states have observed such rule; second, the observance has to be related to state's own belief (*opinio juris*) that the rule must be observed as a matter of legal obligation (Rosenne, 1984). Many international conventions have adopted this principle as part of their sacred rules. These include major international covenants as well as regional ones, as stated earlier. These treaties were ratified by large numbers

of states worldwide. Besides, the *non-refoulement* principle has been considered as *jus cogens* norm, that is, the norm in which no derogation is allowed regardless of how emergency the situation may be. (Costello & Foster, 2016). It is safe to say that this rule has been, as of now, already a part of customary international law.

As far as the limitation of the rule is concerned, it is of limited scope. It is as provided under Article 33(2) of the 1951 Refugee Convention, when it explicitly said that the *non-refoulement* "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." It is a particular provision that has a very narrow application. It is a question of fact and must be determined with proper due diligence standard (Lawyers Committee For Human Rights, 2000).

On July 25, 2011, an agreement entitled "Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement" had been signed in Kuala Lumpur known as refugee "swap" deal between Malaysia and Australia. (BBC News, 2011) This agreement will allow the transfer of 800 asylum seekers from Australia to Malaysia and 4000 registered refugees under UNHCR to Australia. However, this agreement did not proceed any further due to the decision laid down by the Australian High Court that such arrangement was unlawful under the Australian law as Malaysia is not a signatory to the Refugee Convention and has no domestic legal framework that can protect the refugees' rights (Siegel, 2011).

However, in the Memorandum of Understanding concerning this swap deal which was initially being kept confidential between these two countries, Malaysia had pledged to respect the *non-refoulement* principle (Government of Australia, 2011). Clause 10 of this Memorandum states that "[t]he Government of Malaysia will provide Transferees with the opportunity to have their asylum claims considered by the UNHCR and will respect the principle of *non-refoulement*.". This bilateral agreement thus proves Malaysia's *opinio juris* regarding *non-refoulement*, namely, that Malaysia feels legally obligated to observe the *non-refoulement* principle as part of the established law of nations.

Nonetheless, in 2015, during the influx of Rohingya's asylum-seekers, the Malaysian coast guard known as the Malaysian Maritime Enforcement Agency (MMEA) has violated this rule by committing pushback of boats trying to enter the territory in search for a place of refuge (Ghráinne, 2017). It took the government a long time to finally admit that such rule constituted customary international law that bound Malaysia even in the absence of an explicit treaty that required this. However, one major obstacle would be the *Immigration Act 1959/63,* which contains provisions contrary to the rule of *non-refoulement*. It follows, therefore, that the amalgamation of the right to seek asylum

and the rule of *non-refoulement*, has become a *de facto* right for the asylum-seekers to enter state's territory (Hathaway, 2005).

THE MALAYSIAN LAW POSITION

Immigration Act 1959/63

The power to regulate the entry of persons into the country falls within the competence of the Federal government as provided by the Federal Constitution, Ninth Schedule, List I. Unlike countries who have ratified the core refugee conventions, Malaysia has no specific laws that govern these asylum seekers. The main legislative acts that deal with the entry of non-citizens into the country are the *Immigration Act 1959/63* and *Passport Act 1966,* whereas the subsidiary legislation is the Immigration (Exemption) Orders which is issued under the Federal Government Gazette. With regard to the *Immigration Act 1959/63*, Section 6 (Control of entry into Malaysia) provides that no person other than a citizen shall enter Malaysia unless he or she possessed the required documentation such as a passport. Whereas, the term "entry" is defined under Section 2(1). Section 8 of the Act provides for types of immigrants that are considered as "prohibited". The determiner "any" is used for the noun "person", which means that this provision refers to anyone other than the citizens.

Those who arrive in Malaysia and fall within the definition and the scope of this provision may be issued an order known as "Not-To-Land Notice" (NTL). It will naturally also include asylum-seekers and refugees. Since Malaysia does not have domestic asylum laws or policies that specifically guide how the asylum-seekers should be treated upon entry, the asylum-seekers including minors are not treated differently than other non-citizens within the scope of Section 8 above (Nordin et al., 2015). Therefore, in principle, these asylum-seekers are at risk of being detained and arrested by the local authorities if they ever set their foot into the country or denied entry completely at the entry points. Detention of the asylum-seekers can be for an indefinite period since the decision to detain is not subject to judicial review as provided by Section 59A of the Act. The burden of proof lies on the person claiming that he enters the country lawfully.

A section of the same Act goes on to say that "[a]ny person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both, and shall also be liable to whipping of not more than six strokes. However, despite the existence of these provisions, Section 55(1) of the Act provides an exemption of this rule. It states that "[n]otwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto."

Immigration (Exemption) (Asylum Seekers) Order 2011 and Passport (Exemption) (Asylum Seekers) Order 2011

It is to be noted that there are two federal government gazettes in the form of orders that provide for the exemption to the asylum-seekers arriving in Malaysia. However, these orders were made back in 2011 to accommodate the incoming of asylum-seekers from Australia under the specific programme known as "Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement". These orders are valid for three years which is from August 8, 2011 until August 7, 2013. These gazettes prove that giving exemption to asylum-seekers to enter the country legally is not unprecedented, and it is possible as long as there is a will to do so on the part of the government.

Right to Seek Asylum and *Non-Refoulement* in Malaysian Law

The *Human Rights Commission of Malaysia Act 1999*, under Section 4(4) provides that "[f]or the purpose of this Act, *regard shall be had* to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution." (italics added by authors). This provision and the Act as a whole should stand with the Federal Constitution as the Declaration provides for the right to seek asylum under its Article 14. Thus, this article would argue thatsuch rightand the rule of *non-refoulement* are not inconsistent with the Federal Constitution. Since these two notions are meant to protect the right to life, this can be seen squarely through the lense of Article 5(1).This Article provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with the law". This vital provision guarantees that human life must not be deprived unless it is allowed by the law in force (Das, 2002). Due to the wording of the provision, such a constitutional guarantee is interpreted as not just restricted only to citizens of the country, but also extended to the non-citizens as well (Masum, 2008).

The *non-refoulement* is, in fact, the protection of the right to life in essence. The *raison d'être* of this rule can be traced back to Article 33 of the Refugee Convention 1951 which provides that state shall not "expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". The rule of *non-refoulement* existed in the first place in order to protect the right to life of the refugees who have to cross international borders to search for a place of refuge. A review of the *travaux préparatoires* of the 1951 Refugee Convention shows that the prohibition from refouling the asylum-seekers are for the sake of protecting their right to life (UNHCR, 1990).

Besides, in December 2017, a Minister in the Prime Minister's Department, Datuk Seri Dr Shahidan Kassim had admitted that the Malaysian government had always

respected the principle of *non-refoulement* (BERNAMA, 2017). This admission has cleared an ambiguous position that has clouded the issue of *non-refoulement* for so many years. It is to be noted that Malaysia's position concerning this rule was not direct and clear and has been a subject of academic speculation. The government has generally observed the rule, but in 2011 and 2012, despite a protest, it had deported a total of 17 ethnic Uighur asylum-seekers registered with UNHCR in Malaysia back to China.

Additionally, the rule on *non-refoulement* exists in Malaysian law *in principle* in the *Geneva Conventions Act 1962* (Act 512). It can be observed under the Fourth Schedule (Geneva Convention Relative to the Protection of Civilian Persons in Time of War), Article 45 which states "[i] n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." This paragraph is, in fact, describing a *non-refoulement* rule, bearing in mind that this Act is an enacting statute that transformed the four Geneva Conventions concerning the treatment of persons at the time of war into an enforceable Malaysian law. Consequently, the rule on *non-refoulement* had also been transformed into Malaysian law itself. However, the intention and the purpose of the Act was for the civilian persons within a specific situation, that is, during a war which is a *lex specialis* law. Thus, the application of this rule towards the asylum-seekers can be considered as a part of mechanism to remedy the existing legal loophole. Taking into consideration also Article 8(1) which provides that "[a] ll persons are equal before the law and entitled to the equal protection of the law". A creative interpretation of these various provisions by the Court will usher in a new era of promising legal protection of asylum-seekers and refugees in Malaysia.

DEPORTATION OF ASYLUM-SEEKERS ALREADY RESIDING IN MALAYSIA

This article argues that the very nature of asylum-seekers who are among the most vulnerable types of human beings and as discussed earlier that Malaysia has no legal framework governing the treatment of their entry into the country, it necessitates a creative interpretation of the legal sources. A literature review on the protection of asylum-seekers in Malaysia through the application of *non-refoulement* rule revealed a pattern of arguments that are based on the incorporation of customary international law within the definition of the scope of the common law of England. Supaat (2017) argued that *non-refoulement* was part and parcel of international law, but it is not part of the Malaysian law. As Malaysia is a dualist state, the Malaysian courts are not bound to apply laws which are not part of the law of the land (Ismail, 2010) and thus may disregard *non-refoulement* in its consideration. It is as provided by the *Civil Law Act 1956*, Section 3(1).

Therefore, Supaat argued that such rule was applicable in the Malaysian courts because the *non-refoulement* rule was a

part of the common law of England then, as reflected by the current United Kingdom's *Human Rights Act, 1998*, Article 3. As already stated by Supaat, the bindingness of the rule on Malaysia is indisputable (Supaat, 2013). However, a review of courts' jurisprudence showed that the judiciary was generally reluctant to accept this in their consideration. It can be observed in PP v Narogne Sookpavit2 MLJ 100 (High Court of Johor Bharu, 1987) where Shanker, J. said "[t]he customary law to which Article 14 of the Convention on the Territorial Sea is said to correspond may be the customary law of England, or it may be customary international law. In the Court below me, Defence Counsel seemed to suggest that it was self-evident that such customary law was part and parcel of Malaysian law. I am far from satisfied that this is the case.... Section 13 and 14 of the *Evidence Act, 1950* require evidence to be given of a custom before the Court can reach a positive conclusion as to its existence... No such evidence was led in the Court below." Hamid thought that the learned judge in the case above had strictly rejected customary international law. (Hamid, 2005). However, this author believes that was not the case. The decision not to acknowledge the existence of customary international law was because of lack of evidence before the Court. It shows that proving a particular rule of international law as a custom is difficult to succeed before Malaysian courts. The alternative argument should be made instead in order to achieve the same goal.

As argued earlier, therefore, the best course of action in arguing the *non-refoulement* rule in Malaysian courts should be based on Article 5(1) in combination with Article 8(1) concerning the right to equality as well as the Article 45 of the Fourth Schedule under *Geneva Conventions Act 1962* (Act 512), as it is much easier to argue a provision of local written law in Malaysian courts rather than to argue on unwritten law of the international source. This provision is dynamic enough to be making a convincing argument on behalf of the asylum-seekers in Malaysia facing the deportation by pleading to the Court for an expansive reading of the provision (Hashim, 2013), bearing in mind that states owed under international law negative and positive obligations to protect the right to life of all persons within its jurisdiction (Sicilianos, 2014).

Besides, the *Civil Law Act 1956*, Section 3(1) made it clear that if there is law in force that can have the same effect as foreign law, the local law should be relied on, not the other way around (Shuaib, 2009). In order to stop the deportation of an asylum-seeker, it is advisable that a legal suit should be brought before the competent Court and application should be made to stop such deportation by applying for the writ of *certiorari* through the invocation of those provisions as argued earlier and in addition to this, to plead for the Court to compel the Minister to exercise his power to exempt that asylum-seeker under Section 55 of the *Immigration Acts 1959/1963.*

To conclude this part, the dicta of Bugdacay v. Sec. of State for Home [1987] AC 514 at 531 in which the Lord Bridge observed that: "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis for the decision must call for the most anxious scrutiny." There is no reason why the Malaysian Court cannot act as the last protector of these asylum-seekers' right not to be returned to places of danger. The Court is duty-bound to make sure this critical right is not imprudently affected by the state's administrative oversight.

FINDINGS AND DISCUSSION

To address the first question, it is to be noted that the asylum-seekers have not fulfilled any of the requirements to enter Malaysia legally per local legislation. Malaysian law never distinguishes between asylum-seekers and illegal migrants without proper documentation. They are at risk of being arrested and may be charged for immigration law violations. The deportation or denial of entry will put them at risk of torture and even death upon return which directly violated the rule of *non-refoulement*. These provisions in the *Immigration Act 1959/63* and the *Passports Act 1966* if strictly followed would amount to a violation of Malaysia's international responsibility. The best step to take is by the Minister in charge of immigration affairs to invoke Section 55 of the *Immigration Act 1959/63* as well as Section 4 of the *Passports Act 1966* and to declare that those who enter the country to seek asylum would be exempted from the requirement under both Sections. The Minister should also make relevant regulations regarding asylum-seekers proper entry into the country as provided under Section 54 of the *Immigration Act 1959/63* and Section 11 under the *Passports Act 1966*. Malaysia is called upon to amend the provision in the *Immigration Acts 1959/1963*, of Section 6 which hasa minimal scope of types of people who may enter into the country, as well as the provision in the *Passports Act 1966* concerning the entry with a passport under Section 2. If the amendments to these Sections are not practical, this Article proposes that the Minister in charge of immigration affairs makes an order of exemption to the asylum-seekers so that their entry would not be denied. It can be best achieved by invoking Section 55 of the *Immigration Acts 1959/1963* as well as Section 4 of the *Passports Act 1966*, as the asylum-seekers are considered as "a class of persons".

With regards to the second question, it is to be noted that the principle of *non-refoulement* as in treaties and customs could be said as asylum-seekers first line of defence. Asylum-seekers leave their countries because of the threats to life that they faced in their country of origin. The refusal of Malaysia to allow these asylum seekers to enter its territory in seeking for refuge, at least for a temporary period violates established rules of international law *vis-à-visnon-refoulement* (Helton, 1992). Malaysia should not expel asylum-seekers

seeking access into its territory to seek safety as the principle of *non-refoulement* explicitly forbids this. This Article strongly believes that it is a naïve standpoint to accept the notion that the right to seek asylum and the rule on *non-refoulement* as engraved in the treaty cannot be construed as to entitle the asylum-seekers to enter state's territory. It just does not make any sense as far as the right to seek asylum is concerned if states were to be given unfettered power to push the asylum-seekers away (Gkliati, 2011). Since treaties were born out of international politics, obviously it was not possible to construct this implicit entitlement explicitly.

CONCLUSION

Therefore, Malaysia must be cognizant about the existence of UNHCR as the agency with the authority to determine the refugee status in Malaysia. Asylum-seekers should be allowed access to UNHCR, which is located in the country as they have no other international protection to guarantee their safety—blocking access to its territory, which in turn, stopping the asylum-seekers from getting to UNHCR is utterly unacceptable given the history of the existence of the agency which was founded back in 1978 in this country to deal with the influx of Vietnamese asylum-seekers to Malaysia. It is Malaysia's responsibility to allow these persecuted people access to institutional protection available.

ACKNOWLEDGEMENT

The authors would like to acknowledge the generous assistance by the Faculty of Law and International Relations, UniSZA during the publication process of this article.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 89 - 104 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Statutory Provisions of Malaysian Law to Subdue Deviant Teachings in the Religion of Islam and its Implication

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ABSTRACT

Deviant teachings that are contrary to the recognised religions often disturb the peace and harmony of society. The aspect of aqidah (faith) is the core of religion for a Muslim. This paper explained the applicable statutory provisions of law in dealing with cases of deviant teachings in Malaysia. This paper attempted to relate instances of deviant teachings and the penalties prescribed by the Shariah Law as well as other general law. The paper also tried to provide exposure to the clauses contained in the existing legal provisions and significant forms of punishment. The methodology adopted in this paper was doctrinal in nature whereby methods of library research were resorted to in collecting data related to the statutory provisions governing deviant teachings and criminal offences relating to aqidah. Statistics showed that the number of cases for deviant teaching is increasing each year. The findings from this research showed that the current punishment and penalty are not sufficient to curb the offence committed and to create awareness among the public. This paper suggested that the relevant authorities should increase the severity of the punishment and widen the jurisdiction to control cases of deviant teaching in Malaysia. Members of the Muslim community should be given more exposure on its importance.

Keywords: Aqidah, civil law and punishment, deviant teachings, islamic law

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.07

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

Deviant teachings are any teachings or practices by Muslims or nonMuslims who claim the teachings are Islamic teachings or based on Islamic teachings. Yet, the teachings are not based on the Qur'an and AlSunnah as well as against the teachings of the Ahlus Sunnah Wal Jamaah. The term 'misguided' is a common term used to describe deviant teachings among Malaysians. Furthermore, there are several other terms that are often used in media which have similar meaning as the deviant teachings including false teachings, discordant discourse and *aqidah* deviations. The term *aqidah* distortion is an expression which attempts to illustrate the form of discipline which deviates or is not according to the basis and order outlined in the Qur'an and Al-Sunnah. In addition, it deviates from the collective opinions of the Ahlus Sunnah Wal Jamaah members. One of the reasons for the advent of the teachings is the influence of the emanations that are impregnated with elements which are not in line with the true teachings of the Qur'an and the Sunnah and the formula enumerated by the Ahlus Sunnah Wal Jamaah (Stapa, 2002) Unfortunately, some deviant teachings have been detected in Malaysia, indicating that they are a community disease that exists in almost all states and countries around the world. This issue of deviant teachings is very important as it touches the lives and creeds of all Muslims. This paper attempted to explain the general definition of deviant teachings, the applicable law, problems of deviant teachings and proposed solutions.

METHODS

The methodology adopted in this paper was doctrinal in nature whereby methods of library research were resorted to in collecting data related to the statutory provisions governing deviant teachings and criminal offences relating to *aqidah*. Primary sources referred to were statutory provisions and cases, while secondary sources were books, journal articles and official documents of relevant authorities.

Library research was performed to accumulate data in the form of documents that are related to the topic of the study. It was conducted to collect data and information from the reading of related documents, such as books, journals, scientific research, dissertations, theses, paperwork, written reports, bulletin, newspapers, and other related sources by utilising libraries. Fieldwork utilised three procedures to collect information and data, which are interviews, observations, and surveys. The interview was the main procedure to collect data, while observation was used to strengthen the study's findings. Fieldwork utilised three procedures to collect information and data, which are interviews, observations, and surveys. The interview was the main procedure to collect data, while observation was used to strengthen the study's findings. The fieldwork employed to obtain the latest information about State Islamic Religious Department that preside over deviant teaching cases. The methodology used was through an interview with the head of the department to obtain information starting from the process of the receipt of

the complaint, enforcement, establishing evidence, and prosecution. Interviews are considered important data sources in this study. An interview is a question and answer session using oral to obtain information, evidence and views orally. Before this method was implemented, the respondents to be interviewed had been identified in advance and consisted of authoritative and experienced parties, especially those in the research, enforcement and prosecution of cases of criminal offenses of faith, namely in the State Islamic Religious Department, District Religious Office, Subordinate Court and State *Shariah* High Court as well as other parties involved in the process of dealing with such offenses.

RESULTS

The findings from this study showed that the number of cases for deviant teaching was increasing each year. It was also shown that the current punishment and penalties were not sufficient to curb the offence committed. Also, there was a lack of fundamental knowledge on Islamic religion among Muslims, making them involved in deviant teachings. This information provided by Aqidah Division, of the Islamic Development Department of Malaysia (JAKIM), in Malaysia, there are 127 organizations or teachings that have been identified as deviating from the teachings of Islam. From that number, 22 teachings have been proven astray but are still active, 51 teachings are no longer active (dead), 15 teachings are found to be weak and less active, while 3 teachings in the fatwa (determined by law) are out of Islam and 36 are still under investigation. Based on interviews and reports from the Head of Research Division, State Islamic Religious Department, namely Mr. Sabaruddin Isnin and the officer handling the case of deviant teaching, Mr. Shahrul Bazli, there are an increase in cases of deviant teachings. Based on the research of M.As'ari Tiba, related to deviant teachings and its influence in Johor. Johor Religious Department. There are 21 dubious heretical teachings detected in the state of Johor.

DISCUSSIONS

Definition of Deviant Teachings based on Language and Terms

Deviant teachings are derived from the basic word, "teaching" which means guidance (Kamus Dewan, 2002). Whereas the teachings are meant for everything that is taught, whether in the form of advice or guidance. 'Deviant' in terms of language means 'not following the correct way, mistaken, and wrong way either regarding deeds or beliefs, confused (deeds, beliefs) and deviate from the right path (Kamus Dewan, 2002). Therefore, the meaning of deviant teachings based on language is an act or practice that is contrary to the *aqidah* and the Islamic law, either openly or in secret either in *'iktiqad'*(belief) or practice. Whenever a teaching is accepted and practised, then it will implicate himself as an apostate, imperfect to his or her religion and the worships are unaccepted.

According to Aqidah Division, of the Islamic Development Department of

Malaysia (JAKIM) in which presented by Rahman (2001) and Bahagian Hal Ehwal Agama Islam (1994), deviant teaching is defined as any teaching or practice brought by Muslims or non-Muslims who claim that the teachings and practices are based on Islamic teachings. But in fact, the teachings and practices are contrary to the Islamic faith, Qur'an and the Sunnah, noble madhhab and to the Ahlus Sunnah Wal Jamaah. In Islam, those who are astray, are not well-equipped with religious knowledge because the deviant teaching is against Islamic jurisprudence and far from the truth (Basmeih, 2010). Further, it is stated that the deviant people are the ones who are not properly informed of the religion as learned by the rules and the real path (Basmeih, 2010). Thus, a misguided person is a non-religious person who does not seek to learn the religion.

Features of Deviant Teachings

Deviant teaching is a phenomenon that has, is and will hit the Muslim community. Malaysia is also affected by this phenomenon. Deviant teaching is a deviation in religion, and it is very dangerous to the religion, family institution, ummah, and country. It can be likened as cancer that needs to be addressed and prevented early because precautionary measures are always better than treatment and rehabilitation efforts (Gadot, 2001). The Islamic Research Centre of JAKIM lists the characteristics of deviants in a teaching or discipline that can cause its practitioners to have abandoned their faith and become deviates. Among the features of such teachings is their contrariness to the Qur'an, AlSunnah, alIjma' (the agreement of the religious scholars of the period) and Qiyas (analogy). It must be noted that when a practitioner of such teachings or practices contradicts with the Qur'an, the Sunnah and Ijma', he becomes an apostate of Islam (Othman & Zainal, 2006).

The next major feature is the teachings which contradict the fundamentals of Islam, like *Aqidah, Shariah*, and morality. False, misguided, and manipulation may occur regarding aqidah, syariah or morality. For example, abolishment of certain obligations in the Islamic law such as abandoning the obligation to perform obligatory prayers five times a day, to fast in Ramadan and to pay zakat (tithes). These obligations are then replaced with new obligations instead (Alwi, 2007). In addition, the new obligations are contrary to the beliefs of Ahlus Sunnah Wal Jamaah members Deviant teaching involves believing in the existence of another book that rivals or abolishes the Holy Qur'an, there is another Qibla other than the Kaabah, and more (Otham & Zainal, 2006). Deviant teaching can be eliminated if Muslims return to the Qur'an, the hadiths and the Ijma'. The Muslim community is urged to refer any doubts and uncertainties relating to religious affairs, ceremonies and so on to the respective State's Mufti Department, Religious Departments, JAKIM and Institute of Islamic Understanding (IKIM).

Provisions of Related Law for Deviant Teachings in Johore

Each state in Malaysia has its own law

governing the affairs of Muslims. Although there is no specific provision for deviant teaching, there are several provisions that can be applied to deviant teachings. According to study by Jamal (2008) and Alwi (2007), the provisions of the law for offenses relating to deviant teachings in Johor are based on:

(a) *Syariah Criminal Offences Enactment 1997* (In this paper the enactment of Johore was referred to represent)
(b) The *Federal Constitution*
(c) *Penal Code*
(d) *Sedition Act 1948* (Amendment 1970)
(e) *Police Act 1967*

Syariah Criminal Offences Enactment 1997

This enactment involves the forms of offenses under Part II which is offense relating to Aqidah; Part III is the offense connected with the Sacred Religion of Islam and its Institutions; Part V is misconduct; and Part VI is abetment and trial.

Analysis of the Category of Punishment Related to Deviant Teachings

Based on Table 1, it is shown that the majority penalties are in the category of a fine not exceeding RM3000 or imprisonment not exceeding two years or both. The offences relate to perform false worship, develop false doctrine, insult or cause the religion of Islam to be despised, insult or deny religious authority, deny court order, have opinion contrary to fatwa, publish or issue religious publication contrary to Islamic law, give false information or statements, and destroy or defame mosques, surau and so on (Sections 3, 5, 7, 9, 10, 12, 13, 30 and 32).

The second category is the penalties ranges from a fine not exceeding RM5000 or imprisonment not exceeding three years or both. This category relate to false doctrine, false allegations, derogatory verses of the Qur'an or hadith, teaching religion without permit and takfir (Sections 4, 6, 8, 11 and 31).

The heaviest penalty is for the offence relating to false doctrine. The punishment includes a fine not exceeding RM5000 or imprisonment not exceeding two years or strokes not exceeding six strokes or punishable with any combination thereof (Section 4).

On the other hand, the lightest sentences are for offences relating to the incitement of offence to disregard religious duties. The penalties include a fine not exceeding RM1000 or imprisonment for a term not exceeding 6 months or both (Section 17 (1)); and a fine not exceeding RM2000 or imprisonment for a term not exceeding one year or both (Section 17 (2)).

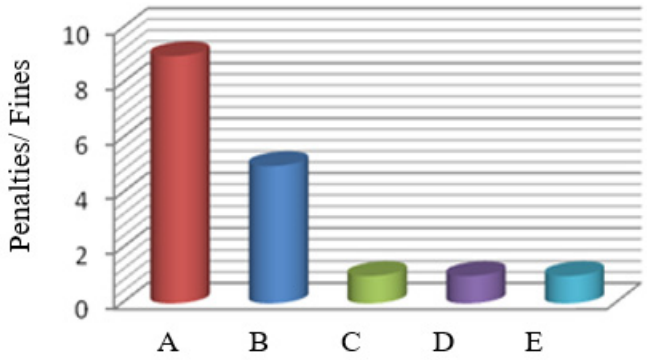
In general, the category for a fine of not more than RM3000 or imprisonment not exceeding two years or both, is the highest type of penalties (56.25%) which are for nine misconducts related to deviation. For category of penalty of not more than RM5000 or imprisonment not exceeding three years or both, there are five forms of offences (31.25%) of the total offences related to misguided teachings. While part

C, D and E only involve one form of offence (6.25%). In conclusion, each category of punishment for an offence is dependent on the discretion of the court to decide whether it has been determined or reduced from the maximum limit of punishment decided for the offence.

Table 1

List of offences and penalties relating to misguided teachings under the State Syariah Criminal Offences Enactment 1997

SECTION	ITEMS/WRONGDOINGS& FINE/PUNISHMENT
3	False worship: A fine of not more than RM3000 or prison of not more than two years or both
4	False doctrine: A fine of not more than RM5000 or prison of not more than three years or whipped of not more than six strokes or with any combination of penalties.
5	Developing Religious Doctrine: A fine of not more than RM3000 or prison of not more than two years or both
6	False Indictments: A fine of not more than RM5000 or prison of not more than three years or both
7	Insulting or leading to disdain of Islam: A fine of not more than RM3000 or prison of not more than two years or both
8	Insulting, ridiculing verses of the Qur'an and Hadith: A fine of not more than RM5000 or prison of not more than three years or both
9	Humiliating or deny religious authorities: A fine of not more than RM3000 or prison of not more than two years or both
10	Denying the court order: A fine of not more than RM3000 or prison of not more than two years or both
11	Teaching without credentials: A fine of not more than RM5000 or prison of not more than three years or both
12	An Opinion Contrary to a fatwa: A fine of not more than RM3000 or prison of not more than two years or both
13	Religious Issues Contrary to Hukum Syarak: A fine of not more than RM3000 or prison of not more than two years or both
17(1) & (2)	Inciting to ignore religious obligations: A fine of not more than RM1000 or prison of not more than six months or both/ A fine of not more than RM2000 or prison of not more than one year or both
30(1) & (2)	Providing false information, declaration or statements: A fine of not more than RM3000 or prison of not more than two years or both
31	Takfir: A fine of not more than RM5000 or prison of not more than three years or both
32	Destroying or tainting mosque,surau,etc:A fine of not more than RM3000 or prison of not more than two years or both



SECTION	A	B	C	D	E
3, 5, 7, 9, 10, 12, 13, 30, 32	9				
4, 6, 8, 11, 31		5			
4			1		
17(1)				1	
17(2)					1

Figure 1. Penalties and fines related to offences of deviant teachings. Source: *Syariah Criminal Offences Enactment 1997 of Johore*

Evidences of the Forms of Offences and Penalties Related to Deviant Teachings under the Syariah Criminal Enactment of the State of Johore 1997

(a) Offences relating to Aqidah

(i) False worship

This offence is under the provisions of Section 3. Section 3 (1) explains that any person who worships nature or performs any act which shows worship or respect to any person, animal, place or thing in anyway in violation of Hukum Syarak shall be guilty, and shall on conviction be liable to a fine not exceeding RM 3000 or imprisonment for a term not exceeding two years or both. Under Section 3 (2), it clarifies that the Court may order any device, thing or material used in the commission or incidental to the offences referred to in subsection (1) is defamatory and destroyed, although no one has been convicted of such offence.

(ii) False Doctrine

This offence refers to any person who teaches or clarifies any doctrine or performs any illegal ritual or act relating to the religion of Islam in any place, whether at private or public place (Section 4 (1)). Upon conviction he shall be fined with not more than RM5000 or a period not exceeding three years of imprisonment or whipping not exceeding six strokes or in any combination.

Also, the court may order any document or thing used in the commission or connection with the offence in subsection (1) is defamed and destroyed, although no one has been convicted of such offence (Section 4 (2)).

(iii) Developing religious doctrine and other wrongdoings

This offence relates to any person who develops doctrines or religious beliefs other than the doctrine or belief of Islam among Muslims. Upon conviction, he is subject to a fine not exceeding RM3000 or imprisonment of not exceeding two years or both (Section 5).

(iv) False allegations

This offence arises when any person declares himself or any other person as apostle or prophet, Imam Mahadi or saints (Wali) (Section 6 (a)). This offence also refers to whoever claims that he or any other person who knows any event or matter which is beyond human' understanding or knowledge, while the declaration, statement or allegation is false and contrary to the teachings of Islam. These offences are subject to a fine not exceeding RM5000 or to a maximum of not more than three years or both (Section 6 (b)).

(b) Offences relating to the sanctity of Islam and its Institutions

(i) Insulting or leading to disdain of Islam

This offence involves any person who orally or in writing or with a visual appearance or any other means insult or lead to disdain of Islam (Section 7). In details, Section 7 (a) refers to insulting the religion of Islam or causing the religion to be despised, Section 7 (b) refers to contempt, propagation or reproach of the practices or rituals relating to the religion of Islam, and Section 7 (c) refers to taunting or leading to disdain of Islam in any law as enforced in the State of Johore relating to the religion of Islam. Under this section, a person shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both.

(ii) Insulting/ ridiculing verses of the Qur'an or Hadith

This offence refers to any person who by his words or deeds, contempt, scorn, reproach or lead to disdain of the Qur'anic verses or Hadith. Upon conviction he shall be liable to a fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or both (Section 8).

(iii) Humiliating or denying religious authorities

This offence refers to any person who is acting in a manner that insults a religious authority or denies, violates or disputes the order or direction of the Sultan as the Head of the Islamic Religion, the Majlis or the Mufti as mentioned or given through a fatwa. Upon conviction he shall be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both (Section 9).

(iv) Denying the court order

This offence refers to any person who denies, violates, argues, damages or induces any order of the Judge or Court. Upon conviction he shall be liable to a fine not exceeding RM3000 or imprisonment for a term not exceeding two years or both (Section 10).

(v) Teaching religion without credentials

This offence is under the provisions of Section 11. Section 11 (1) specifies any person who teaches or claims to teach any matter relating to the religion of Islam without the credentials granted under Rule 9 of the Rules of Teaching and Religious Lecture 1991, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5000 or imprisonment for a term not exceeding three years or to both. Whereas section 11 (2) of subsection (1) should not be applicable to section 11 (2) (a) which any person or class of persons exempted by the Council under the Rules of Teaching and Religious Lecture 1991, or to section 11 (2) (b) for any person who teaches or claims to teach any matter relating to the religion of Islam in his own home to his family members only.

(vi) Opinion contrary to fatwa

This offence occurs when any person who gives, develops or disseminates any opinion on the teaching of Islam, *Hukum Syarak* or any issues contrary to any fatwa as enforced in the State of Johore. Upon conviction he shall be guilty of an offence and shall be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both (Section 12).

(vii) Publication of religion contrary to *Hukum Syarak*

Section 13 (1) (a) stipulates that any person who prints, publishes, records, distributes or otherwise disseminates any book, leaflet, document or anything - any form of recording that contains anything that is contrary to *Hukum Syarak*, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both. Section 13 (1) (b) further specifies any person in his possession contains anything that is contrary to *Hukum Syarak*, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both. Whereas Section 13 (2) states that the court may order any book, leaflet, document or recording referred in subsection (1) to be withdrawn and destroyed, although no person has been convicted of any offence relating to the book, pamphlet, document or recording.

(viii) Incitement to ignore religious obligations

When any person incites or induces any Muslim not to attend a mosque or religious teaching or any religious ceremony, he has committed this offence. Upon conviction he shall be liable to a fine not exceeding RM1000 or to imprisonment for a term not

exceeding six months or to both (Section 17 (1)). Another offence is when any person who by any means may prevent others from paying zakat or fitrah> He shall upon conviction be liable to a fine not exceeding RM2000 or to imprisonment for a term not exceeding one year or both (Section 17 (2)).

(c) Multiple Offences

(i) Providing false information, declaration or statements

Section 30 (1) stipulates that any person who gives false evidence or falsifies evidence for it to be used at any stage in a judicial proceeding in Court shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM3000 or imprisonment for a term not exceeding two years or both. Whereas Section 30 (2) states that any person who knows or has reason to believe that an offence has been committed under this enactment or any law, any other written law relating to the religion of Islam, who furnishes any information relating to the offence known or believed to be false shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both.

(ii) *Takfir*

Section 31 (1) stipulates that subjected to subsection (2), any person who speaks or slurs, either verbally or in writing or with visible gestures or images, any act, activity or conduct, or by organising, sponsoring or arranging any activity or otherwise in any way, that any person who professes the religion of Islam or people belonging to any group, class or description of those who profess the religion of Islam are infidels or no longer embrace Islam or should not be accepted or unaccepted as someone who professes Islam, or does not believe, follow, profess or belong to the religion of Islam, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or both.

Whereas section 31 (2) states that subsection (1) shall not be applicable to:

(a) anything done by any Court or established religious authority, which is formed or appointed by or under any written law and is empowered to make or remove any decision on any matter relating to the religion of Islam; and

(b) anything done by any person pursuant to or in accordance with any decision made or issued by Court or authority, whether the decision is in writing or, if in writing, whether it is published in the news.

(iii) Destroying or tainting the mosque, surau or any place worship

This offence refers to any person who destroys, damages or taints any mosque, surau or another place of worship or any equipment with the intent to insult or degrade Islam. He shall on conviction be liable to a fine not exceeding RM3000 or to imprisonment for a term not exceeding two years or both (Section 32).

(d) Abetment and Attempt

(i) Abetment

This offence is under the provisions of Section 43 which states that a person abets the conduct of a deed if he:

a. incites other person to do the deed
b. is involved with one or more persons in any misconduct or performing the deed, if any unlawful act or omission takes place because of the infraction, and with the intention of doing so; or
c. deliberately assists, with any unlawful act or omission, the commission of the deed.

(ii) Penalties for abetment

Any person who abets any offence shall, if the act of abetment is committed, shall be punished with the punishment decided for the offence (Section 45).

(iii) Attempt

Section 47 (1) stipulates that any person who attempts;

(a) to commit an offence punishable under this enactment or under any other written law relating to *Hukum Syarak*; or

(b) to cause the offence to be committed, and in the attempt to do the act towards the commission of offences shall, if no clear provision is made by this enactment or such other written law, whichever applicable for the sentence of the offence, be sentenced with any punishment decided for the offence.

It must be noted that any period of imprisonment implicated for an attempt to commit an offence or to cause an offence to be committed shall not exceed one-half of the maximum period of imprisonment as decided for the offence (Section 47 (2)).

Federal Constitution

The *Federal Constitution* states that state law and the Federal Territories of Kuala Lumpur, the federal law could control the expansion of any iktikad or religious beliefs among individuals professing Islam (Article 11 (4)). This provision when read together with Clause (5) connotes that the law does not permit any act contrary to the general law of public order, public health or morals.

Penal Code

Chapter XV of the Penal Code describes offences relating to religion. Section 295 to Section 298A described in the Penal Code as punishment to any party practicing deviant teaching or not, with the interests of interfering with the freedom to practice religion in Malaysia. Section 295 for the offence of destruction, damage or contaminating any place of worship or anything used for worship with the intent of insulting the religion or with his knowledge that his actions may have caused any group of human to regard the act of the accused to be an insult to their religion. If convicted, the accused will be sentenced to jail for up to two years or fine or both (Harun & Ahmad, 1993).

Section 296 is for the offence of disturbing a religious assembly, which upon

conviction of his offence shall be sentenced to imprisonment for a term of up to one year or fine or both. Section 297 states that anyone who enters the cemetery is guilty of an offence if it is intended to disturb the funeral customs or to disturb the people who assemble there or to insult the deceased. For example, grave worship activities are done to obtain lottery number.

Section 298 is for misleading words and so forth with the intention to offend any religious belief. A person who, if convicted, will be sentenced to imprisonment or fine or both.

Section 298A describes the offence which causes disharmony, disunity, frustration, or hostility, hatred or envy or prejudice and so on in preserving harmony and unity on religious basis. If convicted, he shall be sentenced to imprisonment for a term not less than two years and not more than five years (Harun & Ahmad, 1993).

The offence under section 298A also includes prejudice or attempt to induce such feelings or likely to induce prejudice in the effort of preserving harmony and unity from religious intention, performed on oneself, a group of people of the same religion or vice versa. In addition, it shall also be an offence when the accused does so by word, whether by speech or writing or by means of a signal or representation or by any act, activity or conduct or by establishing, organizing or assisting the activities of establishing or arranging any activity or otherwise through any means (Harun & Ahmad, 1993).

Sedition Act 1948 (Amendment 1970)

Section 2 of this Act provides the interpretation of the word "incitement" which is involving any act, speech, word, publication, or other thing with the tendency to incite. Section 3 of the Act, for example, defines the seditious tendency among others to arouse dissatisfaction or dislike among Malaysians or to induce anger and dissatisfaction among Malaysians. Section 4 of the same Act defines it is an offence to commit, prepare or conspire to commit seditious acts, pronounce seditious words, and organise and promote or bring in any seditious publication. Commonly, deviant teachings tend to incite and cause propaganda to their followers regarding an issue especially when it involves public order.

