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FOREWORD BY THE EDITOR

Alhamdulillah

2020 has been truly life changing for everyone. With the COVID-19 pandemic coming into existence, a lot of things were shifted online, including the publication of this volume. From recruitment of the editorial board to finalizing the articles with the authors, everything was done virtually. With the MCO being announced in the middle of the semester, the 2020 academic year was conducted virtually; from classes, exams to the publication of this volume as well.

The challenges that this volume went through were astonishing. The editorial team faced many hurdles in making this issue a reality, all the while never physically meeting up.

Alhamdulillah, we still managed to get submissions from both students and lecturers. Each article in this volume explores some sort of relevant aspect in 2020. From digital aspects such as artificial intelligence, one's constitutional right to privacy to mental health law; all these were big issues in the year. The impact of COVID-19 was also explored in one article, particularly on how businesses were impacted due to the implementation of MCO.

The law of evidence and crime is also discussed in this issue as well - contributed by one lecturer and two students. The Islamization mission of IIUM is also still upheld in this issue as Islam as the religion of the Federation in the Constitution is explored in a different angle by three authors this time.

I would like to thank the editors and authors who have dedicated their time into making this volume a success. Some of them even had graduated into working life but still found time to complete this volume. To this, you have my utmost gratitude. To Ms Nurul Hanani, thank you for always assisting me when I needed it the most.

I would also like to thank our advisors and also the Kulliyyah for their continuous support, that came in various forms, in making this journal a success. From Prof Dr. Farid Sufian, Assoc Prof Dr Majdah Zawawi and Assoc Prof. Dr Maizatun Mustafa, you have my utmost thanks and gratitude.

With this, I hope this volume inspires all AIKOL students to seek knowledge and breaking down barriers, and also be part of the intellectual discourse.

I would like to end this note with a hadith reported by Anas ibn Malik:

"Whoever goes out seeking knowledge is in the way of Allah until he returns"

Sunan al-Tirmidhī 2647

Amirah Fatimah Ahamed
Editor to the Law Majalla
Volume 7, 2020

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CONTENTS

LAW ON THE LEGAL PROTECTION FOR THE MENTALLY DISORDERED IN MALAYSIA

Dr. Mazlena Mohamad Hussain[1]

"One small crack does not mean that you are broken, it means that you were put to the test, and you didn't fall apart." — Linda Poindexter

ABSTRACT

Persons who are suffering from mental illness are often known as mentally disordered persons. They have been commonly misunderstood by the society as dangerous, prone to violence, incurable and a threat to the society. Consequently, they are discriminated against by many, including their own family members. The truth is that not all mentally disordered persons are dangerous and most mental illnesses are curable. Nevertheless, the discrimination and stigma associated with mental disorder have discouraged people from seeking the necessary treatment. As far as the Malaysian laws are concerned there are several laws, in particular the Mental Health Act 2001 and Regulations (MHA 2001) to address the needs of the mentally disordered persons. The MHA 2001 by comparison to the former Mental Disorders Ordinance 1952 is more 'wholesome' in addressing various aspects of mental disorder. The issue is whether the laws provided are adequate to both address the needs and provide proper protection to the mentally disordered persons. This paper seeks to identify the adequacy of MHA 2001 to protect the rights and provide adequate health care to the mentally disordered persons in Malaysia. In order to determine as such, not only we have to look at the provisions themselves, but we must also ascertain whether the laws provided for the mentally disordered persons are consistent with the standard set by the World Health Organization.

Keywords: Mental disorder, mental health law, insanity.

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ABSTRAK

Mereka yang menderita penyakit mental sering dikenali sebagai orang yang mengalami gangguan mental. Mereka telah disalah faham oleh masyarakat sebagai berbahaya, ganas, tidak dapat ditolong dan dilihat sebagai ancaman terhadap masyarakat. Sebagai akibatnya, mereka berdepan dengan diskriminasi oleh orang ramai termasuklah anggota keluarga mereka sendiri. Hakikatnya, bukan semua orang yang mengalami gangguan mental berbahaya dan kebanyakan penyakit mental dapat dibantu dan diubati. Walau bagaimanapun, diskriminasi dan stigma yang dikaitkan dengan gangguan mental telah melemahkan semangat mereka daripada mendapatkan rawatan yang diperlukan. Terdapat beberapa undang-undang di Malaysia, khususnya Akta Kesihatan Mental 2001 dan Peraturan-Peraturan yang dicipta untuk menangani keperluan orang yang mengalami gangguan mental. Jika dibandingkan Akta Kesihatan Mental 2001 dengan Ordinan Gangguan Mental 1952, Akta Kesihatan Mental 2001 lebih lengkap dalam menangani pelbagai aspek gangguan mental. Isu yang perlu dibincangkan ialah sama ada undang-undang yang disediakan bertepatan untuk memenuhi keperluan di samping menyediakan perlindungan yang afdal kepada mereka. Wakalah ini bertujuan untuk mengenal pasti ketepatan Akta Kesihatan Mental 2001 dalam melindungi hak-hak selain menyediakan penjagaan kesihatan yang memuaskan kepada orang-orang yang mengalami gangguan mental di Malaysia. Oleh itu, kita bukan sahaja perlu merujuk kepada peruntukan itu sendiri, malahan kita juga perlu memastikan sama ada undang-undang yang diperuntukkan untuk orang yang mengalami gangguan mental ialah selaras dengan piawai yang ditetapkan oleh Pertubuhan Kesihatan Sedunia (WHO).

Kata kunci: Gangguan mental, undang-undang kesihatan mental, kegilaan.

INTRODUCTION

Mental illness has always been associated with the stigma that those who suffer the disorders are dangerous, violent, incurable, and should be put under lock for the safety of the society at large. The misconception of who is a mentally disordered person and what is a mental disorder has caused mixed responses from the society; among others is that they need to be put under lock, while some want them to live a normal life within the community. Proper understanding of mental disorders and their needs will help the society to decide on how to respond towards the mentally disordered person.[2]

Historically, spiritual influence has affected the perception of society on understanding mental disorders.[3] The Greeks believed that mental disorder was the effect of being possessed by Goddess Mania.[4] The Europeans hold on to the draconian belief that the cause of mental disorder was the possession of evil spirits. The perception of the relationship between the possession of evil spirit and loss of sanity also existed among the ancient Malays and Africans. Consequently, inappropriate treatments were given to them. They were also often restrained from using orthodox, unnecessary, and inappropriate means.

In England, the mentally disordered persons were once considered as the poor, homeless and natural fools. Mental disorder is better known as insanity or unsoundness of mind. According to Thomas Szasz, the definition of mental disorder usually is very much determined by the

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[2] Agofure, Okandeji-Barry & Ume, Knowledge and Perception of Mental Disorders among Relatives of Mentally Ill Persons in a Rural Community in South Africa, *Journal of Community Medicine and Primary Health Care*, Vol. 31 No. 2 (2019), p.75. https://www.ajol.info/index.php/jcmphc/article/view/190415 accessed 10 Dec 2021.

[3] Kua, Ee Heok and Ang, Peng Chye, *Sanity Insanity*, Times Books International, Singapore, 1987, p 1.

[4] The isolation of mentally and physically defective children on mountainsides are documented as early as 800 B.C in Sparta. See also J.K. Laben & C.P. McLean, *Legal Issues and Guidelines for Nurses who Care for the Mentally Ill*, 1984, Slack Incorporated, United States of America, pp 1-3.

position of the person defining it. What mental disorders mean to a psychiatrist may be different from the perspective of a lawyer. Szasz said that mental disorder appears to refer to a disease but in fact, it refers to a decision. The common belief is that insanity means violence, danger, and threat to society.[5] The truth is that the contribution of mental illness to the overall level of violence within the society is small. The way the media, especially films and newspapers, have portrayed the mentally disordered persons does not help to improve the perception of society.[6]

The Diagnostic and Statistical Manual of Mental Disorders-IV (DSM-IV)[7] defines mental disorder as a psychological syndrome associated with distress, impairment in an important area or areas of functioning, or significantly increased risk of death, disability, or loss of freedom. The DSM-IV includes both the probable cause and symptoms in the definition of mental disorder. The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. The clinical and scientific considerations involved in the categorizations of these conditions as mental disorders may not be wholly relevant to legal judgments in order to decide on a person's criminal responsibility, disability determination and competency.[8] Nevertheless, if the diagnosis is used

[5] Horwitz, A, *Creating Mental Illness*, Chicago: University of Chicago Press, 2020, p.19. https://doi.org/10.7208/9780226765891.

[6] Neuman, W.L, *Social Research Methods*, 5th Edn, Pearson Education, Boston, 2003, p 4. See also Bartlett. P & Sandland. R, *Mental Health Law – Policy and Practice*, 3rd Edn, Oxford University Press, Oxford, 2007, p 2.

[7] DSM-IV is a manual published in 1994 by the American Psychiatric Association (APA) that includes all currently recognised mental disorders. The manual provides for standard classification of mental disorders. The manual is not only used in the United States but also applicable by clinicians, researchers and policy makers all around the world. It is designed to correspond with International Classification of Diseases (ICD). The manual is updated regularly to keep up with the latest development in mental health studies.

[8] DSM-IV, American Psychiatric Association, Washington DC, 2000, p xxxvii.

properly, it can assist the court to make proper decisions on the liability of an accused person.

The International Classification of Diseases-11 (ICD-11)[9] defines mental disorder as mental, behavioural, and neurodevelopmental disorders. Their syndromes are characterised by clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes that underlie mental and behavioural functioning. A deviant pattern of behaviour, whether political, religious, or sexual, or a conflict between an individual and society, is not a mental disorder unless it is symptomatic of a dysfunction in the individual.[10] Mental disorders are recognisable by the symptoms suffered by the patients. The symptoms can only be identified and determined by medical experts.

In Malaysia, the Mental Health Act 2001 & Regulations[11] defines mental disorder as any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and 'mentally disordered' shall be construed accordingly.[12] This definition concentrates on the effect of mental disorder on the person's mind, rather than the cause of the mental disorder. The MHA 2001 also defines the mentally disordered persons as any person found by due course of law to be mentally disordered and incapable of managing himself and his

[9] This Code is published by the World Health Organization and used worldwide and revised periodically.

[10] See also *Oxford Dictionary of Psychology*, 4th Edn, Oxford University Press, New York, 2015, p 453.

[11] (Act 615). From here onwards it will be known as the MHA 2001. The MHA 2001 was passed in 2001, but the implementation only took place in June 2010. The MHA 2001 replaced the Mental Disorders Ordinance 1952, FM Ord. (No. 31) of 1952. Hereafter will be known as the MDO 1952. The MDO 1952 was applicable to the Peninsular Malaysia, Mental Health Ordinance 1961 [Sarawak Ordinance 16 of 1961] was applicable in Sarawak and Lunatics Ordinance 1951 [Sabah Cap. 74] was applicable in Sabah.

[12] Section 2 MHA 2001.

affairs.[13] In other words, the MHA 2001 emphasises on legal insanity rather than medical insanity.

INTERNATIONAL FRAMEWORK ON THE PROTECTION OF THE INSANE PERSONS

There are various international benchmarks that address the rights of the mentally disordered persons. However, this paper will only concentrate on two; the Universal Declaration of Human Rights and the Principles on the Mentally Disordered Persons under the Office of the High Commissioner of Human Rights. The gist of these two international benchmarks is respect for human rights. Respect is essential for adequate development of a human's personality, happiness, and progress. Every man and woman are entitled to these rights by virtue of them being born as a human being.[14] It is an inherent right to all human beings irrespective of their race, religion, language, sex, nationality or other status (including their state of mind) in their society.

The Universal Declaration of Human Rights (UDHR)

Since the Declaration is applicable to everyone irrespective of their state of mind, it will also be applicable to the mentally disordered persons. Article 1 of the UDHR provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood; to respect one another and to live peacefully and harmoniously. Article 2 states that the UDHR shall be applicable to everyone: without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides for the freedom to live and to have liberty and security of a person.

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[13] Section 51 MHA 2001.

[14] Nagendra. S, *Enforcement of Human Rights in Peace and War and the Future of Humanity*, 1986, p.1. See also R. Gordon & T. Ward, *Judicial Review and the Human Rights Act*, Cavendish Publishing Ltd, London, 2000, p 84.

Article 5 of the UDHR embodies the fundamental right freedom of a person. This right is very relevant to mentally disordered persons as it provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. It is a well-known fact that in many situations the mentally disordered persons have been discriminated and treated cruelly and inhumanly because many thought that since their minds are affected, they will not know that they are being treated cruelly or even if they know, they will not be able to complain or take action against the perpetrator.