Police Act 1967

This Act empowers any police in controlling and supervising assemblies, marches, and gatherings. Permits must be obtained before holding any gathering. Section 27 of the Police Act 1967 is in line with Article 10 (2) (a) of the Constitution of Jurisdiction which limits the rights of Malaysians. The police have authority to approve the applicant's permit applying for a permit to make an open-air meeting provided his speeches do not touch sensitive issues. Nonetheless, most gatherings of deviant teachings do not have permits. Therefore, the police have full power to curb their activities by preventing rallies of more than 20 persons to be subjected to action against if they do not have a permit.

Implication of Deviant Teachings

Muslims must realise with full conviction that the deviation of Aqidah has a very serious and significant risk in the life of a Muslim (Manzur, 1955). Question arises whether actions to deter such teachings are not sufficient. This is because, although preventive measures are taken by the state authorities against deviant groups, they are still spreading from one state to another. Therefore, integrated action is needed from all parties to handle and control the groups. A plan to eradicate deviant teachings requires a uniform process to produce more effective measures. It is evident in the general view that these deviant teachings have negative impacts not only on Islam, individuals and society but also a threat to the national security. Among the consequences of the spreading of these deviant teachings are:

Shirk, Kufur and Apostasy. Shirk is taken from the Arabic word which means sharing or agreeing. Shirk to Allah s.w.t. means to associate Allah, in term of His Power and Attributes, with another thing or being. In other words, shirk is seen from the standpoint and position between Allah s.w.t. with other creatures. In the event of equality and association, then shirk occurs. The worship of grave that is considered sacred and the belief of the magic of the saints and the shaman, are considered superstitious which often practiced in the belief or teaching which will drag its followers to associate Allah with other being. *Kufur* (infidelity) is opposed to faith which is turning away from the truth and committing vices after showing obedience and faith (Ma'luf, 1987). *Kufur* can also be defined as refusing and denying anything that comes from Allah s.w.t through His apostle without any doubt (al-Maydani, 2002). Similarly, a person will become apostate if he returns to disbelief after he accepts Islam as his *Deen*.

Disunity in Society. Widening of disunity in Islamic society is observed. This is because every misguided teaching has its 'Master Teacher' and its followers. Through the teachings, they cultivate the understanding of life and try to create and form a distinct group or society. Hence, creating specific rules that are exclusively made for members of their group, such as not to be married to non-members. In fact, every group or tribe feels they are on the right path to be able to persuade others to shirk resulting in the feelings of hatred among various groups of people. This has caused terrible consequences, not only to the religion but also to social stability (Yusof, 2007).

Emergence of Violence in Society. Often these misguided groups isolate themselves from the majority groups in society. They do not participate in programmes held by the local community and isolate themselves from the current physical and spiritual activities that the government have implemented. They also boycott, and initiate dispute to induce feeling of hatred between one group and another.

Misguided Religion. In misguided religion, it is inclined to practice a doctrine which is

contrary to Islam. Among the things that can bring Muslims astray away from the religion of Islam include believing and practicing deviant teaching. It happens when the followers overwhelmingly worship the leader by giving total obedience to him blindly without any questions, comments, or criticisms. This indirectly opens opportunities for certain groups to gain self-interest in this world (Shafii, 2004). Frequently the involved groups in misguided teachings do not only deviate from the Shariah (religious law) but also Aqidah.

Threat to National Security. If these deviant teachings are left to operate without any action taken against them, they are capable of jeopardising public safety and order. These are some of the negative consequences of deviant teachings, but there are many more bad consequences and disasters resulting from these deviant teachings. Therefore, preventive and corrective measures need to be continued so that the negative events do not occur again.

CONCLUSION

Deviant teaching is one of the weapons used by enemies of Islam to destroy Muslims and Islam.

Hence, in order to prevent Muslims from being trapped by deviant teachings, continuous efforts, especially in education, must be done to complement and enhance Islamic religious knowledge among Muslims so that such knowledge can shield themselves from the spread and influence of deviant teachings. Many factors are involved in the formation of misguided belief or teaching including trust, knowledge, faith, economic, sexual, social, psychological, spiritual factors, Western thinking factors and so on (Tiba, 2000). Various efforts have been made by the government in addressing the issue of deviant teachings, among others, to enact law under the state's Syariah Criminal Offences Enactment. The fatwa institution also plays an active role by issuing the fatwa on the activities of group identified to spread deviant teachings. Efforts by religious enforcement authorities have been enhanced to curb the spread of these deviant teachings. Nonetheless, more efforts are still needed to identify any groups which have been recognised as deviant and list them as forbidden groups. Despite efforts by the government to control their activities yet they are still active by altering the shape, name, and appearance of their groups. Some even have declared apostates (of Islam) but are still active. Indeed in the world without border, the complex and diverse human life has created a huge space for the development and spread of misguided teachings in line with the rapidity of the Islamic preaching done by both government and private agencies in Malaysia. Thus, a concerted effort from all Islamic authorities, as well as all walks of Muslims, should be executed to properly address the issues of deviant teachings in Malaysia. Therefore, the government and legislators need to play a role in improving in terms of punishment and control of the movement of heretical teachings in Malaysia.

ACKNOWLEDGEMENT

The authors would like to express greatest appreciation to the Universiti Teknologi MARA Kelantan Branch for providing financial support on publication of this study. Special thanks as well to the reviewers for the comments and helpful ideas.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 105 - 117 (2021)

PERTANIKA JOURNALS

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Journal homepage: http://www.pertanika.upm.edu.my/

Law of Trust and the Beneficial Interest in Matrimonial Property

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ABSTRACT

Beneficial interest at home is a very fundamental element of a marriage institution. When a couple ties the knot, wanting to spend the rest of their lives together, such relationship will give rise to many implications, be it legal or social. Such legal implications will continue throughout their lives not only as husband and wife, but will also become more apparent if the union between these two is broken. Hence, issues relating to distribution of property, especially matrimonial property, need to be handled as subtle as possible, alongside other ancillary claims such as maintenance and custody. The existence of both legal and beneficial interests in a property has enabled the court to resolve claims relating to ownership by looking at the existence of common intention to share beneficial ownership. Thus, this article examines the ways on how the court has utilized the concept of trust in dealing with disputed issues on matrimonial property. The study adopted a qualitative methodology where data were collected through library research. It analysed statutes, books, journals, reports, conference proceedings and other periodicals. The study concludes that the use of law of trust in the distribution of matrimonial property has become obvious since trust will be the best option to be used in resolving matters relating to any disputed property.

Keywords: Beneficial interest, common intention, matrimonial property, property, trust

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.08

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

Trust is a very unique creation. It is said to be one of the best creations of English jurists as it covers both legal rights and equitable rights. Despite the fact that Malaysia does not have a specific statute on trust, this has not been an obstacle for the law to develop with a wider coverage. There are many definitions of trust and although Malaysia has no single statute governing the law of trust, the law developed and to some extent, the principles of English law of trust are fully adopted. (George, 1999) This development has led to the recognition of new circumstances that may give rise to the creation of trust. Many terms have been created in order to give recognition to trust in relation to matrimonial property which is known as "beneficial interest in the family home" (Ramjohn, 2019).

Although married couples have had their legislated rights as to how their interests in the matrimonial home or house are determined upon separation or divorce, that does not mean that trust mechanisms should only be confined to those without legislated rights. There are situations where the court is more than willing to decide on the distribution of property involving a married couple. The ever-famous maxim of equity which looks into intent rather than forms has been regularly observed in order for the court to uphold the existence of trust based on the existence of intention (Ramjohn, 2019). Even by looking at an express declaration of trust, the court is often faced with legal rules which are uncertain and difficultto apply and sometimes being put in a state of uncertainties.

It was not until 1990 when Lord Bridge of the House of *Lord in Llyods Bank plc v Rosset* [1991] 1 AC 107, where through his judgment, two types of cases relating to distribution of property between couples were clearly distinguished. The first type is where there is an agreement, arrangement or understanding that the property is to be shared beneficially and secondly, where there is no evidence of any agreement and thus it is independently of the conduct of the parties. These are among the rules adopted by the court in recognizing the rights of a couple when the argument revolves around the distribution of property. This practice has led to the application of two trusts namely, the resulting and constructive trust in matters dealing with beneficial interest in the family home. The discussion revolves around the mechanisms adopted by the courts in Malaysia when dealing with the similar subject matter.

METHODS

This paper describes the application of trust concept used by the court in dealing with distribution of assets or interest in matrimonial homes by exploring cases decided by the courts in England and Malaysia, The methods used was analysing provision in relevant statutes and decision of the courts and compared it with the situation both under civil and Syariah laws.

DEFINITION OF MATRIMONIAL PROPERTY

There is no statute in Malaysia which defines the term 'matrimonial property'.

No definition can even be found in the *Married Women Act 1957 (Revised 1990)* although it is the main statute dealing with married women's property. The *Law Reform (Marriage and Divorce) Act 1976* (the "LRA") is also silent on this and this failure has led to uncertainty indeciding what should and should not be included in the definition, though it is very pertinentfor the parties to know what matrimonial property is, before making any claim for its division. Although no definition can be found in the acts, a study of case law demonstrates that it comprises *inter alia*, matrimonial home and everything put into it by either spouse to be used jointly and severally for the benefit of the family as a whole; all landed properties acquired during the marriage apart from the matrimonial home; cars, cash in bank accounts, jewellery, shares in companies including the family business(es) and even club memberships if acquired during the marriage. (Division of Matrimonial Assets: https://www.mondaq.com/divorce/467070/division-•of-•matrimonial-•assets).

In the case of *Ching Seng Woah v. Lim Shook Lin* [1997] 1 MLJ 109*,* the court held that above definition clearly showed that matrimonial property should cover anything that was acquired during the marriage. The matrimonial home (even if acquired before the marriage)and everything which is put into it by either spouse is considered a matrimonial property. This includes the purchase of kitchen cabinets, furniture and so on, payment of servant's/maid's salary, keeping, maintaining, and servicing the house as a going concern. Similarly, the earning power of each spouse is also an asset although its division may lead to another dispute especially in term of its quantification (Ibrahim et al., 2014).

The above finding corresponds to the decision of Lord Denning in the case of Wachtel v. Wachtel [1973] Fam. 72 where matrimonial assets should refer to those things which were acquired by one or the other or both of the parties. This must be coupled with the intention that it should be a continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole. Additionally, the judge dividedthe matrimonial assets into two parts that was the assets "of a capital nature" such as the matrimonial home and its furniture while the other one was a "revenue producing nature" which includes the earning power of husband and wife. In another English case of Pettit v Pettit [1970] AC 777, Lord Diplock deliberated that matrimonial property or family assets meant "property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children". The cases obviously demonstrate that the English courts by using the word "family assets", describe matrimonial property as property in which both spouses should have some interest in, either because of the way in which it was acquired or because of the manner in which it was used (English Law Commission (Family Property Law), 1971).

Meanwhile, matrimonial property for the Muslims is called "*harta sepencarian*". Section 2 of the *Islamic Family Law (Federal Territories) Act 1984* (the "IFLA") defines it as acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syarak". The judicial decisions explained that *harta sepencarian* refers to any property acquired during marriage in which both parties contributed to its acquisition. Briggs J, in the old case Hajah Lijah binti Jamal v. Fatimah binti Mad Diah [1930] 16 MLJ 63*,* defined *harta sepencarian* as "property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. It also extended to the enhancement of value by reason of cultivation or development." In pursuant to that, there was no reason for the wife, being a lawful widow, not to get one-half of the property bought originally from savings which accumulated from a piece of land inherited from her parents, although it was registered in the name of the deceased husband.

The definition of *harta sepencarian* can be found also in other cases like the case *Yang Chik v Abdul Jamal* [1985] 6 JH. 146 and the case of *Piah binti Said v Che Lah bin Awang* (1983) 3 JH. 220). In the former case, the learned Kadhi defined *harta sepencarian* as a property that was acquired during the marriage with both husband and wife contributing by the joint efforts or money to acquire the property while the latter case illustrated that *harta sepencarian* was not only confined to both of the spouses' efforts in acquiring the property, but extended further to cover their contribution whether formal or informal that would arise in cases where the parties were either employed in similar occupations or otherwise.

Harta sepencarian basically refers to any property which is acquired during marriage, either by joint or sole effort of the parties as long as there is a contribution either directly or indirectly by the party who does not acquire the property (Ibrahim & Abdul Ghadas, 2017). It is based upon the "recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvement done to it (in cases where it was acquired by the sole effort of one spouse). It is due to this joint effort or labour that a divorced spouse is entitled to a share in the property acquired (during coverture). As long as the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption" (*Piah binti Said v Che Lah bin Awang* (1983) 3 JH. 220).

Thus, although typically the claim on *harta sepencarian* involves the matrimonial house, land and animals that used to work on the land, the form has developed as to include moveable and immovable property like household goods and furnishing, in line with the lifestyle and the purchasing power of society (Majid, 1999). It may also include other properties such as joint bank accounts, compensation paid for land acquired by the government (*Rokiah bte Haji Abdul Jalil v. Mohammad Idris bin Shamsuddin* (1410)

JH 111; [1989] 3 MLJ ix; *Kamariah v. Mansjur* (1986) 6 JH 301), shares registered in the name of either spouse (*Noor Jahan bt. Abdul Wahab v. Md Yusuff bin Amanshah* [1994] 1 MLJ 156), as well as business assets which have been acquired during marriage (*Tengku Anun Zaharah v. Dato' Dr. Hussein* [1980] 3 JH 12).

THE LAW ON MATRIMONIAL PROPERTY IN MALAYSIA

Family matters in Malaysia are governed by two separate laws, namely civil laws for non-Muslims and Syariah laws for Muslims. The law governing the division of matrimonial property of the non-Muslims is the LRA which is enforced throughout Malaysia since 1st March 1982 (PU (B) 73/1982). Its Long Title provides for monogamous marriages, solemnization and registration of such marriages, amendment and consolidation of the law relating to divorce and matters incidental thereto. The division of matrimonial property is specifically dealt with in section 76 of the LRA. The LRA generally applies not only to all non-Muslims in Malaysia but also to those residents outside Malaysia whose domiciles are in Malaysia (Section 3 of the LRA).

On the other hand, the Muslims are governed by their respective Islamic Family Law Acts and Enactments in their states. However, for the purpose of this article, reference is made only to the IFLA, being the model followed by many other states in Malaysia.

Law Reform (Marriage and Divorce) Act 1976

Section 76 of the LRA deals with the power of the court to order the division of matrimonial assets acquired during the marriage upon granting a decree of divorce or judicial separation. Basically, it requires the court to consider the contributions of the parties in the form of money , property or work towards the acquiring of the assets or payment of expenses for the benefit of the family (Section 76 (2)(a) of the LRA). In addition, the court will also take into consideration the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family (Section 76(2)(aa) of the LRA). Several other factors that are also included are the participation of the spouse in looking after the home or the family, the payment of expenses for the benefit of the household, the duration of the marriage, the debts contracted for the parties' joint benefit, and the needs of minor children. Subject to these factors, the court will divide the property equally between the divorcing spouses (Section 76(2)(b)(c)(d) of the LRA). Hence, section 76(5) of the LRA further elaborates that for the purposes of this section, assets acquired during a marriage includes assets owned before the marriage by one party as well. Nevertheless, it is subject to the condition that the claimed property must be substantially improved during the marriage by the other party or by their joint effort.

Islamic Family Law (Federal Territories) Act 1984

Section 122 of the *Islamic Family Law (Federal Territories) Act 1984* empowered the Syariah Court, when permitting the pronouncement of talaq or when making an order of divorce, to order any assets acquired by the parties during the marriage (harta sepencarian) either through their joint efforts or by the sole effort of one party to the marriage or the sale of any such assets to be divided between the parties (Section 122 of the IFLA). Where the assets were acquired by the joint efforts of the parties, in accordance with Section 122(2) of the IFLA, the court must have regard to: (i) the extent of the contributions made by each party by way of money, property or labour towards acquiring the assets; ; (ii) any debts owed by either party that were contracted for their joint benefit; and (iii) the needs of any minor children of the marriage. Subject to these considerations, the court should be inclined to order equal division of the assets. (Section 122(2) of the IFLA).

In case the assets were acquired by the sole of one party to the marriage, in accordance with Section 122(3) of the IFLA, the court must have regard to: (i) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family; (ii) the needs of any minor children of the marriage. Subject to these two considerations, the court may divide the assets or the proceeds of sale in such proportions that the court deems reasonable, but in the case where the party of whose efforts the assets were acquired must receive a greater proportion of the assets. (Section 122 (4) of the IFLA).

THE CONCEPT OF TRUST AND MATRIMONIAL PROPERTY

The association of trust and matrimonial property can be seen when two persons (husband and wife) claimed the same property which either one or both of them acquired during their marriage. The thin line dividing these matters which are often misunderstood as the position under the English law which was followed in Malaysia, clearly imposed the concept of trust in cases where claims are made between unmarried couple who jointly acquire property during their cohabitation (*Tinsley v Milligan* [1994] 1 A.C 340; *Hussey v Palmer* [1972] 1 WLR 1286; *Eves v Eves* [1975] 1 WLR 1338). Nonetheless in a few other decided cases, namely *Gissing v Gissing* [1971) AC 886 and *Pettitt v Pettit* [1970] AC 777, the concept of trust had also been invoked in cases involving married couples. Lord Diplock in Gising v Gising [1971] A.C 886 stated that any claim to a beneficial interest in land by a person, whether spouse or stranger needed to be based upon the fact that the person in whom the legal estate was vested held it as trustee upon trust to give effect to the beneficial interest of the claimant as beneficiaries and this applied in the case where the legal estate in the land was not vested in the stranger or a spouse.

In most cases relating to the division of a shared or matrimonial home, the court will

need to look at the intention of both parties in order to ensure the relevant intention and this was emphasized by Lord Diplock in *Gissing v Gissing* [1971) AC 88. The concept of trust has been manifested as the law which is not only governing property between unmarried couple but also as between married couple. The legal principles applicable to this type of claim may come under the creation of resulting, constructive trust or proprietary estoppels.

Resulting Trust

A resulting trust is a type trust where the trustee will be holding the beneficial interest in favour of the settlor or his estate instead of the beneficiaries. It is a type of trust which being without being consciously created. The "sulting" in "resulting" shares a common Latin root with the word "sault" in "somersault". It is also a Latin word of "*resultare*" which means "spring back" (Edwards & Stockwell, 2002). "To result" literally means "to jump, returning, ends up or revert". It is also known as returning or implied trust as resulting trust arises as a result of the implied intention of the settlor. Resulting trust exists not based on the actual ntention of the parties, but is founded on the existence of a state of affairs giving rise to presumed intention (Hingun & Ahmad, 2013).

Lord the Browne-Wilkinson in *Westdeutche Landesband Girozentrale* v *Islington* LB.C [1966] A. C 669 stated that resulting trust could be divided to two types, namely, automatic resulting trust and presumed resulting trust. The connection of resulting trust and matrimonial property can be seen under the first type of resulting trust, that is, presumed resulting trust. The court will make a presumption in three situations, firstly, where there is voluntary transfer of property in the name of a stranger, secondly a purchase by a person who provides purchase money and lastly a transfer by a purchaser to his wife or children or anyone stands in *loco parentis*. The last two situations are very much applied in our present discussion.

As for Malaysia, the law on resulting trust is settled. Gopal Sri Ram in *Loo Hon Kong v Loo Kim Hoo* [2004] 4 CLJ 1 emphasized that the categories of cases in which a resulting trust might arise were settled and although this case did not deal with matrimonial property, it is sufficed to reflect Malaysian law towards the division of resulting trust. One of the common situations in which the court will presume is where that the legal owner holds the property in favor of the purchaser. Hence, if both husband and wife have jointly purchased the property, the court will have no problem in dividing their respective shares as they are considered as joint tenant in common.

More importantly, if both of them have expressly agreed as to the way in which the beneficial interest in the property should be held, the court will give its recognition. Lord Bridge stressed on the need to show the common intention that the beneficial interest in the property would be jointly owned. In another different scenario, the wife's right to the property would be uphold in certain cases despite the fact that she did

not make any contribution in purchasing of such property. This is known as the equitable doctrine of advancement. The court will make a presumption in cases where the husband bought a property and put it in the name of the wife, that there exists a gift (*Yeoh Poh Hong v Ng Cheung On* [2010] MLJU1077; *Noor Jahan bte Abdul Wahab v Mohd Yusuf Aman Shah & Anor* [1991] 3 MLH 190; *Neo Tai Kim v Foo Stie Wah* [1982] 1 MLJ 170).

This often occurs in a relationship where a moral obligation is imposed on upon one to provide for another. In this specific case, the court will regard that it is the duty of the husband to support his wife. (*Re Eykyn's Trusts* (1877) 6 Ch D 115). This presumption also extends to the relationship between a father and his child, children or any other person to whom he stands in *loco parentis*. In *Bennet v Bennet* (1879) 10 Ch D 474, Jessel MR stressed that the presumption of gift arose from the moral obligation to give and to provide for his child. This rule does not apply in cases involving unmarried couple or cohabitees (*Dharmaratna v Dharmaratna* [1939] 1 MLJ 310). Nonetheless in some English cases, the doctrine of advancement was used in cases relating to relationship established during betrothal and recently to mistresses as well (Hingun, 2010).

The ground of rebuttal varies and it must not be illegal. As trust is very much the creation of equity, the maxim "he who seeks equity must come with clean hand" plays a very important role. If the husband transfers the property in order to defeat his creditor or even to escape from paying taxes, the court will be in favor of advancement. If a husband transfers the legal title to cloak the truth from his creditors and also with the intention of getting the property back to himself, the husband cannot use such illegal evidence as a ground of rebuttal (Watt, 2009). In Tinker v Tinker [1970] 2 WLR 331, the rebuttal forwarded by the husband was rejected as the evidence showed that the reason for transferring the house in the name of the wife was to escape from a creditor in the event if his garage business failed.

In Lew Pa Leong v. Chi Shen Lan [2007] 1 CLJ 2003, the dispute between the husband and wife revolved around a property which was registered in the name of the wife. The Court of Appeal held that the husband must be able to rebut the contention by relying on the original purpose behind the registration of property in the name of his wife. Since in this case, the purpose was to escape any future claim by the creditors, the court held that the presumption of advancement applied. Still the best point of rebuttal is the intention on the part of the donor, namely the husband, that the gift was not intended. In the case of Ponniah v Sivalingam & Ors [1991] 3 MLJ 90 the defendant, a father and husband to the plaintiffs, averred that the company and shares that he had transferred to his children and wife were not meant as a gift. This is supported by the evidence that he still kept all the shares certificates and more importantly he was still in charge of the company. Hence, such presumption can only be allowed to be rebutted if it can be shown at the time of the transaction, both the

husband and wife commonly intended that it was to be otherwise (*Dato Kadar Shah bin Sulaiman v Datin Fauziah Harun* [2009] 8 MLJ 850).

According to some opinions, the presumption of advancement does not reflect the contemporary socio-economic reality and the idea of gender equality (Salim & Abdul Ghadas, 2012). It would no longer be a good reason that husbands are the only ones who provide means in the family and the same applies in cases relating to mothers. It is said that the presumption between husband and wife is now understood to be very weak and the courts will need to redress the inequality by not focusing more on ones (Hayton & Mitchell, 2005).

Constructive Trust

The word "constructive" is derived from the verb "construe" and it may arise under a wide variety of circumstances and sometimes these situations are slightly different from resulting trust. The nature and scope of a constructive trust is always vague and undefined (*Carl Zeis Stifting v Herbert Smith* (1969) 2 CH 276). As it may arise in any given situation, the court will not wait for someone to think that there is an existence of constructive fraud, malice or notice as it will be the court's duty to consider the existence of this trust. There is a thin line dividing constructive trust and resulting trust. The similarity lies with the fact that the legal owner or person with legal title is held by the court as a trustee, holding the property for the claimant. Unlike resulting trust, the door to constructive trust is still open and in most cases (other circumstances where the court may hold the existence of constructive trust are in cases where strangers are in possession of trust property; fiduciary relationship, agreements to create secret trust, vendors of land and also acquisition of property by killing), deals with the rights of unmarried couple and the development can be seen over the past 40 years (*Bernard v Joseph* [1982] Ch. 391; *Burns v Burns* [1984] Ch. 317; *Springette v Defoe* [1992] 2 F.L.R 388).

The hypothetical situation is where there is a need to show that a man or a woman have contributed in acquiring the home which they shared and both relied on in reliance on a common understanding that they would be sharing the property. The court may impose constructive trust on the basis that it would not right for the one with legal title to keep the property for himself (Chong, 2005). Lord Diplock in *Gissing v Gissing* [1971] AC 886, emphasized that the existence of common understanding between the parties that the other party (whether husband or wife) should obtain a share of the property. Lord Bridge in *Lloyd's Bank plc v Rosset* [1991] 1 AC 107 stated that what was needed to be shown further was that both intended to share the ownership of the property commonly. All these have been the centre of discussion over these years and has ultimately built a foundation for the court to acknowledge the concept of constructive trust not only in cases between married couples, but extended to cohabitees as well (Hingun & Ahmad, 2013; Greer & Pawlowski, 2010).

Mutual will is another situation where the concept of constructive trust has been introduced. This is when two persons (usually husband and wife) have come to an agreement that their property, after the death of either of them, shall be enjoyed by the survivor or by the nominated beneficiary. The existence of mutual will is subject to the availability of an irrevocable agreement to make wills whereby it must indicate that the wills are to be mutually binding with clear or extrinsic evidence and must amount to clear contract at law. (*Re Oldham* [1925] Ch 75; *Re Cleaver* [1981] 1 WLR 939).

Although this may involve matrimonial property, there is no direct and detail discussions on the issue of mutual will. Mutual will denotes an understanding between spouses as to how their assets should devolve upon their death and the reason why court imposes constructive trust is to ensure what has been discussed or agreed before the demise of either of them needs to be uphold. Dixon in *Birmingham v Renfrew* (1936) 57 CLR 666 has imposed constructive trust in the case of mutual will and he stressed that express promise should be understood as to mean that if the wife died leaving her will unrevoked then husband on the other hand, would not revoke his. The constructive trusteeship will be imposed on the survivor and the terms in his will would not be considered as the last terms. There is no single case on mutual will in Malaysia.

Proprietary Estoppel

Proprietary estoppel is one of the branches of equitable estoppels. It is also known as estoppel by acquiescence or estoppel by encouragement and this doctrine gives rise to a right in property. It usually applies in relation to land (Ali et al., 2017). The foundation of the doctrine is the protection of a person who has expended money pursuant to the request and encouragement of another (*Paruvathy v Krishnan* [1983] 2 MLJ 121). There are four elements that must be shown in order to invoke proprietary estoppel as stated in the case of *Brinnard v Ewens* [1987] 2 EGLR 67. In *Willmott v Barber* (1990) 15 Ch D 96, Fry had come up with four probandas on proprietary estoppels. First, the claimant must have incurred expenditure or otherwise acted to his detriment; secondly, the claimants must have acted in the belief that they either owned or would obtain a sufficient interest in the property to justify the expenditure thirdly, the claimant's belief must have been encouraged by the landlord and lastly there must be no bar to the equity such as the contravention of any statute.

The concept of trust has been invoked in order to support the application of proprietary estoppels and this can be seen in cases involving relationship between spouses. (In *Naleen Nair a/p Sekaran Nair v Jasim Sura Puthucheary & Anor* [2018] MLJU 2070, the court rejected the existence of proprietary estoppel in a claim relating matrimonial property since the application was for an interlocutory injunction to restrain the respondent from disposing and transferring an asset and there was a need to show that the case was frivolous and not vexatious). If a husband promises the wife to have the house conveyed to

her but after the marriage ended refuses to do so, the wife may claim the right to the property by invoking proprietary estoppel. The court would then impose trusteeship on the husband so that the property that he is now holding as an owner before is a trust property and to be held in favor of the wife. In *Pascoe v Turner* [1979] 2 All ER 945, the wife spent her own money to repair, improve and decorate the house and also on furniture after the husband told her that the house and everything in it would be hers. The Court of Appeal ordered the house to be conveyed to her.

Proprietary estoppels require a cautious approach as the claimant needs to show that the reason for the chances in his position is due several reasons namely, acquiescence, encouragement sometimes detriment (Ali et al., 2017). Although the latter is one of the requirements and must be very substantial, it does not consist of any expenditure of money or other financial detriment, and at times, reliance and detriment are often intertwined (Per Walker LJ in *Gillet v Holt* [2001] Ch 210). It may be in other forms such as taking care of a handicapped person without payment and also doing something more than ordinary house work (*Greasley v Cooke* [1980] 3 All ER 710).

CONCLUSION AND DISCUSSION

The connection between matrimonial property and trust, therefore, lingers around the concept of legal and equitable ownership. The maxim that equity will not suffer a wrong to be without any remedy showed that equity is more than willing to accommodate any problem that comes before the court on how matrimonial property should be distributed when a relationship ends. No doubt the legal structures on matrimonial property law is clear when it comes to this but nonetheless, the application of trust on this matter shows that there are the conduct of parties in dealing with matrimonial property that has led to the rise of three main concepts namely, the presumption of advancement, constructive trust and proprietary estoppels in order to support claims to any interest arising thereof. The presumption of advancement has clearly indicated the recognition given by the court in acknowledging the wife's right in a shared home. Although it is subject to some criticisms, the generating idea behind this presumption lies more towards moral obligation owned by the husband to the wife. Constructive trust on the other hand, has in one way or another facilitated this issue ina very subtle way i.e. empowering the concept of constructive trusteeship on to those who have the legal titles. Meanwhile, proprietary estoppels supplement cases that deal with acquiescence and encouragement. The only setback here is that the coverage is only limited to the jurisdiction of the civil court and not the shariah court.

ACKNOWLEDGEMENT

This paper would not have been published without the hard work from all authors. The authors would like to express their gratitude to their families and the two institutions that they are currently attached to, namely International Islamic University Malaysia (IIUM) and Universiti Sultan Zainal Abidin (UniSZA).

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 119 - 133 (2021)

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A Comparative Analysis of Unfair Terms in Consumer Contracts in Malaysia and Singapore

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ABSTRACT

The inclusion of welfarist ideology in the consumers' trade derived from the ideal of paternalism is a paradigm change from the doctrine of freedom of contract. Regulatory and legislative steps must be taken to support and attract consumers to the industry. Judicial and legislative actions must be taken to correct the market flaws that create consumers' vulnerability while trading in the global market. As one of ASEAN members' founders, Malaysia is moving towards people-centered economic endeavours to balance both industry and consumer interests through exclusion clauses to prevent unfair practices in consumer contracts. Legal intervention is one of the ways to curbing the issues that arise from exclusion clauses. Before 2010, the non-existence of a specific regulatory framework to limit exclusion clauses usage in contracts involving consumers further increases consumers' vulnerability. Traditional judicial approaches in the battle against coercion and unethical behaviour of traders before 2010 did not engross consumer rights and interests. This sign is, in fact, the modern age of customer contracts, the enforcement of unfair terms. This article used the content analysis technique and analysed the evolution of legislative

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.09

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ISSN: 0128-7702
e-ISSN: 2231-8534

interference and judicial approaches in interpreting exclusion clauses in contracts involving consumers in Malaysia and Singapore.

Keywords: Unfair terms, consumer contracts, legal intervention

INTRODUCTION

The effect of globalization on trade has seen the emergence of consumerism to provide market protection. In the cardinal concept of contract equality, the globalised economy's existence has led to consumers' insecurity. Contract freedom no longer offers equal bargaining power for the vulnerable consumer in consumer contracts (Yusoff et al., 2011). In contrast, freedom of contract is often used as a tool for the advantages of traders.

Exclusion clauses have provided an indirect contract drafting method for the traders' benefit rather than the consumers. Equal bargaining power is the primary rationale for security measures for the poor and vulnerable community, widely recognized as consumers in a modern market economy (Alias & Abdul Ghadas, 2012). The information available regarding the products were within the manufacturers, retailers, merchants, and the sellers but never the consumers. According to Treitel (1984), the benefit usage of exclusion clauses is on unfair terms. These terms enable one party to the contract to predict the risks they might encounter to take precautionary measures such as insurance to protect themselves. These terms are subject to abuse, particularly to the consumers because of their vulnerability in bargaining power and the contract and industry practices. Further, lack of resources as compared to the industry players explores consumers to greater risk (Yusoff, 2009). The lack of adequate knowledge to determine the substance in consumer contracts is fair, and customers' insecurity is balanced. Consumers are uncertain of the terms to which they have accepted. This research's significance is perhaps reflected in the dilemma a consumer is confronted with within the marketplace (Atiyah, 1971).

In Malaysia, consumer protection laws are designated to protect consumers' interest and intend to balance sellers and consumers' interest by governing unfair terms in consumers' contracts. Existing laws, namely, Part IIIA *Consumer Protection Act 1999* governing consumer contracts have been reviewed and amended to upheld consumerism. Besides, the Consumer Protection Act 1999, the National Consumer Policy 2002, was set up to improve the legal and institutional framework further to protect Malaysian consumers. Consumer protection regulations cover many issues intertwined between private and public law issues (Amin, 2013).

On the other hand, Singapore enacted the *Consumer Rights (Fair Trading) Act* in 2012 to regulate consumer contracts' unfair practices. Unlike Malaysia, Singapore has used the name of 'unfair practice' rather than unfair terms. *Consumer Protection (Fair Trading) Act 2003 (CPFTA 2003)* was enacted to provide a fair market for the

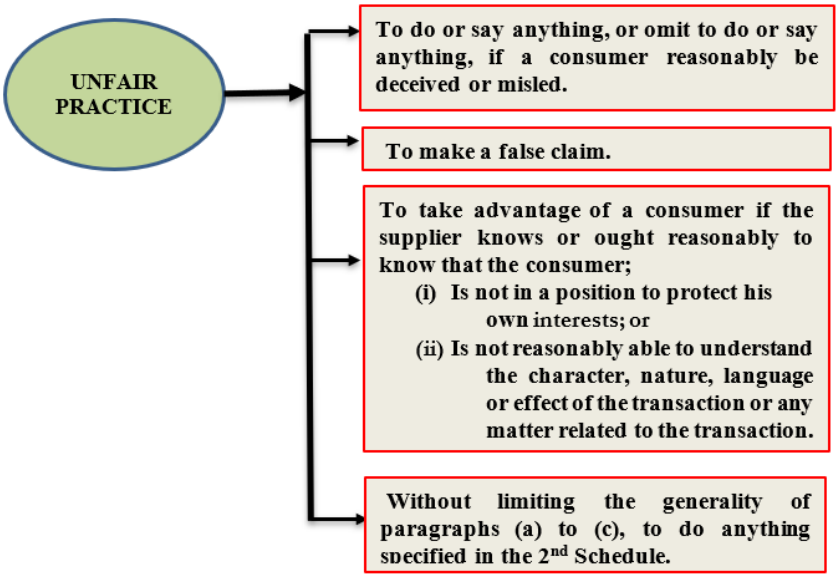

Figure 1. Meaning of 'unfair practice' in Section 4 CPFTA

sellers while protecting consumers. Figure 1 shows the unfair practice within the scope of the Act:

This article analysed the different legislative approaches of 'unfair terms' and 'unfair practices' in Malaysia and Singapore's consumer contracts by adopting the comparative methodology.

METHODOLOGY

This article adopted two approaches, which are the content analysis approach and comparative approach in its methodology. The first approach was content analysis, a method used to analyse the contents of documents systematically. (Chatterjee, 2000). This method was deployed in analysing the unfair terms in Malaysia *Consumer Protection Act 1999* (CPA 1999) and the Singapore *Consumer Protection (Fair Trading) (Amendment) Act 2012* (CPFTA 2012). Also, an appraisal of the content analysis was used to analyse the judicial approach to cases involving exclusion clauses in Malaysia. Singapore's contract law is primarily founded on England's common contract law and covers unfair terms and unfair practices more significantly than Malaysian. As with Malaysia, Singapore courts have applied the same construction rules in cases involving unequal terms, specifically exclusion clauses (Yusoff et al., 2012). Nevertheless, the Singapore courts' laws bear a somewhat similar resemblance regarding background and history to those set under England's common law, such as Malaysia. (Yusoff, 2009).

The second approach is by the comparative analysis, which explains a

similar situation using similar attributes, and different positions using different characteristics. (Pickvance, 2005). This approach has been used in the analysis of the related consumer protection challenge in unfair practices. However, Malaysia and Singapore react to the events with different methods in the Act. The second comparative analysis approach was used to compare the other unfair terms in CPA 1999 and unfair practices in CPFTA 2012.

TYPES AND CATEGORIES OF EXCLUSION CLAUSES

The term 'exclusion clause' applies to "any clause in a contract or term in a notice that purports to restrict, exclude or modify a liability, duty or remedy that would otherwise arise from a legally recognised relationship between the parties." (Yates, 1982). Poole (2008) acknowledged that there were enormous types and categories of exclusion clauses about one another. It is impossible to categorise them in an organised manner.

In Malaysia, there is no provision in the *Contracts Act 1950* that governs unfair terms (Mahmood, 1993). Thus, the necessity of legislative provision to provide specific regulations on unfair terms compared to the generality of common law is much needed. The courts have been hampered because, under the principle of freedom of contract, courts have not prevented unfair terms from being included as exclusion clauses in English common law. (Yusoff, 2009).

In the context of consumer contracts in Malaysia, the governing legislations are the *Contracts Act 1950 (CA 1950), the Sale of Goods Act 1957 (SOGA 1957),* and the *Consumer Protection Act 1999 (CPA 1999).*

SOGA 1957 codified the principles of sale of goods in its established case law into statute. However, SOGA 1957 is an Act of the 1950s that upholds freedom of contract and focuses on market economic growth rather than protecting the less advantaged party to the contract. SOGA 1957 regulates all business-to-business (B2B) and business-to-consumer (B2C) transactions.

Even though the implementation of the exclusion clauses is allowed in contracts, the interpretation of the *contra proferentum* remains; whereby a judge shall construe restrictions against the person who relies on the exclusion clauses. Despite such limits of judicial interpretation, small print, which conceals a wide range of exclusion clauses, particularly in standard form contracts, is always detrimental to customers (Wu, 1994).

The development of case law regarding exclusion clauses in Malaysia has shown grave concern over the years, particularly in consumer welfare.

The apprehension of the courts' exclusion clauses, which results in unfair or oppressive treatment to the consumers, has brought changes in the judicial approach. Malaysian courts' judicial attitude toward treating exclusion clauses is also hard to evaluate due to various judges' various ideologies (Yusoff, 2009). Only the judges using the paternalism approach would give priority to consumer protection. The rules of the judges derived from how the clause

is drawn up are either 'incorporation' or 'construction.' Although there is a lack of decision on exclusion clauses in consumer protection litigation, Malaysian courts have been able to apply specific rules on the use of exclusion clauses as terms and to view certain clauses as contra proferentum. Unless the exclusion clauses are vague, the court may have solved the clauses against the party's interests demanding that they are included in the contract (Yusoff, 2009).

In recent years, the judicial approach's developments to the exclusion clause to the just cause of protecting the weaker party to the contract in the awareness of bargaining power disparities have been pragmatic (Rahman, et al., 2017). In CIMB Bank Berhad v Anthony Lawrence Bourke & Alison Deborah Essex Bourke (2019) 2 CLJ 1, the Federal Court held that the exclusion clause of CIMB Bank was contrary against public policy as provided for in section 29 of the *Contracts Act 1950*. The learned Justice Balia Yusof Wahi mentioned in his decision:

> "The bargaining powers of the parties to that agreement were different and never equal. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain services, he has to accept the terms and conditions of a standard contract prepared by the other party. There are the patent unfairness and injustice to the plaintiffs. It is unconscionable on the part of the Bank to seek refuge behind the clause and abuse the freedom of contract."

The Federal Court has changed the traditional static way of giving effect to a more current and fair interpretation of the exclusion clause. By supporting the principle of unequal bargaining power in the contract, the weaker party, particularly the consumer, would be better securedIt is observed that the use of exclusion clauses in Malaysia's contract is valid as long as it does not contravene public policy. There is no way to render a more equitable use of exclusion clauses, particularly in many standard forms contracts by the prevailing industry players. The vulnerability of the parties to the contract remains until there is an apparent legislative intervention.

UNFAIR TERMS IN CONSUMER CONTRACTS

In Malaysia, the *Consumer Protection Act (CPA) 1999* is the main legislation governing consumer protection. The responsible ministry is the Ministry of Domestic Trade and Consumer Affairs. Throughout one way or another, the CPA has been affected by legal advancements in the United Kingdom, Australian and New Zealand (Amin, 2013). There are several deficiencies in the 1999 Act in providing sufficient consumer protection in contract, particularly in exclusion clauses. While Section 6 of the 1999 Act provides for some kind of safeguard that prevents the contracting out of the Act's provisions, it notes the need to restrict the extensive use of the exclusion clauses in consumer contracts. (Yusoff, 2009).

However, CPA 1999 lost its claws in providing comprehensive consumer

protection because section 2(4) of the Act stated that CPA 1999 is a supplemental Act being complimented and with a detachment to any other legislation regulating relations in contracts. According to paragraph 2(4): "The application of this Act shall be supplemental in nature and without prejudice to any other law regulating contractual relations." This provision can be seen as reducing the CPA relative to other legislation because 'supplementary' simply means added because of complementary legislation (Amin, 2011). In this context, the CPA does not supplant existing legislation; it only provides additional safeguards to consumers above existing legislation. The new law shall prevail in the event of any contradiction in the application of any other legislation. The 1999 Act's object is not to interfere with the execution of any other provision that imposes a strict duty on a seller or supplier other than the 1999 Act. In the truancy of consumer protection provisions in current legislation, the CPA 1999 reigns supreme. Section 2(4) diminishes the Act's paternalistic characteristic, reducing the level of consumer protection offered to the consumers. (Abdullah & Yusoff, 2015).

In 2010, the CPA (Amendment) Act ratified Malaysian consumer protection legislation's inadequacy in diagnosing unfair terms, according to Singh and Rahim (2011), as opposed to enacting a whole new law. A new section added to the current CPA, and Part IIIA is called Unfair Contract Terms. Therefore, CPA embraced a fresh way to describe unequal terms by characterising unfairness as 'procedural' and 'substantive' unfairness. It brings benefits to consumers and tends to affect how business to consumers' conduct (B2C) is carried out by corporations and companies providing consumer products and services (Sinnadurai, 2011).

The CPA (Amendment) Act 2010 accepted the proposal put forward in the *Indian Law Commission Report on Unfair (Procedural & Substantive) Contract Terms (2006).* The said Commission Report distinguishes between 'procedural' and 'substantive' unfairness. This creative approach in distinguishing unfairness seems to be uncertain of its application and its purpose in providing more comprehensive protection to the consumers. Further, Amin (2011) criticised an unclear magnitude as to how procedural unfairness and substantive unfairness under a new Part IIIA of the CPA could better protect consumers' in the fair bargain. Moreover, unfairness in procedure and substance is often hard to distinguish even in judicial review cases. How this unfairness being determined by Consumer Claims Tribunals in Malaysia, remain challenging.

UNFAIR PRACTICES IN *CONSUMER PROTECTION (FAIR TRADING) (AMENDMENT) (SINGAPORE) ACT 2012*

The primary consumer protection statutes in Singapore are the *Unfair Contract Terms Act 1977* (UCTA) and the CPFTA. The Unfair Contract Terms Act regulates the use of exclusion and limitation clauses in consumer contracts and is a substantial re-enactment of the *English Unfair Contract*

Terms Act 1977 and was reviewed in 1994. The CPFTA provides a "consumer" involving an "unfair practice" in consumer contracts with a right to bring an action against the supplier for some sort of redress (Aziz et al., 2011).

The aim is to impose a limitation on civil liability for breach of contract, or for negligence or other violations of the duty to protect consumers from unfair practices. Besides, it also forbids and contains specific contractual terms that are deemed unreasonable. Matters relating to the unfair contract terms will be dealt with the UCTA 1977 founded on the English model. However, another statute but non-English models regulating unfair terms is the CPFTA. The CPFTA is the lemon law of Singapore. It was primarily based on fair trade laws passed in Alberta and Saskatchewan. The lemon law in Singapore provides that the customers claim a defective product (also known as lemons) sold to them within 6 months of their purchase. A seller of a defective product must replace, repair, refund, or reduce the defective product's price subject to certain conditions. The Act applies to most consumer matters, but it does not apply to sales of land and houses and employment contracts. It was formulated to provide consumers with additional rights to ensure that they are fully protected under the Act (Manaf & Amiruddin, 2018).

Singapore amended its *Consumer Protection (Fair Trade) Act 2012* (CPFTA 2012) to include an additional part of unfair practices in Part II of the amended Act. Unfair practice in CPFTA 2012 means that doing or omitting to do or say that might deceived or misled reasonable consumers in making a false claim and being taken advantage of when the supplier ought to know that the consumers will be taken advantage of because of its weaker position.

Furthermore, the Second Schedule of CPFTA 2012 sets out a long list of different unfair practices. Including the representation that the products or services have support, approval, performance characteristics, accessories, ingredients, components, qualities, uses, or benefits that they do not have. The making of false or misleading representations to the need for such goods or services; the demand for quality for any products or services is unfair. This representation also provides for a price for products or services that is considerably higher than the customer's estimate; that is, an arrangement concerning goods or services where the customer does not have a right, remedies, or obligations if the description is inaccurate or deceptive. There are 20 specific unfair practices provided in the Second Schedule of the CPFTA 2012. The specific unfair practices in the Second Schedule of the CPFTA 2012 are distinct from each other with precise details covering particular unfair practices.

UNFAIR CONTRACT TERMS ACT: THE SINGAPOREAN APPROACH

The statutory law in Singapore relating to exemption clauses is essentially based on English law. The UK *Unfair Contract Terms Act 1977*, which either invalidates an exemption clause or limits the efficacy

of such terms by requiring reasonableness, has been reenacted in Singapore as the Unfair Contract Terms Act (as Cap 396, 1994 Rev Ed). The *Unfair Contract Terms Act 1994* generally only applies to terms that affect liability for breach of obligations that arise in the course of a business or from the occupation of business premises. It also gives protection to persons who are dealing as consumers. Under the *Unfair Contract Terms Act 1994*, exemption clauses are either rendered wholly ineffective or are ineffective unless shown to satisfy the requirement of reasonableness. Terms which seek to exclude or limit the responsibility of a party for death or personal injury arising from the negligence of that party are made entirely useless by the 1994 Act.

In comparison, the terms that seek to exclude or limit liability for negligence resulting in loss or harm other than death or personal injury and those seeking to exclude or restrict contractual liability are subject to that Act. The reasonableness of the exemption clause is evaluated as that of the time at which the contract was entered. The actual consequences of the breach are, therefore, in theory, at least, immaterial. (Aziz et al., 2011)

The UCTA is intended to protect individuals, but it is not exclusively for consumer protection in the narrower CPFTA sense. For example, s 2 (exemptions for negligence) applies to all contracts; s 3 (exemptions for breach of contract) applies when one party 'deals as a customer' or contracts on the other party's standard written terms. In contrast, ss 6 and 7 (exemptions in goods contracts) disallows such exemptions when one party 'deals as a consumer' and allows them to make business-to-business contracts where appropriate. "Deals as consumer" is broad enough to embrace a business entity where the contract is not made in the course of its business. The application of the UCTA beyond the narrow consumer context is essential. As noted in Jurong Port, the business entities may find themselves in weak bargaining positions. It is evident, though, that the Singapore (and British) courts are justifiably reluctant to apply the UCTA to contracts between sophisticated, advised, commercial parties. Some courts have gone so far as to suggest that the UCTA has little role in the commercial context (Booysen, 2016).

In the case of Consumers Association of Singapore v Garraway Enterprises Ltd Singapore Branch [2009] SGDC 193 (unfair practices); Freely Pte Ltd v Ong Kaili [2010] 2 SLR 1065 (misleading conduct); and Speedo Motoring Pte Ltd v Ong Gek Sing [2014] 2 SLR 1398 (defective goods), the court is of the opinion that in the absence of locus standi for CASE and STB can to some extent be addressed via the CPFTA since unreasonable terms may constitute unfair practices (Booysen, 2016).

RESULTS AND DISCUSSIONS

Part IIIA of the CPA 1999 in Malaysia sets out the factors that the Court or the Tribunal may find relevant in reviewing either procedural or substantive injustice. The majority of substances do not require

judicial consideration as to their nature, as opposed to 'substances without sufficient justification;' 'oppressive;' 'unreasonable;' 'just expectations of fair dealing' (Sinnadurai, 2011). As such, for substances that are descriptive, it can be far more accessible for the court to decide if the contractual word is appropriate to the parties to the contract or otherwise. (Hamid & Mansor, 2011).

Procedural inequality relates to the method of forming a contract. For example, a customer is unaware of a small print when the contract has been signed. On the other hand, the substantive injustice object is the consequence of the process, i.e., the contract's essence or substance. A provision in the contract that excludes one party from any liability for negligence is substantive oppression. Also, a deal or condition of a contract can be decided based on its unfairness, simply because of its procedural injustice, which will necessarily result in substantive unfairness. From a practical point of view, procedural discrimination is more difficult to prove than substantive discrimination, and this is because the only available proof is just a copy of the unfair contract itself. There is little else to help determine how and under what conditions the parties have entered into such an agreement.

Section 24A(b) of the CPA 1999 defines "standard form contract" as "a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry." It involves conventional type contracts for different sectors, such as insurance, banking, credit facilities, and all other supply of goods and services. Section 24(C) defines the unfair term as "a term in a consumer contract which, about all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer." This segment focuses on defending customers from unfair terms in the traditional form of business-to-consumer (B2C) contracts and other unfair terms in the form of exemption clauses in different documents (Amin, 2011).

Section 24C(1) of the CPA 1999 provides "a contract or a term of a contract is procedurally unfair if it has resulted in an unfair advantage to the supplier or unfair disadvantage to the consumer on account of the conduct of the supplier or how or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and supplier." At the same time, section 24C(2) sets out a long list of factors used by the Court / Tribunal based on the Indian Law Commission in determining procedural injustices. The key objective is to ensure that there is no prejudicing aspect in terms of procedure and substance (Amin, 2011). Handing with procedural discrimination, terms such as 'knowledge and understanding,' 'fine printing,' 'negotiable authority,' 'linguistic disability,' 'independent legal or other professional advice' and other circumstances set out in section 24C(2) are technical words. These terms may conflict

with the sections provided in the Contracts Act 1950 on unreasonable control, error, and distortion (Sinnadurai, 2011).

Section 24D(1) states that the contract or term of the contract is substantially unfair; (d) excludes or restricts liability for negligence; or (e) excludes or limits liability for breach of the express or implied terms of the contract without reasonable justification and, what is more, if it contains harsh and oppressive. The current legislation extends to the exclusion of responsibility for both negligence and contractual obligations. Section 24D(2) sets out a list of cases of severe inequality. Significant disparities should be based on the contract's context regarding how it is constructed or incorporated rather than on the contract process (Amin, 2011).

Also, the binary distinguishes notions of unfairness that may include correspondence with each other. It is not an easy task to create procedural unfairness based on substantive injustices, which describes why is there no difference between such two notions of the law on unfair contractual terms in different countries (Amin, 2011). In line with the difficulty of distinguishing between these two concepts, paragraph 24G(1) provides that the court or Tribunal may, as an unfair contract term under sections 24C and 24D, decide that the contract is either procedurally or substantially unfair or both. For the contract's proper operation, Section 24G(2) claimed that the other terms of the contract that are not affected would remain in place irrespective of the offence period, which has been rendered unenforceable or void. As such a legislative control over the use of unfair terms in consumer contracts in Malaysia featured in the Pat IIIA CPA 1999 is not free from significant flaws.

Whereas in Singapore, the framework of regulating pattern of control of unfair practices in the Second Schedule aimed at unfair terms include the use of unreasonably harsh or one-sided (2nd Sche, para. 11:11). The misuse of small prints (2nd Sche, para. 20) by customers under terms or conditions that are punitive, restrictive, or unduly one-sided to be unconscionable in the agreement. In the current framework, unfair market practices are still taking place in Singapore. Some service providers may claim to escape liability for injuries. However, this may have been the case in the case of ADX v Fidgets Pte Ltd [2009] SGDC 393 [ADX] (Booysen, 2016). Because such a clause is unconstitutional under the UCTA, it is unfair to practice the industry watchdog should reintroduce that on its initiative (Booysen, 2016).

Also, section 5 of the CPFTA 2012 states that unfair practices can occur earlier, but at the same time, unfair practices may well be a single act or omission. In deciding whether a person has engaged in an unfair practice, two requirements must be met, such as an act or omission on the part of the employee or agent of the individual and an act or omission on the part of the individual. If the act or omission has occurred within the framework of the employee's employment with the individual; or (ii) the agent exercises

the powers or performs the duties on behalf of the individual within the limits of the real or apparent authority of the agent.

Consumer's right to sue for unfair practice governs in section 6 of the CPFTA 2012. A consumer who has entered a consumer contract involving an unfair practice may bring an action against the supplier in a court of competent jurisdiction. Any action relating to an unfair practice concerning a relevant contract shall be heard in front of a small claims tribunal. Furthermore, a consumer can also bring a lawsuit against the supplier regarding a deposit paid contract for selling motor vehicles as provided under section 7(10) (e). The relevant contract means a contract for the sale of goods or the provision of services or contract for the lease of residential premises that does not exceed two years from the contract's date. Small Claims Tribunals. However, a hire-purchase agreement or sale of immovable property is not a relevant contract.

The uniqueness of the unfair practices provided under Part II of the Singapore CPFTA 2012 is that the Act introduced a new element such as a voluntary compliance agreement. If there are reasonable grounds for believing that a supplier has engaged, is involved in, or is likely to be involved in, unfair practices, the specified body may demand that the supplier enters into a voluntary compliance agreement. A specified body may require the supplier to enter into a voluntary compliance agreement. The supplier's voluntary compliance agreement is an undertaking requiring the supplier to not participate in any unfair practice. The contract is entered into on a shared basis. All suppliers don't need to enter into such a contract. The issue of how many suppliers? If any will voluntarily enter into such an agreement, remain the main problem on enforceability. The lack of enforceability means a lack of the supplier's practical involvement not to engage in unfair practices.

The CPFTA 2012 has a significant feature not found in the UCTA and MA: it enables the "relevant body" to interfere to stop the unjust activity. There is a general understanding that an adequately financed body is necessary to facilitate such legislation's successful implementation. The appointed bodies are the Consumers Association of Singapore ('CASE') and the Singapore Tourism Board ('STB'). They may pursue a voluntary agreement with a supplier to cease any alleged or real unfair practice, to declare that an unfair practice has been or will be committed, and, if necessary, to issue an injunction to stop such practice as is provided for in Sections 8 and 9 (Booysen, 2016).

Also, Article 9 of the Act provides that where a supplier has engaged, engaged, or is likely to participate in unfair practices, the District Court or the High Court may, at the request of the Commission, make a statement that the way engaged in or about to be joined by the supplier is an unfair practice. The court also has the power to grant an injunction prohibiting the supplier from involving in the unfair practice. The court may, at its discretion, allows an

additional one or more of the accompanying orders. There have been many forms of discriminatory legislative control in Malaysia and Singapore. The meaning of unfair terms in CPA1999 is narrow compared to CPFTA 2012 Singapore. Table 1 summarises the legislation in place on unequal terms relative to Malaysia and Singapore as a comparative analysis between CPA1999 and CPFTA 2012.

Table 1

Summary of the legislation in Malaysia and Singapore: Regulation pattern

Scope	Malaysia	Singapore
Type of legislation: Specific legislation	None	Unfair Contract Terms Act 1994
Type of legislation: Specific legislation in other legislations	Part IIIA, *Consumer Protection Act 1999*	Consumer Protection (Fair Trading) Act 2003
Type of provision on unfair terms	It provides a procedurally and substantively unfair contract or term of the contract. It is to be kept unenforceable or void. Lists down 11 procedural unfairness circumstances and 5 instances that render a term/ a contract substantively unfair.	List down 20 acts amounting to specific unfair practices.
Effect	None	Voluntary compliance upholds industry-friendly, based on trust to govern traders who do not comply with the regulation and are involved in unfair practices. This approach is very good at preventing unfair practices with foresight. This approach will not affect business practices, such as fine.
Sanctions	Civil & Criminal	CPFTA Civil

RESULT AND DISCUSSION

Referring to the laws in Singapore on unfair contract terms and consumer protection, there are several proposed alternatives for Malaysia in regulating unfair contract terms.

a. Amending the *Contracts Act 1950* by adding provision(s) on unfair terms. The problem with this alternative is the general nature of the 1950 Act. It does not have specific requirements dealing with contents or the terms of a contract.

b. Specific legislation on unfair terms. This form of regulating unfair terms is regarded as the best form for Malaysia, bearing in mind the limitations of other legislations; or

c. Consumer Protection Act 1999

i. Amending Part IIIA of the 1999 Act by taking into account unfair practices in CPFTA Singapore and not limit to unfair terms; or

ii. Enacting a regulation on unfair terms under section 150 of the 1999 Act.

Nevertheless, the problem with this alternative is the limited scope of the 1999 Act. In adopting this form of reform, the Act's limitations should be considered, for example, deleting section 2(4) and being replaced with a section giving the overall effect to the 1999 Act.

CONCLUSION

The history of Malaysian case law and the recent amendment to the exemption clauses in consumer contracts indicated a need for legislative intervention on these unfair clauses to protect consumers. Legal intervention and the judicial approach's changes to unfair contract terms in consumer contracts caused the business to realize that they could no longer exclude consumers' rights and interest by exploiting unfair terms.

The growing influence of the statute, which codifies the effect on consumers' contract terms, has expanded the boundaries of the consumer contract law in Malaysia and Singapore. Traders need to be conscious of the legal implications of the unfair terms in CPA 1999, particularly in consumer contracts. The distinction of procedural and substantive unfairness gave a somewhat confusing approach in determining the unfair terms in consumer contracts. Despite that, Singapore CPFTA 2012 provides a different attitude towards unfair terms. CPFTA 2012 provides a broader coverage of unfair practices, identifying unfair practices rather than merely on the contractual terms.

The existing Part IIIA of CPA 1999 still contains some weaknesses that could have been addressed by enacting a single comprehensive piece of legislation of unfair terms in Malaysia. Singapore's legal regime has recognised unfair terms, including unfair practices, and thus the necessary protection through legislation. It is time for Malaysia to make reforms in this area to enhance consumer protection against the use of unfair terms in consumer contracts. This article highlighted some of the measures which Malaysia can adopt from Singapore to enhance consumer protection against unfair contract terms.

ACKNOWLEDGMENT

The authors would like to acknowledge the Ministry of Higher Education Malaysia (MOHE) for granting the project entitled Pembinaan Garis Panduan Mengelak Penipuan dalam Pembelian dalam Talian (online), Project No: FRGS/1/2019/SSI10/UKM/03/1 and Malaysia Competition Commision for granting the project Reconsideration of Competition Theory for E-Commerce Consumer Sale of Goods: Vertical Restraints, Project No: MYCC RGPCL 2019/20.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 135 - 148 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

International Commercial Arbitration in Malaysia

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ABSTRACT

In the recent two decades, the wave of globalisation has hit the Malaysian market. It hence contributes to the popularity of arbitration as the means to settle cross border commercial disputes. The existing literature concerned with Malaysia suggests that the recent trend in Malaysia is that arbitration has become the dominant choice of dispute resolution forum. Using qualitative and doctrinal methods, this paper seeks to analyse the regulatory framework for international commercial arbitration in Malaysia, before and after Malaysia's accession to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (hereinafter, NYC 1958). The NYC 1958 is one of the most successful international treaties with 161 contracting States. The NYC 1958 aims to promote uniform practical procedures for the recognition and enforcement of foreign arbitral awards in its contracting States, irrespective seat of the awards. In doing so, the paper examines two significant periods of arbitration laws in Malaysia: pre and post-accession to the NYC 1958. The paper concludes that Malaysia no longer follows English arbitration legislation and instead follows international best practice by adopting the *UNCITRAL Model Law on International Commercial Arbitration* (hereinafter, UML) as the basis of its modern legislation, the *Arbitration Act 2005*. Malaysian courts are also seen to adopt a positive 'pro-enforcement' attitude in the application to recognise and enforce foreign arbitral awards, in promoting maximum enforcement of awards as promoted by the NYC 1958 and the UML.

Keywords: *Arbitration Act 2005*, international commercial arbitration, New York Convention 1958, recognition and enforcement of foreign arbitral awards

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.10

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ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

International Commercial Arbitration (hereinafter, ICA) provides a neutral forum for dispute resolution that is detached from the parties' national systems and courts (Born, 2012). The key benefit of ICA is that it is more readily and expeditiously enforced by both international arbitration convention and arbitration legislation (Born, 2012). The lifeblood of international commercial contracts is provided by the assurance embodied in the enforcement status of arbitration agreements and awards through international treaties (Fiske, 2004). Many businesses would not contract abroad for fear of foreign litigation without a neutral, efficient and fair dispute resolution that is legally enforceable, such as arbitration (Fiske, 2004).

The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (hereinafter, NYC 1958) is one of the most successful treaties in the international law (Wolff, 2019). The purpose of NYC 1958 was to promote and encourage cross-border transactions and commerce (McLean, 2009), now boosted by 161 signatories from all over the world (UNCITRAL, 2020). A pro-enforcement regime is provided by NYC 1958 with its expedited recognition procedures and limited grounds for refusing the recognition and enforcement of awards (Born, 2012). With NYC 1958's numerous signatories, especially the major trading States, the enforcement of foreign arbitral awards now has more considerable acceptance worldwide than foreign judgments (Blackaby et al., 2009).

The paper seeks to analyse the provisions and legal framework for the recognition and enforcement of foreign arbitral awards in Malaysia. In doing so, this paper examines the regulatory framework of ICA in Malaysia before and after its accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, NYC 1958). It finds that the first period, from the first arbitration legislation in Malaysia, the Arbitration Ordinance XIII of 1809 until the *Arbitration Act 1952* (hereinafter, AA 1952), involves full court supervision over arbitration. Legislation from this period was *in pari materia* with English legislation Malaysian courts followed English courts' approach in maintaining full supervision over arbitration, both domestic and international. Unlike international arbitration, domestic arbitration must be held and subject to the domestic law of that place (Blackaby et al., 2009). Therefore, the courts perform supervisory role over domestic arbitration. On the other hand, international arbitration transcends beyond national boundaries where the enforcement court are bound to respect its obligation to adhere to the NYC 1958, subject to the reservations entered by the State when ratifying or acceding to the NYC 1958.

The second period, which started after Malaysia's accession to NYC 1958 in 1985, demonstrates Malaysia's efforts to conform to international best practice, albeit only on the recognition and enforcement of foreign awards. This period portrays Malaysia's efforts to move away from

transplanting English domestic legislation and instead adopts UNCITRAL Model Law on International Commercial Arbitration 1985 (hereinafter, UML) as the basis for AA 2005. Historically, the English courts were known for extensive judicial intervention in arbitral proceedings (Tweeddale & Tweeddale, 2005). Unlike Malaysia, the English government decided not to adopt UML as the basis of its new legislation, the *Arbitration Act 1996* (hereinafter, AA 1996). The AA 1996 repealed most of the previous arbitration legislation in England and currently is the most comprehensive arbitration statute in England. However, the AA 1996 moved English law closer to UML, and international best practice (Merkin & Flannery, 2014). The paper concludes that Malaysia opted to follow international best practice by adopting UML as the basis of its *Arbitration Act 2005* (hereinafter, AA 2005). Malaysian courts also adopt positive 'pro-enforcement' attitude in the application to recognise and enforce foreign arbitral awards.

METHODS

The methods of the study would be primarily qualitative research and analysis. The methodological approach followed was doctrinal research. Doctrinal research enquires what the law is on a particular subject matter (Dobinson & Johns, 2007). The author, in conducting doctrinal research, collects and subsequently analyses relevant legislation and law cases to investigate the law in that particular area (Dobinson & Johns, 2007). This paper investigated the regulatory framework of ICA in Malaysia. This paper critically examined the essential features of statutes and law cases to establish a complete set of statements of law on ICA in Malaysia (Hutchinson, 2013). The paper conducted a critical examination and analysis of the legislation and law cases in Malaysia to determine the law applicable in Malaysia both pre and post-accession to NYC 1958.

RESULTS AND DISCUSSIONS

Legal Framework of International Commercial Arbitration in Malaysia

The regulatory framework of ICA in Malaysia involves two significant periods: Pre-accession to NYC 1958 and post-accession to NYC 1958.

Pre-Accession to NYC 1958

Arbitration Ordinance XIII of 1809-Arbitration Act 1952. The first period of regulatory framework of arbitration in Malaysia involves a period when the courts were given broad powers to supervise arbitration proceedings. It was influenced by British colonisation and Malaysian courts followed the English courts' hostile attitude towards arbitration. Malaysia had domestic arbitration laws copied exactly from English legislation. The first statutory law on arbitration in Malaysia was Arbitration Ordinance XIII of 1809, which applied to the Straits Settlements, consisting of Malacca, Penang and Singapore (Davidson & Rajoo, 2006a). The *Arbitration Ordinance 1890* replaced *Arbitration Ordinance XIII* in two States in Malaya, Penang and Malacca

(Idid & Oseni, 2014a). In 1950, all States of the Federation of Malaya enacted the *Arbitration Ordinance 1950,* which was modelled on the English *Arbitration Act 1889* (Idid & Oseni, 2014a). An essential feature of *Arbitration Ordinance 1950* is that the Ordinance recognised parties' intention to opt-out of the jurisdiction of Malaysian courts, provided the parties expressed their intention in an arbitration agreement (Idid & Oseni, 2014a).

In 1952, Malaysia (then the Federation of Malaya) enacted the *Arbitration Act 1952* (hereinafter, AA 1952). The AA 1952, which followed England's *Arbitration Act 1950* (hereinafter, English AA 1950) *in verbatim*, did not stipulate any distinction between domestic and international arbitration (Davidson & Rajoo, 2006a). The AA 1952 reflected a time when the Malaysian courts had broad supervisory powers to intervene in the arbitration process (Davidson & Rajoo, 2006a). They were granted excessive powers to intervene, by AA 1952, in almost all aspects of the arbitral process '…ranging from rendering an irrevocable arbitration to revocable, discretionary powers on whether to stay proceedings or not in favour of arbitration, to the appointment of arbitrators and removal of arbitrators' (Idid & Oseni, 2014a, p. viii). The judicial intervention practices of the Malaysian High Courts were excessive, unnecessary and incapacitated the whole arbitral process, which was supposed to be neutral of any State's influence or involvement (Idid & Oseni, 2014a).

Reciprocal Enforcement of Judgment Act 1958. Alternatively, the parties may opt to enforce a foreign arbitral award as a foreign judgment under the *Reciprocal Enforcement of Judgments Act 1958* (hereinafter, REJA 1958). To date, this Act is still applicable. Section 2 of the REJA 1958 specifies that judgment includes arbitral awards unless an award is made by a tribunal in a country outside Commonwealth jurisdiction. According to Section 3 of the REJA 1958, the parties may enforce an award under this Act, provided that they can satisfy three requirements: (1) the award is final and conclusive, (2) payable under a sum of money and (3) rendered by a tribunal of a country specified in the First Schedule.

The provisions are incorporated in Order 69 Rule 9 of the latest *Rules of Court 2012*, where it states that: 'Where an award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place, an applicant may enforce the award in the manner provided for under rule 8. With the coming of the latest AA 2005, the provision under REJA 1958 cannot be overlooked and serves as an alternative to the enforcement regime under AA 2005.

However, the enforcement regime under AA 2005 is still preferable than the enforcement under REJA 1958 as the countries specified in the First Schedule of that Act are signatories of NYC 1958 (Choy & Rajoo, 2017). Also, in comparison, the NYC 1958 stipulates more straight-forward procedures of positive evidence where a party wishing to recognise or enforce a

foreign arbitral award must only supply arbitration agreement and arbitration awards (NYC 1958, Article IV). On the other hand, the party wishing to recognise or enforce a foreign award under REJA 1958 has to satisfy two (2) additional conditions compared to AA 2005 which are an award is final and payable under a sum of money.

Arbitration (Amendment) Act 1980. In 1980, several years before Malaysia decided to ratify NYC 1958, there were steps to adopt the best practices of arbitration conducted under the newly established KLRCA (Abdul Hak et al., 2016). 1n 1980, Malaysia amended its AA 1952 to allow total freedom for arbitration held under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965* (hereinafter, ICSID), or under the UNCITRAL Arbitration Rules 1976 and the Rules of the KLRCA.

The amendment to Section 34 was not comprehensive as it only covers arbitration held under KLRCA and does not differentiate between domestic and international arbitration. Unlike international arbitration, domestic arbitration is not subject to the NYC 1958. Any arbitration proceedings, including the enforcement of foreign awards in Malaysia, were subject to the full supervisory jurisdiction provided under AA 1952, unless arbitration proceedings were held under ICSID, UNCITRAL Rules or KLRCA Rules. In the case of Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, Zakaria Yatim J in 1989 held that the words in Section 34 of AA 1952 were plain, clear and precise, and that the section excluded the court from exercising its supervisory function under AA 1952 or any other written law for arbitration proceedings held under KLRCA.

Also, in the case of Jati Erat Sdn Bhd v City Land Sdn Bhd [2002] 1 CLJ 346, the court held that the 1980 amendment applied to all arbitration held under KLRCA Rules, irrespective of whether the arbitration involved only domestic parties or includes international ones. The amendment barred Malaysian courts from interfering in the arbitration process and causing delays and extra costs to the parties. The purpose of the 1980 amendment was to encourage international arbitration in Malaysia by providing a neutral a-national venue to arbitrate there (Lim, 1997). The amendment to Section 34 recognises and confirms the fact that international parties are generally reluctant to submit their disputes to arbitration in States with unfamiliar rules and procedures that may disadvantage arbitration proceeding and the enforcement of arbitral awards (Lim, 1997).

Post Accession to NYC 1958

The second significant period of regulatory framework of ICA in Malaysia followed Malaysia's accession to NYC 1958. Malaysia did not participate in the NYC 1958 Conference in New York in 1958. However, it did attend the NYC 1958 Conference as an observer as Malaysia had just achieved independence at that time (*Final Act and Convention on the*

Recognition and Enforcement of Foreign Arbitral Awards, 1958). Similar to most Commonwealth States, Malaysia is a dualist State. The application of international law in Malaysia is through the implementation of international law at the domestic level. Therefore, in Malaysia, international and domestic law work in separate and distinct spheres and legal systems. Domestic law prevails over international law at the domestic level. International law first needs to be transformed into domestic legislation through an act of Parliament before it can have a substantial and material effect on the law in Malaysia. Malaysia acceded to NYC 1958 on 5 November 1985 (UNCITRAL Secretariat, 2016). The implementing legislation enacted to give effect to it was the Convention on the Recognition and Enforcement of *Foreign Arbitral Awards Act 1985* (hereinafter, CREFA 1985), which came into force on 3 February 1986.

Implementing Act of NYC 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. The CREFA 1985 served as the enabling act for the application of NYC 1958 in Malaysia until it was repealed by the new *Arbitration Act 2005* (hereinafter, AA 2005). The long title and preamble of CREFA 1985 clearly state that the act gives effect to the provisions of NYC 1958. The text and wording of CREFA 1985 are very similar to the model bill provided by the Commonwealth Secretariat (Patchett & Secretariat, 1981). In June 1981, the Commonwealth Secretariat distributed an explanatory paper on NYC 1958 including a commentary on the text, guidance and model legislation should the Commonwealth government decide to accede to NYC 1958. One of the apparent similarities of CREFA 1985 and the Model Bill provided by the Commonwealth Secretariat was the addition of an interpretation section. The official text of NYC 1958 does not contain any definition section. In the *travaux préparatoires* for NYC 1958, there were several attempts and suggestions by the delegation of the NYC 1958 Conference to include a definition section in NYC 1958 (Summary Record of the Seventh Meeting, 1958). The definition of the term 'convention award' in Section 2 (1) gave effect to the reservations entered by Malaysia when acceding to NYC 1958.

Nevertheless, at that time, even though Malaysia had acceded to NYC 1958, CREFA 1985 still had to be read together with AA 1952 when parties brought an action to recognise or enforce foreign awards in Malaysia. Section 3 of CREFA 1985 gave effect to NYC 1958 by stating that Malaysia would recognise and enforce an arbitral award, providing that the award was considered commercial under domestic law and the award was made in the territory of a State party to NYC 1958. However, the procedure to govern such enforcement of arbitral awards was still under the purview of AA 1952, where the court had broad supervisory powers, subject to exception of Section 34 of AA 1952. In the case of Klockner Industries-Anlagen GMBH v Kien Tat Sdn Bhd & Anor [1990] 3 MLJ 183, the High Court held that the words in Section

34 were clear and precise and the Court was excluded from exercising its supervisory function with respect to arbitration held under KLRCA Rules. Therefore, foreign awards not held under ICSID or KLCRA would be subject to supervision by Malaysian courts. The CREFA 1985 was repealed with the enactment of AA 2005. Sections 38 to 39 of the Malaysian AA 2005 are the current implementing provisions of NYC 1958.

Malaysian Arbitration Act 2005. Malaysia began the process to modernise its arbitration laws in 2004. The AA 1952 was criticised for being outmoded and more lacunae were found (Davidson & Rajoo, 2006a). Besides, there was a paradigm shift in the arbitral process with less or minimal intervention from domestic courts (Idid & Oseni, 2014b). It was common for States to adopt UML and apply it to their domestic arbitration laws.

There were heated debates in Malaysia. Different bodies were involved in proposals and engaged in discussions with the Attorney General's Office to reconstruct the new legislation. The Malaysian Bar Council preferred a single Act based on the popular UML to govern both domestic and international arbitration, as dual regime legislation would cause confusion and be against the spirit of harmonisation promoted by the international commercial community (Davidson & Rajoo, 2006b). Meanwhile, the Malaysian Institute of Arbitrators wanted separate domestic legislation based on English AA 1996 and international legislation based on UML, arguing that UML was not suitable for domestic arbitration (Davidson & Rajoo, 2006b). However, their main objective was still the same, namely, to provide Malaysia with a new Act that moved with the times (Davidson & Rajoo, 2006b).

Finally, on 30 December 2005, Malaysia enacted AA 2005, which repealed AA 1952 and CREFA 1985. The new AA 2005 adopted UML with some modifications to suit the situation in Malaysia. For instance, it is a single Act with two regimes and the primary difference is the extent of court supervision, as it acknowledges that international arbitration parties may prefer to avoid judicial intervention from Malaysian courts. In contrast, domestic arbitration would need some judicial supervision from them (Davidson & Rajoo, 2006a). The AA 2005 is influenced by the New Zealand Act 1996, also a single Act with two regimes (Davidson & Rajoo, 2006a). The spirit behind the New Zealand Act has been followed, recognising that UML is perfect for both domestic and international arbitration, hence there is no need for different Acts to be enacted. Sections 38 to 39 of the AA 2005 are the current implementing provisions of the NYC 1958, repealing the CREFA 1985.

It was a first in the Malaysian legal history of arbitration that Malaysia chose not to follow the English legislation *in verbatim*. The AA 2005 repealed and supplemented AA 1952 'to bring Malaysian arbitration law in line with modern arbitration practice' (Rajoo, 2018). Malaysia adopted an internationalist approach in adapting to the

needs of international best practice and align its adherence to provisions of UML, thus deviating from Malaysia's old regime where the courts were allowed to intervene in most arbitral proceedings (Idid & Oseni, 2014b).

Arbitration (Amendment) Act 2011 and Arbitration (Amendment) Act 2018. Malaysia amended AA 2005 in 2011 and 2018 to provide for greater clarity in arbitration law in Malaysia. The amendment in 2011 stipulates new directions on one of the grounds for the recognition and enforcement of foreign arbitral award1s. The amendment in Section 39(1)(a)(ii) replaced the word 'Malaysia' with 'the State where the award was made'. Therefore, the courts in Malaysia may refuse to enforce any award on the ground that an arbitration agreement is invalid under the laws of the State where the award was made. The amendment is compatible with Malaysia's obligation to transform the ground under Article V (1) (a) of NYC 1958 into domestic law. In the case of Food Ingredients LLC v Pacific Inter-Link Sdn Bhd [2012] 8 MLJ 585, where the Plaintiff sought to enforce in Malaysia awards made in England, the Court held that the new amendment to Section 39 of the Act was applicable to the proceeding filed on 2 August 2011.

Also, an amendment to Section 39 (3) stipulates that part of an award which contains a decision on a matter submitted to arbitration may be recognised and enforced subject to the possibility that the decision may be separated from a part where the parties agreed not to submit to arbitration. This additional amendment also portrays Malaysia's efforts to conform to Article V (1) (c) of NYC 1958. Malaysia amended AA 2005 once again in 2018 to note the change in the name of KLRCA to the Asian International Arbitration Centre (AIAC).

The Recognition and Enforcement of Foreign Arbitral Awards in Malaysia

The main attraction of ICA is its universal enforceability of the foreign awards provided by the NYC 1958, having 161 contracting States to date. Sections 38 to 39 of AA 2005 govern the recognition and enforcement of foreign awards in Malaysia. The AA 2005 serves as a single regime for the recognition and enforcement of domestic and foreign arbitral awards (Das, 2007). Section 38(1), when reading together with Section 38(4), stipulates that an award made in a foreign State which is a party to NYC 1958 shall be recognised and enforced as a judgment. These provisions reflect the scope and reciprocity reservation entered by Malaysia. Malaysia declared two reservations when it first acceded to NYC 1958 in 1985: (1) the reciprocity reservation whereby Malaysia would only apply NYC 1958 to awards made in the territory of another contracting State; and (2) the commercial reservation where Malaysia would only apply NYC 1958 when considering differences arising out of a legal relationship considered as commercial under its domestic law.