Article 6 provides that everyone has the right to recognition everywhere as a person before the law. Consequently, section 7 provides that everybody is equal before the law and shall be protected against any discrimination and shall be entitled to equal protection before the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. In addition, Article 25 provides the right to medical care and security in the event of disability which includes mental disability.

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare under the Office of the High Commissioner of Human Rights[15] (PPMIIMH)

The Principles on the Mentally Disordered Persons as provided by the office of the High Commissioner of Human Rights are also known as the Principles for the Protection of Persons with Mental Illness. The principles specifically provide for the human rights of the mentally disordered persons. The principles are applicable to all without any discrimination of any kind such as on grounds of disability, race, colour, sex, language, religion, political, or other opinion, national, ethnic, or social origin, legal or social status, age, property, or birth. Even though the general principle is that these Principles shall be applicable to all, the general limitation clause provides for the exercise of the rights set forth in these Principles may be subject only to such

[15] The principles which were adopted by the General Assembly Resolution number 46/119 on 17th December 1991 provided for the basic rights of the mentally disordered person and for the improvement of mental health care.

limitations as are prescribed by the law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health, morals or the fundamental rights and freedom of others.

All States should implement these Principles through appropriate legislative, judicial, administrative, educational, and other measures, which they shall review periodically.[16] Principle 1 provides for the fundamental freedom and basic rights of everyone on mental health care. There are seven basic, but important rights provided under this Principle. The first right is the right of all persons to have the best available mental health care services which shall be part of the health and social health care system. The principle further provides that all persons with mental illness or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person. The third right is that all persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual, and other forms of exploitation, physical or other abuse and degrading treatment. The fourth right is that the mentally disordered persons cannot be discriminated against on the ground of them having mental illness. Discrimination under this right means the mentally disordered persons cannot be treated with any distinction, exclusion, or preference that has the effect of nullifying or impairing equal enjoyments of rights with those who are not suffering from mental illness. However, any special measures taken solely to protect the rights, secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. The fifth right provides for the right of the mentally ill to exercise all civil, political, social, cultural rights as recognised by the Universal Declaration of Human Rights, or other International Conventions or Covenants or other relevant documents.

The sixth right is the right to have a fair hearing in any legal proceeding involving any mentally disordered person. In addition, they will also be entitled to appoint a counsel to represent them. In the event that they cannot afford to appoint one, then a counsel shall be provided for them without any payment. They also have the right to appeal against the

[16] Principle 23 paragraph 1 PPMIIMH.

decision made by the lower court to the higher court. The seventh right is that if the court finds that the person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition to ensure the protection of his or her interest. These rights are also extendable to persons serving sentences of imprisonment for criminal offenses, or who are otherwise detained in the course of criminal proceedings or investigations against them who are determined to have a mental illness or who is believed may have such illness.[17] This includes receiving the best available treatment and mental health care.

Principle 2 deals with the protection of the underage mentally disordered persons. Whenever necessary, a personal representative other than the family member can be appointed. Principle 3 provides for the life of the mentally disordered persons in the community. Every person with mental illness shall have the right to live and work, as far as possible, in the community. Principle 4 provides for the determination of mental illness to be made in accordance with the internationally accepted medical standards and not based on political, economic, or social status or membership of a cultural, racial, or religious group or any reason not directly relevant to mental illness. The principle even provides that the background of past treatments or hospitalizations shall not in themselves justify any present or future determination of mental illness. In fact, no person or authority shall classify a person as having mental illness except for purposes relating to mental illness or the consequences of mental illness. Principle 5 provides that no person shall be compelled to undergo medical examination with a view to determine whether he has mental illness except in accordance with the procedure authorised by the domestic law.

Principle 6 protects the confidentiality of information concerning all persons to whom these Principles shall be respected. Principle 7 stresses the importance of the community and culture. First every mentally ill patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives. If the treatment takes place in a mental health facility, the patient shall have

[17] Principle 20 paragraph 1 PPMIIMH.

the right whenever possible to be treated near his relatives or friends. In addition, they also have the right to treatment suited to his or cultural background. As soon as they have undergone treatment, they have the right to return to the community as soon as possible. Principle 8 provides for the minimum standard of care for the mentally ill patients. Every patient shall have the right to receive such health and social care as is appropriate to his health needs and is entitled to the care and treatment in accordance with the same standards as other ill persons. They must be protected from any harm, including unjustified medication, abuse by other patients, staff or other acts that may further cause them mental distress or physical discomfort. It is said that if a person is detained against his will, he deserves to be treated as best as possible. If not, he should be released as there is no difference between his release and his detention.[18]

According to Principle 9 every patient has the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patients' health needs and the need to protect the physical safety of others. The treatment and care for each patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff. The medical practitioners dealing with mentally ill patients are required to apply the standards of medical ethics as adopted by the United Nations General Assembly. Mental health knowledge and skill shall never be abused.[19] The main objective of treatment of every patient with mental illness is directed towards preserving and enhancing personal autonomy.

The protection of the rights of the mentally ill is so important that Principle 10 provides that medication provided to the mentally ill patients must meet the best health needs of the patient. The medication prescribed to the patient is only for therapeutic or diagnostic purposes

[18] M. Birnbaum, The right to treatment, in *Law and Psychology – International Library of Essays in Law & Legal Theory*, ed by M. L. Levine, Dartmouth Publishing Co. Ltd, Aldershot, 1995, pp. 41-52.

[19] A.Opitz-Welke & N.Konrad, Psychiatric Approach to Violent Behavior in Severe Mental Illness -Violation of Human Rights, *Ethics, Medicine & Public Health*, Vol. 8, Jan - March 2019, pp. 127-131.

and shall never be administered as a punishment or convenience of others. The medication prescribed to the patients must be medication that is known or demonstrated efficacy. Only authorised mental health practitioners may prescribe medication to the patients and all prescriptions shall be recorded in the patient's records. The patients also have the right to consent for their treatment[20] except provided for in paragraphs 6, 7, 8, 13 and 15. If the mentally ill patient is not capable of giving an informed consent, his representative may give so on his behalf.[21] At any time a patient is allowed to refuse or stop treatment; however the doctor has the duty to explain to the patients the consequences of stopping or refusing the treatment.[22] A patient shall not be induced to waive his right to give full consent and under no circumstances should a doctor provide treatment to a patient if the patient does not give his informed consent.[23]

Any patient in a mental health facility must be informed as soon as possible after the admission of all his rights in accordance with these Principles and any other domestic law in a form and language that is understandable to the patient. They will also be informed on how to exercise these rights.[24] If the patient does not have the capacity to understand his rights, the information must be given to his representative or any other person who will be willing to act for his best interest. A patient who is in the capacity to decide, has the right to nominate a person who should be informed on his behalf, as well as a person to represent his interest to the authorities of the facility.[25]

[20] Principle 11 paragraph 1 PPMIIMH.

[21] Principle 12 paragraph 2 and paragraph 3 PPMIIMH.

[22] Principle 11 paragraph 4 PPMIIMH.

[23] Principle 11 paragraph 5 PPMIIMH.

[24] Principle 12 paragraph 1 PPMIIMH.

[25] Principle 12 paragraph 3 PPMIIMH. The person nominated may also be the legal guardian or the parents of the patient and will be known as the personal representative of the patient. He will be the person charged by law with the duty of representing the patient's interest in any specified respect or of exercising specified rights on the patient's behalf.

The two types of admission recognised by the Principles, are voluntary and involuntary admission. Paragraph 2 of this Principle provides that as much as possible the involuntary admission must be for a short period only; meant for observation and preliminary treatment pending review by the review body.[26] The review body shall be a judicial or other independent and impartial body established by the domestic law and functioned in accordance with the procedures laid down by the domestic law. The review body shall receive assistance from qualified and independent mental health practitioners and take their advice into account before making any decision on the involuntary detention or retention of the patient.[27] The involuntary admission must take place as soon as the decision has been made by the review body and the decision must be reviewed at reasonable intervals as specified by the domestic law. If the body feels that the conditions prescribed in Paragraph 1 of Principle 16 are no longer satisfied, then the patient must be discharged as soon as possible.[28] The patient or his representative has the right to appeal to the higher court against any decision made by the review body.[29]

Principle 18 provides for the procedural safeguards for any complaints or appeals made by the patient or his representative. Among the safeguards are the patient has the right to a counsel and interpreter whenever necessary to assist him during the procedure. The patient or his representative also shall have access to his medical records or any evidence that may be used by him during the procedure. The patient or his representative have the right to attend the proceeding and the judgment of the procedure must be made public and the reasons for the decision must be made in writing and copies of the decision must be given to the patient.

[26] The review body is the body established in accordance with Principle 17 to review involuntary admission or retention of a patient in a mental health facility.

[27] Principle 17 paragraph 1 PPMIIMH.

[28] Ibid.

[29] Ibid.

The Principles provide the rights of the patients in the mental health facility. The facility's function is to provide proper mental health care to all patients. The mental health facility shall have access to the same level of resources as any other health establishments. This includes the provision of adequate numbers of qualified medical and other appropriate professional staff, adequate space to provide each patient with privacy and programme of appropriate and active therapy, proper diagnostic and therapeutic equipment for the patient, appropriate professional care and adequate regular and comprehensive treatment that includes supplies of medication.[30] Every mental health facility must be inspected by competent authorities with sufficient frequency to ensure that the conditions, treatments and care of patients comply with these Principles.[31]

According to the Principles, every patient in a mental health facility shall have the right to full respect for recognition as a person before the law, right to privacy, and freedom of communication which includes the right to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive in private visits from a counsellor and personal representative and at reasonable times from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television. They will also have the freedom of religion or belief.[32] The environment and living conditions in the facility shall be as close as possible to those of normal life of persons of similar age. Hence the facility shall include facilities for recreational and leisure activities, facilities for education, facilities to purchase or receive items for daily living, recreation, and communication.[33]

There must also be facilities and encouragement to use such facilities for patient's engagement in active occupations that suit the patient's social status and cultural background. This may include vocational rehabilitation and guidance, vocational training and placement services

[30] Principle 14 paragraph 2 PPMIIMH.

[31] Ibid.

[32] Principle 13 PPMIIMH.

[33] Ibid.

that will promote reintegration into the community and enable patients to secure or retain employment in the community.[34] Nevertheless, despite all the above facilities, under no circumstances shall the patient be subjected to forced labour. The patient should be given freedom to choose the type of work that he wishes to perform.[35] The labour of a patient in the facility shall not be exploited. They have the right to remuneration for any work that they have performed.[36]

The two international benchmarks as we can see have provided ample rights to the mentally disordered persons. These rights have improved the quality of life of the mentally disordered persons. They are now treated better compared to the people before them. Unfortunately, not all countries adhere to the principles. Various reports by the World Health Organization have proven that the mentally disordered persons are still treated as second class citizens in some countries.

[34] Principle 13 paragraph 2 (d) PPMIIMH.

[35] Ibid.

[36] Ibid.

THE INSANE AND THE LAW: THE MALAYSIAN PERSPECTIVE

In Malaysia, the Federal Constitution guarantees the right to fundamental liberties of a person.[37] No one shall be deprived of his life or personal liberty in accordance with the law.[38] The Federal Constitution provides that everyone is equal before the law and is entitled to equal protection by the law.[39] The Federal Constitution protects everybody against any kind of discrimination except as expressly authorised by the Constitution. There shall be no discrimination against citizens only on the ground of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.[40] Even though this provision is applicable to every citizen of Malaysia regardless of their state of mind, it will be better if the specific term prohibiting the discrimination based on a person's state of mind can be expressly mentioned in the Federal Constitution. It is time for the government to follow the footsteps of the Universal Declaration of Human Rights that has clearly outlined in Article 2 that no one shall be discriminated against on the grounds by their birth or other status.

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[37] Neither the Reid Commission nor the White Paper explained the meaning of fundamental liberties. Section 2 of the Human Rights Commission of Malaysia Act 1999 defines human rights as rights referring to fundamental liberties in Part two of the Federal Constitution. Section 4(4) of the Act provides that "for the purpose of this Act, regard shall be given to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution. See also Abdul Aziz Bari & Farid Sufian Shuaib, *Constitution of Malaysia Text and Commentary*, 3rd Edn., Pearson Prentice Hall, Malaysia, 2009, p 15.

[38] Article 5(1) Federal Constitution.

[39] Article 8(1) Federal Constitution.

[40] Article 8(2) Federal Constitution. The term gender has just been included in the provision to emphasize gender equality in Malaysia.