The first reservation entered by Malaysia was that it would only enforce arbitral awards made in the contracting State. Section 38 (1) states that an award

where the seat of arbitration is in Malaysia or a 'foreign State' will be recognised and enforced. Even though the term foreign award seems to accommodate the needs of international arbitration, Section 38 (4) of AA 2005 then defines 'foreign State' as a State that is one of the contracting States of NYC 1958. Section 38(4) gave effect to the first reservation entered by Malaysia when acceding to NYC 1958 in 1985. The second reservation entered by Malaysia concerns the application of NYC 1958 only to matters considered as commercial under domestic law. The AA 2005 is silent on the definition of commercial reservation. Section 5 of the Malaysian Civil Law Act 1956 (hereinafter, CLA 1956) specifies the application of English Law in commercial matters in Malaysia. Section 5(1) defines commercial matters as "the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally".

Section 38(1) the Malaysian AA 2005 states that an arbitral award where the seat of arbitration is Malaysia or from a foreign State must be recognised as binding and enforced by entry as a judgment. Section 38(2) stipulates the rules of procedure for enforcing arbitral awards, which is by application in writing to the High Court in Malaysia with conditions similar to Article IV of NYC 1958. Section 38 is a comprehensive section dealing with both domestic and international awards (Rajoo, 2016). Foreign awards made by NYC 1958 contracting States will be fully recognised and enforced in accordance with the conditions provided by NYC 1958 and under the rules of procedure of Malaysia.

Recent cases have shown that Malaysian courts have been applying Section 38 of AA 2005 using a 'pro-enforcement' stance. In 2016, the Malaysian Court of Appeal in the case of Alami Vegetable Oil Products Sdn Bhd held that Section 38 was a recognition procedure in order to convert an arbitral award into a judgment. The judges also held that as Section 38 was a procedural provision to seek recognition of an award, and as long as there was an award, then the procedure in Section 38 was satisfied and the award needed to be recognised. Recently, in 2018, the Court of Appeal in the case of Jacob and Toralf Consulting Sdn Bhd & others v Siemens Industry held there was nothing in Section 38 of AA 2005 to permit registration of a partial award, except Section 39(3) where a judgment was made on matters not submitted to arbitration and awards were separable, and allowed the appeal to set aside the judgment of the High Court. More importantly, in relation to Section 38 of AA 2005, the judges recognised that having complied with the requirements under Section 38, the registration of an international arbitration award is granted as of right to the appellants unless the respondents are able to show any other reason to refuse enforcement as provided under Section 39 of AA 2005.

There are two ways in which an applicant wishing to have an arbitral award recognised or enforced may start the application in

Malaysia. First, is to file the originating summons under Order 28 read together with Order 69 of the Malaysian *Rules of Court 2012* (hereinafter, ROC 2012) (Mah & Navaratnam, 2016). This procedure applies to all arbitral awards, regardless of whether an award is considered domestic or foreign in Malaysia. The arbitration procedure for enforcement of awards under Section 38 of AA 2005 is an arbitration claim under Order 69 Rule 2(1)(k).

The second way is for an applicant to apply to recognise or enforce a foreign award under Order 69 Rule 8 of ROC 2012. Rule 9 states that an applicant may enforce an award that has become enforceable in the same manner as a judgment given by a court where the award was made under Order 69 Rule 8. The title of this order explicitly means that this procedure is only applicable to the recognition and enforcement of foreign awards. The Malaysian courts portray a positive 'pro-arbitration' attitude to the recognition and enforcement of award where the High Court shows a relaxation in procedural matters regarding recognition and enforcement of the said award. The court in Armada (Singapore) Pte Ltd also held that the omission to include the endorsement order under Order 69 Rule 8 (8) did not nullify the arbitral award. In its judgment, the High Court held that failure to comply with procedural requirements should not be cause for invalidating an action unless it resulted in a substantial miscarriage of justice.

Despite applying a formalistic and strict approach to having to satisfy both requirements of evidence specified under Section 38 of AA 2005, the Malaysian courts have consistently allowed the recognition and enforcement of foreign arbitral awards subject to the fulfilment of prima facie requirements. For instance, in the case of Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd, the Court allowed the defendant's application for recognition and enforcement of an award after being satisfied that formal requirements had been satisfied as the defendant had submitted a certified copy of the final award and a duly certified copy of the arbitration agreement. In Agrovenus LLP v Pacific Inter-Link Sdn Bhd, the Court of Appeal allowed the appellant's appeal to recognise and enforce an award in accordance with Section 38. The court also held that despite there being an objection to the jurisdiction of the arbitral tribunal from the defendant, the Court accepted a formalistic approach of compliance with Section 38 as a *prima facie* proof where the appellant produced a copy of the award and the sale contract relating to the transaction containing an arbitration agreement.

In Malaysia, a party wishing to oppose the recognition or enforcement of a foreign arbitral award must prove one or more of the limited grounds available under Section 39. The Malaysian court in the case of International Bulk Carriers Spa v Cti Group held that subject to strict compliance to *prima facie* requirements under Section 38 of Malaysian AA 2005, a foreign award in Malaysia could only be challenged using the limited grounds specified under Section

39 of Malaysian AA 2005. The court also took a strict and narrow approach in an application to set aside an award in the case of Armada (Singapore), where the Court rejected the application to challenge the validity of the award and held that the proper channel to challenge its validity was an English Court, the supervisory Court. In the case of Jacob and Toralf Consulting, the court highlighted the extensive nature of the grounds stated in Section 39 of Malaysian AA 2005 which must have been intended to be exhaustive in refusing the recognition and enforcement of a foreign arbitral award. The court, in that case, declined the request to refuse registration of the award as the defendant did not raise any of the grounds in Section 39 of Malaysian AA 2005. Looking at how positive is the attitude of the courts is to applications to enforce foreign arbitral awards in recent cases in Malaysia, the Malaysian courts' position pertaining to the recognition and enforcement of foreign arbitral awards are at par with international best practice.

CONCLUSION

The regulatory framework of ICA in Malaysia involves two significant periods: (1) pre-accession to NYC 1958 and (2) post-accession to NYC 1958. The first period ranged from the first arbitration legislation in Malaysia, the Arbitration Ordinance XIII of 1809, until AA 1952. The first period shows that Malaysia never left the hindsight of its former colonial ruler and always chose to follow the English arbitration domestic legislation word by word. Malaysia used to have broad discretionary power to intervene in arbitration proceedings. However, Malaysia started to realise that the world of international arbitration had now shifted to needing a neutral arbitration process with minimal intervention from the courts. The amendment to AA 1952 in 1980 reflected Malaysia's efforts to promote ICA, as well as Kuala Lumpur as a neutral seat for arbitral proceedings with zero intervention from domestic courts. However, the amendment to Section 34 was not comprehensive as it only covered arbitration held under KLRCA and did not differentiate between domestic and international arbitration.

The second period of regulatory framework of arbitration laws in Malaysia starts after Malaysia's accession to NYC 1958 in 1985. Malaysia was an observer at the NYC 1958 Conference in 1958 as it had just gained independence at that time. Malaysia acceded to NYC 1958 on 5 November 1958. Malaysia is a dualist State where international law needs to be transformed into domestic law before it can have a direct effect. Malaysia subsequently enacted CREFA 1985 as implementing legislation. The CREFA 1985 was textually similar to the provisions of NYC 1958, but additionally includes a definition section provided by the Commonwealth government in 1981. Even though CREFA 1985 governed the recognition and enforcement of foreign awards in Malaysia, the parties applying to recognise or enforce an award needed to conform to the procedures under AA 1952. The case of Klockner Industries-Anlagen GMBH held that Malaysian

courts were excluded from exercising judicial supervision over arbitration held under KLRCA rules. Therefore, any other arbitration including ICA which was not held under KLRCA rules was still under the purview of Malaysian domestic courts.

Due to the increasing numbers of international contracting parties, and pressure from the Malaysian Bar Council and Malaysian Institute of Arbitrators, Malaysia joined the UML community by enacting new modernised legislation, AA 2005. In 2005, Malaysia enacted AA 2005, which is a single regime covering both domestic and international arbitrations. The AA 2005 was influenced by the New Zealand Act 1996. For the very first time in arbitration, Malaysia chose not to adopt English arbitration legislation. Sections 38 to 39 of the AA 2005 currently governs recognition and enforcement of foreign awards in Malaysia, repealing the CREFA 1985.

Malaysia enacted sections 38 to 39 of the AA 2005 to reflect its obligation to recognise and enforce foreign arbitral awards pursuant to its accession to NYC 1958. Parties wishing to recognise or enforce a foreign arbitral award in Malaysia may opt either to apply under REJA 1958 or AA 2005. Comparatively, the procedures under Section 38 of AA 2005 is more straight-forward as it follows the requirements stipulated under the 1958 and UML. Unlike previous regime, the enforcement and recognition of foreign arbitral awards in Malaysia is now straight-forward and the courts were seen to have consistently adopted 'pro-enforcement' attitude in the application to enforce foreign arbitral awards. With the recent amendments in 2011 and 2018, Malaysia's laws on arbitration continue to conform to the best practice of international arbitration. In conclusion, the legal framework of ICA in Malaysia has now moved forward and gone well beyond the earlier adopted common law system of England. Malaysia's latest arbitration legislation, AA 2005 is a modern arbitration legislation that conforms to international best practice.

ACKNOWLEDGEMENTS

The author would like to express her gratitude to her PhD supervisors, Dr. Kamala Dawar and Dr. Ahmad Ghouri for their comments and encouragements. The author is also grateful to Prof. Dr. Zuhairah Ariff Abd Ghadas for her invitation to submit this paper to the Pertanika Journal of Social Science and Humanities Special Issue.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 149 - 168 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Corporate Governance Models for Higher Educational Institutions: An Analysis

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ABSTRACT

Since 2000, public and private higher education institutions systems in Malaysia are promoted to meet the nation's needs. Consequently, restructuring the public university system took place in 2005 through the Ninth Malaysia Plan (2006-2010). Under the new structure, the system differentiates between the types of universities in Malaysia, including research, comprehensive, specialised, and technical universities. The new structure offers a strong answer to students' diverse complexity of skills and attention and permits the best use of faculty with different skills subject to specific objectives. The higher education system in Malaysia responds to globalisation, marketing, and the information economy similar to other developing countries. This impact of the new initiative can be seen from the increment of the enrolment, combination of universities, better process in administration, the growth of private colleges and universities has been supported and all aspects of academic programmes that have been widened to cater the demands from the markets. Currently, in Malaysia, there are 20 public universities, 51 private universities and 10 foreign university branch campuses; 37 private university colleges and 338 private colleges. This growth and changes have made Malaysia into an education hub, especially in South East Asia. One of the issues concerned is the governance structure and framework applicable to these higher educational institutions. This paper deliberates on the theories and models of corporate governance and examines the governance structures and framework suitable and applicable to

ARTICLE INFO

Article history:
Received: 2 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.11

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ISSN: 0128-7702
e-ISSN: 2231-8534

higher educational institutions. The research methodologies adopted by this paper are doctrinal and document analysis.

Keywords: Corporate governance, framework, Higher Educational Institutions, theories

INTRODUCTION

Higher educational institutions (HEIs) play a very important role in contributing towards developed nation vision of any country. It is because the HEIs are considered as important producers of knowledge (Reichert, 2006) and therefore become the key institutions in the knowledge-based economy. The effect of demand locally and abroad resulted in large changes in Malaysian policy, objectives and governance strategies for the past 50 years. The Malaysian higher educational system started before the 1980s, where the public sector's involvement in higher education was very active whereas the private sector played a very minimal role. In the late 1980s, the involvement of the private sector became more evident where foreign universities and colleges were offering academic and technical programmes in Malaysia through their local partners. The important role of played by the private sector becomes very clear in the early 1990s. In 1996 the educational reforms took place due to the internationalization and globalization. It covered both public and private higher education. To date, Malaysia has 20 public universities, 51 private universities and 10 foreign university branch campuses; 37 active private university colleges and 338 private colleges. In addition to that, there are 33 polytechnics' and 92 Community Colleges. These institutions offer a comprehensive range of tertiary certificates at a reasonable cost.

Looking at the current Malaysian higher education system development where national education ecosystem and training consist of different nature of players, which includes Public Universities (UA), Private Higher Educational Institutions (PHEIs), Polytechnics and Community Colleges, it is crucial to understand how these institutions are governed and controlled by the government. This paper investigates the corporate governance model practices by HEIs from Malaysia and abroad. This paper is arranged into several sections; after the introduction, the next section will elaborate on the theories relevant to corporate governance, followed by a discussion on models of corporate governance. The subsequent section will analyse on the model of corporate governance in HEIs. Then, the following sections will be on the observation, recommendations and contribution of this paper.

Corporate Governance and Educational Institutions

UNESCAP (2009) states that *"governance" means the process of decision-making and the process by which decisions are implemented (or not implemented).* Governance can be used in several contexts such as corporate governance, international governance, national governance and local governance.

Oxford University (2006) defines the term *'governance' as the processes of decision-making within an institution [which] ... enable an institution to set its policies and objectives, to achieve them, and to monitor its progress towards their achievement.* According to Du Plessis et al. (2005) '*corporate governance deals with the ways to control management, balancing the interest of all stakeholders and other parties who can be affected by the corporation's conduct in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for the corporation'* and *the academic, professional, and policy field focused on how business institutions must be ruled, directed, and accounted for the welfare of all people involved* (Artero, 2007).

Corporate governance Institute on Governance defines *governance as the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say*.

The most important elements in the definition given by several authors are power, relationships and accountability: in which concerns about who has authority, who decides, and to what extent the accountability of the decision-makers (Hassan & Abdul Ghadas, 2017). In order to regulate the management, the role to rule and direct the institution played by the ultimate decision maker's i.e the board of directors, usually, shareholders give certain authority to the management of the organisation, but not their responsibility. It is basically referring to how an organisation is formally governed and managed.

With regards to educational institutions, Hall and Hyams (1998) of the view that the principle of governance refered to checks and balances within the HEI to ensure that they were well governed, to the distribution of responsibilities and to the necessary powers to perform those responsibilities and tasks. It dealt with the trusteeship principle and the conduct of meetings.

Governance in higher education usually refers to the management and procedure for decision making at the institutional or system level (Taylor, 2013). It may also refer to internal management systems, the position of leaders and processes of decision-making and the relationship between those positions and the boards of governors. Middlehurst (2013) described corporate governance as the conformance framework of an organisation, which was a key component of university governance. Universities' corporate governance is similar to in other organisations, where the main concern is with liability and to safeguard the organisation's resources.

Governance is basically related to who should be participated in decision making and in what capacity he is doing so. In attaining the decisions, the key principles of corporate governance should be applied by the decision makers (Shamsuddin et al., 2019).

RESEARCH METHODOLOGY

This paper adopts doctrinal and statutory study by analysing the corporate governance theories. The analysis then conducted on the models of governance structure for higher education institutions in Malaysia. This doctrinal research according to Yaqin (2007) is basically library-based research which involves the obtaining of information on a systematic basis and then examining and evaluating the information in order to arrive at some conclusion. The data used were secondary data with primary and secondary legal materials collected through a literature study. Primary materials include statutory provisions and reported cases and secondary materials include books, journal articles, proceedings, commentaries that discuss the laws, newspapers, and other relevant documents. All sources can be accessed through printed and online materials.

FINDINGS AND DISCUSSIONS

Theories Relevant to Corporate Governance

In discussing corporate governance, few fundamental theories are related which include; agency theory which has been expanded further into stewardship theory as well as stakeholder theory, transaction cost economics theory, resource dependency theory, resource based view theory and contract theory. The convergence theory comes into picture due to globalisation and internationalisation. Let us examine each corporate governance theoretical perspective in order to acknowledge and recognise the importance of corporate governance for the organisations and their stakeholders.

Agency Theory. Agency theory connotes "the relationship between principals (such as shareholders) and agents (such as executives and managers of companies). This theory originates from the economic theory founded by Alchian and Demsetz (1972) and developed by Jensen and Meckling (1976). Under this theory, it is anticipated that the managers and executives of companies to perform their task for the best interest of their principals.

Padilla (2002) found that the issue regarding this theory was the agent might make decision not for the best interests of principals, and they were opportunistic and self-interested (Jensen & Meckling, 1976). According to Davis et al. (1997) and Bhimani (2008), this is because ownership and control in agency theory are separated. The agency theory has normally been used in order to know the relation between ownership and management structure. If separation exists, the agency model may be adapted to suit the management priorities with the shareholders (owners). Under this theory, the accountability and responsibility of employees are on their tasks and duties. Jensen and Meckling (1976) pointed out that the employees must be kept under control by monitoring mechanism or by incentive alignment. The description of corporate governance mechanism is a must for protection of top management's interest. The theory contends that in order to reduce dissimilarities of information between contractually related partners (owners and

managers), voluntary disclosures is required (Ntim et al., 2017). Abdullah and Valentine (2009) suggest the employee to practice good governance structure instead of simply providing the need for shareholders. The emphasis of the theory is on the relationship between the management structure or the board independence with the performance of the firm. Figure 1 shows the relationship between corporate governance organs in the agency model.

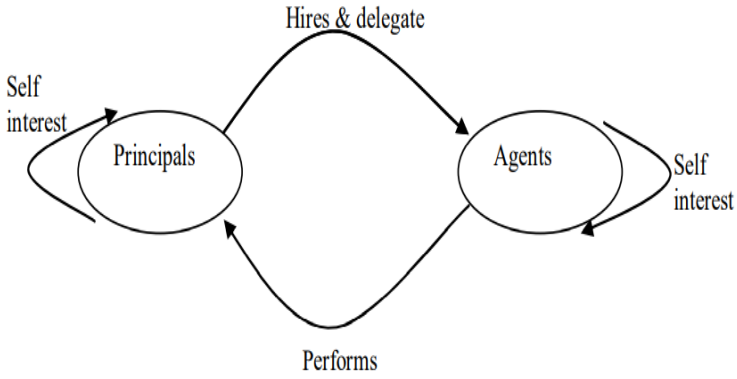

Figure 1. The Agency Model
Source: Abdullah and Valentine (2009)

Stewardship Theory. Stewardship theory originates from sociology and psychology theory where it is based on managerial motivation concept. Davis et al. (1997) defined stewardship theory *as 'steward's utility functions are maximised through performance of the firm by protecting and maximising shareholders' wealth'*. Stewards in this theory are executives and managers who are working, protecting and making profit for the shareholders. The role of top management being as stewards is emphasized under this theory, integrating their objectives as part of organisational objectives. Stewards will be responsible towards the assets they control even when they are left alone (Davis et al., 1997). When the organisational success is attained, stewards are pleased and inspired.

Stewardship theory suggests for consolidation of the Chairman and CEO position to reduce agency cost and for them to have greater function in the company. The agents (stewards) are self-actualizing in this theory, focusing on accomplishment and self-actualisation, involvement-oriented and trusty because the firm is the priority over their own self-interest. In term of relevancy of this theory to the corporate governance, clear and definite role, authority and power must be given to managers by the organisational structure (Abid et al., 2014). Figure 2 shows the relationship between corporate governance organs in the stewardship model.

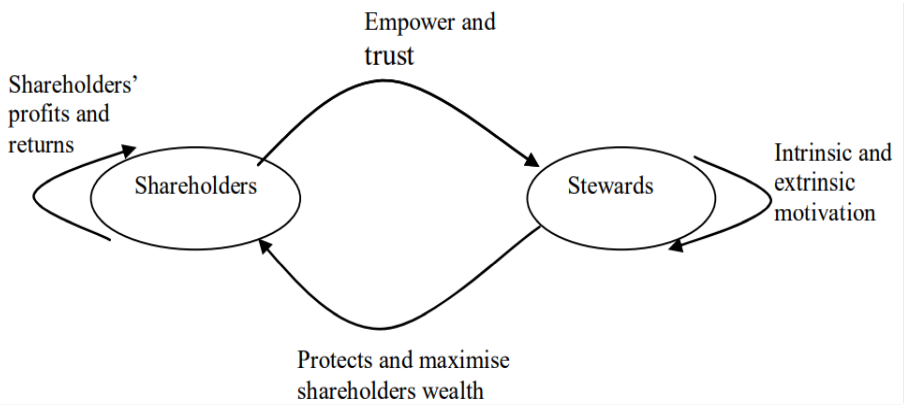

Figure 2. The Stewardship Model

Source: Abdullah and Valentine (2009)

Stakeholders Theory. Stakeholder theory was surrounded in management discipline in 1970. Freeman (1984) later developed the theory by including broad range of stakeholders for corporate accountability. It is developed to define, assess, improve and manage strong coordination among the stakeholders. This theory differs from agency theory, because it focusses on broad stakeholders' group whereas the agency theory focus on the maximising shareholders' wealth. This theory is noticeable because it focuses on the firm's accountability to a broader group than only for its shareholders. Stakeholder is 'any group or individual who can affect or is affected by the achievement of the organisation's objectives, which includes suppliers, employees and business partners.

Freeman (1984) contended that the decision making process would be affected because of the relationship with many groups, and Donaldson et al. (1995) stated that stakeholder theory stressed on decision making of management body and the interest of all stakeholders were of the equal intrinsic values. The shareholders and stakeholders urge different corporate governance structures and monitoring mechanism (Abid et al., 2014). Figure 3 shows the relationship between corporate governance organs in the stakeholder model.

Transaction Cost Economics Theory. Cyert and March (1963) introduced the transaction cost economics theory in 1963 and later popularized by Williamson (1996) through his writing in 1996. It is a combination of law, economics and organisation disciplines. The theory sees the company as an organisation made up of people with different perspectives and objectives. The theory assumes that the company and its structure can determine prices and production because the company has become so large that they are effectively

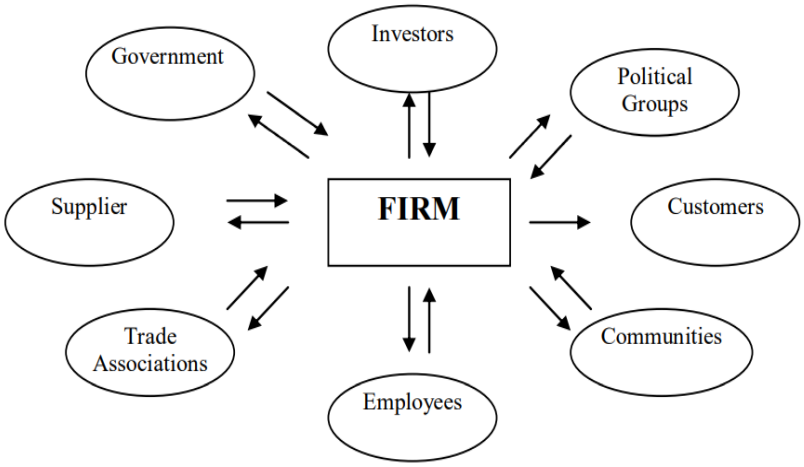

Figure 3. The Stakeholder Model
Source: Abdullah and Valentine (2009)

substituting the market for the allocation of resources. The unit of analysis in transaction cost theory is the transaction. Therefore, according to Williamson (1996) the combination of people with transaction proposes that transaction cost theory managers are opportunists and arrange transactions of the company for their interests. The managers are self-interest seeking and work under bounded rationality. In other words, Abid et al. (2014) of the view that the top management and director of a company act for their interest and not for the shareholders' wealth.

Tricker (2012) pointed that the theory highlighted check and balance mechanisms through audit control internally and externally, disclosure from independent outside directors, separation between chairman and CEO, risk analysis, and committees for nomination and remuneration as cited by Abid et al. (2014).

Resource Dependency Theory. Resource dependency theory evolved from sociology and management field which emphasises on how the external resources of the firm affect the behaviour of the firm and takes a strategic view of corporate governance (Abid et al., 2014). The theory focuses on the role plays by the board of directors in getting external resources needed by the firm through their connections. Johnson et al. (1996) pointed out that under this theory, the representatives from independent organisations was appointed as a tool for resources critical to firm success. For example, as stated by Abdullah and Valentine (2009) the appointment of a partner from a law firm as one of the firm outside directors in order to provide legal advice, either in board meetings or in private conversation with the firm executives. It can be said, according to this theory, that firms depend on each other and exchange resources. As a

result, resources can be the basis of power for firms because resources are valuable, costly to imitate, rare and non-replaceable (Hitt et al., 2012). In the role of resource dependency, the external resources such as information, skills and access was brought by the directors to the company's key constituents (i.e suppliers, buyers, public policy decision makers and social groups) Hillman et al. (2000). Madhani (2017) proposes that the part played by the board of directors under the resource dependency theory would increase the performance of a firm.

Resource based View Theory. The resource-based view theory (RBV) sees the firm as a group of tangible and intangible assets. Under this theory, the resource does not only refer to the tangible but also the intangible which for example, characteristics of the board, i.e, board members' knowledge and experience are much harder for competitors to imitate compared to other aspects of board composition such as size, or ratio of executive/outside members. RBV theory is linked to board characteristics in terms of idiosyncratic (distinctive) resources that may prove to be sources of competitive advantage to firms. In contrast to agency theory, with its emphasis on managing conflicting objectives among managers and shareholders within the firm, the RBV underlines the role that the board of directors can play in bringing unique resources to the firm.

RBV stresses on the board composition and firm's governance structure as an asset that can add value to the firm. When the board are actively taking part in strategic decision making, they are seen as a valuable resource of the firm. It is because the effective involvement requires skills and in-depth knowledge of the board. Under RBV also, the board would be seen as a unique, tacit, socially complex and internal resource which can help a firm to enhance performance (Hart 1995, Madhani 2017). The board is like a resource for organisation, by virtue of their ability to provide expert advice on strategic issues. One of the major tasks of the board is board strategic involvement. According to RBV, the combination effect of firm and strategic tasks of board can build specific resources for the firm and become a dynamic capability. According to Teece et al. (1997), 'dynamic capabilities' means the ability of a firm to integrate, build and reconfigure internal and external competences to address changing environments (Teece et al., 1997). When complementary resources work well, the value they create is greater than that which could be generated by individual resources in isolation. Board Dynamic Capability deals with changes at the corporate level to address the changing environment.

Contract based Theory (Contractarianism). The traditional legal concept of 'contract' introduced in nineteenth-century refers to certain kinds of legally enforceable obligations. For this definition, in order for the contract to be enforceable, it requires negotiation and the voluntary exchange of discrete promise

along with a number of legal requirements. In the case of Dartmouth College, the court depended on literal and technical concept of contract as an explicit and discrete bargain. In this case the corporate charter had legal status because the incorporators had promise to engage in educational activities in exchange for the state promise to grant them the legal powers of a corporation.

Legal theory and doctrine develop a more expansive concept of contract in the twentieth-century. Economists use the term 'contract' to include all voluntary relationships between market participants regardless of exchange or legal enforceability. This is corresponding to the expansion of legal theory in contract, where the traditional concept of exchange of discrete to include preprinted documents with little or no opportunity for negotiation. There are also opinions that contradict, but there is another view that the signing of this type of form indicates consent, regardless of whether the signatory has read or understood the terms (Joo, 2010).

The contractarianism invokes the view of a corporation as the 'natural' outcome of 'private' interaction, as distinct from an 'artificial' state creation. The contract theory resonated with two fundamental and related traditions in American political, economic and legal thought that is firstly, the libertarian view that consent confers moral legitimacy and secondly, the economic view that individual, decentralised consensual exchanges allocate economic goods so as to maximise overall social utility.

In 2016, the conclusion of series of discussion and debates permited a broad perspective on the purpose of the corporation and supported the direction that the fiduciary duties of board were toward the corporation, not the shareholders (Veldman et al., 2016).

Convergence Theory. There is an assumption that laws and regulations are standardised due to globalisation and internationalisation pressures in most countries. This leads to 'convergence thesis'; that laws, regulations and institutions are converging as they develop which brings to a convergence of socio-economic structures and later brings about a cultural convergence. The main reason for convergence is a consensus that economic interest of shareholders should be exclusively protected by managers of a company. However, the convergence theorist overlooked the basic question whether it is possible to implement the same set of rules or regulations for a diverse nation. That is why, the OECD (2004) principles adopted non-binding principles of corporate governance that recognise the need to tailor the systems to varying legal, economic and cultural circumstances. The OECD (2004) global principles of 'good' corporate governance was developed on the basis that common international standards of corporate governance were essential for the expansion of international institutional investment and for closer integration of global financial market. Rashidah and Salim (2010) argued that rules and practices in each country had developed over time in a specific legal and political environment.

Therefore, a country can learn from another but mechanisms should be different as each country has different corporate governance system.

Models of Corporate Governance

There are several models of corporate governance according to Hasan (2009).

The Anglo-Saxon Model. The Anglo-Saxon model (shareholder-value system/market based system) of corporate governance is considered as the most dominant theory championed by the United States and the United Kingdom. This model is practice by many corporations in New Zealand, South Africa, Australia, Canada and most of South East Asia countries. The model is based on the concept of fiduciary relationship between shareholders and the managers which is driven by profit-oriented behaviour. Under Anglo-Saxon system, the structure of corporate ownership reflects the share ownership widely dispersed and shareholders' influence on management is weak. Cernat (2004) provided the Anglo-Saxon Model which was adopted by Hasan (2009). Due to this fact, in order to protect the shareholders, the corporation needs strong legal protection Therefore, corporate governance is important in the Anglo-Saxon system for the shareholders' protection. Figure 4 below illustrates the Anglo-Saxon model of corporate governance.

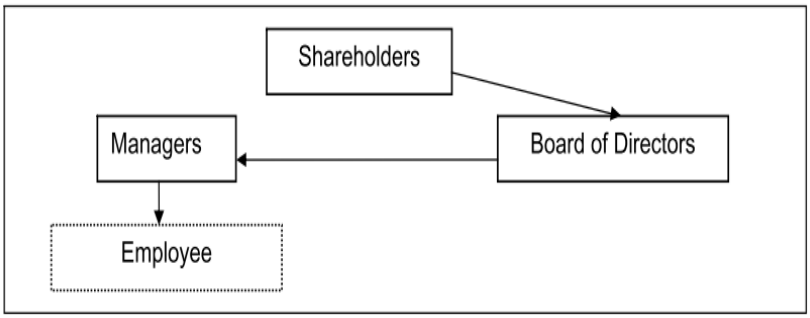

Figure 4. The Anglo Saxon Model
Source: Hasan (2009), Cernat (2004)

The European Model. The European Model is known as stakeholder-based system where the main focus is on the maximisation of the interest for wider group of stakeholders. Most of European countries such as France, Greece and German practiced this model of corporate governance. aproposal for reform of corporate governance system in South Korea as founded by Scott (1998) who recommended the introduction of the European Model of supervisory board or two-tier system and allowing banks to own greater equity shares in the corporation.

European Model practices the two-tier system, which comprises management board of executive directors and supervisory

board of outside directors (as illustrated in Figure 5). The two boards meet separately. Cernat (2004) provided the European Model which was adopted by Hasan (2009). The European model rejects the propositions by American Model and suggests that: the right of stakeholders to be involved in decisions that affect them, the fiduciary duty of managers in protecting stakeholders' interest and the objective of the corporation to promote not only shareholders but the stakeholders' interest.

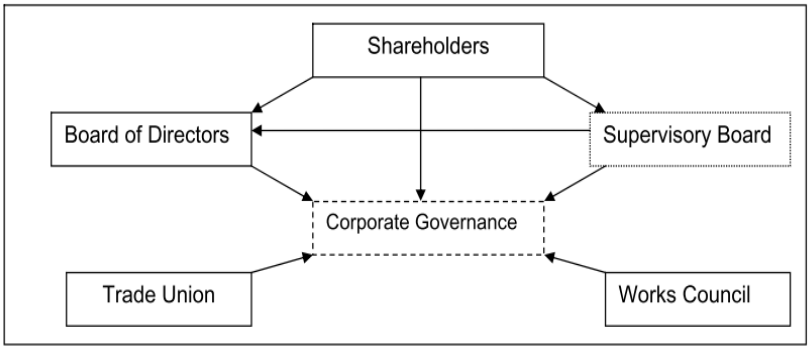

Figure 5. The European Model of Corporate Governance
Source: Hasan (2009), Cernat (2004)

Corporate Governance Models in HEIs

Governance concerns with the decision making structure and evaluation of performance. In the case of HEIs, the issue becomes complex because the owners are not directly identified and in the case of public or national universities, the sources of funds are numerous either in the form of grant and donations. In addition to that, they are also combinations of different groups and even the effects of their actions are tremendous on society, they are not measurable by financial terms (Pandey, 2004). Carnegie and Tuck (2010) defined university governance as a distribution of resources between the governing body, management, academic governing body and academic community. Therefore, university governance involves overall communities of a university including a university's Council, Executive, Deans, Department Heads, Research Directors and typically extensive committee systems, and review and advisory panels. Consequently, it must protect the interests of various stakeholders especially the students, academics, industries and government (Hussin & Asimiran, 2010).

The highest position of power holders in the university management system draws the university governance. This body will watch over and supervises the directions for the university's growth for communities served by the university. Normally, the

powers, roles and responsibility of the actors in the governance structure are stipulated in the university's constitution. To be more specific, university governance refers to the way of how the university policies were enacted within the outlines of the university constitution, The constitution outlines the powers and authorities of the management of the university From the literatures, several features influence HEI governance which can be from indefinite of power in universities management i.e council, management and professionals (Shattock, 2013; Pandey, 2004; Mok, 2010). In addition to this, Hussin and Asimiran (2010) listed several other factors like state regulations, board members' selection, role expectations, university organisational arrangements, bargaining avenues, stakeholder pressures and competition that affected university management. There are several models applied by HEIs worldwide. Following are among the models, which are usually based on the nature and the agendas of the HEI itself.

State Control Model / Centralized Governance Model / Academic Governance Model

Moodie and Eustace (1974) found that the power in university was vested on the academic community. They had suggested that the 'supreme authority' must rest with academics because they were the best person or department to regulate the public affairs of scholars as long as it was responsibly exercised. Fielden (2008) categorised the legal status of public universities into four models of universities governance as in the following Table 1.

The state control model is a traditional model of higher education which is normally

Table 1

Four models of University Governance from control to autonomy

Institutional Governance Model	Status of Public Universities	Examples in
State Control	Can be the agency of MOE, or a state-owned corporation	Malaysia
Semi-Autonomous	Can be the agency of MOE, or a state-owned corporation or a statutory body	New Zealand, France
Semi- Independent	A statutory body, a charity or a non-profit corporation subject to MOE control	Singapore
Independent	A statutory body, a charity or a non-profit corporation with no government participation and control linked to national strategies and related only to public funding	Australia, United Kingdom

Source: Fielden (2008)

applicable to public/national universities worldwide. As the ministry will not be able to control everything within HEIs under the State Control model, some freedom has to be given to the HEIs. The Ministry is entitled to hold the institution accountable in many respects and must retain overall strategic control over the HEIs under the Independent model. The academic freedom is the basis of university's autonomy to enable institutions to manage their affairs to the extend allowed by the state. However, it is important to note in order to protect the interest of the state and its citizens, universities cannot enjoy unlimited autonomy, and checks and balances at two levels is needed. The international trend of increasing the autonomy of public institutions makes them independent and self-governing organisations in line with models C (Semi-Independent) or D (Independent). This development is described as moving from a system of state control to one of "state supervision". Corporatisation policy exercised by the government initially in 1998 and decentralization since 2006 making the three modes of governance able to be operationalized. This development determined the universities' degree of governance, whether they are centralized, decentralized or marketized forms.

Private Model / Business Oriented Model/ Neo-Liberal Model. The private sector significance in providing higher education is recognised as one of the strategies of many countries to achieve the national targets for higher education's participation. This is because the private providers are able to fulfill the demands in supply higher education faster and sometimes more effectively. However, Fielden (2008) argued that some concern for example fears as to whether the profit motive was not matched with the values of education, questions regarding research culture and quality of the education services had been brought up by some countries.

For the Malaysian public universities to be more competitive globally, the government introduced the ideas of corporatisation/ incorporation. The corporatisation of public universities according to Mok (2010) means the universities adopt practices of business corporation in order to improve efficiency and effectiveness in the university management. In order to boost the quality of programmes and to improve the competitiveness of the universities, most governments including Malaysia, Taiwan, Singapore, Hong Kong, Japan and South Korea revise their education systems and consequently come up with different reform measures. Among the measures taken is to look for good practices of university governance even beyond their national boundaries (Crossley & Watson, 2003). From corporatisation and incorporation, universities are expected to be more entrerprising and entrepreneurial to rely on research grants, commercial contract and private financial sources instead of state block grants. In response to New Public Management (NPM), the reform of the university governance structures has been done by universities in Malaysia and Singapore. This includes to strengthen the

university leadership, introduction of new governance for faculty and performance review systems, enhancing quality assurance mechanism with accountability and human capital development (Morshidi & Abdual, 2008).

In the case of private institution in Malaysia, initially they offered foreign-linked programmes to meet the superfluous demands in the country, even before 1980. Many programmes later came into existence such as external degree programmes, distance learning programmes, advanced standing programmes, twinning programmes, credit transfer program, and joint programmes. At that particular time, the foreign universities could not confer degrees or establish branch campus yet. Subsequently, with the 11th Malaysian Plan, and the Vision 2020 goal to become developed nation, the Private Higher Educational Institutions Act (PHEI) was introduced in 1996 to facilitate the management of private providers. Under the PHEI, the institutions are allowed to grant their own degrees and the foreign institutions may set up branch campuses in Malaysia. The *National Accreditation Board Act 1996* (later repealed by Malaysian Qualification Agency (MQA) Act 2007) was enacted in the same year to govern matters pertaining to standards and quality. Normally, the Board of Governors are appointed from the body which initiated and established the university. The main role of the Board is to ensure the growth, development and sustainability of the institutions or the corporate body (Hussin & Asimiran, 2010). The governors mind and thinking and the way university to be driven at are all affected by the ideas and its surrounding developments. Within this governance system, the strategy will usually be a top-down approach, where the governing bodies will provide guidelines on the management of the company.

Hybrid Model / Shared Governance. The other governance structure discussed among authors are hybrid governance structure where more fair analysis of the roles of contemporary vice chancellor was introduced. Gayle et al. (2003) defined shared governance as "a mutual recognition of the interdependence and mutual responsibilities among trustees, administrations, staff, faculty and students for major institutional decision making relating to mission, vision, budget, teaching and research". Dearlove (2002) suggested the shared governance to blend collegial authority with managerial authority in order to respond to the managerialist mode. The shared governance allows the steering group to take advantage of the combination of the strength of traditional collegiality, the expertise of the academic community and the loosely-coupled with federal structure of universities. This steering group is also able to engage with management imperatives, and to address the tension between consultation and speedy decision making (Lapworth, 2004). Gayle et al. (2003) defined shared governance as a mutual recognition of the interdependence and mutual responsibilities among trustees, administrations, staff, faculty and students for major institutional

decision making relating to mission, vision, budget, teaching and research. By modifying Lapworth Model, Hussin & Asimiran, (2010) suggested a model of shared governance, which showed the relationship amongst different groups in HEIs. Through the said shared governance model, the university objectives can be attained within the legalized framework.

From Figure 6 below, the power and ability to participate in the policy decision making is equal as shown by the same size of the circles. The outer circle reflects that the universities are functioning within a sphere of a legal framework although they have certain degree of autonomy with visions and missions that have driven, shaped and influenced by the universities core functions and activities.

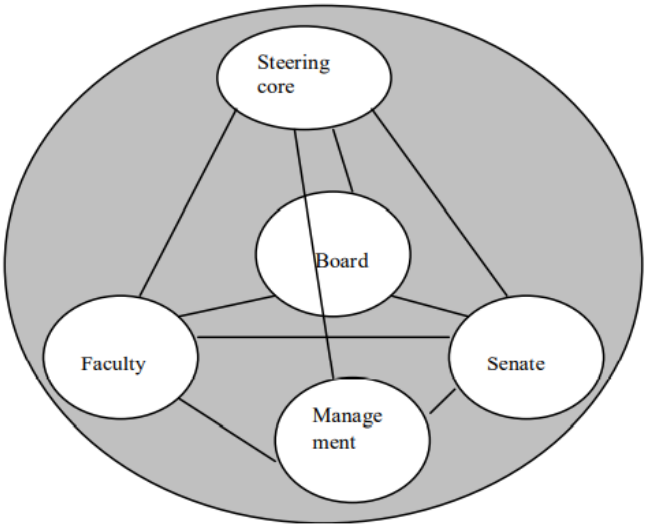

Figure 6. Flexible shared governance model by Hussin and Asimiran (2010)

CONCLUSION

From the discussion above, it can be concluded that the governance system of HEIs are not of the same nature. It all depends on the managerial and financial purposes of the HEI (Sulaiman & Abdul Ghadas, 2019). The interaction between the management and the academic team enhances the level of voluntary disclosures, therefore supporting the relevancy of a "shared" leadership in the HEIs' sector towards enhancing accountability and transparency in HEIs (Ntim et al., 2017). In the UK, the Guide for Members of Higher Education Governing Bodies had been developed by the Committee of University Chairs in 2014. The Guide shares governance good practice and encourages its appropriate adoption across the higher education sector in the UK. The main

purpose is to support the development of the highest standard of governance for the higher education sector.

The issue of whether there should be standard form of governance is among the matters concerned. Most authors of the view that the corporate governance policies and implementations are not the same (Abid et al., 2014), therefore they cannot have a standard model which fits all HEIs and the model should be of normative model (Pandey, 2004) which means consciously created with specific mission and well-defined goal. It is observed that, in Malaysia, the government is still playing an important role whereby, even with the 'empowered governance', the government come into picture on the 'program accreditation' and 'academic audit' by the MQA. One of the shift under the Malaysian Education Blueprint (Higher Education) 2015-2025 laid down ten shifts and the no 6 Shift is 'Empowered Governance'. This shift aims to empower universities with greater decision making rights and autonomy together with greater accountability. The Ministry provides detail for the governance under the University Transformation Program Green Book on Enhancing University Board Governance and Effectiveness.

"Autonomy is a process we are moving into. We are moving from being a tight controller to being a regulator and policy-maker," Idris Jusoh (the then Minister of Higher Education) stated in the National Conference of Higher Education 2017 organised by the Institute for Democracy and Economic Affairs (Ideas) in Kuala Lumpur (IDEAS, 2017). This shift in goal enables the Ministry to become policymaker and regulator rather than to play a role as tight controller, and to enable the HEIs to have their own growth and development strategies. In order to achieve these outcomes, the government through the University Transformation Programme Green Book by the Ministry of Higher Education Malaysia. (2015) provides several key initiatives which include:

i. Defining five-year (3+2) outcome based performance contracts between the Ministry and HEIs, with public funding at risk if performance goals are not met, and incentives for exceeding targets;

ii. Strengthening quality assurance in the private sector, by requiring the private HEIs to participate in enhanced national quality assurance framework (for example SETARA and MyQuest) for continued access to government funding (for example research grant and PTPTN student loans); and

iii. Moving decision rights from the Ministry to the leadership of public universities, improving the governance effectiveness of HEIs and building the capacity and capabilities of University Board and institutional leaders to take on these increased responsibilities.

In the University Transformation Programme Green Book, the Ministry set out the guidelines for the Board of Directors of HEIs. As this issue is quite recent, research

should be conducted as to whether, in terms of the regulatory framework of governance, is it comprehensive enough to cater the issue related to the roles and responsibilities and also the liability of Council/Steering Committee and management team as well as the issue of autonomy of HEIs.

ACKNOWLEDGEMENT

The authors would like to thank for the support given by the Faculty of Law and International Affairs, UniSZA, and Open University Malaysia (OUM).

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 169 - 183 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Digital Disinformation and the Need for Internet Co-regulation in Malaysia

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ABSTRACT

The spread of fake news on Covid19 is causing public unrest and suspicion among citizens which is a challenge for countries facing the pandemic. The misinformation or disinformation which stems from uncertainties, unrest, and anxiety because of movement control order procedures, financial and economic hardship caused wrong information to spread like fire. Called as 'info-demic', it becomes a second source of virulent information that requires arresting just like the pandemic itself. Controlling fake news in the time of pandemic is a daunting problem that slaps Internet regulation at its face. On the Internet, lies spreads faster than truth and correcting misinformation means tonnes of work. This paper examines Internet self- and co-regulatory approaches in selected jurisdictions to reduce the impact of fake news on governments, industry, and private actors. In applying content analysis as a qualitative research method, the first section analysed specific legislations enacted by parliaments to criminalise the acts of disseminating and publishing fake news. The second section examines legislative and administrative efforts to impose civil and criminal liability on platform providers to monitor online content. The final section analysed self-regulatory efforts to introduce online fact-checking portals and awareness campaigns. This paper argues that Internet self-regulation scheme in Malaysia is not bringing the desired result in the scope of maintaining peace and security of the nation. Considering how dangerous disinformation can cause to the society, more so in global emergency like the present Covid19 pandemic, it is submitted that Internet co-regulation is more suitable if the social, moral and cultural fabric of the society is to be maintained.

ARTICLE INFO

Article history:
Received: 05 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.12

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Keyword: Co-regulation, disinformation, fake news, online fact checking portals, self- regulation

ISSN: 0128-7702
e-ISSN 2231-8534

INTRODUCTION

The world is striving hard to curb the spread of COVID19 outbreak. As of 15th April 2020, the Ministry of Health Malaysia has recorded more than 5000 positive COVID19 cases and is expected to rise further in the months to come. As the government has instructed for movement control order since 18th March 2020, the public are being served with fake news on digital media on a daily basis, which spreads faster than the real news. For example, on March 28th the public was shocked by a suicide case at Serdang Hospital. Rumours were that the victim committed suicide because he was tested positive with COVID19. Upon clarification, the Ministry of Health confirmed that the news was fake (Astro Awani, 2020).

As countries stepped up on their fight against COVID19 virus, there is another source of worry - misinformation regarding the spread, containment measures as well as source of virus spread. Why is disinformation as dangerous as the virus itself that it is labelled as 'infodemic'? In Malaysia, the authorities are extremely careful with the information they released. The daily briefing by the Director General of Health are imbued with carefully crafted words containing a count of daily infections, death, and the possible cluster. In none of the briefings are the identity of the patients revealed - just Case 1041 who came back from Italy aged 58 years old. All these daily chorus is to protect the privacy of the patients as well as to allay unnecessary fears, social stigma and blame game which is spreading like wildfire in Malaysia since the beginning of the COVID19.

Misinformation, disinformation or the glamour term 'fake news' may not seem to be a new animal – but "digital disinformation" has slapped Internet regulation in its face (Marsden et al., 2020). Considering the decentralised nature of the Internet where data flows beyond borders, imposing restrictions on online fake news has proven to be a huge challenge for regulators and governments. As legal solutions may assist to a certain extent, the bigger question is whether policymakers need to look beyond Internet self-regulation to successfully curb fake news. Marsden, whilst acknowledging that there is no single solution, believes that the effort "should not fall solely on national governments or supranational bodies" nor "companies". In his opinion, all content regulation efforts should aim towards Internet co-regulation to achieve sustainable results (Marsden et al., 2020).

The term fake news was popularised by Donald Trump in his United States Presidential Election in 2016 and since then has become the buzzword of the day (Allcott & Gentzkow, 2017a). So whenever fake news appears in any part of the world the global community must somehow connect them to the events which had occurred during the United States' Presidential Election in 2016, no matter how remote the link is. In Japan, Germany, Egypt, Kenya, Malaysia and other countries, fake news has

become a daunting issue (The Law Library of Congress, 2019). While the Malaysian government has repealed the *Anti-fake News Act 2018* in December 2019, more is to be desired of its next approach to address online fake news (Shankar, 2019). In this regard, we examine Internet self- and co-regulatory approaches in selected jurisdictions to reduce the impact of fake news to governments, industry, and private actors.

MATERIALS AND METHODS

This work adopts qualitative research method through content analysis of relevant literatures and semi-structured interview with the Malaysian Communications and Multimedia Commission. The first section analysed self-regulation practised in Malaysia and criticised the pitfalls of such approach. The second part looked at co-regulation and what it had done to reduce fake news. The third part examined at specific legislations enacted by parliaments that criminalised the acts of disseminating and publishing fake news through comparative analysis. This includes efforts to impose civil and criminal liability on platform providers to monitor online content. In the final section, we analysed efforts to introduce online fact-checking portals and awareness campaigns. These measures suggest that while policymakers take a step forward in curtailing access to fake news online, a self-regulatory approach may no longer be adequate to deal with the fake news, as explained in the next part.

Fake News Regulation in Malaysia via Internet Self-Regulation

The introduction of the Multimedia Super Corridor project in 1991 and the enactment of the MSC Bill of Guarantee has paved the way for the introduction of an Internet self-regulation regime in Malaysia. In particular, the Bill of Guarantee No. 7 promises that there shall be no censorship of the Internet to support the development of the communications and multimedia industry in Malaysia. This is further supported by the enactment of the *Communications and Multimedia Act 1998* that provides in Section 3(3) to declare that nothing in the Act shall be construed as Internet censorship. Section 124 of the *Communications and Multimedia Act 1998* (CMA) demonstrates the type of Internet self-regulation adopted in Malaysia. In pursuant to this, the CMA commissioned the drafting of an industry Content Code in 2004 as the code of conduct for the members of the communications and multimedia industry. As the status of the code remains an industry guideline with no statutory force, compliance to the code is sought through regulatory and licensing controls (Azmi, 2004; Daud & Jalil, 2017).

Self-regulatory control is executed through three means: 1) the enactment of legislations, 2) issuing takedown notices, and 3) advocacy and education. Sections 211 and 233 of the CMA mandate content application service providers or other persons using content application services to abstain from providing 'false content'. However, one may only be accountable under the said provisions if he communicates false content

with the intent to "annoy, abuse, threaten or harass any person". The High Court's judgment in Public Prosecutor v. Rutinin Suhaimin [2013] 2 CLJ 427 confirmed that actual annoyance of fake news victim need not be proven but tendencies would do.

Between 2000 and 2018, the problem of fake news intensified to an extent that it caused chaos in the society. When it starts to disrupt the smooth functioning of the government by becoming political propaganda, the Malaysian government came up with the *Anti-fake News Act 2018*. The Act provides a broad spectrum of legal framework that criminalises fake news, whether online or in print. If the perpetrator is found guilty, he may be punished up to a maximum of RM500,000 or ten years imprisonment. Since the introduction of the Act, there has been only a single prosecution, which involved a Danish citizen (Tariq, 2018). Criticised as being draconian and a form of political manoeuvring, when the government changed, the Act was quickly tabled for repeal in late 2018 (Lourdes, 2018). Unfortunately, the move to repeal the Act did not find support at the House of Senate which was dominated by members of the opposition party. Due to political pressure, the Act was presented again for the 2nd time to be repealed (Shankar, 2019). The change of events later came to side with the government when in December 2019, the repeal was approved by the House of Senate. With the repeal, a vacuum exists for a more effective weapon against fake news and some has expressed the desire again for Malaysia to come up with the right redress (Wong, 2019). The Act deserved repeal as substantive provisions in the Act was not sufficiently considered prior to enforcement (Daud & Zulhuda, 2020).

The events that took place in Malaysia exemplifies that self-regulation, alone, is not strong enough to reduce fake news, what more eliminate it. This warrants a change of policy, that self-regulation be complemented with a set of strong legislative measures. Such approach is called the co-regulatory approach (Daud & Zulhuda, 2020). This idea is not new and has been propagated by scholars including Marsden. Marsden strongly advocates for regulatory framework to shift towards Internet co-regulation as self-regulation alone has proven ineffective to combat fake news (Marsden et al., 2020; Marsden, 2011). The paper now moves to discuss Internet co-regulation.

Internet Co-Regulation

Co-regulation requires a clear government involvement that involves giving "explicit legislative backing in some form for the regulatory arrangements"(The Organisation for Economic Co-operation and Development, n.d.). The UK Ofcom reiterates that "the statutory regulator is responsible for overseeing the effectiveness of co-regulation, and retain powers to intervene where necessary." (UK Office of Communication, 2006). Machill expanded the interpretation of Internet co-regulation to mean "joint responsibility of all affected parties" where the regulator serves as the "final authority" that provided corrective

measures when self-regulation failed (Machill et al., 2002). Co-regulation returns the social responsibility that is originally set for the society (or Internet actors) "within a system that places its trust in market forces while still remaining true to the notion of social responsibility."

In this regard, co-regulation involves minimal government intervention to ensure the effectiveness of the governance and "reserves its power to intervene only when the self-regulatory system fails". Marsden found self-regulatory mechanisms such as adopting industry codes to co-exist in a co-regulation framework to be the ideal choice particularly if supported with statutory enforcement (Marsden, 2011). By co-sharing the burden of enforcement, this may reduce the operational costs incurred in direct regulation and resolve the inefficiency experienced in self-regulation due to its voluntary nature and less transparent process in the implementation of the framework (Daud, 2019). One example of Internet co-regulation framework worthy of mention is the Australian that involves the following: -

1. A strong partnership between government, industry actors, and Internet users.
2. The Internet industry to develop its own code of practice, accreditation, or content rating schemes with legislative backing from the government.
3. The co-regulatory scheme is supported by the government enforcement mechanism and strong laws. (Bartle & Vass, 2005)

On the other hand, the European co-regulation involves multinational cooperation between the EU members to regulate a wider sectors of Internet governance, including pan-European games rating system (administered by Pan European Game Information, PEGI), the regulation of child pornography (collaboratively administered by the UK's Internet Watch Foundation and INHOPE) and the administration of domain names.

Considering how fake news travels at the speed of light, it is submitted that Internet co-regulation is a more suitable regulatory framework that empower regulators, intermediaries, and Internet users to take part in curbing its spread. The next part provides a comparative analysis on how other countries regulate fake news as part of Internet self- and co-regulatory approaches undertaken at national level.

Enactment of Fake News Legislations

Malaysia is not alone in enacting fake news legislation, although it is amongst the earliest as there are many others who are in the same boat. In this regard, the United States Library of Congress conducted a survey on 15 countries which had adopted regulatory mechanisms that ranged in between aggressive to passive (The Law Library of Congress, 2019). Examples include Germany, France, and China.

Fake news legislations may be confused with defamation or hate speech legislations. What constitute fake news remains unclear as fake information constitute either a defamation or hate speech, depending on

its effects about the news and people around him. Furthermore, there are several shades or level of truthfulness and falsity and at times it is difficult to gauge. The final arbiter of the truth is unknown and cannot be guaranteed (Allcott & Gentzkow, 2017b). In most instances, the court system, with the ability to bring evidence and witness and cross examine them may be the suitable venue to determine the truthfulness of a piece of information. Consequently, countries like Germany and France render the courts as the final arbiter of truth. (Duffy, 2014).

Under Article 1 of the French Electoral Code, for three months preceding an election, a judge may order "any proportional and necessary measure" to stop the "deliberate, artificial or automatic and massive" dissemination of fake or misleading information online. A public prosecutor, a candidate, a political group or party, or any person with a particular standing can bring fake news case before the judge who must rule on the motion within forty-eight hours. However, one would certainly understand that time is of essence when it comes to speedy and expedient remedies as court proceedings require time and resources. It is thus unclear to what extent has the French system has been successful in establishing the truthfulness of a piece of information fast enough to stem the fire of fake news.

Another contentious issue is the definition of fake news itself. This has become the subject of heated debate as many fake news legislations adopt a very wide definition as to what constitute fake news. One example of such broad definition can be found in Section 2 of the *Malaysian Fake News Act 2018* (repealed) which defines 'fake news' as "any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas". In the Russian legislation, the term 'fake news' is defined as "socially-significant false information distributed under the guise of truthful messages if they create a threat of endangering people's lives, health, or property; create possibilities for mass violations of public order or public security; or may hinder the work of transportation and social infrastructure, credit institutions, lines of communications, industry, and energy enterprises."

China has also criminalised the offence of "fabricating false information on [a] dangerous situation, epidemic, disaster or alert and disseminate such information via [an] information network or any other media while clearly knowing that it is fabricated, thereby seriously disturbing public order." France through its *1881 Freedom of the Press Law* has criminalised acts that "disturb public peace through the publication, dissemination, or reproduction of fake news in bad faith." Bad-faith publication, dissemination, or reproduction of forged or altered items, or items falsely attributed to third parties is also prohibited.

In the above statutory definitions, 'fake news' has been given a broad interpretation. This calls for specificity and clarity for fear of unconstitutional suppression of free speech (Emma, 2019; The Law Library of

Congress, 2019). In the above definitions, one can note that any information which may be partially or wholly incorrect or misleading may be classified as fake news. The ensuing issue is who determines the falsity of the information. The problem with such administrative measures is that eventually the power to decide falls on the executive. Which means, it will ultimately be the government of the day or the Minister as the arbiter of truth. To that extent, there is a need to obtain redress if the ministerial discretion is wrongly made. Countries like Singapore allows the dissatisfied party to appeal against any ministerial decision for an order of correction or takedown, but this is ultimately is subject to due course of law. It is plausible if civil societies fear that these legislations will more likely be used as political weapons rather than to stem the dissemination of fake news that can harm the society, for which legislation is initially designed.

Canada legislated on fake news through Section 181 of the *Canada's Criminal Code*. Unfortunately, by the virtue of R v. Zundel in 1992, the Canadian Supreme Court had declared the provision to be unconstitutional for being a violation of freedom of expression. Since then the legislature had removed the provision and it ceased to have legal effect. The same development could be traced in Kenya in the Bloggers Association of Kenya (Bake) v Attorney General & 5 others [2018] eKLR. The plaintiff challenged the constitutionality of various fake news provisions in the *Kenya Computer Misuse and Cyber Crimes Act 2018*. The Constitutional and Human Rights Division of the High Court of Kenya has suspended the implementation of those provisions pending full hearing of the above case.

On the other hand, Sweden focuses on a self-regulatory mechanism through creating "professional organisations of journalists and other media providers and strengthening ethics rules" (The Law Library of Congress, 2019). Malaysia has also called for the establishment of a media council to co-regulate media affairs (The Star, 2019). This effort is in line with the European Union's introduction of the EU Code of Practice on Disinformation. European Council had established the European Union's External Action Service (EEAS) to review 'disinformation' content on a weekly basis (Tariq, 2018).

The next section explores the second mechanism in the regulation of fake news through notice and take down procedures, backed with the imposition of civil and criminal liability upon failure to act.

Imposing Civil and Criminal Liability on Mere Conduits

Mere conduits or internet intermediaries do not play any role in the production of content. Being intermediaries, they also do not undertake active editorial role when content passes through their network, but merely facilitates "transactions between third parties on the Internet" (The Organisation for Economic Co-operation and Development, 2010). Being intermediaries, they control the gateway to the transmission of content

and are in the ideal position to act. Formerly developed as a mechanism to control the transmission of copyright infringing material, it is equally an ideal platform to stem the dissemination of fake news. The next part focuses on developments in Germany. Germany is specifically reviewed due to its fake news legislations that impose regulation at intermediaries' level, which is rather unique. On the other hand, Singapore adopts administrative measures through legislative controls. Germany's case is discussed as follows.

Germany – Notice and Takedown Reformed?

On 1 January 2018 Germany introduced its Network Enforcement Act known in Germany as the 'Netzwerkdurchsetzungsgesetz' law or 'NetzDG' law in short. The law does not aim to create new types of offenses such as to criminalise fake news. Instead, this law creates new obligations for large-scale social media platforms with more than two million members to remove "manifestly unlawful" content. Social media platforms must evaluate what acts amount to 'manifestly unlawful' by reference to the 22 provisions included in Germany's criminal code, such as: "incitement to hatred", "dissemination of depictions of violence", and "forming terrorist organizations" and "the use of symbols of unconstitutional organizations" (Tworek & Leerssen, 2019).

Criminal offences are categorised into 22 provisions under the *Germany Criminal Code.* By virtue of the NetzDG law, social media platforms are obliged to create a complaint mechanism in any form that is accessible to their viewers to allow visitors to lodge complaints about the availability of fake news on social media sites. In general, Internet intermediaries are not liable for any third-party illegal content hosted on their platforms. However, once a complaint is received, the intermediaries and social media platforms must investigate and determine whether the content is 'manifestly unlawful' and expected to remove it within 24 hours. Category (b) (c) and (g) consists of content that can be identified easily to be unlawful on face value itself. But the other categories may require more effort and evidence to be substantiated. Contents that fall within of such category must be investigated within 7 days. Any social media networks that fail to act will face up to 50 million euros in fine.

In this regard, the NetzDG law puts the responsibility to judge 'manifestly unlawful' contents on the shoulders of social media platforms. Contrary to the common practices of 'notice and takedown' in copyright infringement or illegal content cases, social media platforms are not required to notify its subscribers to takedown illegal content posted by them. They 'judge' whether the content is 'manifestly unlawful' and remove them. The NetzDG law does not require any court order for the social media platforms to execute content removal, nor does it provide any form of appeal through formal court processes. This has created heated debates and civil unrest in Germany as netizens were concerned that the NetzDG law might cause chilling effects on free speech (Tworek &

Leerssen, 2019). Instead it may turn into a form of privatised censorship by private companies which conveniently removes online content to avoid from being fined. Wenzel Michalski, the German director of Human Rights Watch was correct to say that "governments and the public have valid concerns about the proliferation of illegal or abusive content online, but the new German law is fundamentally flawed," … "It is vague, overbroad, and turns private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal" (Human Rights Watch, 2018).

Echikson and Knodt conducted a study on the effectiveness of content removal rate. The results are reproduced in the Table 1.

According to the study, Facebook with its huge size was reported to achieve 76.4% removal rate due to the complexity of the reporting feature on its page. This is low compared to YouTube, Twitter and Change.org which recorded more than 90% removal rate due to their simple and accessible reporting features. These sites use the 'flagging' feature which can directly capture any fake content on the site. Echikson and Knodt reported that these social media platforms remove fake content based on its breaches of the community guidelines rather than compliance with the NetzDG law. The law also requires the social media platforms to submit a semi-annual report on its content moderation practices should they receive more than 100 complaints per year. This somehow imposes transparency requirements so that content removal practices can be reviewed and evaluated by the government from time to time. Since the NetzDG law is still in its baby steps, the full effects of its legal provisions remain to be unknown.

Administrative Measures - The Case of Singapore

Singapore has also passed its *Protection from Online Falsehoods and Manipulation Act* (POFMA) in June 2019 to "prevent the electronic communication in Singapore of false statements of fact, to suppress support for and counteract the effects of such communication, to safeguard against the use of online accounts for such communication and for information manipulation and to enable measures to be taken to enhance transparency of online political advertisements". POFMA enables any minister in Singapore to issue directions under Part 3 of the Act in the

Table 1
The effectiveness of content removal rate

Platform	Total Items Reported	Total Removal Rate	Removal within 24 hours
Facebook	1704	362 (21.2%)	76.4%
Google (YouTube)	241827	58297 (27.1%)	93%
Twitter	264818	28645 (10.8%)	93.8%
Change.org	1257	332 (26.4%)	92.7%

Source: (Echikson & Knodt, 2018)

forms of Correction Direction and Stop Communication Direction. The general idea is that POFMA empowers any minister in Singapore to issue a ministerial direction to correct and cease from communicating any false news accessible to the Singaporean public. Section 16 further authorises the Minister of Communications and Information of Singapore to direct the Info-communications Media Development Authority to "order the internet access service provider to take reasonable steps to disable access by end-users in Singapore to the online location". Non-compliance to the access-blocking order is a criminal offense under POFMA. To provide some check and balance, Section 17 provides that any Directions under Part 3 may be appealed to the High Court within a certain period as prescribed by the Rules of Court.

The Singapore approach goes one step beyond taking down and disabling access. It also enables the Minister to order the end-user to issue corrections to the false news. In that sense it is more progressive than simply blocking and taking down. By issuing correction, end users would be able to receive the correct information. Part 4 of POFMA specifically deals with the liability of internet intermediaries with respect to false publications. In this regard, Section 20 empowers any minister to issue direction to any internet intermediary that carries "(a) material that contains or consists of a false statement of fact has been or is being communicated in Singapore;" and that "(b) the Minister is of the opinion that it is in the public interest to issue the Direction". Such direction may be issued in the form of Targeted Correction Direction which requires the internet intermediaries to communicate notice(s) to all end-users in Singapore who have access to the subject material by means of that service. Section 22 further authorises any minister to issue a Disabling Direction to any internet intermediaries to disable access to false content accessible to Singaporean users. Any contravention to the above ministerial direction is a criminal offense punishable with fines and imprisonment.

The third approach is the introduction of online fact-checking portals and awareness campaigns, which is discussed below.

Online Fact-checking Portals and Awareness Campaigns

Other than legislative means, Malaysia has also introduced an online fact checking portal *Sebenarnya.my* which is maintained by the Malaysian Communications and Multimedia Commission (MCMC). This portal serves to provide clarification on any alleged false information relating to government agencies in Malaysia. MCMC has also been routinely issuing advisory warnings to WhatsApp Group administrators to monitor fake news or false content in their respective WhatsApp groups. However, to what extent such warnings translate into legal liability for WhatsApp group administrators remains unclear. What is clear is that if the group administrators serves as passive managers without any active monitoring or publishing, they can cover themselves as the 'innocent carrier'

under the CMA (Daud & Zulhuda, 2020). These measures have also been carried out in other governments as well such as the United Kingdom and Russia by websites whose role is to list and verify any false content in their country.

Some countries such as Sweden and Kenya approach the fake news issue by educating citizens about their dangers and risks. For example, Sweden designed a "famous cartoon character to teach children about the dangers of fake news through a cartoon strip that illustrates what happens to the bear's super-strength when false rumours are circulated about him" (The Law Library of Congress, 2019).

The United Kingdom government recently announced its commitment to fight fake news through the allocation of £18 million over 3 years to fight disinformation and fake news across Eastern Europe and strengthen independent media in the Western Balkans (Foreign & Commonwealth Office UK, 2019). The government opines that "it is more important to inform citizens of the facts than to simply rebut false information". In response, a Rapid Response Unit within the executive branch was established to monitor news and engage with the public online.

Similarly, the Chinese government launched a government online platform known as Piyao or 'Refuting Rumors' to broadcast real news sourced from government agencies and state-owned media. The Chinese Central Cyberspace Affairs Commission in association with the Xinhua news agency have integrated over 40 local rumour-refuting platforms that apply artificial intelligence to identify rumours. Like other countries, the Chinese media has regularly reported and corrected any online rumours. President Xi Jinping has reiterated China's commitment to build a "clean and clear" Internet.

RESULT AND DISCUSSION

Amidst all legal, technological, and social efforts undertaken by governments around the world, one may come to conclusion that 'one size does not fit all' and maybe one solution is not enough? With the mess that we are facing, a single solution, be it just self-regulation, notice and take down procedure, administrative and criminal approaches would not be comprehensive to combat fake news.

Due to the all the weaknesses of all the various approaches, co-regulation is more suited to Malaysian environment. The proposed framework includes the following component:

(a) Law: Enactment of specific piece of legislation that renders the publication and circulation of fake news as an offense. This includes having provisions for fact corrections and takedowns, whereby the authority issuing them may depend on an independent regulator, or as may be appointed by a minister(s). Such legislations should place liability on the platform providers with significant numbers of users to monitor, correct and remove fake news upon user

notification. This should also come together with harsh penalty should the platforms fail to comply.

(b) Technology: Platform providers should co-regulate by deploying artificial intelligence, machine learning, bots and enabling content moderation features. Recognising that these features may under-block or over-block content, therefore human intervention remains necessary (Marsden et al., 2020).

(c) Social: To create an online fact-checking portal maintained by independent agencies in collaboration with the media. The effort should also extend to holding awareness campaigns to instil knowledge for the public on how to detect and report fake news to stop its further circulation.

In this manner, every part of the information cycle is entrusted to each player in a co-regulation style. Whilst lawmakers play the role of enacting legislations, technology should be deployed to help identify fake news through content moderation or flagging as was done by Facebook and YouTube. Finally, there must be continuous public engagement to instil awareness on the dangers of fake news. As discussed above, Malaysia is into a great start via having the government-led fact-checking portal, *Sebenarnya.my*. It may be given a co-regulatory flavour by supporting the factchecks with independent agencies in collaboration with the media.

Considering these co-regulatory initiatives to combat fake news, we argue that cyberspace freedom must be balanced with the constitutional right to freedom of expression. The notion of Internet censorship has proven to chill, over-block, and under-block free expression online. It has failed to apply human judgments in analysing the actual context where computers do all the thinking and decisions at network level. There needs to be a combination of human judgment and machine automation by applying mixed approaches in regulation mechanisms.

Parliaments play vital role in criminalising fake news through enabling legislations. Legislations create legal and administrative measures to provide avenues to verify and reduce its availability online. In this regard, it is proposed that the repealed *Anti Fake-news Act 2018* to be re-enacted given its specific objective aimed to curtail fake news both offline and online. Approaches taken by Germany in enacting the NetzDG law may also be considered where technological measures implemented by platform providers through takedown, content moderation, flagging and machine learning are enforced. Social measures come in to complete the co-regulatory efforts where at the end, human must make the final decision whether to take action, what type of action and against whom.

In this regard, we argue that co-regulation framework would not restrict the right to freedom of expression. Restrictions and

countermeasures offered in the framework are the least restrictive if compared to the damage caused by Internet censorship as well as unwarranted 'cyberspace freedom' promulgated by Barlow (1996).

CONCLUSION

In short, men create technology, and therefore it is absurd to blame technology for the harm it has caused to men. Fake news is not new issue as it has existed since the beginning of humanity. This paper wishes to reiterate that there is nothing good in fake news, except for giving false hope to some in return for fooling the others. It creates unnecessary worries and trauma to those who choose to believe the news. Criminalising fake news may not be too difficult for legislators but the better question to ask is how severe the punishments should be. Given the extent of damage that fake news has caused, it is justifiable and least restrictive measure to enact laws that serve as deterrence and education to the public. Today, it is no longer relevant to simply put blind trust in Internet self-regulation as rightly put by the UK Digital Secretary Jeremy Wright, "The era of self-regulation for online companies is over. Voluntary actions from industry to tackle online harms have not been applied consistently or gone far enough. Tech can be an incredible force for good and we want the sector to be part of the solution in protecting their users" (Department for Culture Digital Media and Sports United Kingdom, 2019). It is time for Malaysia to move towards co-regulation to achieve digital well-being

ACKNOWLEDGMENT

The author extends his deepest appreciation to International Islamic University Malaysia for funding this paper and related research work via IIUM Research Acculturation Grants Scheme (IRAGS18-011-0012).

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 185 - 203 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Monitoring Internet Child Pornography (ICP) in Malaysia

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ABSTRACT

Malaysian law enforcement authorities were previously at a disadvantage in monitoring and investigating ICP cases. They lacked online tools to detect ICP and other cases of child sexual exploitation and relied on information from their international counterparts. The discovery of Richard Huckle and Blake Johnston, two child sex offenders who abused Malaysian children, was only possible with information shared by Australia's Argos Task Force and the US Homeland Security Investigations. While Malaysia currently practises information and intelligence exchange and collaboration in digital forensics, more action is needed to detect and monitor ICP activities. It is imperative for Malaysia to take all necessary steps to prevent, detect, investigate, punish, as well as address the root causes of ICP. This paper addresses this issue; it focuses on the dilemmas faced by Malaysian authorities in reducing the availability of ICP images and in deciding to prosecute offenders. It conducts an initial exploration of the ways in which authorities can protect children by proactively seeking out ICP images via a victim-identification database and blocking ICP images. The paper seeks to demonstrate that traditional policing methods, such as responding to citizen reports and image discovery through arrest and seizure, while still necessary, can be out-dated. Through semi-structured interviews with key-stakeholders from the Malaysian government and agencies, this study seeks to gain some insight into Malaysia's implementation and enforcement experience in relation to ICP. The study suggests how the present-day policing response of ICP images can be realigned to other key intermediaries on the internet.

Keywords: Child pornography, detecting and monitoring ICP material, enforcement of the law, *Sexual Offences Against Children Act 2017*

ARTICLE INFO

Article history:
Received: 05 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.13

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ISSN: 0128-7702
e-ISSN 2231-8534

INTRODUCTION

The *Sexual Offences Against Children Act 2017* (SOAC) represents a significant landmark in protecting children from ICP offenders. It marks a departure from criminalising child sexual abuse images through the more general obscenity-based approach in the *Penal Code*, the *Communications and Multimedia Act 1998* and the *Child Act 2001*. SOAC now covers an unlimited representation of ICP in various technologically-mediated forms. This include pseudo pornographic imagery and virtual images of child sexual abuse, as well as other forms of non-physical sexual crimes such as child sexual grooming. Sections 5 - 10 under Part II of SOAC are the main provisions governing ICP. Another significance of SOAC is the provision of a specific working definition of ICP, which was previously absent in other legislation. To ensure harmonisation between SOAC and other applicable provisions, cross-referencing clauses are explicitly provided in Schedule 1 to 5.

Although Malaysia is not short of good legislation such as SOAC, the main problem is reported to lie in its implementation and enforcement. Criminal sanctions alone are insufficient to deal with the problem and will be ineffective if enforcement is weak. This is especially important because ICP crimes are clearly complex and time-consuming and often involve multiple jurisdictions. RMP officers report some challenges faced and dilemmas encountered in detecting and investigating ICP images on the internet. These include a general lack of coordination and control in the administrative structure of regulatory agencies, limited funding, limited digital forensic investigation experts, a lack of coordination between governmental law enforcement agencies and telecommunication companies, and limitations in detecting and monitoring ICP crimes. These problems are highlighted when, in 2018, Malaysia was revealed to be one of the locations favoured by pornographers to download, transmit, and distribute ICP.[1]

The paper focuses in examining issues in the detection and monitoring of ICP crimes in Malaysia. Law enforcers especially find it difficult to detect ICP images in mobile applications with temporary recording features such as media streaming and private-browsing sessions. Furthermore, the possession of ICP material in an individual's portable software is almost impossible for the authorities to detect, and identifying offenders is not clear-cut if ICP is found on a computer used by multiple individuals. The case of R v. Richard Huckle (2016)[2] demonstrated how the dark web was used for illegal activities such as the transaction of child pornography imagery; an opportunity for offenders to evade police detection. According to a Sessions Court Judge: [3]

[1] As reported in Malaysia's mainstream media and confirmed by the police, The Straits Times Asia. (2018, January 30). Malaysia Tops in South-east Asia for Online Child Pornography. Retrieved from https://www.straitstimes.com/asia/se-asia/malaysia-tops-in-south-east-asia-for-online-child-pornography. See also interview: Police Officer 1.

[2] R. v. Richard Huckle London Central Criminal Court, Old Bailey (Unreported) 2016.

[3] Interview: Judge 1.

> The dark web needs specialised and aggressive undercover agents who are equipped with thousands of ICP images as a 'ticket' to enter the group. Our law enforcement can only scratch the surface. Our expertise is not at the level to dig into the deep web. This is why there has yet to be any charges against dark web ICP activities.

From 2006-2014, Huckle worked as an English teacher and church volunteer in the Malaysian capital of Kuala Lumpur. It was later discovered that Huckle had systematically abused the children under his care. Huckle would photograph and film his sexual exploits of these children, which he then edited, and posted on the hidden 'dark web'[4] network. During his trial in London in June 2016, the Crown revealed that Huckle was an active member of a heavily encrypted deep website, 'The Love Zone', which is now inoperative. The shift away from the public domain of the web to password-encrypted networks has facilitated offenders to evade filtering and other detection software from law enforcement bodies, reducing the risks of getting captured.[5] This would explain why Huckle had managed to conduct his illegal activities for nine years without being detected. He only came to the attention of the British authorities in 2014, after a tip-off from Australian's Argos Task Force investigators who had arrested another man running a paedophile site. By using the dark web to upload, distribute, advertise, and sell images of child abuse, the Crown emphasised the intensity and extremity of Huckle's crime.

Another case highlighted by RMP is R v. Blake Robert Johnston (2017). This involved an American child sex offender arrested by the US authorities in 2014 for ICP and child sexual grooming offences.[6] In 2017, US' Homeland Security Investigations agency had identified 94 minor victims who were enticed online by the Johnston to engage in sexual activity, ranging in age from as young as 12 years and coming from 32 US states and six different countries. On his personal electronic devices the police found explicit images of his own genitals and those of more than 300 child victims, many of whom were Malaysian. His *modus operandi* was to befriend children through the social media applications *OoVoo*, *Kik*, and *Omegle*.[7] He would "entice young

[4] The term 'dark web' refers to the 'hard to access' part of the internet, as opposed to the public domain of the internet accessible via search engines such as Google, Internet Explorer, or Mozilla Firefox. Accessing the dark web requires the use of an anonymising browser called The Onion Router, or commonly knowns as TOR. The TOR browser routes a web page request through a series of proxy servers operated by thousands of servers around the globe, and each of these levels may be encrypted. This process renders an internet protocol (IP) address unidentifiable and untraceable, and is often used by individuals to hide their physical location. See Wall (2017). *Crime and deviance in cyberspace*. Abingdon, UK: Routledge.

[5] Ibid.

[6] US v. Blake Robert Johnston, 2017, Northern District of California (Unreported).

[7] *OoVoo* is described as being similar to *Skype*. *Kik* is a secure messenger application that protects user's anonymity. *Omegle* is a website designed to allow strangers to talk to other strangers anonymously. See Ireland's Raidió Teilifís Éireann (RTE) (2017, September 3). *US Sex Offender Groomed Children*

girls" and exchange pornographic images with them.[8] Even though the images in Huckle and Johnston's case were initially distributed in a closed network, the images are ultimately subjected to uncontrolled worldwide distribution.

It is useful to chart some concerns about the Malaysian law enforcement framework to identify further steps that that should be taken by law enforcement agencies in enhancing the detection and monitoring of ICP material transmitted online.

METHOD

This research adopts a doctrinal approach. A library research was conducted to examine the legal literatures from the primary and secondary sources which included, but not limited to, international human rights treaties, statutes, case-laws, extra-legal materials, books, articles, seminar papers and newspapers. The study was supplemented by an empirical study through semi-structured interviews conducted over a period of three months from 2017 to 2018[9].