Mental Health Act 2001 and Regulations

The MHA 2001 consolidated the laws relating to mental disorders and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control, and protection of persons who are mentally disordered and for related matters. There are various provisions in the MHA 2001 that reflect the seriousness and commitment of the government to provide for better mental health legislation to benefit the people. The Mental Regulations that are within the MHA 2001 brought about various changes to mental health law compared to the three previously implemented Ordinances. The provisions within the MHA 2001 are consistent with the Universal Declaration of Human Rights and the United Nation Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The MHA 2001 consists of twelve parts that touch different aspects relevant to the mentally disordered persons. The first part deals with the interpretations of various terms that are relevant to mental health. Part II provides for admission, detention, lodging, care, treatment, rehabilitation, control, and protection of mentally disordered persons in, and the discharge of voluntary patients from psychiatric hospitals. The term mental hospital that usually brought a negative perception is replaced with the term psychiatric hospital.[41] Part II provides for the procedures of voluntary and involuntary admission.

Part III provides that the Medical Director has the power to discharge a patient from any the psychiatric hospital if he is satisfied that the discharge is for the patient's best interest[42] and the patient is not in need of further care or treatment in the psychiatric hospital.[43] A patient or his relative also has the right to apply for discharge to the Medical

[41] In fact, all the psychiatric hospitals have been renamed, the Tanjung Rambutan Mental Hospital for example is now known as the Hospital Bahagia Ulu Kinta. The other psychiatric hospitals are now known as Hospital Sentosa in Kuching, Hospital Mesra Bukit Padang and Hospital Permai in Tampoi.

[42] Section 15(a) MHA 2001.

[43] Section 15(b) MHA 2001.

Director.[44] Part IV deals with the admission, detention and discharge of persons committed or confined in psychiatric hospitals under the Criminal Procedure Code. This Part specifically deals with the mentally disordered persons who committed crime. Section 23 is on the examinations of persons detained or confined in an approved psychiatric hospital while section 24 deals with the review of persons confined under section 348 of the Criminal Procedure Code by Visitors. Section 25 provides for a relative or friend of the mentally disordered person to apply for review of persons confined under section 344 or 348 of Criminal Procedure Code by the Board of Visitors.

Part V provides for the admission, lodging, nursing care and rehabilitation of mentally disordered persons in psychiatric nursing homes.[45] The duties and responsibilities of the person in charge of the psychiatric nursing home are provided in section 30. The admission of patients into the home is voluntary and the purpose of the admission is only to provide him with accommodation and nursing and rehabilitative care.[46] The patient or his relatives are free to request for discharge at any time. The patients admitted under this Part shall be examined regularly by the medical officer or at least once in every two weeks.[47] This will ensure that the patient will receive continuous medical examination and his mental health state is monitored properly.

Part VI is on the community mental health centre to provide community healthcare treatment including screening, diagnosis, treatment and rehabilitation of any person suffering from any mental

[44] Section 16 MHA 2001.

[45] Part V of the MHA 2001 provides for the admission, lodging, nursing care and rehabilitation of mentally disordered persons in psychiatric nursing homes. Psychiatric nursing home is a home for the accommodation and provision of nursing and rehabilitative care for persons suffering or convalescing from mental disorders. The admission to the psychiatric nursing home is based on a voluntary basis as provided by section 31 of the MHA 2001.

[46] Section 30(3) MHA 2001.

[47] Section 31(5) MHA 2001.

disorder. The community mental health centre makes mental health care more accessible to the society, simpler and less stigmatised types of mental health care.[48] Part VII provides for the Board of Visitors whose duty is to visit psychiatric hospitals to enquire on the welfare and health of persons detained at the hospital, the adequacy of opportunities and facilities for the persons detained at hospital and any other matter that the Visitors consider necessary or expedient.[49] The second duty of the Board of Visitors is to make the necessary inspection on the premise of the hospital, the documentation at the hospital.[50] The Board of Visitors also has the duty to examine the involuntary patients before the expiry of the three-month period of detention. If satisfied with the mental state of the patient, the Board may make an order for the discharge of the patient.[51]

The MHA 2001 also emphasises on the quality of the psychiatric health care facilities and services. Part IX provides for the required quality that must be provided by all psychiatric hospitals, psychiatric nursing homes and community mental health centres.[52] Part X provides for the proceedings in inquiries into mental disorders. This Part deals with mentally disordered persons who have been found by due course of law to be mentally disordered and incapable of managing himself and his affairs. Among the decisions that the Court will have to make is on the management of the mentally disordered persons' affair, in particular his property. Part XII is on the rights of the mentally disordered to

[48] Harun Mahmud Hashim, 'Human Rights of the Mentally Ill in Malaysia' a paper presented in the *4th Mental Health Convention*, 23-24th August, 2002, Johor Bahru.

[49] Section 42(1) MHA 2001.

[50] Section 42(2) MHA 2001.

[51] Section 44 (2) MHA 2001.

[52] Section 49 MHA 2001.

consent[53], the right to be well informed on his detention and discharge[54] and the right to be treated with respect.[55]

The rights for the mentally disordered persons are also provided in the Mental Health Regulation 2010. Among the rights conferred by the Regulations are the rights to be informed on the reason for their detention, the duration, and the procedures for their discharge. Part VII of the Regulations provides for the following rights to the mentally disordered persons who are detained at any psychiatric hospital:

a. Right to receive treatment and to be informed of the treatment given to him.
b. Right to confidentiality.
c. Right to personal identity and privacy.
d. Right to adequate accommodations.
e. Right to recreational activities.
f. Right to practice gender identity.
g. Right to practice religious belief of his choice.
h. Right to communicate with persons outside.
i. Right to receive visitors.
j. Right to have access to a second psychiatric opinion.
k. Right to obtain legal representation.
l. Right to appeal to the Medical Director, the Board of Visitors or the Director General for discharge.

Compared to the previously applied Ordinances, the MHA 2001 adopts a better understanding on mental health.[56] The better part of the MHA 2001 can be seen in five main areas. The first is in the definition of mental disorder. The definition of mental disorder and mentally disordered persons in the MDO is vague, more restrictive and degrading compared to MHA 2001. The MDO 1952 for example categorised the mentally disordered into two main categories, first as

[53] Section 77 MHA 2001.

[54] Section 78 MHA 2001.

[55] Section 86 MHA 2001.

[56] Puteri Nemie Jahn Kassim, '*the Mental Health Act 2001: Giving better legal protection to the mentally ill in Malaysia'* [2005], *The Law Review*, p 559.

persons who are suffering from mental disorder and incapable of managing himself or his affairs but not necessarily in need of reception and detention and second as mentally disordered persons who need reception and detention in the other category. The MDO 1952 also included idiots as persons governed by the MDO 1952. The definition by MDO did not cover the various types of mental illness and mental disorder that are now recognised by the present medical practices.[57]

The MHA 2001 on the other hand, uses more positive terms to define mental disorder. The definition covers all types of mental disorders, making it possible for the law to address the needs of various types of people with mental disorders. The fact that mental illness is not defined in the MHA 2001 means that its operational definition and usage are a matter for clinical judgment in each case. In addition, the Act also includes what is not a mental disorder in the definition. Section 2(2) of the MHA 2001 states that a person cannot be considered as mentally disordered purely on the ground of promiscuity, other immoral conduct, sexual deviance or dependence on alcohol or drugs. This provides clear guidelines on who are mentally disordered persons.

The second aspect is on the objectives of MHA 2001. The late Tan Sri Mahmud Hashim was of the opinion that the principal flaw of the MDO 1952 is the fact that it reflects an outmoded and constrictive understanding on mental health. The emphasis of MDO 1952 is primarily oriented on the management of the mentally disordered persons without acknowledging the external factors contributing towards mental health and the care of the mentally disordered persons.[58] The preamble of MDO stated that the Ordinance is to consolidate the law to regulate proceedings in cases of mental disorder, and to provide for the reception and detention of persons of unsound mind in mental hospitals. Consequently, the emphasis of MDO 1952 is on the reception and detention of the people with mental disorders, rather than on the protection of their rights and interest. Comparatively, the MHA 2001, clearly states that the Act is to consolidate the laws

[57] Ibid, p 558.

[58] Harun Mahmud Hashim, *Human Rights of the Mentally Ill in Malaysia*, a paper presented in the 4th Mental Health Convention, 23-24th August, 2002, Johor Bahru.

relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters. The MHA 2001 is not only more focused but all rounded as each of the objectives of the Act has been clearly identified.[59]

The third aspect is on the admission and detention of the mentally disordered persons. The MDO 1952 emphasised on the reception and involuntary detention of the mentally disordered persons. On the other hand, the MHA 2001 is more humanitarian. The Act divided the admission and detention of the mentally disordered persons into voluntary and involuntary. The various grounds for reception and admission facilitate the various needs of the mentally disordered persons and the society. The voluntary admission of the mentally disordered patients also encourages the society to voluntarily seek psychiatric treatment if they think that they need one.

The fourth aspect is on the authorised body to provide treatment and care to the mentally disordered persons. The MDO 1952 only authorised the public hospitals to provide for the admission and detention of the mentally disordered persons[60], the MHA allows the private hospitals to provide such services as well.[61] The decision to 'share' some of the responsibility to provide for mental health care services with the private hospitals will not only reduce the burden of the government and public hospitals but also provide rooms for better mental health care services available to the people. The establishment of private mental hospitals will help to address the problem of overcrowding of patients and lack of human resources at the public

[59] Puteri Nemie Jahn Kassim, '*The Mental Health Act 2001: Giving Better Legal Protection to the Mentally Ill in Malaysia'*, pp 558.

[60] Section 29 MDO 1952.

[61] Section 4 MHA 2001 gives jurisdiction to the Minister to appoint any private hospital to be a private psychiatric hospital for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of the involuntary patients.

psychiatric hospitals.[62] In addition, they will also help to address the issue of the increased number of mentally disordered patients that need treatment.

Since the MHA 2001 is considered as more humane, the approach by the MHA 2001 is more patient-friendly compared to MDO 1952. The society has the option of undergoing treatments as provided by the psychiatric nursing home and community mental health centre.[63] The mental health care services via community mental health centre and psychiatric nursing home is in line with the recommendations made by the World Health Organization. Community care results in better treatment outcomes and quality of life for individuals with chronic disorders. Shifting patients from mental hospitals to community care can be cost effective, help to ensure respect for human rights, limit the stigma of receiving treatment and lead to early treatment. The various options for treatments increase the avenues of choice for mentally ill patients.

The MHA 2001 also conferred more rights for ensuring the protection of the mentally disordered persons. In fact, most of the rights ushered by the MHA 2001 are consistent with the Universal Declaration of Human Rights and also the United Nation Principles for the Protection of Persons with Mental Illness. Part XIII of the MHA 2001 provides for various rights for the mentally disordered patients. These rights brought about the standard of duty and care to the mental health care provider.[64] The MHA 2001 indeed has provided a better legal

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[62] Mahmud Harun Hashim, *Human rights of the Mentally Ill in Malaysia*, a paper presented in the 4th Mental Health Convention, 23-24th August, 2002, Johor Baharu.

[63] Part VI of the MHA 2001 provides for the reception, care, treatment and rehabilitation of mentally disordered persons in community mental health centre. Section 37(2) provides that the centre may provide community care treatment for voluntary and involuntary patients. Subsection (3) provides that the community mental health centre shall only be provided on outpatient basis and no patient shall be lodged in any part of the community mental health centre for more than twenty-four hours.

[64] P, Bean, *Mental disorder and legal control*, Cambridge University Press, Great Britain, 1986, pp 166-167.

landscape to the protection and better health care of the mentally disordered persons in Malaysia.

CONCLUSION

Summarily, the MHA 2001 has encompassed all the necessary elements to provide a better standard of mental health care to the society. The Act also has improved the status of the mentally disordered persons. This can be proven by the definition of the mentally disordered persons given by the Act and also the rights specifically prescribed by the Act for the mentally disordered persons. The fact that the society now has the option to seek treatment at the government or private mental health care institutions and to choose whether they want to receive treatments from the psychiatric hospitals, psychiatric nursing homes or community mental health centres show the government's commitment towards providing the best care over mental health for the society.