RESULT AND DISCUSSION

The Detection and Monitoring of Crime

One accepted practice for enhancing legal compliance is to increase rates of detection and prosecution. This concept is widely accepted and is used in various contexts. For example, threats of a fine for speeding or illegal dumping are preventive measures to improve road safety and protect the environment. Compliance increases in proportion to the degree to which the general public believes that failure to comply is likely to be detected and penalised. The WePROTECT Global Alliance addresses this issue, and demonstrates a commitment undertaken by state parties to, among others, investigate cases of ICP exploitation and prosecute offenders, reduce the availability of ICP material, and increase public awareness of the risks posed by children's activities online.[10] For example, SOAC criminalising the possession of ICP is based on the fact that the image would not have been produced in the first place but for the demand for such material on the part of those who have an interest in ICP. When the authorities intervene to block the supply of images, this may deny users access to the images. When image producers are aware of the online presence of regulators, they are more likely to desist. This, therefore, contributes to deterrence.

Every image viewed represents a real child who has been groomed and abused to meet the demand for ICP. As long as the material is still circulating, the child is continuously harmed. This is particularly significant when ICP activities are difficult to detect and blocking the infringing website is the only practical immediate recourse in preventing further re-distribution. The authorities, therefore, play an important

in Ireland. Retrieved from https://www.rte.ie/news/2017/0910/903600-johnston-abuse/.

[8] Interview: Police Officer 1.

[9] Ethical approval to conduct the interviews was granted on May 2017.

[10] WePROTECT Global Alliance (End Child Sexual Exploitation Online). (2015). *Our Commitments: 15-16 November 2015.* Retrieved from https://www.weprotect.org/our-commitments.

role in monitoring ICP websites to reduce public access to them. WePROTECT Global Alliance demonstrates that the identification and blocking of ICP images is practiced by most national regulatory agencies. While restrained by a number of enforcement challenges and thus unable to nip ICP images in the bud, this strategy remains key in reducing dissemination and possession of ICP and serves to dissuade ICP offenders in the long run.

The Role of Relevant Law Enforcement Agencies in Malaysia

Figure 1 illustrates the main agencies involved in regulating ICP in Malaysia:

The discussion of this paper confines itself to mainly the role of RMP, and to a certain extent, of MCMC and the Royal Malaysia Customs Department (Customs Department).

The Policing Regime

> *Money and resources are always a chicken and egg problem, but like it or not, we just have to manage accordingly. It ought to motivate us to be more innovative, and at the same time active and proactive, rather than responsive.*[11]

[11] Interview: MCMC Officer 2.

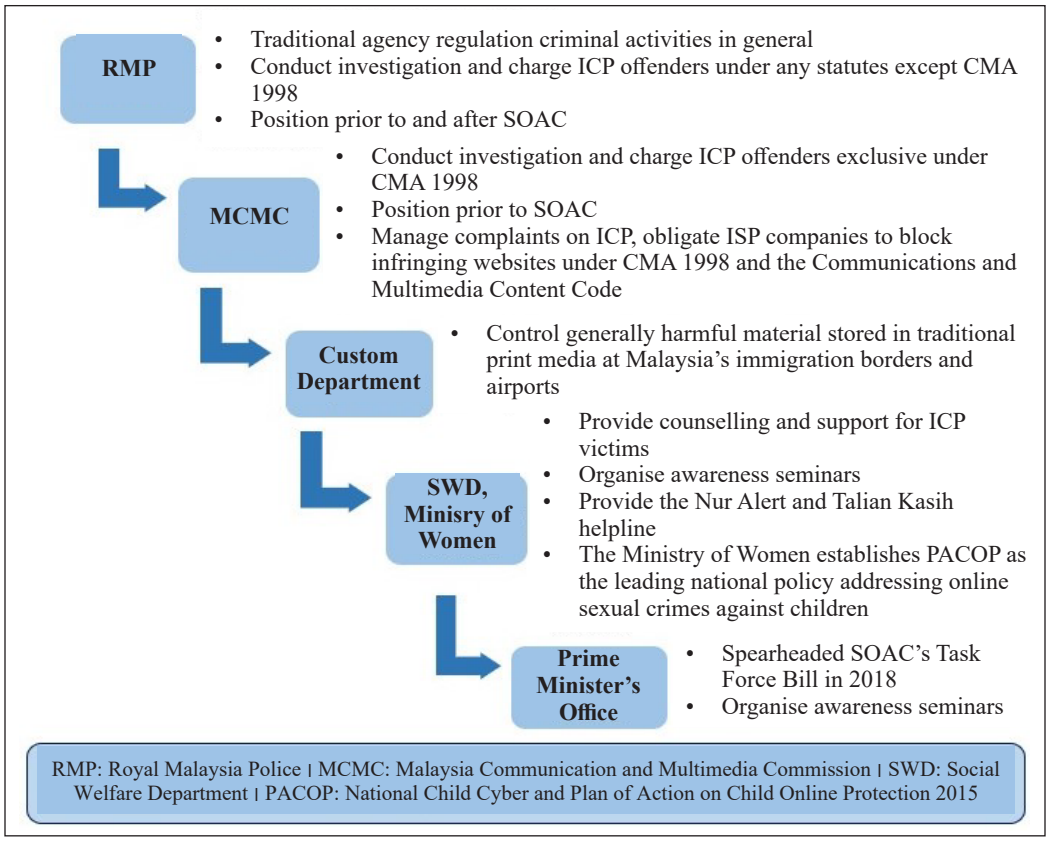

Figure 1. The role of law enforcement and regulatory agencies

Traditional methods of conducting investigations, such as responding to reports and image discovery through arrest and seizures, will not be sufficient, as the investigation and prosecution of ICP crimes must be swift.[12] The internet medium in which ICP offences are committed demands technological competence and sophistication on the part of law enforcement agencies. Earlier police operations used impersonation techniques where investigators adopted a number of guises: ICP consumer; child pornography collector interested in trading images; or user of a private P2P media application such as *bit-Torrent*, *Ares* or *Freenet*.[13] For example, Operation Starburst was first conducted in England in 1995, yielding many prosecutions[14] The operation resulted in the arrest of 15 offenders in Britain, and a number of others in Hong Kong, Germany, South Africa, Singapore, Canada and the United States.

Other international police operations have since resorted to a new, technology-based form of policing using undercover techniques. One example is the Sweetie Operation of 2013 which was considered "a policing success".[15] This Dutch-led police operation identified 999 men of 71 nationalities who tried to make sexual contact with a life-like computer-generated 10-year-old Filipina girl called *Sweetie*. *Sweetie* was used as bait to lure child predators: when adults contacted Sweetie in public chat rooms, the police operated her from an Amsterdam warehouse through a software application. The police identified suspects by cross-referencing their e-mail or *Skype* addresses, social media profiles and other public information. The highest three groups of child sex offenders arrested in this operation were from the US, the UK, and India,[16] and this is linked to webcam cybersex as a 'flourishing' ICP phenomenon of the 21st century. Such investigations are, however, very resource intensive, complex and time-consuming. ICP investigations are ultimately a race against time as the technology possessed by the Malaysian Government is reported to "often be a few steps behind that of the industry".[17] Special

[12] Interview: Police Officer 1. For a commentary on international police operations against ICP, see Krone, T. (2005). *International police operations against online child pornography*. Canberra: Australian Institute of Criminology.

[13] Adilah & Dzulkifly (2018). Experts laud new police system tracking child porn users. *Malay Mail*. Retrived from https://www.malaymail.com/news/malaysia/2018/07/10/experts-laud-new-police-system-tracking-child-porn-users/1650523.

[14] Subsequent police operations include Operation Cathedral in 1998, and Operation Ore in 2002, both led by Britain's National Crime Agency. Operation Cathedral seized pornographic material from an international ring called *The Wonderland Club* which traded child abuse images over the internet. The operation discovered one of the largest collections of ICP images, over 750,000 images and over 1,800 hours of digitised videos. Operation Ore led to the investigation of more than 7000 people, with almost 1,500 convictions. See Metcalf (2008). Policing operation ore. *Criminal Justice Matters*, 68, 8-9. doi: 10.1080/0962725070855327, BBC News. (2001, February 13). *Wickedness of Wonderland.* Retrieved from http://news.bbc.co.uk/1/hi/uk/1167879.stm.

[15] Crawfurd (2014). Child abuse image database containing millions of images to launch. *BBC News UK*. Retrieved from https://www.bbc.co.uk/news/technology-30175102.

[16] DW News. (2013, November 7). *Dutch Activists Uncover Webcam Child Sex Tourists*. Retrieved from https://www.dw.com/en/dutch-activists-uncover-webcam-child-sex-tourists/a-17213042.

[17] Interview: Police Officer 1.

units managing online investigation needs to be sufficiently agile to respond to the rapid pace of on-going technological change.

Despite these challenges, there are technological initiatives which provide potentially viable means to help address the problems of ICP. This is the approach taken by RMP, one which is underpinned by a dose of realism regarding the institution's available funding, facilities and human resources at this point in time. RMP recently launched the Internet Crime Against Children: Child Online Protective Services (ICACCOPS) monitoring software. ICACCOPS represents a significant investment by the government in the development of police services to assist ICP investigations. The government recognises that direct harm to children depicted in images will continue for as long as the image is distributed and displayed[18], hence the need for authorities to monitor and subsequently block access to the images. A similar tool was deployed by Australia's Argos Task Force and this was responsible for detecting *Huckle's* activities.[19] This software is a welcome addition to RMP's suite of investigative tools to detect ICP offences.

RMP had been under heavy public scrutiny for their failure to detect Huckle's activities and the complete lack of trained police forensic hackers in Malaysia.[20]. In 2017, RMP's Assistant Principal Director Jenny Ong revealed in a press statement that the Malaysian police could not properly monitor encrypted paedophile networks as it did not have the expertise to access and navigate the dark web.[21] It should be noted that, at that time, there was a distinct lack of urgency on the part of the government and the RMP hierarchy regarding the problem of ICP. RMP's regime underwent significant change in July 2018, a year after SOAC was enacted. The newly-launched Malaysia Internet Crime Against Children Investigation Unit (MICAC) has now replaced RMP's former D11 Women and Children Investigation Division (D11) and operates under D11's supervision. MICAC monitors traffic at pornographic websites, and are tasked with using software to monitor, locate and pin-point viewers and disseminators of CSA material in order to obtain evidence for prosecution.[22] MICAC's objective is to enhance ICACCOPS and expand its coverage to monitor anyone who accesses ICP websites.

[18] Dewan Rakyat (House of Representatives). (2017). April 3 Debate (Thirteenth Parliament, Fifth Session). Retrieved from https://www.parlimen.gov.my/hansard-dewan-rakyat.html?uweb=dr&lang=en, per YB Azalina Othman Said, pp. 14-16.

[19] 'Team Argos, the Australian detective unit…made a startling discovery from the team's scouring of online paedophile networks…the unusual number of internet addresses in the Kuala Lumpur area transmitting CSA material from the dark web", in Ananthalakshmi (2016). Child sex abuse crimes 'going unpunished' in Malaysia. *Independent*. Retrieved from https://www.reuters.com/article/us-malaysia-sexcrimes-insight-idUSKBN1390AT?il=0.

[20] Interview: Police Officer 1.

[21] Ibid.

[22] Vijaindren & Sazili (2018) Communications and Multimedia Ministry to combat child pornography. *News Straits Times*. Retrieved from https://www.nst.com.my/news/nation/2018/07/389324/communications-and-multimedia-ministry-combat-child-pornography.

ICACCOPS represents the use of innovative technology as part of a package of measures designed to monitor the activities ICP offenders and provide evidence with which the authorities can prosecute them .[23] It works 24 hours a day and locates and pin-points in real time internet users surfing ICP sites. It builds a data library of these individuals and the Internet Protocol (IP) addresses they visit. The individuals are profiled for three data points: which portals they frequent, how long they spend on the sites, and the files they upload and download. ICACCOPS tracks in real time the IP addresses of individuals accessing ICP and the websites they visit.[24]. The key capacity of this software is its ability to remotely monitor an offender's use of known mobile phones and computers. Ong explains that MICAC is now authorised to call suspects in for questioning or even arrest them in their homes. MICAC also has the power to seize smart phones, computers or laptops to check for both adult and child pornographic material.[25] Sections 4 - 10 of SOAC and section 292 of the Penal Code provide the legal underpinnings of ICACCOPS investigations.

Some Issues with Malaysia's ICACCOPS

The first issue is whether ICACCOPS is monitoring ICP activities in general internet traffic or is focused only on activities on the dark web. In 2017, when the fieldwork was conducted, RMP reported that they were still beta-testing ICACCOPS. The reporting officer mentioned that, if successful, ICACCOPS would be able to monitor the uploading and downloading of child abuse images to and from the dark web. The officer was, however, aware of several drawbacks of the software and spoke about them candidly: [26]

> With ICACCOPS, we can detect the traffic of IP addresses, leading to whoever is downloading or uploading any pornographic image. But we do not know what he does with the material, and we cannot ascertain if it is a video or an image. We cannot access that because of our Data Protection Act 2010. We are trying to get full access to this [ICP images in the dark web], however, for now, this remains a concern.

This software is reported to have the ability to monitor the dark web and P2P networks, provided that investigation teams can decipher encrypted pages. However, it is unlikely that the software will monitor regular internet usage through public sites such as *Google*, *Youtube*, as well as social media sites including *Facebook* and

[23] Ibid. For transparency in investigation, officers handling the system were required to log in their registered credentials, in interview: Police Officer 1.

[24] Today Online. (2018, July 9) *New Malaysian Police Unit to Monitor Citizens Who Watch Pornography Online.* Retrieved from https://www.todayonline.com/world/new-malaysian-police-unit-monitor-citizens-who-watch-pornography-online

[25] Ananthalakshmi, 'Child sex abuse crimes 'going unpunished' in Malaysia'.

[26] Ibid. See also interview: Police Officer 1.

Twitter.[27] This is because private activities carried out within the public internet domain are protected under the *Data Protection Act 2010*. The RMP officer was concerned that the protection of individual personal data provided under the *Data Protection Act 2010* might limit the success of ICACCOPS.[28]

The second issue is that ICACCOPS identifies websites based on IP address. However, this is problematic in the case of public computers. IP addresses in a family home or a cybercafé, for example, are generally shared. It should not be automatically assumed, therefore, that all traffic to and from an IP address corresponds to a single account holder. The government has, nonetheless, undertaken to regulate cyber cafes and introduce liability on online publishers in an attempt to solve this quandary. It has partially ordered internet cafe operators to take measures against obscene, indecent or pornographic materials in some territories.[29] For instance, the Federal Territory of Kuala Lumpur enacted the *Cyber Centre and Cyber Cafe Rules 2012*. Its main role is to supervise the granting of professional licenses, and to require licensees to keep records of computer usage for each computer deployed, including the personal identity of users. The rules are not federal law and, therefore, only apply in Kuala Lumpur. This creates gaps and discrepancies among the laws applicable in different Malaysian states.

The third issue is that MCMC's role in detecting and monitoring ICP is further enlarged by ICACCOPS. In 2019, MCMC's Network Security, New Media Monitoring, Compliance and Advocacy Sector Chief reported that the agency was starting to collaborate with RMP in monitoring pornographic websites through an Artificial Intelligence (AI) system[30] known as the Algorithm.[31] Algorithms is practiced by Microsoft's *PhotoDNA*, *Google Photo*, *Google Cloud*, and is commonly deployed by the US and Australian police.[32] This is uncharted territory for MCMC, and the agency needs more time to explore this AI in order to ensure that it does not block or

[27] Ibid.

[28] Under Section 40 (1) of the Data Protection Act 2010, a data user shall not process "any sensitive personal data". Sensitive personal data includes information on physical health or any other information the relevant Minister deems to be personal, including an individual's private communications data.

[29] United Nations Human Rights Council. (2018). ECPAT Universal Periodic Review of the Human Rights Situation in Malaysia Submission. In End CSEC Network Malaysia & ECPAT International, *Sexual Exploitation of Children in Malaysia*. Geneva: OCHCR Publications. Retrieved from https://www.ecpat.org/wp-content/uploads/2018/07/Universal-Periodical-Review-Sexual-Exploitation-of-Children-Malaysia.pdf.

[30] According to Fadhlullah Abdul Malek, in Adilah & Dzulkifly, 'Experts laud new police system tracking child porn users'.

[31] Algorithms are calculations, instructions and rules that computers and other technologies use to make decisions about what people see online. Algorithms allows for the interlinking of websites based on similarity content and other criteria. See UK Department for Digital, Culture, Media & Sport and Home Office. (2019). Closed consultation. In Wright, J. & Javid, S., *Online Harms White Paper*. UK: APS Group. Retrieved from https://www.gov.uk/government/consultations/online-harms-white-paper.

[32] See Interview: MCMC Officer 2.

bypass restrictions to free expression under the Federal Constitution. The Algorithm system functions in a similar to *Google Photos*: it categorises pictures according to user, photographic subject, and other traits, and these images are continuously fed to the algorithm by users. The Algorithm can also translate images into text which could make possible narrower searches that are beyond the capabilities of visual tools; one could search an archive of images with the search string "children and beds", for example.[33]

While ICACCOPS builds a database of user profiles, RMP has to work with MCMC in order to obtain internet users' details.[34] This raises another issue with regard to the "fair procedure requirement": affected users are not afforded the opportunity to respond or appeal before a blocking decision is made.[35] It is worth noting that a number of European countries rely on the police to analyse internet content and decide its potential illegality, and this is based on the EU-funded COSPOL Internet Related Child Sexual Abuse Material Project (CIRCAMP)[36]. The CIRCAMP project manages investigation activities in the field of child abuse material and the internet. CIRCAMP is initiated by the European Police Chief Task Force under the Comprehensive Operational Strategic Planning for the Police (COSPOL) mandate. For example, Ireland, Denmark, France (Gendarmerie), Norway, Sweden and Spain are tasked to monitor the different peer to peer networks and collect evidence and data on computers and IP addresses. These countries disseminate evidence packages to enable national police services to start investigations, ands such information will lead to the identification of high-profile targets. This practice demonstrates how ICACCOPS, alongside MCMC, can represent a workable and proactive model of policing to determine the legality of a material, and whether or not it should be blocked.

The final issue is that, despite having recourse to the ICACCOPS system, RMP still suffers from a lack of technology specialists and computer forensic experts and from inadequate staffing levels in general. To detect ICP images, RMP needs a highly-skilled investigation team to monitor and infiltrate heavily-encrypted websites and P2P groups. The absence of a dedicated specialist unit makes the penetration of password-encrypted webpages a challenging task and makes it inherently difficult to read large hard drives in the course of collecting evidence. RMP have to work with limited staffing resources, a crucial factor hindering a comprehensive enforcement of the law.

[33] Ibid.

[34] The Straits Times. (2018, July 12). *MCMC Does Not Act on its Own in Combating Online Pornography - Gobind.* Retrieved from https://www.nst.com.my/news/nation/2018/07/390127/mcmc-does-not-act-its-owncombating-online-pornography-gobind.

[35] McIntyre (2013). Child abuse images and cleanfeeds: assessing internet blocking systems. In Brown, I. (Ed.). *Research handbook on governance of the Internet*. University of Oxford, UK: Edward Elgar Publishing.

[36] Other member states of the CIRCAMP project include Belgium, Finland, Germany, Ireland, Italy, Malta, and the Netherlands. See European Commission Migration and Home Affairs. (n.d.). *Project Description: COSPOL Internet Related Child Abuse Material Project.* Retrieved from https://ec.europa.eu/homeaffairs/financing/fundings/projects/HOME _2010_ISEC_AG_INT-004_en.

RMP's Assistant Principal Director confirms this:[37]

> We [the division] do not only handle child abuse cases, but also rape and domestic violence ones. In some districts, we don't even have enough investigating officers and priority has to be given to murder cases. In other countries, they have teams visiting the crime scene, recording statements and holding meetings, but that is rarely the case here because everyone is bogged down…We should have a case-by-case team to allow us to run through each case effectively. Some cases had to be dropped due to inexperienced police investigators.

All stakeholders agree that Malaysia is held back by manpower and budget constraints in addressing crimes against children, including ICP. A police officer explains that it costs a lot to keep up with rapidly-changing technology and, at the moment, there is a lack of funding to purchase state-of-the-art investigation technology.[38] While RMP admits that investigation of the dark web can be particularly expensive; to tackle the ICP issue seriously would require significant institutional will to invest in sending staff overseas to train as digital forensic investigators.[39] Meanwhile, exchanging tip-offs with counterpart police forces is considered one of the best strategies to enhance ICACCOPS.

Definitional Dilemmas and Forensic Software

Law enforcement agencies may be more willing to pursue cases if clear digital evidence of the crime confirms its severity, and this increases the likelihood of a successful prosecution.[40] In determining the severity of an image, the authorities are required to determine: whether actual children are depicted; the identity of the children; and their location in anticipation of future testimony. Each defendant enjoys a "built-in defence of reasonable doubt as to the actual existence of the depicted child at each step in that process".[41] These prosecutorial burdens are onerous and the obvious difficulties in meeting them render the enforcement of existing ICP laws practically impossible. From a practical standpoint, law enforcement and prosecuting authorities may not always be able to determine whether or not children in images fit statutory definitions. Some prosecutors may be hesitant to move ahead with cases in which the only images available depict older

[37] New Straits Times (2018, October 6). *Child Abuse: We are Not Doing Enough About It*. Retrieved from https://www.nst.com.my/news/exclusive/2018/10/418676/child-abuse-we-are-not-doing-enough-about-it.

[38] Ibid.

[39] Interview: Police Officer 1.

[40] United Nations Office on Drugs and Crime (UNODC). (2015). *Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children*. Vienna, Austria: United Nations Office on Drugs and Crime. Retrieved from https://www.unodc.org/documents/Cybercrime/Study_on_the_Effects.pdf.

[41] Armagh (2001). Virtual child pornography: Criminal conduct or protected speech. *Cardozo Law Review*, 1993, 23(6), p. 2.

children, while others may give priority to these cases.[42] In many instances, prosecutors are hesitant to arrest an offender if the image depicts adolescent children and they anticipate problems proving that the image depicts a minor.[43]

RMP and MCMC officers argue that it was thought a better use of police resources to tackle crimes involving images depicting grave acts with obviously underage children as they were the most vulnerable group. This is due to the assumption that harm to younger children is greater. There also exists the risk of wasting resources in investigating images which may turn out to be individuals who are aged 18 or over but may appear younger.[44] Moreover, if the images do not depict actual children, it is important to consider the "civil liability" for law enforcement agencies who conduct search-and-seize operations in violation of protected speech rights.[45] An RMP officer reports that RMP has thus far only responded to reports of ICP involving actual children.[46] It relies on forensic resources to determine the age of the child before deciding to proceed with a legal action against an offender and to assist with the investigation of ICP cases.

It is pertinent that discussion now turn to forensic software that examines material suspected to contain videos or images of child abuse. MCMC and Cybersecurity Malaysia (CSM)[47] have developed *Prototype A* to identify suspects from surveillance videos, and this prototype could be used to identify a child depicted in an image.[48] Regulators from MCMC and CSM report that RMP have been requesting assistance in digital forensics from them.[49] While RMP has an in-house forensic lab, it is insufficient, and to a certain extent, outdated from the point of view of MCMC and CSM. A prosecutor reports that RMP is often delayed because they have an extremely large number of images to extract: "For cases charged today, we may not even get a forensic report within three-months' time".[50] This is why forensic analysis is often outsourced to MCMC and CSM. Representatives of both agencies are currently unaware if their product has been used in ICP investigations since SOAC is fairly recent.

The main drawback of *Prototype A* is that RMP can only use it to analyse images already detected and the authorities also need to secure copies before the software can be used. A CSM officer confirms that, while this software can render a clearer image of a person in a photograph or video, it is not yet sufficiently sophisticated to distinguish older

[42] Wells et al. (2007). Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession. *Police Practice and Research*, 8(3), 278.

[43] Ibid.

[44] Interview: MCMC Officer 2.

[45] Armagh, 'Virtual child pornography: Criminal conduct or protected speech'.

[46] Interview: Police Officer 1.

[47] Cyber Security Malaysia (CSM) is an advisory and consultative arm of the government. It provides support for the government's cyber-security policy and cyber-forensics support to law enforcement agencies and is not involved in regulating ICP in Malaysia.

[48] Interview: MCMC Officer 2.

[49] Interviews: MCMC Officer 1 and MCMC Officer 2.

[50] Interview: Police Officer 1.

children from adults.[51] This is particularly problematic when it cannot determine the age of post-pubescent teenagers depicted in an image, for example those aged 14 and above. A sexually explicit image of a 15-year-old victim may be overlooked as grounds for a police investigation because the child appears to be an adult. In a lot of instances, much also depends on the quality of CCTV recording.[52] Given the cost of mobile devices with high-end cameras, most amateur ICP images are of low quality and, therefore, it is beyond the capacity of *Prototype A* to make forensic use of them. *Prototype A*, nonetheless, is a useful tool to detect young children in pornographic images or video provided that the recorded image is clear. These are some of the main limitations of *Prototype A*, and its exact reliability remains to be seen.

Exploring the Victim Identification Technology

Having a software such as ICACCOPS is a positive development, but it is only the first step in detecting and identifying offenders. It is equally important for law enforcement to use detected ICP images as evidence to identify, rescue, and protect child victims who may remain at risk of ongoing sexual abuse. International instruments such as the Lanzarote Convention[53] and the EU Directive 2011[54] emphasise victim protection and support as key elements of ICP. One of the recognised issues in supporting victims of ICP is the difficulty of identifying them.[55]. Once identified, the authorities can take steps to search for, rescue, and safeguard the child. They could also provide medical or psychological support to help victims overcome trauma. The images acquired essentially provide evidential leads contributing to successful prosecution in court.

The general lack of formal complaints made to RMP and MCMC are among the pressing issues which makes the detection and investigation of ICP cases difficult. Without some form of ICP monitoring or a victim identification system, there is maximum reliance on public reporting, and interview respondents unanimously argue that this has not always been dependable. Agencies in charge of coordinating the take downs of ICP websites such as the UK's Internet Watch Foundation (IWF) report that the overall volume of global ICP is increasing.[56] While this could mean that more children are abused and exploited for

[51] Interview: MCMC Officer 2.

52 Ibid.

53 Lanzarote Convention Article 5: Recruitment, training and awareness raising of persons working in contact with children (1) Each Party shall take the necessary legislative or other measures to encourage awareness of the protection and rights of children among persons who have regular contacts with children in the education, health, social protection, judicial and law-enforcement sectors and in areas relating to sport, culture and leisure activities.

54 EU Directive 2011 Article 23(3): Member States shall promote regular training for officials likely to come into contact with child victims of sexual abuse or exploitation, including front-line police officers, aimed at enabling them to identify and deal with child victims and potential child victims of sexual abuse or exploitation.

[55] Interviews: Police Officer 1 and 2.

[56] UK Internet Watch Foundation (IWF). (2018). Annual Report. Retrieved from https://www.iwf.org.uk/report/2018-annual-report.

the purposes of producing these images, it could also be true that the increase in images may reflect higher rates of duplication of an already existing image stock.[57] Although duplicates may seem to be less worrying in the sense that no child is subject to a new instance of abuse when duplication takes place, it is nevertheless a serious issue. This is because the existence of the image on the internet entails continuing harm to the victim, and further proliferation of the image needs to be stopped where possible. It would be useful, therefore, to explore victim identification as a method of policing where the authorities identify duplicate images and prevent their redistribution, effectively responding to and preventing the crime.

Through its National Crime Agency, England and Wales have launched a similar system known as the Child Abuse Image Database (CAID)[58] as part of its commitment to identify and protect victims. By November 2015, all forces in the UK were connected to CAID and the system is fully compatible with INTERPOL's ICSE.[59] The US National Centre for Missing & Exploited Children (NCMEC) developed a similar system, the Child Victim Identification Program (CVIP). CVIP allows analysts to perform a review of copies of seized images and videos and determines which images contain previously identified child victims.[60] Since 2002, NCMEC has reviewed more than 160 million images and videos. CAID and CVIP are examples of national ICP image databases that represents a national law enforcement effort to locate and rescue child victims depicted in ICP images. They are especially useful in stopping any ongoing abuse and exploitation of children.

There are some practical concerns relating to data protection and data retention in implementing any victim identification software in Malaysia. In commenting on the success of CVIP in the US, an RMP officer observes:[61]

> Their software is of course much more sophisticated. Unfortunately, we do not have it yet. Even if we do, I doubt we can use it with our present *Data Protection Act 2010.* Because of this 2010 Act, we do not have image datasets suitable for the necessary training and testing of this kind of software.

The officer is sceptical about the effectiveness of such a system in the

[57] Nair (2018). *The Regulation of Internet Pornography: Issues and Challenges*. Abingdon, UK: Routledge.

[58] INTERPOL. (n.d.). *International Child Sexual Exploitation Database*. Retrieved from https://www.interpol.int/en/Crimes/Crimes-against-children/International-Child-Sexual-Exploitation-database, UK Prime Minister's Office. (2013). News story: Internet safety summit at Downing Street: communique. Retrieved from https://www.gov.uk/government/news/pm-hosts-internet-safety-summit.

[59] Brown (2017). *Online risk to children: Impact, protection and prevention*. UK: John Wiley & Sons.

[60] US Department of Justice. (n.d.) National Strategy for Child Exploitation Prevention and Interdiction. Retrieved from https://www.justice.gov/psc/national-strategy-child-exploitation-prevention-and-interdiction.

[61] FBI Services. (2003). *Privacy Impact Assessment (PIA) Child Victim Identification Program (CVIP) Innocent Images National Initiative (IINI)*. Retrieved from https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/cvip.

Malaysian context due to data protection laws under the Data Protection Act 2010[62] and this echoes her earlier concerns about the implementation of ICACCOPS. In light of this, there is an urgent need to provide law enforcement agencies with the legislative mechanisms they require to investigate ICP offending. For example, legislation that forces ISPs to retain data would increase law enforcement agencies' investigative capabilities. While provisions on mandatory data retention is not provided under the Malaysian law[63], it can be justified up to a limit that respects rights to privacy; this would constitute a solution that addresses the officer's concerns. Due to constraints of space and time, this issue is beyond the scope of the paper, but it should be the subject of future research exploring possible avenues to increase the effectiveness of applying ICP offender detection and victim identification technology in Malaysia.

A Collaborative Recommendation: Extending the Responsibility to Internet Intermediaries

This paper discusses how law enforcement has been extended from traditional police work to identification and blocking strategies implemented by ISPs as internet intermediaries. ISPs, because of their technical capacities, are better placed than the police to act as regulatory agents and content assessors in the detection and blocking of ICP material. It is prudent to consider how identification and blocking strategies by ISPs are fundamental to effectively regulate the flow and dissemination of ICP.

ISP traffic is monitored by dedicated agencies such as IWF and NCMEC. These agencies dispatch ICP reports to ISPs who, in response, issue take-down orders to ICP websites where possible and block public access. While this approach is intended to prevent the cross-border flow of ICP content, Malaysia's current implementation of the identification and blocking strategy can only censor ICP content within local network servers. The strategy is regulated under the Content Code which currently regulates local ISPs as its licensees.[64] In theory, the Content Code should limit ISP immunity by placing on such companies extra liability for the distribution of and access to all forms of pornographic content. However, uncoordinated efforts by MCMC in the broader enforcement scheme has largely protected ISPs' legal immunity in terms of content.

MCMC is also not required to work with other international bodies, such as IWF and NCMEC, in the taking down

[62] Under Section 40 (1) of the Data Protection Act 2010, a data user shall not process "any sensitive personal data". Sensitive personal data includes information on matters such as health or any other personal data as determined by the relevant Minister. This would include an individual's private communications held on his personal devices. In interview: Police Officer 1.

63 "I was there in AGC when they wanted to make a law on data retention. It was extremely difficult as there were a lot of interests to consider. Until now, we cannot decide what data should and can be retained by the ISPs", in interview: MCMC Officer 2.

[64] See section 213 (1) of the *Communications and Multimedia Act 1998*: "A content code prepared by the content forum or the Commission shall include model procedures for dealing with offensive or indecent content".

of ICP content. As a consequence, the identification and blocking strategy is not being used to its maximum potential. To address this, the paper proposes the drafting and passing of a clearly-defined substantive law on the duty of care of ISPs to regulate the consumption and dissemination of ICP images on its platforms. Furthermore, it argues for the reinforcement of MCMC's role as an independent regulator to oversee and enforce ISPs' duty of care to their users in relation to ICP material. As per section 23 of SOAC, MCMC can act as an independent regulator with the power to issue substantial fines and impose liabilities on senior members of ISP companies should take-down notices be disregarded. This would undoubtedly be a financial challenge, nevertheless it should be introduced as a standard feature of MCMC's regulatory practice. According to this arrangement, MCMC would evolve in its role as the main regulator, as per CMA 1998, into a body which provides monitoring, support and enforcement. This would permit ISPs to take a leading role in regulating and censoring ICP content. ISPs would actively develop and maintain software for the acquisition, storage, and dissemination of monitoring, control, and surveillance data, taking into account the public's rights to data protection. Coordinating its monitoring efforts with INTERPOL's ICSE victim database should also facilitate the discovery of ICP victims. Law enforcers could exploit this information to block public access to websites with potential matches, integrating an extensive detection and monitoring approach to curb the crime of ICP.

CONCLUSION

England, Wales, and the US may have dedicated police units with specially trained officers and private specialists dealing with ICP such as CAID, IWF, and NCMEC. However, other countries such as Malaysia lack specialist units within their police forces. This inevitably means that the law cannot be effectively and efficiently enforced at the global level. It is commendable that RMP has now adopted ICACCOPS as an ICP online monitoring system. RMP and MCMC can now monitor the traffic of internet users by IP address on Malaysian internet servers, as well as identify duplicate images of child abuse and prevent their redistribution. These systems should be sufficiently agile to respond to the rapid pace of technological development. A continuous evaluation of Malaysia's regulatory responses should boost the capacity of MCMC and RMP to keep pace with developments on the internet and effectively detect, identify, and block ICP images. These initiatives demonstrate the government's paradigm shift in their perception of the severity of the ICP problem as well as a strengthened political will to ensure that children remain safe from the harms of ICP.

In reality, current levels of police resourcing and traditional policing techniques of arrest and seizure are inadequate to the task of combatting ICP crime. There is so much ICP content available that the police, despite these initiatives, cannot entirely stem its flow. In the complex, risky, and rapidly changing world of crime and technology, placing

total reliance on the traditional policing system is an inadequate policy approach. This is because it assumes that police and others in the criminal justice system have the competence to tackle the problems posed by ICP crime; the immediate causes of this inadequacy lie well beyond their resources or traditionally defined roles. The main challenges are posed by content distributed via the dark web, media streaming devices and encrypted email services. The increasing use of mobile devices to exchange ICP and the development of advanced and default encryption makes it more difficult to detect content and identify offenders. It is prudent to consider realigning the policing response of ICP images to other key intermediaries on the internet. This, it is envisaged, will alleviate some of the concerns surrounding the policing and institutional challenges in enforcing ICP law in Malaysia.

ACKNOWLEDGEMENT

The author thanks her PhD supervisors, Ms. Ann Sherlock and Dr. Brendan Coyle for their comments on the earlier draft of this manuscript. The author would also like to express her appreciation to Prof. Dr. Zuhairah Ariff Abd Ghadas for her invitation to submit this article.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 205 - 219 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Digital Era and Intellectual Property Challenges in Malaysia

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ABSTRACT

The world is undergoing a digital transformation where everyday connections are done among people, businesses, data, and processes online. The digitalisation is taking shape and undermining conventional notions about how businesses are structured, how firms interact and how consumers obtain services, information, and goods. Issues of piracy and infringement of IPRs raise concerns surrounding the enforcement of legal measures for (IPRs) protection. The paper seeks to explore the challenges of IPRs protection towards the world of digitalisation. This research utilities secondary data and semi-structured interview with government officials who are directly involved in the IPRs. The findings reveal that the challenges dwell in the issues of the rise of technology which requires advanced technology to cope with it, the lack of enforcement officer to monitor the entry point to the country, the issues of cross border where the agencies need to cooperate with international agencies, lack of awareness among the public, territorial limitation and the piecemeal of the institutional framework. Finally, recommendations on how to improve the enforcement are offered.

Keywords: Digitalisation, intellectual property rights, policies, Malaysia

ARTICLE INFO

Article history:
Received: 05 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.14

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INTRODUCTION

In the digital area, most of the economic activities have been digitalised. Every day online connection among people, businesses, devices, data, and processes is taking place at a fast pace which undermines the conventional style of connectivity (Ghazali et al,. 2017). The

ISSN: 0128-7702
e-ISSN 2231-8534

effects of technologies and platforms (such as the Internet, artificial intelligence (AI) robotics, 5G, computational biology, the Internet-of-Things or IoT, data analytics, and computational analysis) give rise to whole new industries that have changed our lives fundamentally. Looking at the current situation, the digital transformation is happening at breakneck speed.

For example, for transportation services, many customers prefer using 'Grab' compared to a taxi. Previously, if you needed a taxi you would need to call the taxi driver to place a booking, but with 'Grab' you just need the applications to place your booking through the application installed on your mobile phone which is cheaper and more convenient. Many benefits that can be reaped from the digitalisation of businesses particularly cost-cutting, efficiency, effective operations, lack of human error, safe data storage that enables data to be analysed which benefits the consumer as well as the businesses (Abdul Ghadas et al., 2015). Examples of companies that benefit from the advent of digitalisation are Amazon, Facebook, Alibaba, Google, and Netflix.

On the other hand, Intellectual Property Rights (IPRs) are seen by economists as a policy tool to ensure the market is efficient and competitive despite the growing innovation and creative activities. IPRs are defined as the right to use and sell knowledge and inventions- as one category of intangible assets that may be owned by a firm, some others being customer goodwill, human skills embodied in their workers and good management practice. In simpler terms, IPRs confer upon its owner an exclusive right to its creator of the product. There are a few types of IPRs such as patents, industrial designs, copyrights, trademarks, geographical indications, and confidential information. In the new digital or high-tech environment, IP protection, awareness and actual use of IP assets as an integral part of business strategy in achieving competitiveness have become an absolute necessity. As the World Intellectual Property Organization (WIPO) publication explained: "The history of the human race is a history of the application of imagination, or innovation and creativity, to an existing base of knowledge to solve problems... imagination feeds progress in the arts as well as science...intellectual property (IP) is the term that describes the ideas, inventions, technologies, artworks, music, and literature, that are intangible when first created, but become valuable in tangible form as products."

Due to the rise of technology, counterfeiting is a massive drain on the economy. Counterfeiting is an activity of imitation to deceive or fraud which can lead to unconscionable bargain. Nowadays, the issues of unconscionability bargain has gone wider (Alias & Abdul Ghadas, 2012). The range of counterfeit items is luxury items such as branded consumer products, spare parts, batteries, and business-to-business goods to common consumer goods such as food, pharmaceuticals, cosmetics, and toothpaste. As long as the product has a logo, it is exposed to the danger of counterfeiting. This means someone else's

efforts of creativity can be stolen without having to undergo the process until the final product exists.

The law has traditionally lagged behind commercial and technological development; thus, the issue of piracy and infringement is a major flipside to this development. There is a close nexus between IPRs and the digitalisation of businesses that is inevitable due to the rapidly changing nature of the technology. Therefore, it is the objective of the research to explore the challenges of IPRs protection towards the world of digitalisation in Malaysia.

MATERIALS AND METHODS

This section highlights the literature and methods utilised in this research.

LITERATURE REVIEW

IPR and Digitalisation

Intellectual Property Rights or IPR is referring to the legal protection given to the creativity and innovation of a person as the creator of the products or services. In this context, legal protection is referring to a set of laws such as patents, trademarks, industrial designs, copyright, geographical indications, and layout designs of integrated circuits. As the creator of the product, the creator usually possesses exclusive legal rights over the use of his/her creation for a certain duration of time. The IPRs allow the creators of intellectual property (IP) to gain financial benefits for creating the products or services. At the same time, the creator of the products or services also has an exclusive right to prevent others from using, dealing or tampering the product or services without the consent of the creator. For instance, a patent owner can prevent the production of the patented good or the registered trademark owner can prevent others from applying the names to goods or services (Ramaiah, 2017).

Due to the rapid development of the digital area, IPRs are important for economic growth, innovation, and competition. Currently, the world is in the midst of a digital transformation, with 40% of the world population now connected to networks, an increase from 4% in 1995. (Li & Lin, 2018). In Southeast Asia in particular, nearly 80% of adults in Indonesia and around 20% of adults in Lao PDR and Cambodia have shown the interest of digital technologies. The connection among people grew due to the rapid growth of mobile broadband where it enables people to get connected to digital networks and digital services (Li & Lin, 2018).

Digital transformation has been the forefront of changing how the world works, particularly businesses. The importance of IPRs policies with regard to digitalisation has been contentious such as in the case of pirated music, film and software. Literally 'digitalisation' means technology has become part of people's life activities as it alleviates the problems or challenges experienced by people in their everyday lives. Therefore, digitalisation refers to the amalgamation of material or information into a digitised form. Recently, TechCrunch, a digital economy news site, acknowledged

the rapid development of the world of digitalisation in our everyday activities such as "Uber, the world's largest taxi company, own no vehicle. Facebook, the world's most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory and Airbnb, the world's largest accommodation provider, owns no real estate... Something interesting is happening." (Deloitte, 2018).

In another context, 'digitalisation' refers to the process of computerising systems and jobs for a more efficient organisation and use. Mesenbourg (2001) categorises 'digitalisation' into three elements such as a) E-business infrastructure such as hardware, software, telecommunication networks and human capital b) E-business, namely how business is run and any process that a company manages using a computerised system and c) E-commerce, the selling and buying of goods online.

Studies have shown that industries that are more technologically advanced will be more competitive as they focus on producing technologically advanced systems, platforms, and activities. On the other hand, industries that are not technologically advanced can only participate in world trade by exporting products that are labour intensive and then only proceed to produce higher value-added activities. However, it is important to note that both industries benefit from the exchange which contributes to global trade (ERIA, 2016). Research also suggests that major industries such as pharmaceuticals and semiconductors regard intellectual property as a fundamental aspect in the growth of their companies. For instance, in the semiconductor industry, major companies use intellectual property rights to cross-license portfolios and protect their liberty to work, instead of focusing to regain R&D investments. Smaller companies use intellectual property to signal commercial potential to venture capitalists (Hall & Ziedonis, 2001).

Digitalisation: Piracy and Infringement Issue

Due to the development of digitalisation, the issue of piracy and infringement has grown on a global scale. The form of piracy and infringement issues that are happening now are more intangible where it could be done easier and faster. As pointed out in the Financial Times, 2016 "Pirates are more adept at using new technologies than those trying to shut them down." Michael Evans, Alibaba's president, has asserted, however, that Alibaba has "the tools to change the way the war is waged…using data and technology…to defeat the counterfeiters... If Alibaba delivers, it will be a game-changer by stopping counterfeiting at source rather than at platform level." (Monstert, 2018).

Counterfeit products are often at a lower quality from the original products. This means the products that are sold under another brand's name with (or without) the authorisation of the owner of the product. In the eyes of the law, the seller of the product has infringed the IPRs law such as trademark, patent or copyright of the brand owner. When consumers buy counterfeit products, including digital content, distributed by or benefiting organised crime, they are contributing to financing their dangerous

and illegal activities. Besides, counterfeit medicines may create wider threats to society by exposing the public to health risks (Setiati & Darmawan, 2018). The profit from intellectual property infringement is a strong lure to organised criminal activities as a revenue source to fund their unlawful illegal activities (Jankovic, 2017).

In addition, the counterfeiting activities negatively impact economic growth where it leads to a revenue loss of the country where tax cannot be imposed on the illicit trader. Despite revenue loss, it also poses a serious threat to the health of consumers because the goods are produced and distributed without the need to pass any quality standard. Asia is often targeted to be a favourable place for counterfeit trade because it is so easy to have access to transportation via maritime and manufacturing platforms that are highly active due to cheap labour and costs. In 2018, The Edge Market reports that an alarming level of counterfeiting activities in South East Asia can be found particularly in Malaysia (Li & Lin, 2018).

Based on past studies, the issues and challenges arise from the perspective of IPR protection during the digital era can be summarised as follows:

Challenges of IPR Protection During the Digital Era

The Volume of Imitation Goods is Still Prevalent. The issue of global counterfeiting becomes more serious with the rise of online shopping (Shahbaz et al., 2019). Infringing activities normally happen in the free trade zones area. The activities may include manufacturing, storing, assembling, exporting, re-exporting, re-labelling, and repackaging of imitation goods to conceal the country of origin. In Malaysia, although the laws grant a power to the Royal Customs Office to take action against the counterfeiters by asking the operators to provide information on any activities at free trade zones, the issue of the lack of control over physical and documentary matters in free trade zones trigger the usage of such area for storing and moving imitation goods by the counterfeiters (European Commission, 2018).

On the other hand, Deloitte (2017) stresses that counterfeiters normally work in a complicated logistic system that involves ever-changing distribution routes to escape from authorities. This situation may exist in most countries in the world particularly those with low investment in R&D and enforcement of IPR. In many instances, it is difficult to identify the counterfeiter as it is often unknown to the brand or content owner.

Online Piracy becomes a Developing Conundrum. Most of the countries without established protection of the IPR system seem to have higher rates of online piracy (Priest, 2006). In other words, the stricter the IPR protection enforcement, the lower the prevalence of online piracy. Setiati and Darmawan (2018) highlight that as access to the internet has broadened, illegal downloads of many media content, either for private use or for reselling, have become open to the public. The infringement happens in various forms of piracy which

includes music, movie, software, and books. There is no appreciation to the creator or the owner notwithstanding the high cost incurred to obtain the right.

Capacity Building of The Officials and Institutions Need to be Elevated. Not all the countries in the world have a mature IPR system, which makes the administration and enforcement require assistance from various stakeholders especially from private IPR specialists' groups (Deloitte, 2017). Therefore, capacity building of the officials and institutions remains crucial in developing a conducive IP environment, as well as raising public awareness on IP issues and providing the right skills to identify and support the innovation that contributes to economic growth. The procedure and registration of IP should accommodate the needs of the creator/owner in terms of timeframe and process. Clear procedures and processes will ensure the effectiveness of the IP system and inevitably could encourage more registrations of IPs.

Apart from that, border measures enforcement is also a crucial issue. The customs authorities need to be equipped with relevant and up-to-date skills and knowledge on IP particularly with the era of digitalisation. Therefore, IP experts may be required to provide such training and disseminating knowledge to relevant authorities. Combating corruption may also be important for effective enforcement of trademark through border measures (Mukhtar et al., 2018).

Transparency on the Regulation and Procedures. Deloitte (2017) emphasised the importance of transparency in government regulations as the IP matters is a global issue and may involve more than one country. An open and flexible regulatory framework is critical to accommodate cross border enforcement. All regulations should also consider public comments and should be administered in a uniform and reasonable manner. Besides, modes of alternative dispute settlements should be properly addressed and explained to ensure effectiveness by eluding technicalities of procedural law (Mukhtar et al., 2018).

Awareness among Stakeholders. Deloitte (2017) highlighted the importance of awareness among all stakeholders such as governments, private sector experts and the public which were capable of assisting to safeguard IPRs locally and globally. This can be done through the sharing of information and educations with the consumers. Furthermore, global sharing of IP risks includes the tactic of bad actors and best practices, understanding IP issues through public campaigns and other communication strategies are also critical to promote awareness among the stakeholders. Lee et al. (2019) stressed the importance of educating students upon entering college about the ethical and legal use of IPRs to provide them awareness and capability of observing the integrity of digital media.

Institutional Framework for IPRs in Malaysia. Malaysia has shown strong support for IPRs protection both at the national and international levels. The 26th April has been declared as the annual IP Day of Malaysia. The motto 'IP as a current economic spinner' MyIPO was established in March 2003, to regulate matters relating to IP. Over time, online registration and IP courts are introduced and developed. The National Intellectual Property Policy (DHIN) has also been introduced by the government and the main purpose is to leverage IP as a new growth engine to improve economic and social prosperity. Agencies have been established such as MyIPO (Malaysia Intellectual Property Corporations) and IAM (Intellectual Asset Management) – comprise of 3 value chains such as IP creation, IP protection, and IP commercialization. There are various ministries or agencies which are responsible to IPRs issues in Malaysia such as the Ministry of Communication and Multimedia Malaysia (MCMM), the Malaysian Administration Modernisation and Management Planning Unit (MAMPU), Ministry of Domestic Trade, the Co-operatives and Consumerism (MDTC), and Ministry of Home Affairs (MOHA), supported by the Royal Malaysia Police and the Intellectual Property Corporation of Malaysia (MyIPO).

Besides, Malaysia has also established specialised IP enforcement units, including the Special Internet Forensics Unit (SIFU) in Malaysia's Ministry of Domestic Trade, Cooperatives, and Consumerism which is responsible for IP enforcement that has also been proven to be an important catalyst in the fight against counterfeiting and piracy. Furthermore, IP enforcement coordination mechanisms and agreements to enhance interagency cooperation are also developed. In deterring and preventing networks that distribute counterfeit and pirated goods, the progress is shown by an inter-agency, namely the Special Anti-Piracy Task Force. At the international level, Malaysia is a member of the World Intellectual Property Organisation (WIPO) and a signatory to the Paris Convention and Berne Convention which regulates these intellectual property rights. Also, Malaysia is also a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed under the auspices of the World Trade Organisation (WTO).

Malaysia's intellectual property laws are in conformance with international standards and have been reviewed by the TRIPs Council periodically. Intellectual property protection in Malaysia comprises of patents, trademarks, industrial designs, copyright, layout designs of integrated circuits, and geographical indications. Patent protection is governed by the *Patents Act 1983* and the *Patents Regulations 1986*. A patent is an exclusive right granted by law to the creator to prevent others from benefiting from his or her patented invention without the creator's consent. The scope for patents is wide, but it does not include ideas because the ideas must be transformed into the following; a process or method, a machine, a manufactured article, a new composition and an asexually reproduced and new

variety of plants. Trademark protection is governed by the *Trade Marks Act 2019* and the *Trade Marks Regulations 1997* where the Act protects registered trademarks and service marks in Malaysia. The scope for the trademark consists of words, letters, numeral devices, brands, heading, labels, tickets, names, and signature. At the same time, industrial design protection in Malaysia is governed by the *Industrial Designs Act 1996* and *Industrial Designs Regulations 1999* which gives protection to the registered industrial designs. It protects the feature of configuration, shape, pattern or ornament applied to an article by any industrial process or means. The *Copyright Act 1987* provides comprehensive protection for copyrightable works. It extends to various types of works such as literacy works, dramatic works, artistic work, drawing, musical work, recordings, broadcasts, and finally layout. The *Layout Designs of Integrated Circuits Act 2000* provides for the protection of layout designs of integrated circuits based on originality. A layout-design of an integrated circuit is a three-dimensional disposition of the elements of an integrated circuit and some or all of the interconnections of the integrated circuit or such three-dimensional disposition prepared for an integrated circuit intended for manufacture (MYIPO). The *Geographical Indications Act 2000* protects the origin of the goods which possess unique qualities that essentially represents the goods' geographical origin.

The score of IP has shown a commendable improvement as it has slightly decreased from 6.44 in the year 2016 to 6.4 in the year 2017. The overall score has also decreased from 6.75 in the year 2016 to 6.6 in the year 2017. Notwithstanding this decrease, Malaysian authorities have continuously expanded their efforts in combating online piracy which includes access to piracy websites, removing infringing content on domestic sites, and handling raids and arrests of Malaysians either operating or posting links to sites with pirated content.

The Malaysian government understands the importance of intellectual property not just as a new element that will propel the nation's economic and social prosperity, but it will also protect Malaysian innovations which will develop Malaysia into an international ICT hub. Currently, in Malaysia, it is self-evident that the mushrooming of 'digitalisation' of many services are online such as transportation, banking, products, and goods. Businesses are becoming more competitive. Thus, it is high time for the study to be conducted, as the growing world of 'digitalisation' particularly in the business industry and at the same time, IPRs policies are necessary pillars for the market to be efficient and competitive.

RESEARCH DESIGN

This study utilised secondary data based on library research together with the qualitative methods including interviews with relevant authorities and practitioners were adopted. Articles, books, case law legislation, and subsidiary legislation were the references. A semi-structured interview was utilised to interview the key players

of the IPRs protection. Key respondents were from the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTC) and the Intellectual Property Corporation of Malaysia (MyIPO). The respondents consisted of Senior level officers which included director and senior enforcement officers. For confidential and ethical reasons, the names of the respondents and the respective organization are not disclosed in this paper.

Respondents were carefully selected to represent an important cross-section of the industry. Therefore, the credibility of the study has been achieved including these professional and intellectually qualified respondents. All the interviews took place from May until June 2019.The questions asked during the interviews were carefully framed to reflect the main IPRs concerns of that particular stakeholder. The information obtained was analysed from the segment of challenges from the IPRs perspective. Based on the views of respondents during interviews, several themes were identified. These themes were based on responses that were corroborated by more than one respondent. The thematic findings reveal the challenges faced by authorities in addressing IPR protection during the digital era which is discussed in the next section. The findings in the semi-structured interviews, as well as the data from the current literature, were analysed to draw out the conclusion and to arrive at policy recommendations.

ANALYSIS AND DISCUSSION

The findings of the interviews reveal that the challenges of IPRs enforcement during the digital era are associated with the rise of the technology which can be summarised as follows:

Entry Point Enforcement

In specific, the offence committed involves advanced technology which requires high technical skills to prove, in which the government is still lacking in this expertise. Based on the responses given by the respondents, the problem is due to their insufficient knowledge on technical skills. One respondent commented:

> *"We have limited skill because most of us are trained and equipped ourselves with skills within our scope only...for example...when you came back from Vietnam for example, you just need to pay tax, custom officers focus on tax only, not the skill to trace forfeited items."*

Therefore, it shows that entry point enforcement remains challenging as the customs officers are not trained to identify the counterfeit items, and instead, they are more interested to impose a tax that is within their portfolio. As mentioned by Mukhtar et al. (2018), the customs authorities needed to be equipped with relevant and up-to-date skills and knowledge on IP particularly with the era of digitalisation. This will include an alliance with the countries that have an established IPR system where IP experts in

those countries may be required to provide such training and disseminating knowledge to relevant authorities.

Cross Border Enforcement

The challenges become higher for cross border enforcement. In these particular circumstances, collaboration from the respective authorities in the country where the offences are committed is highly demanded. Many of our cases are lost at the cross border due to a lack of collaboration with the respective country. The following statement was expressed by one of the interviewed respondents:

> *"In the case of Ariani scarf, the unauthorised seller of Ariani will go to Vietnam and print the scarf brand Ariani and then sell it back to Malaysia at a cheaper price as compared to its original price. However, Ariani cannot sue the producer in Vietnam because the IPRs law in Vietnam was not strongly enforceable. So Ariani lost any IPR right of their own product at cross border."*

Although Malaysia is also a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) signed under the auspices of the World Trade Organisation (WTO), in many instances, it is difficult to get full cooperation from the respective country. The settlement of this case is highly dependent on whether there is a good relationship between the state who owns the IPR and the state where the offences are committed. However, not many of the countries signed to the international conventions, therefore the border enforcement measures will allow the right holders to obtain cooperation of customs administrations so as to prevent release of infringing imports to free market. (Lakshmi & Patro, 2009)

High Technology Skills

Bad actors typically utilise technology to flood pirated and counterfeit products on the online market., whereby they are able to produce perfect copies at unparalleled volume and pace contrasts sharply with the sluggish and shaky way good actors are using technology to authenticate their product across supply and distribution chains. Following this the interview reveals that one of the challenges of IPR protection during the digital era is lack of expertise in high technology to handle many cases of piracy and infringement issues. Many of the cases cannot be traced or missed due to the lack of professional skills to handle cases as high technical skills are involved. As commented by respondent:

> *"We already equipped ourselves with technology skills for example when the case involved broadcasting equipment like android tv boxes or cases like pirated software..but the law breaker seems to be more advanced in terms of technological skill that made it difficult to trace the infringement…"*

Therefore, specific training or courses seems to be inevitable so as to ensure the enforcement officer is capable of discharging the duty very well. Following this, collaboration with relevant technical experts are necessary. Besides, right-holders have responded to the issue by designing and implementing a remarkably similar array of digital resources. In order to produce fruitful outcomes, voluntary collaboration and support are needed between online platforms, right holders and administrative authorities. Relying on complete remedy from a legal protection seems inadequate as the law also appears to have traditionally fallen behind commercial and technological development (Mostert, 2018).

Collaboration and coordination inter-agencies-In terms of enforcement, many agencies were involved to execute any enforcement activities such as the Police, MCMC, Cyber Security and KPDNHEP.As explained by the respondents:

> *"Once a complaint is received at KPDNHEP, we must take action immediately.. For example in the case of telekung Siti Khatijah or well known as SK….for us as the enforcement officer to conduct a raid; we need to collaborate with the police as well as the owner of SK to bring her to the ground to identify the fake item."*

This issue was also discussed by Delloite (2017) where it mentioned the need of collaboration between inter agencies as not all the countries in the world had a mature IPRs system. In Malaysia particularly, different ministries have different portfolios and jurisdictions over IPRs matters. For example, cyber security has power and skill in tracing the security breach, however in terms of enforcement, collaboration should be extended with the Police Department to ensure the criminal is brought before the court of law. Therefore, collaboration and coordination between inter agencies are inevitably needed.

Territorial Limitation

The interviews revealed that IPRs were by nature, based on territorial limitation, which meant that IPRs within a country was independent of any such rights existing in other countries. The protection is unique because IPRs is offered and governed by the respective country's legislation. This is reflected in a statement by the responded:

> *"In the case of our prominent film producer Datuk Yusuf Haslam, he found out his film was broadcasted in Uzbekistan…. he is not happy... and complain to us to take legal action. Unfortunately, our country does not have good working relationship with Uzbekistan to handle this situation. Thus, no action can be taken because of the different legal system."*

The principle of territorial limitation is rooted in the municipal and international law has further created a complicated environment in case of protection and infringement of IPRs. It was commented by Ginsburg and Lucas (2011) that

"Each country determines, for its own territory and independently from any other country, what it is to be protected as intellectual property, who should benefit such protection for how long and how protection should be enforced."

Rotstein (2011) further highlighted that there were inadequacies to resolve multi-jurisdiction intellectual property disputes at international level; "while international conventions allow rights holders access to other national systems and provide a platform of uniform standards, it is unclear whether they extend to conferring jurisdiction regarding multi-jurisdictional disputes".

Lack of Awareness

It is admitted that there is a low level of awareness about IPRs protection particularly at the individual level where it requires more effort to be done by all the stakeholders. One of respondent commented:

"Public still not aware of this issue of IPR as it involves technical knowledge to fully comprehend the infringement issue. Some people easily claimed that they used the forfeited item for themselves...for example...if you copy one CD, it is fine for your personal consumption, but when you copy more than 3 CDs to distribute to others, it will breach the law even without intention…."

There are quite a number of awareness programs on IP which are organised at the national level. The programs utilise several platforms to reach the target which includes social media, electronic media and also newspapers. Schecter (2019) opined that although in some countries the IP awareness was increasing, however IP understanding was not following the same trajectory. As awareness and understanding are two different matters, emphasis should be given to the latter as the general public does not appreciate what IP is, how it is acquired, and how it achieves its intended purpose of promoting innovation. The reason behind this is due to the fact that IP is a complicated subject and articles often refer to different types of IP confusingly. Therefore IP awareness and understanding is very important to establish public trust and respect for IP. Besides promoting IP awareness via national campaign, effort should be enhanced through education by making a silibus in primary or secondary level nationally.

CONCLUSION AND RECOMMENDATION

The era of 'Digitalisation' has been happening across borders and seems to be limitless. Imagine less in many parts of our lives from business, devices, data, and processes. The era of 'Digitalisation' creates innovation through creativity and produces wealth accumulation. On the other hand, IPRs protection is the gatekeeper to ensure protection is given particularly to the issue of piracy and infringement of rights. It is

important to note that the findings indicate that despite the rapid technological growth, the challenges are also moving faster and faster in parallel with its development.

Are the above findings unique to Malaysia? They are certainly not. The entry point, cross border enforcement, the institutional framework and lack of awareness among the public are the main obstacles to its development. Reform is necessary to ensure better protection for the rapid growth of digitalisation is in line with the protection offered by the IPRs policies. Each sector cannot stand alone as it needs a collaborative effort to ensure that the speed neck innovation of digitalisation is well protected by the IPRs.

Based on the findings of this study, with a collaboration on issues by multiple stakeholders interviewed, point to several important conclusions. Overall, they suggest that many of its challenges dwell around the issues of the rise of technology itself. The findings indicate that the entry point is lacking the expertise to monitor counterfeit items, where many counterfeit goods were brought in easily. The challenges at the cross-border enforcement are in peril particularly to get cooperation from the respective state. The settlement is highly dependent on the good relationship between the state who owns the IPR and the state where the offences are committed. IPRs protection is closely associated with digitalisation as the technology needs protection for it to evolve further. Lack of professional skills to handle cases of piracy and infringement have negatively affected the creativity and innovation of the respective industry. In terms of collaboration of enforcement, many agencies are involved which require coordination of inter-agencies. Finally, public awareness is crucial as a medium for educating the individual. IPR protection can only be appreciated and valued if there is enough knowledge about its importance.

What policy implications emerge from these findings? First, it is recommended to adopt best practices on customs including investment in capacity at border and customs operations including the use of the latest technology. Second, it is fundamental to establish formal mechanisms for greater cooperation with the private sector, such as right owners, online platforms, IP lawyers and IP consultants. In addition, it is also recommended to introduce customs recordal systems where those do not exist. The recordal system allows the IPR owner to actively record its IP registration with Customs to prevent pirated products from being exported or imported in an unauthorised manner. Third, to widen the scope of protection but not to limit to a particular territory among the countries and finally, businesses and entrepreneurs should put the protection of their intellectual property at the heart of their business strategy.

ACKNOWLEDGEMENTS

This work would not be possible without the financial support of the University of Malaya Grant GPF012P-2018. We also thank the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTC) and

the Intellectual Property Corporation of Malaysia (MyIPO) who provided insight and expertise that greatly assisted the research.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 221 - 232 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Legal Exploration of Right to Health

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ABSTRACT

The right to health is recognised as a fundamental human right in the World Health Organisation (WHO) Constitution. In Malaysia, the enjoyment of the highest attainable standard of physical and mental health is a fundamental human right without discrimination for every human being. Consequently, the principle of the "right to health," regardless of the legal status of an individual, is the driving force in creating acceptable standards of health care for all citizens. Even for individual who suffers from Covid-19, he still has a fundamental right to health. The issue of the right to health is whether the patients have any rights of their health? If they do have the right to health, the next issue is whether the hospitals are legally bound to follow such right, i.e. the right to health of the patients. Therefore, this paper aims to analyse and discuss the issues regarding the rights to health of the patients. Without the legal mechanism in recognising the right to health, it pointed out that is no such right. The method employed in this paper is qualitative based. The paper finds that although Malaysia does not have any specific legal framework about the right to health, the application of international legal mechanism can be referred to a guideline.

ARTICLE INFO

Article history:
Received: 05 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.15

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ISSN: 0128-7702
e-ISSN 2231-8534

Thus, it is important to have a specific legal framework by applying international legal mechanism in order to address this issue.

Keywords: Covid-19, medical treatment, international law, human rights, legal mechanism, medical law and ethics

INTRODUCTION

It is well known that the right to health is being accepted as a basic human right in the WHO (Rahman, 2008). It shows there is always initiative of government in upholding the rights to health in this country. In general, Malaysia has an efficient and widespread healthcare system that can be seen as a two-tiered healthcare system consisting of a government-based universal healthcare system and a private healthcare system that coexists. Malaysia has a well-known healthcare network. There is increasing awareness that safety is a precondition for growth. According to Rahman, investing in health is investing in development (Rahman, 2008). Whereas in the Malaysian case, Malaysia's Ministry of Health has launched numerous health initiatives over the years to improve patient safety and the welfare of the population (Has an along with the private healthcare system (Health Care in Malaysia, 2010).

METHODS

This paper adopted a pure legal research methodology by using qualitative analysis on the right to health in Malaysia. By using content analysis, this paper analysed the phenomena of right to health, particularly focusing on the legal analysis in Malaysia. Referring to Krippendorff (2004), analysis of content can range from simple word counting to thematic analysis or conceptual analysis. The data collected based on primary and secondary sources, concentrating on secondary sources.

INTERNATIONAL LEGAL MECHANISM

There are a number of international conventions that have proven that every human being has a right to health and that this right should be protected. This paper will, therefore examine the international legal mechanism relevant to the protection of the right to health, which can be taken from the perspective of the Malaysian. The WHO Constitution 1946 envisages the highest attainable health level as a basic right of every human being (National Economic & Social Rights Initiative, 2018). Considering health as a human right imposes a legal duty on states to ensure sufficient quality access to appropriate, reasonable and accessible healthcare for the basic determinants of health, such as clean and drinking water, sanitation, food, housing, health information and education and gender equality (World Health Organisation, 2017).

Carel Vasak, the Czech jurist, split human rights into three separate generations according to the French Revolution such as Liberty, Freedom and Fraternity. First-generation people are concerned about civil and political rights. The first generation consists of the right to life, citizenship, and protection of individuals, freedom of speech, freedom of association and religious

freedom. Economic, social and cultural rights are the focus of the second generation. Since the Stockholm Declaration on the Human Environment, the third generation begins with the United Nations. The third generation comprises collective and group rights, such as the right to self-determination (autonomy), the right to the environment and the right to development.

Health is an essential prerequisite for enjoying certain human rights that are generally limited to the right to life (Karim, 2010). All human rights include such acts as the right to life, human protection, the right to water, the right to knowledge, the right to education, the right to food and nutrition, freedom of movement, freedom from discrimination, the right to privacy, the right to vote, harmful traditional practices, freedom from abuse, torture and slavery (Karim, 2010; WHO, 2018).

In addition, the duty of a State to uphold the right to health, including by allocating the maximum available resources, in order to slowly realise this goal, which is reviewed through various international human rights mechanisms (World Health Organisation, 2017). The right to health has also been adopted into domestic law or constitutional law (World Health Organisation, 2017). The right to health must be enjoyed on the basis of race, age, ethnicity or any other status, without discrimination (National Economic & Social Rights Initiative, 2018).The right to the highest acceptable quality of health means a specific set of legal responsibilities on states to ensure appropriate conditions for all citizens to enjoy health without discrimination.

The right to health is one of a number of human rights principles agreed globally. This means ensuring the right to health is essential to achieving other human rights, food, housing, jobs, employment, awareness and participation (National Economic & Social Rights Initiative, 2018). Like with most freedoms, the right to health requires both liberties and entitlements. The freedoms include the right to regulate one's health and body, such as sexual and reproductive rights, and to be free from coercion such as torture-free and testing and non-consensual medical care. The entitlements take account of the right to a health protection system that offers every person equal chances to enjoy the highest attainable health level.

The equipment, products, and services must be certified scientifically and medically. Quality is a crucial component of the Universal Health Coverage, which covers both the experience which health care understanding. Health care services have to maintain quality. There are seven principles of quality that need to be maintained. Quality health services should be safe. This first concept means preventing accidents to people intended for the treatment. Second, quality. It means delivering healthcare programs that are focused on facts for those who need them. The third is focused on men. It means caring for individual preferences, needs and values. Fourth is opportune. It means reducing waiting times and delays which are sometimes harmful. Fifth is equal. This means delivering quality care that does not vary due to gender, race,

geographic location, and socioeconomic status. Sixth is put in. This means offering care which will make the full spectrum of health services accessible over the course of life. The last is an important one. This means optimising the value of the resources available and eliminating waste (World Health Organisation, 2017).

Besides WHO, the concept of the right to health appeared in the Committee on Economic, Social and Cultural Rights, United Nations Human Rights Office of the High Commissioner (ICESCR, 1976). The right to health is an inclusive right given to the Committee on Economic, Social and Cultural Rights, applying not only to timely and sufficient healthcare, but also to the fundamental determinants of health, adequate provision of nutritive food, nutrition and housing, such as access to safe and potable (clean) water and sufficient sanitation, good work-related and environmental conditions and access to health-related education and information (ICESCR, 1976).

For instance, the Supreme Court of India has taken an expansive view of the right to life to include an individual's right to health and medical care (*Lim Meng Suang and Another v Attorney General*; and another appeal and another matter [2015] 2 LRC 147 at page 152, [2014] SGCA 53, Singapore). This approach must be understood in the context of India's social and economic conditions (*Yong Vui Kong v Public Prosecutor* [2011] 1 LRC 642 at page 83-84). Each Constitution was supposed to reflect the social mores of the society from which it emanated (*Lim Meng Suang and Another v Attorney-General* [2015] 2 LRC 147 at page 152). Such social mores possibly will and frequently will change over time (*Lim Meng Suang and Another v Attorney-General* [2015] 2 LRC 147).

In general, the *Universal Declaration of Human Rights* (UDHR) 1948 is one of the focal instruments governing matters in relation to human rights (UDHR, 1948). The right to health is guaranteed as stated where "everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, and medical care"(Paper 25 of the UDHR, 1948). Whereas, in relation to Paper 12 of *The International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1976 states "the States being Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Paper 12 of the ICESCR 1976).

The *Universal Declaration on the Human Genome and Human Rights of 1997* contains similar provisions relating to health (UN General Assembly, 1999). It can be seen that the standard of living is connected to health under Paper 25 of the UDHR. These international human rights instruments should be applicable to all people, including patients henceforth, making them as beneficiaries of the rights. Most of the instruments deal with physical health, while the ICESCR includes both physical and mental health (Paper 12 of the ICESCR, 1976). Meanwhile, *The*

International Covenant on Civil and Political Rights (ICCPR) describes that right in terms of the highest standard of health attainable (ICCPR, 1976).In the European region, according to Part I of the *European Social Charter of 1961* provides that "everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable"(Paper 11 of the European Social Charter, 1961).

To sum up, the international legal mechanism such as by referring to WHO, UDHR, ICESCR, ICCPR and *European Social Charter of 1961*, there is a need to protect the right to health of all people. Nobody should be discriminate his or her right to health, especially when he or she goes to the hospital to get his or her medical treatment. Plus, the treatment must be treated fairly and equally.

RESULT AND DISCUSSION

Based on the literature, in Malaysia, the right to health is protected indirectly under the Malaysian Federal Constitution (Razak & Nordin, 2017). This is to confirm that enjoying the highest possible physical and mental health standard is a fundamental human right of every human being without discrimination (Human Rights Commission of Malaysia, 2018). This description was ratified in Malaysia by SUHAKAM and worldwide by WHO. Consequently, the concept of the "right to health," irrespective of the legal status of a person, is the guiding force in establishing adequate standards of health care for all (Human Rights Commission of Malaysia, 2018).

The question of the right to health in general in relation to public health is protected by the Federal Constitution of Malaysia, with no in-depth emphasis on particular classes. Papers 5 to 13 of Part 2 of Malaysia's Federal Constitution provide for the fundamental rights of citizens and noncitizens. Paper 5 (1) provides that "No person shall be deprived of his life or personal liberty, save in accordance with the law" (Papers 5 (1) of the Federal Constitution of Malaysia, 1957). This is arguable that the provision in the Federal Constitution of Malaysia includes the right to health (Razak & Nordin, 2017). According to Islam, the right to health is guaranteed by the Federal Constitution of Malaysia (Islam, 2013). Health is a crucial condition which interpreted indirectly within the right to life (Islam, 2013). In the situation to protect the health, the right as to protect health needs to be considered because it encompasses the very fundamental of the human rights which is the right to life (Sulaiman et al., 2018).

In the case of Suzana bt Md Aris v DSP Ishak bin Hussain & Ors [2011] 1 MLJ 107, the judge has given a generous interpretation of the provision point out in Papers 5 (1). The judge mentioned at page 121 and 122 that "nothing can buffer the harsh reality that a person who is being deprived of his liberty is in a more vulnerable position of being deprived of life when his plea for medical help falls on deaf ears and is being brushed aside as being a nuisance." This matter can be seen that everybody has the rights to medical attention and assistance (including health attention), and it falls under the

said generous interpretation. Further, in the case of Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan and Anor [1996] 1 MLJ 261, the Court of Appeal mentioned that Paper 5(1) of the Federal Constitution of Malaysia and held that the term "life" does not refer to mere human existence, but it also "incorporates all those facets that are an integral part of life itself and those matters, which go to form the quality of life." It further held that the term extended to "the right to live in a reasonably healthy and pollution-free environment." This section concerns certain rights which are enforceable by the courts, subject to such limitations as those provided for in such laws. If any of these rights are violated, the person who is a victim shall make a claim before the High Court (Papers 5 (1) of the Federal Constitution of Malaysia, 1957). While, according to the Paper 9 of the Federal Constitution, the freedom of movement of a Malaysian citizen can be restricted by the enactment of the law if he is considered by the government to be a threat to public health (Papers 9 of the Federal Constitution of Malaysia, 1957).

The thoughtful debate indicates the value of health problems, even though the guarantees for such freedoms are not enforceable by the courts. This demonstrates that the right to health is implicitly covered and acknowledged by Malaysian law, but the issue that may be posed here is whether the right to health in Malaysia concerns the right to health on the basis of public health or just focused on a specific group or not. This is because there is no such provision under the Federal Constitution of Malaysia that clearly state in a phrase pertaining the right to health specifically to the specific person, including the patient.

The issue which may arise here is whether patients have adequate right to health and if they do, are the hospitals legally bound to follow them? It is crucial to take into account that the right to health as a human right has always been embodied within the right to life (Razak & Nordin, 2017). However, the right to health has been neglected by Malaysia (Razak & Nordin, 2017). This paper expects to initiate a discussion about the right to access healthcare as a human right. Since Malaysia's Independence Day as of 31 August 1957, the Malaysian government has passed many health and healthcare laws. Such laws were enacted to serve various functions, to make citizens aware of specific illnesses, to set up medical institutions and to control the health sector's human capital. Having numerous acts and laws that concerned with public health, Malaysia arguably could be said as devoted to protecting the right to health (Razak & Nordin, 2017). The legislations that can be seen to provide for the right to health in Malaysia are the *Penal Code* (Act 574) (Malaysia); the *Criminal Procedure Code* (Act No. 593 of 2012) (Malaysia); the *Local Government Act 1976* (Act 171) (Malaysia) and the *Town and Country Planning Act* (Act No. 172 of 1976) (Malaysia) which contain provisions with elaborations on the right to health. According to Section 13(1) of the *Food Act 1983* (Act No. 281 of 1983)

(Malaysia), it provides that any person shall be liable for selling or preparing food with poisonous ingredients that may harm and cause injury (Section 13(1) of the *Food Act 1983* (Act No. 281 of 1983) (Malaysia).

For instance, the *Hydrogen Cyanide Act 1953* (Ordinance No. 22 of 1953) (Act 260) (Revised 1981) (Malaysia) states in Section 4 that the Minister concerned should be informed of any accident which occasions the loss of human life or personal injury. In terms of charges for medical treatment, one law that has been enacted and gazetted by the Federal Government of Malaysia is the *Fees (Medical) (Cost of Services) Order 2014* (Malaysia) that can be charged for foreign patients who are treated in the hospitals in Malaysia. Whereas, the *Prevention and Control of Infectious Diseases Act* (Act No. 342 of 1988) (Malaysia) provides that an authorised officer is governed by this Act to medically examine any vehicle, person and animal at any time upon its arrival in Malaysia. The *Environmental Quality Act* (Act No. 127 of 1974); *Human Tissues Act* (Act No.130 of 1974) (Malaysia); *Protection of Public Health Ordinance 1999*(Malaysia); *Medical Act* (Act No. 50 of 1971) (Malaysia); *Telemedicine Act* (Act No. 564 of 1997) (Malaysia); *Child Act* (Act No. 611 of 2001) (Malaysia) and the *Mental Health Act* (Act No. 615 of 2001) (Malaysia) also provide for the protection of public health which can be seen to uphold the right to health of people.

According to the Malaysian Medical Association (MMA), there are eight of patient's right that need to be protected (Malaysian Medical Association (MMA, 2017). First, the right to health care and humane treatment. Second, the right to choice of care. Third, the right to acceptable safety. Fourth, the right to adequate information and consent. Fifth, right to redress of grievances. Sixth, the right to participation and representation. Seventh, right to health education. Eighth, the right to a healthy environment (Malaysian Medical Association (MMA), 2017). This guideline can be seen that there is an effort that in Malaysia, there is a paradigm that wants to protect the right of the health of the patients in private and public hospitals.

In analysing, what can be experiential about the above laws and guideline is that the government of Malaysia does protect the right to health by regulating certain activities that may have an effect on public health in general. At the same time, all these laws only touch the surface of the right to health, especially in relation to public health. There is no laws or regulations in Malaysia that specifically mentioned and specifically protecting the right to health within the scope of the right to life of the people. The issue of whether patients have adequate right to health is very subjective and need a proper yardstick to measure. So far, there is no specific mention that the patients have adequate right to health. Therefore, there next issue of whether the hospitals legally bound to follow the right to health of the patients still vague. But, according to the literature, the rights to health, which arguably stated under the right to life and human rights, must be

respected. It appears that the right to health of the people, including hospital patients in Malaysia is protected in very general under the capacity as a person living in Malaysia. Their rights should be protected as they have human rights and right to life as a human being. Plus, according to Zahir et al. (2019a; 2019b) individuals have rights towards health care and medical treatment (Zahir et al., 2019a; Zahir et al., 2019b).

RIGHT TO HEALTH IN THE CONTEXT OF COVID-19

Every year an expected 290,000 to 650,000 people pass away in the world due to complications from seasonal influenza (i.e. flu) viruses (Worldometers, 2020). This amount tallies to 795 to 1,781 deaths per day due to the seasonal flu (Worldometers, 2020). Today, as we have noted, the World Health Organization (WHO) has announced that an outbreak of the Covid-19 viral disease (Coronavirus Disease 2019), first detected in Wuhan in December 2019, had reached a global pandemic level on 11 March 2020. In reality, Covid-19 is a new infectious disease caused by a new coronavirus first described in December 2019 whereas, Coronaviruses are a family of viruses known to cause respiratory infections on the human being. By middle of May 2020, more than 150 countries registered cases of Covid-19, including Malaysia, and more than 200,000 cases worldwide were identified by the WHO. Based on the data, more than 7,000 people had passed away, and the numbers were continuing to increase at a shocking rate. By the middle of May 2020, Covid-19 is affecting 213 countries and territories around the world and two international conveyances. In fact, 4,574,208 coronavirus cases, 305,055 deaths and 1,727,869 recovered in the world (Worldometers, 2020). Quoting trepidations with "the alarming levels of spread and severity," the WHO called for governments to take vital and aggressive action to halt the spread of the virus (Human Rights Watch, 2020).