The above discussion has proven that the Malaysian government has strived to improve the mental health law in Malaysia with the hope of ensuring the rights of the mentally disordered persons are well taken care of. Compared to all the abolished ordinances on mentally disordered, the MHA 2001 has indeed proven a paradigm shift to the development of mental health law in Malaysia. Taking into consideration the MHA 2001 is very similar to the Mental Health Act of England, the mental health law in Malaysia is at par with the law in England. In addition, it is also consistent with the standard set by the World Health Organization. However, the law will be rendered ineffective if it is not properly implemented. Proper implementation can only happen with proper facilities, adequate budget and sufficient number of trained manpower. The government must have the will to ensure that the objectives of MHA 2001 are achieved. Particularly during this trying time of the pandemic, many are struggling with their mental health. They need support and understanding from society.

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Puteri Nemie Jahn Kassim, 'the Mental Health Act 2001: Giving better legal protection to the mentally ill in Malaysia' [2005], *The Law Review*, p 559.

The isolation of mentally and physically defective children on mountainsides are documented as early as 800 B.C in Sparta. See also J.K. Laben & C.P. McLean, *Legal Issues and Guidelines for Nurses who Care for the Mentally Ill*, 1984, Slack Incorporated, United States of America, pp 1-3.

THE CURRENT DEVELOPMENT OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIA

Dr. Mohamad Ismail bin Mohamad Yunos[65]

ABSTRACT

Under the focus of evidence law in general, the authorities or any agencies involved in the investigation of crime may obtain the evidence by unlawful means. For instance, the evidence may be obtained through the commission of crime, a tort or a breach of contract or a breach of statutory or provisions governing the powers, procedure and the duties of the police or individual involving in the investigation of crime.[66] Among the unlawful ways that sometimes are used to obtain the evidence are stealing, confiscating goods that were not listed in the search warrant or confiscating goods without consent, collecting evidence illegally by way of entrapment, obtaining evidence through the wrong standard operating procedure (SOP) and using unnecessary force in confiscating the good or obtaining the evidence. The issue that arises currently is whether the admissibility of the evidence which is illegally obtained is affected by the manner of it being obtained even though the evidence ought to be relevant? This has caused a dilemma between two competing policies. Thus, this paper will clarify the latest standing of the Court of Appeal decision in 2018 in light of the Federal Constitution and Rule of Law.

Keywords: Evidence, illegally obtained evidence.

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[66] Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol. 12, No. 2, p. 172.

ABSTRAK

Secara umumnya, di bawah undang-undang keterangan pihak berkuasa atau mana-mana agensi yang terlibat dalam penyiasatan jenayah boleh mendapatkan bukti dengan cara yang menyalahi undang-undang. Sebagai contoh, bukti boleh diperolehi melalui perbuatan jenayah, tort atau pelanggaran kontrak atau pelanggaran undang-undang atau peruntukan yang mengawal kuasa, prosedur dan tugas polis atau individu yang terlibat dalam penyiasatan jenayah. Antara cara yang menyalahi undang-undang untuk mendapatkan bukti ialah mencuri, merampas barangan yang tidak disenaraikan dalam waran geledah atau merampas barangan tanpa kebenaran, mengumpul bukti secara haram melalui penahanan, mendapatkan bukti melalui prosedur operasi standard (SOP) yang salah dan menggunakan kekerasan dalam merampas barang atau mendapatkan bukti. Isu yang timbul ialah sama ada kebolehterimaan bukti atau keterangan yang diperoleh secara haram terjejas dengan cara ia diperoleh walaupun keterangan tersebut sepatutnya relevan? Hal ini telah menyebabkan dilema antara dua dasar yang bersaing. Oleh itu, artikel ini akan menjelaskan kedudukan terkini keputusan Mahkamah Rayuan pada tahun 2018 berdasarkan peruntukan Perlembagaan Persekutuan dan Kedaulatan Undang-undang.

Kata kunci: Keterangan, keterangan diperoleh secara haram.

INTRODUCTION

It has been contended that the reliability of any evidence obtained in an illegal manner should not be the reason for such evidence to be set aside, however if the issue of admissibility is neglected it would often result in the acquittal of the accused[67] However, there is another contended policy which implies that admitting illegally obtained evidence is equivalent to endorsing the inappropriate manner on how the evidence is procured.[68] As it has been expressed by Justice Homes in the case of *Olmsted v. United States*[69], that:

> *"Therefore, we must consider the two objects of desire both of which we cannot have and make up our minds on which to choose. It is desirable that criminals should be detected and to that end all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes when they are the means by which the evidence to be obtained. If it pays its officers for having obtained evidence by crime, I do not see why it may not as well pay them for getting it in the same way and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces in future it will pay for the fruits. We have to choose; I think it is less evil that some criminals should escape than that the government should play an ignoble part."*

[67] Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 172.

[68] Mohd Akram Shair Mohamed (2014), *Exclusion of Relevant Evidence Procured Improperly or Illegally*, Malayan Law Journal Articles, Vol.4 No. xiix p. 2.

[69] [1928] 277 U.S. 438.

Based on the views expressed by Justice Homes, it can be summarised that, generally, such policy of rejecting evidence which is illegally obtained is not within Malaysia's approbation.

THE POSITION IN MALAYSIA

Unfortunately, there is no specific provision which mentions expressly on illegally obtained evidence in the Malaysian Evidence Act 1950. However, illegally obtained evidence falls under the category of relevancy of facts which under Section 5 of the Evidence Act 1950, which states that:

> *"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."*

The section explains that evidence shall be given by a person who is entitled under the law. This means that as long as the evidence is relevant to the fact in issue, it shall be admissible as if it is procured by the authorised entities.[70]

Under the Malaysian Law of Evidence, the local courts frequently refer to common law cases. If there is any ambiguity or lacuna in the statutory provision, the court shall refer to the judicial precedents of the common law. In the case of *PP v Yuvaraj*[71], Lord Diplock stated that:

> *"But no enactment can be fully comprehensive. It takes its place as part of the general corpus of the law. It is intended to be construed by lawyers and upon matters about which it is silent or fails to be explicit it is to be presumed that it was not the intention of the legislature to depart from well-established principles of law."*

[70] Augustine Paul, *Evidence Practice and Procedure*: Second Edition (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 2000), p. 31.

[71] [1969] 2 MLJ 89.

In the current context, since there is no certain provision on the admissibility of illegally obtained evidence, the court then shall refer to the common law jurisdiction.

It has been a settled rule of common law that if the evidence is relevant to the fact in issue, it does not matter in what manner the evidence is being procured, it is admissible. In the case of *R v Leatham*[72], Crompton J. expressed that regardless of the manner in which the evidence was procured, the evidence will still be admissible. In the locus classicus case of *Kuruma v R*[73], Lord Goddard cited Crompton J. The case of *R v Leatham* affirmed that:

> *"In their Lordships opinion, when it is a question of the admissibility of evidence, strictly it is not whether the method by which it was obtained is tortuous but excusable, but whether what has been obtained is relevant to the issue being tried".*

In the case of *Kuruma v R*[74] the appellant was convicted of unlawful possession of ammunition which was in breach of Regulation 8A (1)(b) of Emergency Regulations 1952. The appellant was then sentenced to death. Under the Emergency Regulations, it is under the prerogative of the police officer or an officer above the rank of an assistant to stop and search an individual on suspicion for committing crime. The evidence found that appellant worked as a farmer. On the day he was caught, he was on leave to return to his rural home in the reserves. A Police Constable then stopped him at the roadblock, searched and found ammunition and a penknife inside his car. There were three individuals witnessing the search, but they were not called to give testimony. The appellant was then charged for capital punishment. Upon appeal, the appellant contended that the evidence procured by the Police Constable was illegally obtained. It was held in this case that the evidence was properly admitted. Lord Goddard in this case articulated that:

[72] [1861] 8 Cox CC. 498, 502.

[73] [1955] 1 All ER 236.

[74] Ibid.

> *"…the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible, and the court is not concerned with how the evidence was obtained."*

Since the Evidence Act 1950 is silent on the admissibility of illegally obtained evidence, the common law rule is to be applied, in which the illegally obtained evidence is admissible as long as it is relevant.

THE DEVELOPMENT OF THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE IN MALAYSIA

In Malaysia, the court in *Saminathan v PP*[75] pioneered in developing the issue of illegally obtained evidence. The accused was charged for running an illegal lottery. In one provision of the Act, the raid must be done by police rank of inspector and above. However, the raid was conducted by those below the rank. The defence in this case contended that the evidence was illegally procured. In this case, J. Atkin expressed that:

> *"There is an overwhelming mass of authority for the proposition that the legality or illegality of a man's arrest does not concern the court which is trying him. The court is only concerned with the charges brought against him, he has the remedy for illegal arrest elsewhere, and the manner in which the police obtained the possession of these documents does not concern the magistrate who is trying the accused. He is only concerned with the relevancy."*

The above judgment depicts that the court is not concerned with the way the evidence is being obtained. Even if it is obtained by a police officer below the entitled rank, the court will still look at the relevancy of the evidence.

The judgment in *Saminathan v PP* was then followed by the case of *Gan Ah Bee*[76]. In this case, the respondent's premise was raided by an

[75] [1937] MLJ 39.

[76] [1975] 2 MLJ 106.

enforcement officer. There were some goods from the respondent's premise being seized by the inspector. However, the inspector was not the authorised person under Section 14 of the Price Control Act. His Lordship Ajaib Singh J. firmly articulated that:

> *"Evidence relating to the seizure and subsequent production of the goods at the trial was relevant evidence to the matters in issue and was therefore admissible, notwithstanding that it was obtained illegally and in non-compliance with the provisions of the Price Control Act."*

In 1987, Edgar Joseph Jr. J. in the case of *Re Kah Wah Video Sdn Bhd*[77], stated that:

> *"More than 30 years ago, Lord Goddard in delivering the advise of the Judicial Committee of the Privy Council, in the celebrated case of Kuruma v R said, inter alia: 'the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.'"*

The above-mentioned case has followed the principle of law in the case of *Saminathan v PP* whereby the principle of relevancy and admissibility is applied. Furthermore, in the case of *Ramli b. Kechik v PP*[78], Mohamed Azmi SCJ said that the rule has been well established in English law, that even though the evidence is procured in an illegal manner, the evidence is still said to be admissible.

In *Wako Merchant Bank v Lim Lean Heng*[79], the evidence was illegally procured by the plaintiff's private investigator in breach of Section 97 of Banking and Financial Institution Act 1989. This section relates to information relating to banking transactions if disclosed will be an offence, to prevent insider dealing. The defendant owed money to the plaintiff. The plaintiff then obtained a Mareva Injunction to prevent the

[77] [1987] 2 MLJ 459.

[78] [1986] 2 MLJ 33.

[79] [2000] 4 CLJ 233.

defendant from taking assets out of jurisdiction, freezing the defendant's assets. In the affidavit supporting the ex-parte application, there was information of deposits obtained by the plaintiff's private investigator from the defendant's bank. That information was in breach of Section 97 of Banking and Financial Institution Act 1989, thus making evidence illegally procured. The defendant objected as the disclosure was in breach of Banking and Financial Institution Act 1989. The court found that the statutory provision did not mention the issue of admissibility of evidence. The provision only provides that it constitutes an offence to disclose such information and/or evidence. This case follows the principle of admissibility established in *Ramli b. Kechik v PP*.

Discretion to Exclude Illegally Obtained Evidence in Malaysia

There are academic discussions on the probable reasons for the courts' rejection to consider illegally obtained evidence. There are four principles as to why illegally procured evidence shall be excluded. Firstly, the reliability principle is one of the principles such evidence should be excluded as the reliability of the evidence can be questionable. Secondly, the remedial principle whereby the accused person should be protected from the consequences of the infringement, as being placed in a position in which the infringement never occurs and can be achieved by excluding such evidence in an illegal manner. Thirdly, disciplinary disciplines must be enforced to avoid the police or any authorised entities to commit such infringement when conducting investigation to obtain the evidence. Fourthly, is the integrity principle as it depicts the disapproval of impropriety and as a result, the purity of the court and criminal justice will be preserved.[80]

[80] Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 175.

Again, we refer to the Malaysian case of *Saminathan v PP*[81], which expounded the principle of admissibility of illegally obtained evidence. The case of *Re Kah Wai Video Ipoh Sdn Bhd*[82], also states that:

> *"The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. Nevertheless, the Malaysian courts have recognised the narrow aspect of the judicial discretion to exclude illegally obtained evidence if the strict rules of admissibility would operate unfairly against the accused."*

The same principle was laid down in *Chee Swee Tiang v PP*[83], wherein the majority bench invoked the discretion of the court to exclude illegally obtained evidence but there was a dissenting judgment by Ambrose J that the Singapore court had no such discretion. The reason was that Singapore Evidence Act, similar to the Malaysian Evidence Act 1950, which both are in *pari materia* with the Indian Evidence Act 1972 does not express the exclusion of illegally obtained evidence even though it is relevant. The position in regards to the discretion of the court to exclude such evidence has been settled in the case of *Law Society of Singapore v Tan Guat Neo Phyllis*[84]. In this case, it was held that the court has no discretion to exclude illegally obtained evidence, including evidence obtained by entrapment because in the Singapore Evidence Act it does not mention about illegally obtained evidence and the court will only have discretion if the authority is in breach of constitutional power and consequently would cause infringement to the constitutional rights and protections to an individual. It is certain that the discretion of the court to exclude illegally obtained evidence is narrow unless there is outstandingly bad circumstance in obtaining the evidence illegally.

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[81] [1937] MLJ 39.

[82] [1987] 2 MLJ 459.

[83] [1964] MLJ 291.

[84] [2008] 2 SLR 239.

CURRENT POSITION IN MALAYSIA

In the recent case of *Aizuddin Syah bin Ahmad v PP*[85], the accused was charged under Section 31A Dangerous Drug Act. According to the Criminal Procedure Code, it mandates urine tests to be conducted by police officers ranked above Sergeant. However, in this case, the urine test was conducted by a Corporal. The High Court decided that it was merely a procedural issue and it can be ratified as it does not involve crucial evidential matter. However, in the Court of Appeal, Hamid Sultan Abu Backer J decided that:

> *"When an act sets out that particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act. The common law cases are subjected to the Act as well as the Federal Constitution which gives protection to the accused (Article 5 and Article 8 of the Federal Constitution)."*

Thus, according to Hamid Sultan J, the provision in the Criminal Procedure Code must strictly be followed. Failure to comply amounts to a breach of the rule of law. The local classicus *R v Kuruma* comes into play when there is no governing statute to regulate how the evidence must be procured. Once the provision has established the requirements, they must be respected.

[85] [2018] MLJU 910.

PREJUDICIAL EFFECT v. PROBATIVE VALUE

Under the context of Evidence Law, it is up to the judges' discretion to exclude the evidence if the prejudicial effect outweighs the probative value.

Prejudicial effect is the extent that the evidence detracts from a court's ability to determine what happened. For example, the evidence may cause prejudicial inference whereby the judge may convict the accused regardless of the infringement being made upon the accused by the authority. Probative value means the ability of a piece of evidence to make a relevant disputed point more or less true. For instance, in the case of murder, if the defendant was fighting with his neighbour which bears no relation to the crime of murder, such matter has no probative value.

Nevertheless, if the fighting with the neighbour leads to the defendant's act of crime, there is probative value.[86]

In the case of *Krishna Rao Gurumurthy*[87], Kang J expressed that the judge must judiciously exercise his discretion to exclude illegally obtained evidence if the prejudicial effect outweighs its probative value. If the prejudicial effect outweighs the probative value, the court must reject the evidence as it will cause miscarriage of justice.

DEFENCE OF ENTRAPMENT

The issue of fairness of trials is often associated with the methods of undercover police investigation. Entrapment occurs when an individual has been forced by the agent provocateur to commit the offence which he did not intend to do.[88] An agent provocateur refers to a person who entices an individual to commit a crime he otherwise would not

[86] "*Probative Value*," Legal Information Institute (Legal Information Institute), accessed January 14, 2022, https://www.law.cornell.edu/wex/probative_value.

[87] [2001] 1 MLJ 274.

[88] Michel I. Stober (1997), Entrapment in Canadian Criminal Law (Toronto: Carswell Legal Publications) p. 57.

committed in order for said individual to be convicted.[89] For instance, a person is instructed to deliver packages containing drugs whilst having the genuine belief that the package contains milk powder. The issue arises when the innocent minded person is enticed to commit a crime by a perverse tactic. Entrapment is also a method employed to procure evidence illegally.

The starting point with regard to the defence of entrapment is based on *R v Sang*[90], whereby the House of Lord expressed that the English law is silent on the defence of entrapment. Besides that, the court has no discretion to exclude the evidence procured by way of entrapment. However, it was held that if such evidence would have an adverse effect on the fairness of the trial then it should be excluded by the court. One of the factors to determine whether evidence obtained by way of entrapment should be excluded is to consider whether the authorised entity acting as the agent provocateur was enticing the accused to commit the crime otherwise he would not have committed. Whilst the rule has been enunciated in *R v Sang*, however, entrapment is still considered to be an abusive way to procure evidence and the courts are using their discretion to exclude such evidence to be admissible.

Consequently, under the common law, in *R v Loosely*[91], the police entrapped the accused by a telephone call by pretending to be interested in procuring the drugs he was offering. The House of Lord acknowledged that evidence procured by way of entrapment may be excluded according to the discretion of the judge, as evidence procured by entrapment is still frowned upon.

In a Singaporean case of *How Poh Sun v PP*[92], the Appellate Court refused to recognise the evidence procured by the agent provocateur by way of entrapment. While in certain cases, the evidence procured by the agent provocateur is given paramount consideration for sentencing.

[89] Archbold Criminal Pleading Evidence and Pleading.

[90] [1979] 69 Cr. App Rep 282.

[91] [2001] 4 All ER 897.

[92] [1991] 3 MLJ 216.

Thus, the court held that the judge has no discretion to exclude evidence which was unfairly or illegally obtained.

Position of Entrapment Defence in Malaysia

In Malaysia, there is no rule mandating the exclusion of evidence obtained by way of entrapment or trickery. Thus, it is under the court's responsibility to protect the integrity of the criminal justice system. In this case, the court should consider whether when such evidence is being brought before the court to be excluded or omitted.[93]

In the case of *Wan Mohd Azman bin Hassan v PP*[94], the Federal Court expounded on the defence of entrapment. The appellant's contention was that the evidence acquired through entrapment was highly prejudicial and that it was incumbent upon the trial court to do a balancing exercise before acting on such prejudicial evidence. Thus, it was held in this case that the admissibility of the evidence of an agent provocateur is not in issue, neither is his credibility as a witness. Statutory legislation has provided for this in the form of Section 40A of the Dangerous Drug Act. It was stated in Section 40A that:

> *"(1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.*
>
> *(2) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged*

[93] Andrew Choo (1990), *A defence of Entrapment: An overview and analysis*, The Modern Law Review, Vol. 53.

[94] [2010] 4 MLJ 141.

with an offence under this Act shall be admissible as evidence at his trial."

In this case, it also discussed the abuse of doctrine process recognised in the case of *Loosely*, that the evidence procured by way of entrapment by the agent provocateur may be excluded under the discretion of the court.

Thus, it was highlighted in this case that under the Malaysian law there was no defence of entrapment. In any event, it was for the appellant to prove that he committed the offence as a result of entrapment, which was a finding of fact, but as there was no such finding by the trial court the defence of entrapment as a defence was not raised. For the defence to operate at all, the appellant had to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence. However, the facts showed that the appellant was an 'unwary criminal' who readily participated in the offence and thus there was no entrapment in the instant case.

APPRAISAL OF THE LAWS IN SOME SELECTED COMMON LAW JURISDICTIONS

The contemporary law of evidence in Canada, England, Australia, and New Zealand represents a compromise between the two extremes of inclusionary and exclusionary of illegally obtained evidence. As to the judicial discretion to exclude such evidence, the trial judges have adopted a narrow or wider aspect of the discretion.

The Position in Canada

The main principle is that relevant evidence even if obtained illegally is admissible subject to its broad discretion to exclude if the illegality involves the violation of the Canadian Constitution Act 1982, Section 24(2).[95] The impact of Section 24(2) of the Charter of Rights and

[95] Mohd Akram Shair Mohamed & Mohamad Ismail bin Mohamad Yunus (2016), *The Status of Evidence Obtained Unlawfully: A Comparative Appraisal of the Laws in some selected Common Law Jurisdiction and Islamic Law Perspective*, Journal of Islamic Law Review, Vol.12, No.2, p. 175.

Freedoms can be seen under the principal section dealing with illegally obtained evidence which provides: If a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The conflict between the wide and narrow views as to the scope of judicial discretion is vividly seen in the Canadian Supreme Court's case of *R v Wray*[96]. The accused was charged with murder. The trial judge held that the statement signed by the accused was inadmissible as being not voluntary. In the statement, the accused said he threw the murder weapon, a rifle, into a swamp. The police found the rifle the following day. In the Court of Appeal, the judge affirmed the acquittal on the ground that the trial judge has a discretion to reject evidence, if the judge considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into dispute. On appeal by the Crown, the majority (6 to 3) held that the judge should have received evidence of the finding of the rifle, and the statement related to the location of the rifle. Catwright CJC, dissenting, stated that the confession of the accused was improperly obtained and was rightly excluded as being involuntary.

The Position in Australia

The common principle is that if the evidence is relevant, how it was procured, did not make such evidence inadmissible, subject to the Court's exclusionary discretion. The leading case that established the existence of the exclusionary judicial discretion is *R v Ireland*[97]. The accused was convicted of murder by stabbing, in circumstances where it was likely the perpetrator had sustained injury to his hand. The accused was required by police to have his hand both photographed and examined by a doctor. The photos were tendered at trial and the doctor gave evidence for the prosecution. On appeal, the High Court held that the police had acted improperly and that, as the trial judge had not

[96] (1970) 11 DLR (3d) 673.

[97] (1970) 126 CLR 321.

adequately considered the question of discretion, the accused was entitled to a retrial.

In the words of Sir Garfild Barwick CJ:

> *"Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider the exercise of it; the competing public requirements must be considered. On the one hand there is the public need to bring to conviction those who commit criminal offence. On the other hand, is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."*

In *Bunning v Cross*[98], the decision in *R v Ireland* was affirmed and guidelines were spelt out to assist trial judges in the exercise of discretion. On a charge of driving while under the influence of alcohol, police had mistakenly believed they were entitled to require the defendant to undertake a Breathalyzer test without first conducting a preliminary on-the-spot test. The results of the test were rejected by the magistrate.

On appeal to the High Court, Stephen and Aickin JJ isolated a set of principles and guidelines to be considered by trial judges in exercising their discretion. First, an account should be taken as to whether the police deliberately disregarded the law. Where the illegality occurs because of a mistake that is a factor pointing in favour of admissibility. Secondly, consideration may be given to the question of whether the illegality affects the cogency of the evidence. Cogency should play no part in the exercise of discretion where the illegality was intentional or reckless. However, where 'the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had'. Thirdly, consideration should be given to the ease with which the law might have been obeyed in procuring the

[98] (1977) 141 CLR 54.

evidence in question. While a deliberate 'cutting of corners' ought not to be tolerated, the fact that the evidence could easily have been procured without illegality had different procedures been adopted may point towards admissibility. Fourthly, the nature of the offence should be regarded. The more serious the offence, the stronger are the arguments in favour of admissibility. Finally, regard should be had to the scheme of any legislation the police may have failed to obey. If the legislation shows a deliberate attempt to restrict the powers of investigating authorities from obtaining certain evidence, that consideration will point towards rejection of evidence obtained in breach of such legislation.

Applying these considerations, the Court held that the results of the Breathalyzer test should have been admitted as evidence. Two factors were crucial: first, the unlawful conduct of the police had resulted from a mistake and not from deliberate or reckless disregard of the law; and secondly, the nature of the illegality had in no way affected the cogency of the evidence.

The Position in England

In the leading case *Kuruma v R*[99], the accused was charged with unlawful possession of ammunition during the period of emergency in Kenya. The ammunition was found during the period of emergency in Kenya. The ammunition was found during an unlawful search, and it was argued that the evidence of finding is inadmissible because of the manner in which it had been obtained. Lord Goddard said:

> *"the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained."*

In *Kuruma*, the Court adopted a narrower view of the discretion. Lord Goddard CJ acknowledged that the only basis for exclusion of evidence

[99] [1955] AC 197.

illegally obtained is to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

In addition to the common law discretion, the judge has now given a wider discretion to exclude evidence in the form of Section 78 of the Police and Criminal Evidence Act;

> *"..in any proceedings the court may refuse to allow evidence on which the prosecutor proposes to rely to be given, if it appears to the court that having regard to all the circumstances in which the evidence was obtained, the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*

The Position in New Zealand

The Court in New Zealand has followed *Kuruma* and recognised that illegally obtained evidence if relevant is admissible. However, the courts have also recognised that there is a discretion to exclude such evidence. In the case of *Trust v. Taylor*[100], a police raid over a medical clinic and seized the patient's files. The Court of Appeal ruled that although the search warrant was unlawful, the police could apply to retain the files, or at least have access to them, for use in any upcoming criminal charges. Furthermore, at the subsequent trial of the doctor on charges of unlawfully proceeding a miscarriage, no objection was made by the defence as to the admissibility of illegally obtained evidence.