As anxieties raise over how the coronavirus crisis can threaten human rights around the world, the UN calls on countries to adopt a more supportive, worldwide and human rights-based approach to the pandemic (United Nations, 2020). Everybody has the right to health (United Nations, 2020). For instance, Advance Medical Directive (AMD) (also known as "Arahan Perubatan Awal" (APA) in the Malay language) makes an individual has a voice relating to his or her health in circumstances when he or she no longer has control over what is being done to him or her (Zahir, 2017; Zahir et al., 2017a; Zahir et al., 2017b; Zahir et al., 2019a). A document specifying the types of treatment that a patient will allow being administered to him and those that are not allowed when he has become incapacitated is AMD (Zainudin et al., 2015). As a consequence, AMD is a guideline that empowers a patient to maintain his or her right to make a decision as to what he or she wishes to do for care before he or she loses the opportunity to

do so (Sommerville, 1996). Therefore, he or she must be competent before making a decision regarding his or her health (Zahir et al., 2019b). This right to health shows that the individual plays roles relating to his or her health care using his or her autonomy. Jaafar et al. (2007) found that the right to health and principle of autonomy corresponded with its relation to Sustainable Development Goals 3 (SDG3) whereas maintaining a safe life and encouraging well-being for all, as it took healthcare as close as possible to where people lived and worked, which is a key part of the ongoing healthcare cycle (Jaafar et al., 2007). With the rapid spread of Covid-19, the Malaysian government has closely monitored the chain of positive cases and uphold the principle of patient's autonomy. Thus, contacts with positive cases are quickly screened while the public must keep a safe distance from the other and stay home to break the chain of the virus from spreading (Prime Minister's Office of Malaysia, 2020).

CONCLUSION

The literature shows health is a fundamental part of the enjoyment of human rights, and it is usually attached to the right to life. Whereas Covid-19 situation calls for the highest standard of health protection. With Covid-19 wrecking our communities, the time is now to have the discussions. Even for an individual who suffers from Covid-19, he is still has a basic right to health. Thus, health should be seriously considered as a human right at the national level as well as within the international legal framework to ensure that health is protected and is given adequate attention. Health, as a fundamental human right, is considered to be the highest attainable standard of living by international legal instruments. The seven principles of quality health services, according to WHO can be referred as to fulfil the quality of services with regard to healthcare in the hospitals in Malaysia. In the Malaysian context, although there are few laws and guideline that speak about health and healthcare for the people and patients but, no laws or regulations in Malaysia that specifically mentioned and specifically protecting the right to health within the scope of the right to life of the people. It is still important to denote to WHO, UDHR, ICESCR, ICCPR and *European Social Charter of 1961*, in which there is a need to protect the right to health which related to the right to life and linkage between health and human rights of all people that may include the patients in the hospitals. Thus, this is important to have a specific proper legal framework by applying international legal mechanism in order to address this issue.

ACKNOWLEDGMENT

The authors would like to thank the Ministry of Higher Education (Malaysia) for providing the research funding under FRGS/1/2014/SSI10/UKM/02/7, FRGS/1/2014/SSI10/UKM/02/6, GGP-2020-005 and special appreciation to the research group member on your expertise, Faculty of Law of UKM, UiTM and UNISZA, also Inovasi@UKM.

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Pertanika J. Soc. Sci. & Hum. 29 (S2): 233 - 252 (2021)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

A Meta-analysis of Integrated Internal Audit Management Effectiveness towards Business Sustainability

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ABSTRACT

This paper classifies the internal and external factors that influence the effectiveness of integrated internal audit management (IIAM) and how IIAM effectiveness affects business sustainability performance. This paper presents a meta-analysis and systematic literature review of previous academic research papers. This study used a comprehensive review of literature and content analysis to obtain information using the electronic databases, specifically ProQuest, Emerald and Scopus from the year of 2003 until 2020. The paper reviewed recently published articles on the integration of at least two out of three management systems (MSs), such as ISO 9001, OHSAS 18001 and ISO 14001. The findings from the research papers are presented according to the factors and outcomes examined. Many studies undertaken on the integration audit of management systems show that there are several internal factors (human resource capability, technological capability and quality capability) and external factors (regulator, customer and supplier) that affect the effectiveness of the integrated internal audit management. It is concluded that the use of integrated management system (IMS) has a positive impact on the firm's performance specifically on business sustainability. The findings indicated of internal and external factors, which are grounded on the identified theories (dynamic capabilities theory, stakeholder theory and contingency theory), having to consider and to understand the effectiveness and implications of integrated internal audit. Thus, based on the findings from previous research carried out and the requirement of IMS, this paper gives

ARTICLE INFO

Article history:
Received: 05 May 2020
Accepted: 12 March 2021
Published: 17 May 2021

DOI: https://doi.org/10.47836/pjssh.29.S2.16

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ISSN: 0128-7702
e-ISSN 2231-8534

directions for the effective way to integrate internal audits in manufacturing firms to achieve business sustainability.

Keywords: Business sustainability, effectiveness, integrated internal audit management, management systems, manufacturing firm

INTRODUCTION

As time evolves, the integrated management system (IMS) was introduced to improve organisational performance (Sa´nchez-Rodrı´guez & Martı´nez-Lorente, 2011). Park et al. (2010) proposed that business integration solutions should be developed to address the key questions of how to take advantage of management system standards based capabilities and improve the efficiency and reliability of business integration solution development. Karapetrovic and Willborn (1998) defined IMS as the unified processes with shared human, information, material, infrastructure, and financial resources that were executed to fulfil goals to satisfy different stakeholders. Rajendran and Devadasan (2005) advocated the importance of adopting integrated auditing standards including the Occupational Safety and Health Management Systems (OHSAS), Quality Management System (QMS) and Environmental Management System (EMS).

The establishment of IMS (including internal audit) is significant as the number of studies in this area has increased from time to time (Nunhes et al., 2016). IMS audits or integrated internal audit management (IIAM) present more effective management systems (MSs) that can reduce bureaucracy, save time and enable more competent adoption of human, technical and financial resources (Abad et al., 2014; De Oliveira, 2013; Karapetrovic & Casadesús, 2009; Zeng et al., 2007). On the other hand, individual certification has increasingly seen as efforts wasted due to excessive bureaucratic, costs and redundancies.

Thus, this study was aimed to explore this matter further by identifying the factors-outcome of the effectiveness of IIAM to ensure business sustainability in the manufacturing industry. According to Mohammad et al. (2007), internal and external factors can be used to measure the critical success factors of IIAM implementation. Although some studies have analysed the factors contributing to effective audit (Beckmerhagen et al., 2004; Endaya & Hanefah, 2016; Karapetrovic & Willborn, 1998), to the best of our knowledge there is no literature report of empirical studies analysing the internal and external factors of integrated internal audit effectiveness.

This study has three main contributions. It combined deductive and inductive methods to identify top three internal factors and external factors primary used in the system of management standards. In all, there were 77 papers derived from reputable journals and used to explain how internal and external factors could be used to examine MSs. Lastly, the outcome of the IIAM effectiveness is discussed to address research gaps identified in previous literature.

The paper is organised as follows; first, a background on the factors that influenced the IIAM effectiveness is presented. This

is followed by the methodology section which explains the search strategy. The results show the factors contributed to the integrated internal audit management as well as the outcomes (business sustainability performance) with support of several theories and finally, in the conclusion section, the factors and outcome of the IIAM are discussed and direction for future research is proposed.

METHODS

Search Approach

The researcher followed four procedures deployed for scientific literature to find relevant works on this topic (Brandenburg et al., 2014; Zimmer et al., 2016). These procedures consist of searching scientific journals for key words (Tranfield et al., 2003), browsing particular journals (Zorzini et al., 2015), cross-referencing (Ang, 2014) and analysing reviews that are thematically familiar (Brandenburg et al., 2014). First, two sets of key word groups were used to conducted systematic search of abstract of papers indexed in the high ranked electronic databases, consist of ProQuest, Emerald and Scopus. The first group of key words comprised "audit" and "IMS", to identify integrated internal audit management. The second group contained the three MSs being studied (see Table 1). This is important to know that different works used different names for the same MSs (for example, IMS audit and integrated internal audit; ISO 9001 and Quality Management Systems (QMS)). Thus, several variations of the names of the standards were included in the search.

Scope of Search

Only articles from high impact journals were included in this review to ensure the reader obtained the true evidence from a scientific study. The scope was limited to empirical, case study and review papers which focused on the top three highly used methods. There are numerous qualitative studies (i.e, Ciliberti et al., 2011) that have significant impact on studies on MSs. Beckmerhagen et al. (2004) provided evidence from two case study on the effect of MSs on the effectiveness and firm's performance. In the meantime, it is important to note that this study's was limited to the most known quality, environmental and social MSs (Table 1).

Table 1
Overview of management system standards considered in this paper

Standard	Description	Developer	Type
ISO 9001	Standards for Quality Management Systems	International Organisation for Standardisation (ISO)	Quality
OHSAS 18001	Standard for Occupational Health and Safety	A group of national standards bodies, certification bodies and consultancies	Social
ISO 14001	Standards for Environmental Management Systems	International Organisation for Standardisation (ISO)	Environmental

Adapted and adopted from Tuczek et al. (2018)

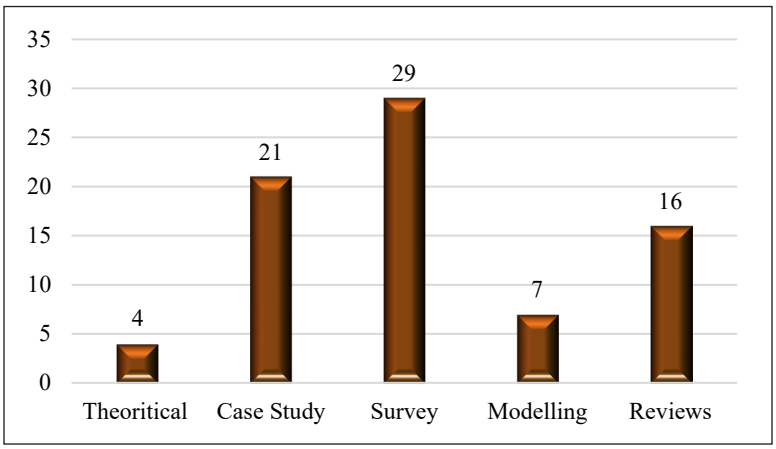

Figure 1. Research methodologies applied

The 77 papers derived from the database were divided according five main research methodologies, surveys, theoretical papers, case studies, literature reviews and modelling papers, as shown in Figure1. It can be observed that 38 of the selected papers applied empirical, case study and review papers.

Search Results

During the first search a total of 644 results, comprising papers published between 2003 and 2020 indexed in ProQuest, Emerald and Scopus databases were found. The papers were screened to refine the search and subsequently, 77 papers which fit the objectives of this review were retained. Further screening found 31 quantitative and case study papers with a comprehensive definition of IIAM which were then used for further analysis.

The researcher cross checked the latest review papers on MSs to determine the completeness of the set of papers, (i.e. Burhan, 2018; Ikram et al., 2020; Heras & Boiral, 2013; Rebelo et al., 2014). The cross-referencing yielded 7 additional papers. In total, 38 papers were considered and analysed in this paper. The articles presented in this paper address two or more standards. The most analysed standards are ISO 14001 (36 papers), ISO 9001 (34 papers) and OHSAS 18001 (21 papers) where some papers used to analyse combined standards together. The summary of standards used in previous studies as stated in Table 2.

A total of 21 papers have applied integrated ISO9001, ISO14001 and OHSAS18001 to measure business performance, specifically business sustainability/ sustainable development. Thus, in this paper, the focus will be on two out of these three standards with relate to quality, environmental and social MSs.

Approach to Analysis

The factors were then clustered into two categories to conduct more detailed analysis and to ensure a more stream-lined presentation of the findings.

Table 2
Summary of standards used in previous studies

No.	Authors	Year	QMS (ISO9001)	EMS (ISO14001)	OHSAS (ISO18001)	Others
1	Ikram et al.	2020	√	√	√	ISO 26000 ISO 22000
2	Burhan	2018	√	√	√	
3	Odigie et al.	2017			√	
4	Bernardo et al.	2017	√	√		
5	Muzaimi et al.	2017	√	√	√	ISO31000
6	Domingues et al.	2016	√	√	√	
7	Rebelo et al.	2016	√	√	√	
8	Nunhes et al.	2016	√	√	√	
9	Bernardo et al.	2015	√	√		
10	Hoy and Foley	2015	√			ISO27000
11	Savino and Batbaatar	2015	√	√	√	
12	Kauppila et al.	2015	√	√	√	ISO45000
13	Ahsen, Anette von	2014	√	√	√	
14	Chee Yew et al.	2014	√	√		Supply Chain
15	Simon et al.	2014	√	√		
16	Mohamad et al.	2014	√	√	√	Energy
17	Abad et al.	2014	√	√	√	
18	Domingues et al.	2014	√	√	√	
19	Rebelo et al.	2014		√	√	ISO31000
20	Simon et al.	2013	√	√		
21	Sampaio et al.	2012	√	√	√	
22	Simon et al.	2012	√	√		
23	Simon and Yaya	2012	√	√		
24	Simon et al.	2011	√	√		
25	Bernardo et al.	2011	√	√		
26	Asif et al.	2011	√	√		IS010001
27	Zeng et al.	2011	√	√	√	
28	Asif et al.	2010	√	√	√	
29	Tarí and Molina	2010	√	√		
30	Bernardo et al.	2009	√	√		
31	Salomone	2008	√	√	√	
32	Rasmussen, JM	2007	√	√	√	
33	Mohammad et al.	2007	√	√		
34	Jørgensen et al.	2006	√	√	√	
35	Zutshi and Sohal	2005	√	√	√	
36	Bamber et al.	2004	√	√	√	
37	Sroufe, Robert	2003	√			
38	Beckmerhagen et al.	2003	√			TQM
	Total		34	36	21	

1. Internal factors focus on the reasons for firms to use their resources to compete with other firms in their sector. In this review, dynamic capabilities theory (DCT) applied to govern the internal factors that affect the firm performance (outcome).
2. External factors determine a firm's actions based on the external view. This is done by analysing how different stakeholders influence the implementation of integrated audit and IMS. Freeman (1984) highlighted that stakeholders are refer to those *who provide support to ensure the livelihood of an organisation.* In this examination, stakeholder theory used to explain the influence of external factors on business decisions.

According to Lozano et al. (2015), clustering refers to the process of grouping factors with overlapping assumptions. In this paper, the clusters have been established with considers the individualities of each MSs. In this paper, the significance of the internal factors highlighted to identify which capabilities in each organisation that affect most on the effectiveness and performance. Furthermore, for external factors, the stakeholder theory is used to examine whether theories on the role of the external environment (customers, suppliers, regulators, traders, communities etc.) in the diffusion and adoption of IIAM.

Moreover, contingency theory was used to explain firm performance as well as to highlight the relationship between firms' strategy (IIAM) and business sustainability (performance/ outcome). Fundamentally, this theory stipulates an organisation's structure could be changed so that it can keep up with changes in the contextual factors to achieve higher performance (Ismyrlis & Moschidis, 2015).

RESULTS

The Effectiveness of Integrated Internal Audit Management (IIAM)

Success in a progressive and dynamic market could be determined by various factors. According to Soh and Markus, (1995), these factors are product quality, speed to market, and competitors' capability. As the global standard, MSs are intended to ensure high quality goods and services in the relationship between suppliers and customers (ISO, 2009). In this regard, the effectiveness of MSs implementation has generated the interest of scholars worldwide (Casadesús et al., 2008).

According to Zeng et al. (2010), the first step for integration is by improving the understanding and common use of systems. The general strategies adopted by an organisation should be combined with different MSs in order to achieve effectiveness. The study examined internal and external factors influencing IMS implementation. It focused on the several internal factors, which were organisational structure, human resources, company culture and understanding and perception. It also examined several external factors, specifically certification bodies, stakeholders

and customers, technical guidance and institutional environment. A multi-level synergy model made up organisational structural-resource-cultural synergy, strategic synergy, and documentation synergy was proposed to ensure the implementation of IMS (Zeng et al., 2010).

Past studies have discussed different integration approaches (Leopoulos et al., 2010). They have presented standardised MSs that are integrated with other systems (Beckmerhagen et al., 2003; Castka & Balzarova, 2008; Matias & Coelho, 2002). Other approaches are based on stakeholders requirements (Asif et al., 2010) as well as quality and environmental determiners and social risks (Labodová, 2004). In the meantime, the integrated approach discussed (Badreddine et al., 2009) is grounded on the general process enterprise model. It was also shown that the integration of MSs could have greater benefits to the firms.

Internal Factors of IIAM

Many studies have discussed motivational factors of ISO MSs implementation, and they can be categorised as internal and external motives (Arauz & Suzuki, 2004; Boiral & Amara, 2009; Burhan, 2018; Gotzamani & Tsiotras, 2002; Ikram et al., 2020; Llopis & Tari, 2003). Boiral, (2003) suggested that internal motivation factors were linked to building an effective quality assurance programme.

According to Newbert (2007), a firm controls its resources, such as technology, human resource, quality, innovation, cost reduction and knowledge capabilities. Such process allows firms to plan and execute strategies to enhance its organisational efficiency by improving firm performance (Barney, 1991). Teece et al., (1997) described that by using the dynamic capabilities theory, where organisation could combine, construct and modify their resources and competencies as strategic options. Recent meta-analyses of past empirical studies found that DCT was able to provide a more accurate description of firms' performance compared to RBV (Fainshmidt et al., 2016).

In this study, the literature review and content analysis were conducted to identify the internal factors that contribute to the internal audit process and IIAM effectiveness. Table 3 presents the analysis of the main literature review the internal factors from 38 published articles in peer-reviewed journal. The purpose of the content analysis is to identify the most common internal factors cited by previous studies.

Table 3 shows that past studies have reported various internal factors. Table 3 presents the distribution of the internal factors influencing the internal audit process and IIAM effectiveness. Therefore, these internal factors are considered as the major influences of audit process and IIAM effectiveness.

External Factors of IIAM

External motivation factors, on the other hand, focus on boosting a firm's quality reputation and image by encouraging organisations to acquire ISO certification in order to fulfil the customer and stakeholder expectations.

Table 3
Content analysis of the internal factors of IIAM

No.	Authors	Year	Human resources	Technology	TQM/ Quality Tools	Material/ Resources	Culture	Time	Management Support	Financial	Firm structure
1	Ikram et al.	2020	√			√	√				
2	Burhan	2018	√		√				√		
3	Odigie et al.	2017	√		√						
4	Bernardo et al.	2017	√	√				√	√		
5	Muzaimi et al.	2017	√			√	√	√			√
6	Domingues et al.	2016	√	√							√
7	Rebelo et al.	2016	√	√			√		√	√	√
8	Nunhes et al.	2016	√	√				√		√	
9	Bernardo et al.	2015	√					√		√	
10	Hoy and Foley	2015		√		√					
11	Savino and Batbaatar	2015	√	√	√	√	√				
12	Kauppila et al.	2015				√					
13	Ahsen, Anette von	2014			√						
14	Chee Yew et al.	2014	√								
15	Simon et al.	2014	√			√		√			
16	Mohamad et al.	2014	√		√	√	√		√		
17	Abad et al.	2014	√								√
18	Domingues et al.	2014	√	√		√			√	√	
19	Rebelo et al.	2014	√		√	√	√				√
20	Simon et al.	2013	√	√				√			
21	Sampaio et al.	2012	√	√	√		√			√	√
22	Simon et al.	2012	√			√	√	√	√		
23	Simon and Yaya	2012	√				√				
24	Simon et al.	2011	√					√			
25	Bernardo et al	2011	√			√		√			
26	Asif et al.	2011	√	√		√			√	√	
27	Zeng et al.	2011	√				√			√	√
28	Asif et al.	2010	√	√	√			√			
29	Tarí and Molina	2010		√	√	√			√		
30	Bernardo et al.	2009	√	√	√	√				√	
31	Salomone, Roberta	2008	√		√		√	√		√	
32	Rasmussen, JM	2007	√	√	√		√				√
33	Mohammad et al.	2007			√	√			√		
34	Jørgensen et al.	2006			√		√	√	√		
35	Zutshi and Sohal	2005		√			√		√		
36	Bamber et al.	2004		√	√						
37	Sroufe, Robert	2003		√							
38	Beckmerhagen et al.	2003	√	√	√						
	Total		29	18	16	15	14	12	11	9	8

Source: Own elaboration

The stakeholder theory helps firms to decide how to respond strategically to critical demands from stakeholders that could lead to organisational success. It offers a strong base in the development of framework to explain how a firm decides to achieve the three fundamental aspects of business sustainability (Freeman, 1984; Henriques & Sadorsky, 1999; Sharma & Henriques, 2005).

External stakeholders (shareholders, customers/clients, distributors, regulatory agencies and community members) play an important role in helping an organisation reaches business sustainability (Delmas, 2001). At the same time, sustainability can be achieved by ensuring good relationship between principal stakeholders (Delmas & Montiel, 2008). It was suggested that the integration further enhanced coordination with external stakeholders, such as suppliers, customers, and regulators (Asif et al., 2010).

In this study, content analysis was done to recognise the external factors that contribute to the internal audit process and IIAM effectiveness. Table 4 presents an analysis of the external factors quoted identified from the 38 published articles in peer reviewed journals. This is to identify the external factors regularly, as cited in the previous studies.

As shown in Table 4, there are many external factors related to the IIAM effectiveness in the audit process. Table 4 explains the circulations of the external factors that influence the audit process and IIAM effectiveness. In addition, as asserted by Docking & Dowen, (1999), ISO certification also provides strong evidence that the firms can offer high-quality products.

Outcome of IIAM Effectiveness

The MSs certification contributes to higher organisational performance, thus led to strong competition among industry (De Oliveira, 2013). In addition, MSs are usually implemented in systems with the similar philosophy, for instance, adopting the PDCA cycle to ensure continuous improvement, as well as principles and values.

According to ISO (2008), MSSs implementation could lead to the sub-optimisation of systems. Thus, it is suggested for companies to combine and implement the requirements from several different MSSs to improve organisational efficiency. Here, it can be observed that SMEs implement integrated management systems (IMSs) due to the external pressures from the environment they are in. MSSs aim to support organisations achieve sustainability based on their environmental, social and economic needs in a balanced and sustainable way.

Furthermore, apart from focusing on total system improvement, IIAM benefits include lower operational cost, more efficient allocation of materials, information and human resources, and provide a comprehensive problem-solving approach to increase efficiency of other interrelated systems. European countries like Spain and Denmark have such experiences that are worth observing (Jørgensen et al., 2006). Furthermore, IIAM is executed by

Table 4
Content analysis of the external factors of IIAM

No.	Authors	Year	Customer	Stakeholder	Supplier	Regulators	Employees	Management	Community	Distributor	Banks/ Trade	Competitor	Contractor	Market
1	Ikram et al.	2020				√		√	√					
2	Burhan	2018				√								√
3	Odigie et al.	2017	√		√	√								
4	Bernardo et al.	2017	√	√		√								
5	Muzaimi et al.	2017	√	√										
6	Domingues et al.	2016	√	√	√		√							
7	Rebelo et al.	2016	√		√	√			√	√	√	√		
8	Nunhes et al.	2016	√			√								
9	Bernardo et al.	2015	√	√		√								
10	Hoy and Foley	2015		√										
11	Savino and Batbaatar	2015	√		√	√	√							
12	Kauppila et al.	2015	√	√	√								√	
13	Ahsen, Anette von	2014	√	√										
14	Wong et al.	2014	√	√	√			√						
15	Sampaio et al.	2014	√				√							
16	Simon et al.	2014	√	√										
17	Mohamad et al.	2014		√										
18	Abad et al.	2014		√		√		√						
19	Domingues et al.	2014	√		√	√	√		√					
20	Rebelo et al.	2014	√	√	√	√								
21	Simon et al.	2013	√	√			√							
22	Simon et al.	2012		√										
23	Simon and Yaya	2012	√	√			√							
24	Simon et al.	2011												
25	Bernardo et al.	2011		√										
26	Asif et al.	2011	√		√	√	√		√					
27	Zeng et al.	2011	√	√		√			√					
28	Asif et al.	2010	√		√	√								
29	Tarí and Molina	2010	√	√				√						
30	Casadesus et al.	2009		√										
31	Salomone	2008	√		√				√					
32	Rasmussen	2007	√		√			√						
33	Mohammad et al.	2007		√				√						
34	Jørgensen et al.	2006	√		√		√		√					
35	Zutshi and Sohal	2005	√	√	√	√	√		√					
36	Bamber et al.	2004	√	√	√	√		√						
37	Sroufe, Robert	2003		√										
38	Beckmerhagen et al.	2003		√				√						
	Total		26	24	15	15	9	8	8	1	1	1	1	1

Source: Own elaboration

combining financial audit sub-systems health and safety, environmental, ergonomics audit standards with the best audit practice. In this light, companies are required to share time, audit teams, plans and the reports. Various authors that have mentioned and discussed the integration of MSs and how it effects the business sustainability are stated in Table 5:

Yang and Yang (2011) posited that value creation could determine the success of an organisation. Contingency approaches assume that performance is dependent on different factors like human resource, firm size, business strategy, organisational structure, technology and ownership culture. IIAM can be considered as a business strategy that could improve operational performance and strategic flexibility (Asif et al., 2010).

Contingency theory is commonly used to study organisations. In essence, the theory states that to achieve high performance, organisations will change their structures so that they are in line with changing contextual factors (Donaldson, 2001). Sousa and Voss (2008) further described that such studies theoretically and practically contributed by identify significant contingency variables that distinguished different contexts, grouping contexts based on contingency variables and determining the most effective internal organisation design strategies in the dominant group.

Earlier studies on the effectiveness of IIAM and IMS outcomes have guided this study to ascertain the benefits of IIAM. It is suggested that IIAM implementation has different outcomes in different contexts. Table 6 summarises the review of literature of works focusing IIAM effectiveness outcomes.

According to reviews done, eleven key outcomes were identified. These are several performance measures according to past studies. Therefore, in this study, business sustainability was chosen as the outcome.

Business Sustainability Performance

'Sustainability' is a term established by Elkington (1994) which reflects corporate

Table 5
Discussion on IMS and business sustainability

Author	Year	Discussion
Ikram, Sroufe and Zhang	2020	The implementation of Integrated Management Systems (IMS) is a requirement for organisations striving to become more competitive and sustainable.
Burhan	2018	IMSs (including audit) used to resolve the risks in comprehensive point of view. Thus, these initiatives may lead to constructive contributions to organisational performances and sustainable developments.
Savino and Batbataar	2015	The relationship between IMS and operational performance; IMS resources, including assets, cooperation Effectiveness of operational resources and Cross-functional IT systems are significant. It is acknowledged that human resources are important substance for IMS success, in addition to other aspects like pollution control, investments, equipment maintenance and integrated audits which are linked to competitive advantage and generate higher profits.

Source: Adapted and adopted from Asif et al. (2011)

Table 6
Content analysis of the outcome of IIAM

No.	Authors	Year	SD/ BS	IMS Benefits	Improvement	Effectiveness	BP	OP	Assessment	CS	FP/ BSC	Innovation	TQM
1	Ikram et al.	2020	√	√									
2	Burhan	2018	√										
3	Odigie et al.	2017			√		√						
4	Bernardo et al.	2017	√										
5	Muzaimi et al.	2017		√				√					
6	Domingues et al.	2016							√				
7	Rebelo et al.	2016	√										
8	Nunhes et al.	2016	√										
9	Bernardo et al.	2015	√				√						
10	Hoy and Foley	2015				√							
11	Savino and Batbaatar	2015				√		√					
12	Kauppila et al.	2015	√				√						
13	Ahsen, Anette von	2014	√								√		
14	Wong et al.	2014	√										
15	Sampaio et al.	2014							√				
16	Simon et al.	2014			√	√							
17	Mohamad et al.	2014	√										
18	Abad et al.	2014		√			√						
19	Domingues et al.	2014		√	√								
20	Rebelo et al.	2014	√					√					
21	Simon et al.	2013		√									
22	Simon et al.	2012		√									
23	Simon and Yaya	2012				√						√	
24	Simon et al.	2011			√								
25	Bernardo et al.	2011			√								
26	Asif et al.	2011	√										
27	Zeng et al.	2011		√									
28	Asif et al.	2010				√				√			
29	Tarí and Molina	2010			√								
30	Casadesus et al.	2009		√									
31	Salomone	2008	√	√									
32	Rasmussen	2007					√		√				
33	Mohammad et al.	2007		√									
34	Jørgensen et al.	2006	√										
35	Zutshi and Sohal	2005		√									
36	Bamber et al.	2004			√								
37	Sroufe, Robert	2003						√					
38	Beckmerhagen et al.	2003				√							√
	Total		14	11	7	6	5	4	3	1	1	1	1

Note. SD= Sustainable development, BS= Business sustainability, BP= Business Performance, OP= Operational Performance, CS= Customer Satisfaction, FP= Financial Performance, BSC= Balanced Scorecard and TQM= Total Quality Management

perspectives on mitigating issues linked to the environment, the society and the economy. Today, many organisations across the globe are adopting different MSs to achieve business sustainability (Turk, 2009). It combines the customer's supply chain practices, supplier's environmental aspirations, and the certification bodies' aspirations (Nawrocka, 2008). Meanwhile, numerous organisations implemented different MSs alongside their EMS either due to market demand or other motivations. In this right, many organisation with ISO 14001 certifications also adhere to different standards like ISO 9001 (ISO, 2008) and ISO 18001 (Karapetrovic & Casadesús, 2009).

Business sustainability can also reflect a company's good image and some researchers have recognised the significant contribution of IMS to the business, including operational efficiency, cost savings, higher reputation, higher customer satisfaction, and improve motivation among employees (Asif et al., 2011; Asif et al., 2010; Casadesús & Karapetrovic, 2005; Karapetrovic & Willborn, 1998b; Salomone, 2008; Zeng et al., 2007; Zutshi & Sohal, 2005).

DISCUSSION

Internal Factors of IIAM Effectiveness

There are various internal factors reported by past studies (Ahsen, 2014; Bernardo et al., 2017; Domingues et al., 2015; Hoy & Foley, 2015; Nunhes et al., 2016; Rebelo et al., 2016; Savino & Batbaatar, 2015; Simon et al., 2014; Ikram et al., 2020). Table 7 illustrates the distribution of internal factors influencing the audit process and IIAM effectiveness. Among these factors, three of the most discussed factors are human resources, technological and quality capabilities. Thus, this study

Table 7
Summary of top three internal factors of IIAM

Internal Factors of IIAM Effectiveness	Discussion	Studies
Human Resources	• Most valuable resource; • Skill and competencies; • Appropriate skill, expertise and technique; and • Effective organisation.	Santos, 2002; Robelo et al., 2014; Arena et al., 2009; Soh et al., 2011 and Ikram et al., 2020.
Technology	• Evolution of IT architecture; • Integrated approach (technology and manual) leads to efficiency and effectiveness; • Technology will reduce the number of auditor involved	Ross, 2003; Venkatesh, 2006; Chaney & Ki, 2007; Lazarine, 2009 and Brand et al., 2011.
Quality	• 5S as philosophical, organisational capability and strategic way; • 5S approach is a way of doing business that required behavioural changes; • Other quality tools can be practice simultaneously such as TPM, JIT, Kaizen and EMS	Ho, 2012; Yusof et al., 2014; Bamber et al., 2002; Tice et al., 2005 and Vais et al., 2006.

considered these internal factors as the main determiners of audit process and IIAM effectiveness. Table 7 presents the top three internal factors of IIAM.

External Factors of IIAM Effectiveness

The review had identified numerous external factors related to the IIAM effectiveness in the audit process (Asif et al., 2011; Bamber et al., 2004; Jørgensen et al., 2006; Kauppila et al., 2015; Rebelo et al., 2016; Sampaio et al., 2014; Simon et al., 2013; Zeng et al., 2010; Zutshi & Sohal, 2005; Ikram et al., 2020). Table 8 explains that the circulation of the external factors that influence the audit process and IIAM effectiveness. Among the eleven factors, the influence of customers, suppliers and regulators respectively were the top three factors highlighted in the previous research. Thus, this study intended to include these external factors as the major effects of audit process and IIAM effectiveness. Table 8 details these factors in the main discussion of the audit process and IIAM effectiveness.

Outcome of IIAM Effectiveness

According to reviews done (Table 6), a total of eleven key outcomes have been identified in this study. Among these outcomes, business sustainability is one of the top outcomes highlighted in previous studies. Thus, this study intended to further examine how IIAM effectiveness affects the business sustainability in the long run.

As mentioned by Dudok van Heel (2001), sustainable development could be assured when organisations combine sustainable development with conventional business strategies, specifically integrated internal audit. On the other hand, there is still a lack of frameworks for the integration of sustainable development and mainstream business processes and this situation has hindered the adoption of IMS at the organisational level (Rocha et al., 2007).

Table 8
Summary of top three external factors of IIAM

External Factors of audit process and IIAM Effectiveness	Discussion	Studies
Regulator	• Government policy and pressure; and • Standardisation of business environment.	Guler et al. (2002); Carlsson & Carlsson (1996); Vloeberghs & Bellens (1996); Jones et al. (1997); Delmas (2001); Asif et al. (2010).
Customer	• Relationship management with principal stakeholders is a key strategic factor; • Integration and standard will increase stakeholder satisfaction.	Delmas & Montiel (2008); Bamber et al. (2002); Bernardo et al. (2009); Kassinis & Vafeas, (2006); Delmas (2001); Asif et al. (2010).
Supplier	• Supplier selection decision helps firms to maintain a strategically competitive position.	Govindan, Khodaverdi & Jafarian (2013); Bernardo et al. (2009); Kassinis & Vafeas, (2006); Asif et al. (2010); Busse, Schleper, Niu & Wagner (2016).

There is a need for a systematic approach to accommodate different management system standards available (Jonker & Karapetrovic, 2004). In this regard, conceptually, instead of looking at the problematic component separately, integrated management systems tackle problems as a whole

CONCLUSION

Environmental, quality, and social MSs play a significant role in the current business climate. While there are numerous academic works that have examined different facets of management system standards, the meta-analyses of the factors and outcomes of IIAM effectiveness in this context are not allied. There are three main contributions of this paper. This paper identified the three most common used internal factors and external factors in examining MSs by combining deductive and inductive methods. In this light, the review found 77 articles from reputable journals on the use of internal and external factors in MSs. Based on these articles, the study has discussed the effectiveness of IIAM in address research gaps as discussed in Rebelo et al., (2016) and future topics for future research (Nunhes et al., 2016).

The paper focuses on well-established and prominent standards of MSs, specifically ISO 9001, ISO 14001, and OHSAS 18001. Thus, this review is limited to papers related to the implementation of these standards which were retrieved from specific electronic databases (ProQuest, Emerald and Scopus). To overcome this limitation, this study suggests that future studies could cover other MSs, including ISO26000, ISO27000, ISO31000 and others. These MSs have also become part of firm pressure to achieve business sustainability.

Besides the limitation, this paper could help researchers and practitioners in various ways. It helps structure the management system standards domain in accordance to different management theories. This paper has also highlighted possible future research direction and present promising theories that could be applied to explore these research paths. Moreover, it presents a structured overview of high-quality empirical works addressing the adoption, transmission and control of MSs standards. In other words, it helps guide the decision-making on the adoption and implementation of standards.

ACKNOWLEDGEMENT

This work is supported and funded by Malaysia Productivity Corporation (MPC). The authors of this paper would like to thank the reviewers for their time, comments and suggestions which contributed to the preparation of the final version of this paper for publication.

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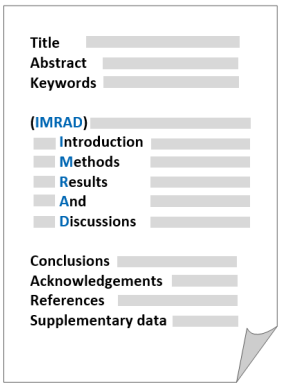

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	Journals	
Journal article with 1-2 authors	**Information prominent' (the author's name is within parentheses):** … (Al-Shboul & Maros, 2020) … Or **'Author prominent' (the author's name is outside the parentheses):** Al-Shboul and Maros (2020) …	Al-Shboul, Y., & Maros, M. (2020). The high and low-context communication styles in refusal strategies by Jordanian Arabic and American English speakers. *Pertanika Journal of Social Sciences and Humanities, 28*(3), 2063-2080.
Journal article with 3 or more authors	*For all in-text references, list only the first author's family name and followed by 'et al.'* **Information prominent' (the author's name is within parentheses):** … (Khajouei et al., 2018) … … (Yusop et al., 2020) … Or **'Author prominent' (the author's name is outside the parentheses):** Khajouei et al. (2018) … Yusop et al. (2020) …	Khajouei, R., Abbasi, R., & Mirzaee, M. (2018). Errors and causes of communication failures from hospital information systems to electronic health record: A record-review study. *International Journal of Medical Informatics, 119*(January), 47-53. https://doi.org/10.1016/j.ijmedinf.2018.09.004 Yusop, F. D., Ab Ghaffar, F., Danaee, M., Firdaus, A., Hamzaid, M. A., Abu Hassan, Z. F., Senom, F., Ebrahim, N. A., Bonn, B. Y., & Chen, Y. M. (2020). Two decades of research on early career faculties (ECFs): A bibliometric analysis of trends across regions. *Pertanika Journal of Social Sciences and Humanities, 28*(1), 325-342.
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Journal article with missing information	**Information prominent' (the author's name is within parentheses):** … (Bajaj et al., 2014) … … (Jdaitawi, 2015) … … (Nastasa & Farcas, 2015) …	**Missing volume number** Bajaj, G., Deepa, N., Bhat, J. S., D'Souza, D., & Sheth, P. (2014). Self-efficacy and verbal fluency — does age play a role? *Healthy Aging & Clinical Care in the Elderly,* (6), 17-24. http://dx.doi.org/10.4137/HACCE.S14292

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Published Dissertation or Thesis References	… (Solomon, 2016) ... Or … Solomon (2016) ...	Solomon, M. (2016). *Social media and self-evaluation: The examination of social media use on identity, social comparison, and self-esteem in young female adults* [Doctoral dissertation, William James College]. ProQuest Dissertations Publishing. https://search.proquest.com/ openview/7d66a63f277a84a64907db68fff991ba/1?pq-origsite=gscholar&cbl=18750&diss=y
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Pertanika Journal of Social Sciences & Humanities
Vol. 29 (S2) 2021

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