The discretion to exclude was exercised in *Police v Hall*[101], where the Court of Appeal held that the evidence of a medical doctor should have been excluded because of the cumulative unfairness of a medical examination without consent, the police refused to let the suspect telephone either his father or solicitor, and the eventual loss of the blood sample taken.

[100] [1975] 1 NZLR 728.

[101] [1976] 2 NZLR 678.

ILLEGALLY OBTAINED EVIDENCE FROM ISLAMIC POINT OF VIEW

In discussing on the admissibility of the illegally obtained evidence in Islam, it is essential to understand the underlying principles of Maqasid al-Shari'ah (Objectives of Islamic law). Five vitalities are enshrined by the Shari'ah namely Religion, Life, Intellectual, Dignity and Property. The highlighted principles are to seek the balance of the right of the state to enforce its criminal law by apprehending criminals and tender evidence to secure conviction and the rights of individual.[102]

The general rule in Islam is that evidence obtained in violation of such rights is inadmissible based on various authorities. However, it should be borne in mind that this rule is subject to exception, if it is highly probative and as such, admitting such evidence will be for the benefit of the public at large. As such, the rule can never be used to excuse the high potential and profile offenders.[103] There are some rights in Islam (during interrogation and primary questioning stage), which has been generally recognised and practiced universally. For examples are:

a. Freedom from unreasonable searches and seizures
b. Interrogation to be conducted only by designated official
c. Right to take an oath
d. Right to refuse answering questions and remain silent
e. Rights to be free from pressures, tortures, and cruel/ inhumane treatment or punishment.[104]

However, these rights are not absolute but subject to maintain social order and security. In regard to state's right, it should also be noted that

[102] Ma'moun M. Salama, 1982, *The Islamic Criminal Justice System: The Right of Individual to Personal Security in Islam*. USA. Oceana Publication, Inc. 55.

[103] Mohamad Ismail Yunus. *The Relevancy and Admissibility of Evidence Obtained through Unlawful Means: A Comparative Legal Appraisal* (2004) IKIM Law Journal vol. 8 No. 1 (January - June 2004) 111.

[104] Ibid.

State's right is further governed by conditions and guarantees aimed at preventing arbitrary and intimidating searches. The restrictions are:

a. The issuance of a search warrant to persons or premises.
b. The warrant of arrest issued must have some evidentiary basis, i.e., sufficient evidence to constitute probable cause that a crime was committed by the accused.
c. There must be lawful discovery of sufficiently incriminating proof of existence of offence.[105]

If the discovery is unlawful e.g. as the result of spying the evidence cannot be used for incriminating purposes. The fundamental principle which correlates with the topic can be found in the maxim "Everything which is based on bathil is bathil."[106]

In deciding the issue of admissibility of illegally obtained evidence, one should bear in mind that to some extent, the state does have the right to violate the individual rights of privacy.

Legal maxims supported are the public interest is given priority over the specific interest of the individual, between two evils choose the lesser one and preventing evil should be given priority than preserving interest.[107]

The Position in Malaysian Shari'ah Courts

The local Islamic enactments have inserted the term *Bayyinah* in the definition of evidence. *Bayyinah* is defined as to enlighten, explain, or clarify a right or interest. Undoubtedly, evidence, though illegally obtained, will still trickle within the purview of *Bayyinah* and thus be

[105] Sami Hasan Al-Husayni, *Al-Nazhoriyah al-Ammah Liltafsir fi Qanun al-Misriwa al-Muqaran* 74 (Cairo, dar al-Nadah al-Arabiyah, 1972) 79.

[106] S. Mahmassani. 1987. *The Philosophy of Jurisprudence in Islam. Kuala Lumpur*. Hizbi Publications. 206; See also Article 72 of The Majelle. Pakistan. The Book House.

[107] Mohamad Yunus, Mohamad Ismail. (2004). *The Relevancy and Admissibility of Evidence Obtained through Unlawful Means: A Comparative Legal Appraisal*. Vol. 8 No. 1. IKIM Law Journal. 110.

rendered admissible. The court, however, maintains its inclusionary and exclusionary discretion power either to admit or reject such evidence in any case where the prejudicial effects outweigh the probative value or whether the issue of miscarriage of justice arises.[108]

CONCLUSION

The courts should rethink and seriously consider adopting the wider version of the judicial discretion to exclude, to be in line with other common law jurisdictions which adopt a more liberalised version of the discretion. This will pave the way forward in attaining fairness and justice and not a way backwards. Whereas, under Islamic law, the balance between the right of the state to enforce its criminal law by apprehending criminals and to collect evidence and the right of individuals to be observed. The judge should refer to al-Quran, Hadith, and Ijtihad to achieve justice between parties.

To admit or exclude the evidence would depend on the circumstances or facts of each case, by considering the need to maintain the integrity of the judiciary and the need to balance the competing interests and values in light of Maqasid al-Shari'ah.

[108] Mahmud Saedon A. Othman. 1996. *An Introduction to Islamic Law of Evidence*. Kuala Lumpur. HIZBI Publications. 8.

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7 2020 LM 56 – 73

FRUSTRATED CONTRACTS INVOKED BY COVID-19 RESTRICTIONS DURING THE MOVEMENT CONTROL ORDER (MCO) IN MALAYSIA: Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd and Another Appeal [2014] 4 MLJ 413

(hereinafter referred to as "this case")

Nik Hajar binti Nik Hisham[109]

ABSTRACT

The COVID-19 pandemic has brought forth a lot of changes to the community and has affected a lot of businesses in Malaysia especially with the unforeseeable implementation of the Movement Control Order (MCO), and its subsequent variations which caused many transactions to be frustrated due to the restrictions imposed during the MCO. Previously, a similar state of panic had occurred in Negeri Sembilan which is depicted by this case has provided the threshold for frustrated contracts in Malaysia. Therefore, this case is analysed to review the applications of frustrated contracts in Malaysia and whether the MCO is an event that fulfils the elements of frustration. This article uses both doctrinal and non-doctrinal research methodology such as content analysis and library research in arriving to a conclusion. This article also reviews the position and elements of frustration in other countries especially with the applicability of '*force majeure'* clauses in unforeseeable circumstances.

Keywords: Frustration of contract, COVID-19, Movement Control Order (MCO).

[109] 2nd year, LL.B, AIKOL, International Islamic University Malaysia.

ABSTRAK

Pandemik COVID-19 telah mengundang pelbagai cabaran kepada masyarakat serta membawa kesan kepada kelangsungan aktiviti perniagaan di Malaysia terutamanya melalui pelaksanaan Perintah Kawalan Pergerakan (PKP) dan variasi-variasinya yang tidak dapat dijangka telah menyebabkan banyak transaksi termasuk dalam kekecawaan kontrak oleh kerana batasan-batasan yang ditetapkan rentetan daripada PKP. Sebelum ini, terdapat satu keadaan serupa yang telah berlaku di Negeri Sembilan yang digambarkan oleh kes ini. Kes ini telah memutuskan kedudukan kekecawaan kontrak di Malaysia. Oleh itu, kes ini dikaji untuk menyelidik kedudukan kekecwaan kontrak di Malaysia di samping menentukan sama ada PKP merupakan suatu peristiwa yang memenuhi unsur-unsur kekecawaan kontrak. Arkitel ini juga menggunakan kaedah kajian doktrinal dan bukan doktrinal seperti analisis isi dan penyelidikan perpustakaan untuk mendapatkan kesimpulan. Selain daripada itu, Artikel ini akan mengkaji kedudukan dan unsur-unsur kekecewaan kontrak di negara lain terutamanya penggunaan klausa ‘force majeure’ dalam peristiwa tidak terjangka.

Kata kunci: Kekecewaan kontrak, COVID-19, Perintah Kawalan Pergerakan (PKP).

INTRODUCTION

This case depicts the conditional events of a successful application to frustrated contracts in Malaysia as provided in Section 57(2) of the Contracts Act 1950. The usage of Section 15(2) of the Civil Law Act 1956 for remedies of a frustrated contract is also discussed in this review.

Frustration will only be applicable when the said event would render the act of performing the contract as 'impossible'. A contract is frustrated when after its formation, a change of circumstances makes it impossible for the parties to perform the contract physically or legally.[110] This can be illustrated through the outbreak of the Japanese Encephalitis (JE)[111] in the country that led the government to issue a gazette banning the operation of pig rearing in Negeri Sembilan. The government took a similar stance during the COVID-19 pandemic when the Movement Control Order (MCO) was declared and enforced nationwide. Consequently, this resulted in many business operations coming to a screeching halt, especially businesses that rely on daily wages.

This case review will discuss the issue on whether the MCO is an event that satisfies the elements of frustration as stated in the case and consequently provide the injured party the means to claim for damages for a breach of contract.

It should be noted that as this case was decided in the Court of Appeal, therefore its decision would be rendered binding to all courts of the lower tier.

[110] [2009] 6 MLJ 293.

[111] World Health Organisation (WHO), "1999 Epidemic Encephalitis in Malaysia".

METHODOLOGY

Content Analysis

This case review involves systematic reading[112] and text observations to express researched content. The data is then categorised under a specific coding system.[113] The area of laws analyzed are based on the Contracts Act 1950, relevant case laws and articles on frustration. Referred cases cited in this article provide the rules and interpretations to both the statute and circumstances to satisfy a frustrated contract.

Library Research

Both primary and secondary sources are referred to such as statutes, case laws, rules, and analysis by other articles. This involves identifying and locating relevant information[114] and analysis on the principles of frustration and force majeure clauses in a contract.

Doctrinal Research

This doctrine is used to research legal concepts and principles of all types of cases, statutes, and rules.[115] The doctrinal research involves analysis of case laws, arranging, ordering, and systematising legal propositions and study of legal institutions through legal reasoning or rational deduction.[116] Rules and principles of frustration and force majeure are analysed from local and common law cases and statutes.

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[112] *Research Methodologies Guide : Content Analysis*, prepared by IOWA State Library (IOWA, IA, 2020).

[113] Hsieh H-F, Shannon SE. Three Approaches to Qualitative Content Analysis. *Qualitative Health Research*. 2005; 15(9): 1277-1288.

[114] *Library Research Process*, prepared by Elmer E. Rasmuson Library (Alaska, AK, 2020).

[115] Vijay M Gawan. *Doctrine legal research method: A Guiding Principle in Reforming the Law and Legal System towards the Research Development*. Internal Journal of Law, Vol 3 Issue 5. 2017. Page no 128-130.

[116] Dr S.R. Myneni. *Legal Research Methodology*. Allahabad Law Agency, Faridabad. 2014.

This is also aided by rules published from the International Chamber of Commerce (ICC) in dealing with international trade.

SUMMARY OF CASE

The Negeri Sembilan State Government had appointed the respondents to develop an integrated pig farming area (IPFA) which involved the construction of a central waste treatment plant (CWTP) to treat wastewater from pig farms. The appellants are pig farm owners and operators that entered into a tapping agreement with the respondents. The agreement stipulates that the appellants could tap into the Central Waste Treatment Plant developed by the respondents to treat wastewater from pig farms if they paid tapping fees. However, due to a sudden outbreak of the Japanese Encephalitis (JE) disease in the country, the state government had banned the rearing and sale of pigs in the area occupied by the appellants. By the time of the ban, the appellants had paid a portion of the agreed fees. The appellants then sued for a refund on the ground of frustration due to the government's ban.

The High Court exercised its discretion under the proviso of section 15(2) of the Civil Law Act 1956, allowing the defendant to use the fees that had been paid by the plaintiffs to set-off the construction costs of the CWTP. The plaintiffs then appealed to the Court of Appeal.

Summary:

Parties	**Issue/Claim**	**High Court**	**Court of Appeal**
Plaintiff/Appellant (YSH)	Refund	Dismissed as the Defendant is allowed to retain the paid fees to set off the construction	Allowed as it was not the Plaintiff/Appellant's responsibility to construct the CWTP
	Tapping Agreement	Affirmed	Affirmed

	void due to frustration		
Defendant/Respondent (NMJ)	Balance of unpaid fees	Dismissed	Dismissed
	Application to use fees to construct the IPFA	Allowed by virtue of s15(2)	Dismissed as it was not the responsibility of the appellant to provide funds in constructing the IPFA

Table 1 shows the decisions of the case in High Court and Court of Appeal

DISCUSSIONS OF ISSUES

A few issues were discussed in this case, namely:

Whether Section 15(2) was wrongly applied in a frustrated contract?

Section 15(2) of the Civil Law Act 1956 states that,

> *"All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:*
>
> *Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considered it just to do so having regard to all the circumstances of the case, allow him to retain, or as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount of the expenses so incurred."*

The appellants had claimed for a refund of those fees on the ground that the Tapping Agreement had become frustrated by the state government's ban. This is based on section 57(3) of the Contracts Act 1950 which provides for compensation for loss through non-performance of acts known to be impossible or unlawful. The pig rearing ban by the state government had rendered the Tapping Agreement void, thus enabling the appellants for a claim of refund.

The respondents on the other hand had counterclaimed for balance of fees unpaid under the Tapping Agreement, claiming that they should be allowed to use the fees that had been paid to set off the construction of the Central Waste Treatment Plant. The previous High Court decision had allowed the respondents to use the fees that had been paid to set off the construction by using the discretion exercised under section 15(2) of the Civil Law Act 1956.

Whether monies paid by one party to another under a frustrated contract is considered performance of the contract?

In this situation, both courts; the High Court and the Court of Appeal had maintained that the agreement was void due to frustration.

The appellants claimed that the respondents were obligated to construct the Water Treatment Plant pursuant to the privatisation agreement entered between the respondents and the state government to develop the IPFA. The respondents claimed that to accommodate the Tapping Agreement, they had to enlarge the size of the treatment plant which they would not otherwise have been required to do. The court held that the obligation of building the Central Waste Treatment Plant is solely on the respondents as they had originally entered into an agreement with the state government to build it. Therefore, the respondents could not use the fees from the Tapping Agreement to build the Central Waste Treatment Plant as the appellant were not parties to the first agreement with the state government.

Whether monies paid should be refunded?

Section 57(3) of the Contracts Act 1950 provides for compensation for loss through non-performance of acts known to be impossible or unlawful. Section 15(2) of the Civil Law Act also provides for refund in cases of frustrated contracts. As the state had banned the operation of pig farms, the contract is void automatically by frustration as performance is impossible by virtue of state law. The appellants had already paid an amount of fees before the ban was gazetted. Therefore, based on section 15(2) of the Civil Law Act 1956, the monies paid can be recoverable. The respondents had argued that the Tapping Agreement caused them to enlarge the size of the treatment plant and counterclaimed for balance of the fees and retainment of the original fee. However, the appellants claimed for a refund on the grounds of frustration as the respondents had the duty to build the treatment plant based on the original agreement with the state government.

Whether evidence shows a party who received monies is obliged to bear expenses on its own?

In pursuant to the agreements made between the plaintiffs and the defendant, the defendant contended that they should be allowed to use the fees paid to construct the Central Waste Treatment Plant (CWTP). However, these agreements were made after the Defendant's appointment as developers of the Integrated Pig Farming Area (IPFA) where they are tasked to construct the CWTP. The plaintiffs were not a party to the agreement with the state government.

The state government then introduced a policy where all pig farming activities are to be allowed only in the IPFA. Even so, existing pig farms are permitted to continue operations if they are connected to the Defendant's Central Waste Treatment Plant (CWTP). As a result, two agreements were made between the plaintiff and the defendant; Tapping Agreement (allows pig farmers like the plaintiffs to tap into the CWTP if fees are paid to the defendant and the cost of construction are to be borne by the Defendant) and Service Agreement (allows defendant to collect service charges for the CWTP). It was from these fees that the defendant had utilised to construct the CWTP as they claimed that to accommodate the Tapping Agreement, which was an enlargement to the CWTP that had to be done which otherwise would

not be required for them to do so. The plaintiffs countered that the defendant was obligated to construct the CWTP as based on the privatisation agreement entered between the defendant and the state government to develop the IPFA.

Based on Section 15(2) of the Civil Law Act 1956, the Defendant bears the burden of proving that the expenses incurred by the defendant were for the performance of the Tapping Agreement. The court found that the agreements and the minutes between the Defendant and the State Government shows that the Defendant was obliged to build the treatment plant and to bear the costs of construction. Therefore, the expense incurred in building the plant is an obligation imposed on the Defendant pursuant to the IPFA project.

JUDGEMENT

It was held that the trial judge had erred in invoking the provision of section 15(2) of the Civil Law Act 1956 after finding that the construction of the treatment plant was an expense incurred in the performance of the Tapping Agreement. The evidence showed the respondents were obliged under the IPFA project (the original agreement between the respondent with the state government) to build and bear the costs of construction of the plant. Based on this, the Appellant is independent from the obligation of bearing the cost of construction as it was not an expense incurred by the performance of the Tapping Agreement. It is an obligation on the Respondent's part when the Respondent entered the agreement to build and bear the cost of construction with the state government. Therefore, the Respondents are not allowed to use the fees paid to construct the CWTP.

The contract was found to be void by frustration and the dismissal of the unpaid balance claim by the Respondent remains unchallenged by both courts. The respondents are to refund the Appellants with interest.

ANALYSIS

Section 15(2) of the Civil Law Act 1956 is applied differently in both courts. In the previous High Court, the respondents were allowed to use the fees that had been paid by the appellants to build the Central Waste Treatment Plant. This is in contrast with the decision of the Court of Appeal which ordered the respondents to provide a refund to the appellants, declaring error judgment by the previous court. This is evident by the first agreement with the state government that is in isolation with the second agreement with the appellants.

Section 15 of the Civil Law Act 1956 discusses the adjustment of rights and liabilities of parties in a frustrated contract. In Section 15(2), refund is available on the grounds of frustration. This is depicted in the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd*[117] whereas the original deposit was refundable under Section 15(2) of the Civil Law Act 1956.

The High Court had decided that Section 15(2) of the Civil Law Act 1956 allows the respondents to retain the paid sums of the appellant to set off the costs of construction incurred by the respondents under the Tapping Agreement. The appellants on the other hand had affirmed for the paid sums to be refunded as the contract has been frustrated.

In the Court of Appeal, the Respondents argued that they need to incur more costs to enlarge the water treatment plant in order to supply it to the appellants. However, the original agreement with the state government had stipulated that the respondents must bear the cost of construction solely. Therefore, the respondents must refund the paid fees of the appellants.

Frustration Claims invoked by COVID-19 Restrictions

There are certain elements and conditions before a contract can be declared as frustrated and therefore discharge parties from their obligations. This is based on the case of *Guan Aik Moh (KL) Sdn Bhd*

[117] [2014] MLJ 413, CA.

v Selangor Properties Lt[118] which established three main elements of frustration. The first being that no provision[119] has been made in the agreement such as the absence of force majeure clause. Secondly, the frustrating event must not be the responsibility of the parties and lastly, the said event must have rendered the contract radically different rendering it impossible to be performed.

The Movement Restriction Order (MCO) was an unforeseeable event as the initial period was originally two weeks before gradually extending to almost three months. This restriction order is also continuous and isolated in certain regions by virtue of statutory prohibitions. A valid example of frustration by statutory prohibition is exhibited in the English case of *Metropolitan Water Board v Dick, Kerr & Co. Ltd.*[120] In this case, the defendants were required by a wartime statute to cease work, thus rendering the whole act of building a reservoir for the Water Board impossible to perform. The parties were later discharged from performing the contracted act.

Since the MCO was enforced by statutory power, grounds of frustration can be applied. The restriction order does not only restrict the movement of the public to a 10 km radius but also imposes a restriction to any form of public gatherings. Although the terms for newly imposed MCOs in different regions vary, the main rule of gathering restrictions are still enforced. This is especially fatal to daily waged or team-based occupations such as construction or factory workers. This is because daily waged or team-based occupations require face to face communication and on-site activities to perform their obligations. Hence, the MCO can be construed as a frustrating event that makes for performance of a contract in such nature impossible.

However, to succeed in the claim of frustration under Section 57(2) of the Contracts Act 1950, the parties must show that the MCO had caused the impossibility of performing the act. Other occupations such as the education or accounting sector may not succeed in frustrated contracts

[118] [2007] 4 MLJ 201, CA.

[119] [1963] MLJ 159.

[120] [1918] AC 119, HL.

as they can continue their occupations via online platforms without breaching the restriction order and their original obligations within their agreement. This is in contrast with daily waged workers or occupations which require the nature of physical contact, which may be in breach of the restriction orders.

Application of Force Majeure Clauses

A force majeure clause in contracts provides for instances of delays, temporary discharge of obligations or other obstacles that allows the contract to be continued without automatically being terminated. Section 57(2) of the Contract Act 1950 can only be invoked when there are no provisions inside an agreement such as stipulated in the force majeure clauses. Usually, force majeure clauses include acts of God, riots, lockdowns, delays, prolonged shortage of supplies, haze, or government prohibitions. This is based on the case of *Hackney Borough Council v Dore*[121] that stipulates force majeure as an expression that means some physical or material restraint and does not include a reasonable fear or apprehension of such restraint.

In Malaysia, there are several epidemics, diseases, riots, war, and other events that have forced government actions in isolation, closure and other restrictions such as dengue fever, H1N1, SARS and Japanese Encephalitis (JE). Even so, there has not been a national lockdown, movement restriction order or curfew throughout the recent years. The last ever lockdowns were the 13 May 1969 riots and the Communist Movement in retro years, other than short school holidays due to the haze or other diseases such as hand foot mouth disease and H1N1. Therefore, there are not many inclusions of pandemics or disease related clauses in current force majeure clauses in local agreements.

Internationally, trade activities are governed by the International Chamber of Commerce (ICC) especially on force majeure and hardships as there are many unforeseen events that makes performance impossible which includes volcanic eruptions or explosions. It is not necessary to terminate the contract wholly by reason of delays as the

[121] [1922] 1 KB 431.

contracting parties still intend to continue the agreements stipulated in the contract.

Force majeure clauses act as a safety net in safeguarding the contracting parties' interests if any obstacles or hardship occur such as transport delays or visa problems. In 2010, a volcanic eruption had resulted in delays in the presentation of documents due to the inability of courier companies to deliver packages on time.[122] Even so, the ICC ruled that it is not an event covered by the force majeure rules. This is similar to the case of *Tskairoglou & Co Ltd v Noblee Thorl GMBH*[123] where the appellants refused to deliver goods on the grounds that the Suez Canal was closed and would incur more expenses by using another alternative. In application, the volcano eruption had caused delays in document delivery, but it did not render the whole performance impossible as there were other alternatives of delivery. This is because the parties involved were still open for business and the delay of the documents did not render their whole duty impossible to be performed. The ICC also holds the same view to the COVID-19 pandemic in comparison to the volcanic eruption in 2010, as it is unlikely to amount to a force majeure event.[124] For example, the online shopping site Shopee, based in China is still operating, delivering, and manufacturing goods internationally, especially to Malaysia. Despite being the epicentre of the COVID-19 outbreak, the shopping site still resumes business under strict Standard Operating Procedures. This shows that invoking force majeure clauses is not straightforward as parties need to show that the whole performance of the contract is impossible for the force majeure to be invoked.

[122] ICC. "News & Speeches : *Volcanic Eruption Delaying Delivery of Documents under ICC Rules*". International Chambers of Commerce World Business Organisation, 21 April, 2010.

[123] [1962] AC 93.

[124] ICC. "*Guidance Paper on the Impact of Covid 19 on Trade Finance Transactions Issued Subject to ICC Rules*". International Chambers of Commerce World Business Organisation, 7 April, 2020.

Legislations on COVID-19

The Singaporean Government had introduced the Covid 19 (Temporary Measures) Act 2020 to facilitate agreements and business affected by COVID-19. This Act offers temporary relief to businesses and individuals who are unable to perform their contractual obligations due on or after 1 February 2020 due to COVID-19. It provides a rental relief framework for Small and Medium Enterprises and enhances relief for other organizations who are unable to fulfil their contractual obligations. The Singaporean government also had protected the interests of daily waged workers such as those in the construction and supply industries through the passing of this Act by introducing a cap on late payment interest of certain parties affected by breaches or delays in construction or supply contracts.

In Malaysia, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) ACT 2020 officially came into force on 23 October 2020, long after the national MCO period ended. The enforcement of this Act allows for disputes below RM 30,000 to be settled via a COVID-19 Mediation Centre (PMC-19) established under the Prime Minister's Department as stated in section 9(1) of the Act. However, this Act will only be applicable for two years from the date of enforcement. Frustrated contracts impacted by COVID-19 are only applicable for 10 months under this Act which is from 18 March 2020 to 31 December 2020. This act allows contracted parties to be discharged from performing their contractual obligations and refrain any action for breach provided that the type of contract is in conformity with the Act's Schedule as stated in Section 7,[125]

> *"The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the*

[125] Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020.

spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract."

Previous agreements made by disputing parties because of COVID-19 restrictions such as deposits, damages, proceedings, and termination are still considered valid. Therefore, previous agreements would not be affected by this provision provided that the agreement was made between the period of 18th March 2020 until the publication date of this Act.

CONCLUSION

Frustrated contracts and the remedies available are recognised in the Malaysian Legislation. To succeed in these claims, the parties must prove that the contracted act has become wholly impossible to perform. In Malaysia, contracting parties that wish to invoke frustration because of COVID-19 Restrictions shall have to prove that the performance of the contract had become impossible due to it, particularly during the MCO period. Remedies can then be claimed when the contract is declared void due to frustration.

To mitigate the situation, contracting parties should include, inter alia, pandemic, epidemic, lockdown, quarantine, and isolation as events that fall under force majeure in Force Majeure clauses. The new COVID-19 Act in Malaysia refrains parties from exercising their contractual rights such as performing the act or acting against parties in cases of breach. Nonetheless, if any action or other agreement had taken place before the publication date of the Act, the said action prevails.

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7 2020 LM 74 – 93

DELAY NOT DENIAL: AN ANALYSIS OF THE DELAYED COMPLAINT RULE FOR SEXUAL OFFENCES

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Syed Ahmed Khabir[127]

ABSTRACT

Delayed complaints for sexual offences have long been perceived by society as indicative of the victim's contributory guilt or blame towards the crime. In an age where women are leading countries and taking over the workforce all while having children, it is disheartening to know that all that progress comes to naught when it comes to their treatment as sexual pawns in the hands of men. This article is aimed at uncovering the effect of these perceptions against women towards the evidential value of delayed sexual offence complaints and whether the law and societal values reflect one another; alongside distinguishing the weight and value of the testimony of a child to that of an adult victim. Finally, this article suggests that other types of evidence such as those fresh in memory, demeanour of victim and evidence of identification can serve as corroborative evidence to strengthen the prosecution's case for a delayed complaint.

Keywords: Delayed complaint, recent complaint, sexual offences, rape, corroboration.

[126] 4th year, AIKOL, International Islamic University Malaysia.

[127] 4th year, AIKOL, International Islamic University Malaysia.

ABSTRAK

Aduan tertunda bagi jenayah seksual telah lama dilihat oleh masyarakat sebagai kesalahan yang telah disumbangkan oleh mangsa. Persepsi ini amat mengecewakan apabila wanita dilayan seperti bidak seksual di tangan kaum lelaki terutamanya pada era wanita memipin negara dan mendominasi tempat kerja sambil mempunyai anak-anak. Artikel ini bertujuan untuk mendedahkan kesan persepsi ini terhadap wanita dalam menentukan kesahihan nilai bukti aduan kesalahan seksual yang tertunda dan sama ada undang-undang dan nilai masyarakat mencerminkan satu sama lain; di samping menentukan berat dan nilai testimoni seorang kanak-kanak berbanding mangsa dewasa. Akhirnya, artikel ini juga mencadangkan bahawa jenis bukti lain seperti ingatan segar, sikap mangsa dan bukti pengenalan boleh berfungsi sebagai bukti sokongan untuk mengukuhkan kes pendakwaan bagi aduan yang tertunda.

Kata kunci: Aduan tertunda, aduan baharu, jenayah seksual, rogol, koroborasi.

INTRODUCTION

Generally, sexual offences refer to all offences that include but are not limited to rape, sexual assault, or assault by penetration. To date, Malaysia has no definite law defining sexual offences. However, the Penal Code contains provisions concerning rape, incest and unnatural offences which could all be categorised as sexual offences. Malaysia's Sexual Offences Against Children Act (SOAC), passed in 2017, also includes offences such as the production and distribution of pornography and sexual grooming. The much-awaited tabling of a Sexual Harassment Bill would be the bright light at the end of a long tunnel for many who have long advocated for stricter laws against sexual offences.[128] Non-Governmental Organizations such as the All Women's Action Society (AWAM) have lamented the need for laws against sexual offences and the need for stricter enforcement to cope with the rise in cases. Many victims have turned to such organisations instead of the police due to the trauma associated when making a police report besides fear that their complaint will not be taken seriously. In fact, there were reported incidents where such complaints were only met with laughter.[129] Police statistics have recorded 1,218 cases of sexual harassment from 2013 to 2017. 1,187 of these cases were still under investigation as of February 2019 while a measly 31 individuals have been charged.[130] Such numbers show the ineffectiveness of Malaysia's law enforcement in dealing with sexual crimes.[131]

[128] Sexual Harassment Bill to be tabled by year end, says minister, *Malay Mail*, 2020, https://www.malaymail.com/news/malaysia/2020/07/22/sexual-harassment-bill-to-be-tabled-by-year-end-says-minister/1887020, (accessed 3 September 2020).

[129] Awam: Cops laughed at sexual harassment complaints, *Malaysia Kini*, 2019, https://www.malaysiakini.com/news/482261, (accessed 3 September 2020).

[130] Devi Yosini, Awam calls for set up of tribunal, *The Star*, 2019, https://www.thestar.com.my/news/nation/2019/07/29/awam-calls-for-set-up-of-tribunal, (accessed 2 September 2020).

[131] Ibid.

SOCIETAL PERCEPTION

Following the wake of the #MeToo social movement aimed at creating awareness towards sexual abuse and violence, The United Nations Children's Fund (UNICEF) of USA launched their own #HerToo campaign to lend a voice to the victims of sexual offences.[132]

In Malaysia, sexual offences, particularly rape, is considered as taboo. In a predominantly modest and conservative society, victims of sexual offences are often blamed for the offence for reasons such as wearing inappropriate clothing or going out in the wee hours of the night. In fact, study findings showing the rise in rape cases are claimed to be false as most of the cases are 'actually consensual' yet men get blamed for it when things go wrong.[133] Malaysian religious teachers and politicians are often the ones on the firing end of these accusations against women with controversial statements that women who refuse to cover up deserve to be sexually abused and raped[134] and that such clothing is what seduced men into raping in the first place.[135]

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[132] Ferguson Sarah, One Year After #MeToo, UNICEF Is Fighting Sexual Assault Worldwide, *Forbes*, 2018, https://www.forbes.com/sites/unicefusa/2018/10/15/one-year-after-metoo-unicef-is-standing-up-for-all-sexual-abuse-survivors/#eba896375fcc, (accessed 3 September 2020).

[133] Victim blaming perpetuates silence, injustice —, *Malay Mail*, 2020, https://www.malaymail.com/news/what-you-think/2020/07/07/victim-blaming-perpetuates-silence-injustice-wcc/1882170, (accessed 3 September 2020).

[134] Cheah Bernard, Ustaz slammed for saying women who 'don't cover up' deserve to be sexually violated, *The Star*, 2019, https://www.thestar.com.my/news/nation/2019/05/03/ustaz-slammed-for-saying-women-who-dont-cover-up-deserve-to-be-sexually-violated, (accessed 2 September 2020).

[135] Victor Daniel, After Claiming Men Are 'Seduced' Into Rape, Malaysian Senator Apologizes, *The New York Times*, 2019, https://www.nytimes.com/2019/08/01/world/asia/malaysia-sexual-assault-seduced.html, (accessed 2 September 2020).

Unfortunately, such sentiments have infiltrated not only the minds of men but also those of women; the majority that make up rape and sexual offence victims.[136] Recently, the Ministry of Women and Family Development had come under fire for their misogynistic 'joke' depicting how women should speak nicely to their lazy husbands in the midst of a worrying increase in domestic violence reports following the Movement Control Order.[137] The perceptions that women are to please and serve men and the traditional view that a woman's place is in the home[138] are the kind of mentality that condones sexual offences towards women as crimes that they had 'asked for' and not what they had fallen victim or prey to.

Survivors of sexual offences often feel ambivalent on reporting the crime for reasons that such complaints would create guilt, responsibility, or shame. They are left with two possibilities: to speak out and risk losing their credibility; especially if the offender is a powerful or well-respected man, or to remain silent and have their truth unknown. According to psychologists, attitudes about rape are influenced by seven factors: views on women's responsibility in rape prevention, sex as motivation for rape, severe punishment for rape, victim precipitation of rape, normality for the rapist, favourable perceptions of a woman after a rape, and resistance as the woman's role during rape.[139] A victim's reaction can be simplified in three concepts

[136] Sexual Harassment Statistics, Royal Malaysia Police (PDRM), *Women's Aid Organisation* https://wao.org.my/sexual-harassment-statistics/ ,(accessed 2 September 2020).

[137] Ramayah Umavathi, Bersolek, buat suara 'Doraemon' waktu PKP: AMM sifatkan syor KPWKM perlekeh golongan Hawa, *Astro Awani*, 2020, https://www.astroawani.com/berita-malaysia/bersolek-buat-suara-doraemon-waktu-pkp-amm-sifatkan-syor-kpwkm-perlekeh-golongan-hawa-236431 , (accessed 2 September 2020).

[138] The Progress of Malaysian Women Since Independence 1957 – 2000, *Ministry of Women and Family Development*, 2003, http://www.undp.org/content/dam/malaysia/docs/WomenE/ProgressOfMalaysianWomen.pdf (accessed 2 September 2020).

[139] Magner Eilis S. (2000), *Proving Sexual Assault, Behavioral Sciences and the Law Behav*. Sci. Law 18: 217 246.

of blame, causality, and responsibility.[140] A victim is blamed when she is considered to have 'asked for' the outcome. She is deemed to have caused it if her behaviour fits the stereotypes associated with such victims. When the victim then acknowledges this, she then attributes responsibility upon herself for her suffering which subsequently further cements the toxic victim blaming that comes with sexual offences and feeds the already growing trauma and fear of reporting the crime in the minds and hearts of the victims.

DELAYED COMPLAINT AND RECENT COMPLAINT RULE

Due to the fact that evidence concerning sexual offences, especially in cases of rape, can only be retrieved via oral evidence from the victim and the offender, there is understandable concern that the longer it takes for a victim to lodge a complaint, the less likely it is to obtain an accurate account of the crime much less reliable evidence.

Evidence of fresh or recent complaints is a fact told very soon after a sexual offence. This rule is specific to sexual offence cases and is deemed to have contributed to the stigma and stereotypes against delayed complaints of sexual offences. This common law rule is based on mistrust towards an accusing witness.[141] This exacerbates the already festering trauma from court proceedings on survivors of sexual offences; one of the main reasons of reduction in the number of prosecutions and convictions.

Blackstone's Commentaries justify the doctrine as indicative of the credibility of the victim. If the victim is of good character or had only presently discovered the offence this would give greater probability to her evidence. Conversely, concealing the offence for any considerable time after she had every opportunity to complain, would carry a strong but inconclusive presumption that her testimony is false or feigned.[142]

[140] Ibid.

[141] Ibid.

[142] Ibid.

In the Australian case of *Papakosmas v The Queen*[143], Papakosmas was convicted for raping the complainant who then, distressed and crying, reported the incident almost immediately. The evidence satisfied the fresh in the memory test under Section 66(2) of Australian Evidence Act 1995[144] which describes the quality of the complainant's memory when the incident happened and the time of making the complaint. On the other hand, in *Graham v The Queen*[145], the court held that the temporal connection between the occurrence of an asserted fact and the making of the complaint is the primary factor in determining whether a complaint is fresh in the memory. It must be recent, immediate, contemporaneous, or nearly contemporaneous.[146] In contrast, the court in *R v XY*[147] stretched the meaning of fresh in the memory as it does not indicate recent or immediate. The temporal relationship remains a relevant consideration, however the court must also consider the nature of the event concerned.

The delay in making a complaint must be viewed in light of other relevant and admissible evidence. In *Ahmad Nazari bin Abd Majid v Public Prosecutor*[148], the complainant initially chose to remain silent due to embarrassment and ignorance of the law. She eventually lodged the report on the advice of her son.[149] The implication of the recent and delayed complaint rule will affect the complainant's credibility in terms of proving the case against the accused. The case of *Public Prosecutor v Teo Eng Chan & Ors*[150] illustrates the position of the doctor as someone in authority who treats the complainant. Pursuant to

[143] [1999] HCA 37.

[144] Anne Cossins (2002), The hearsay rule and delayed complaints of child sexual abuse: The law and the evidence, *Psychiatry, Psychology and Law*, 9(2), p. 165.

[145] [1998] HCA 61.

[146] Ibid.

[147] [2010] NSWCCA 181.

[148] [2009] 9 MLJ 297.

[149] Ratanlal Ranchhoddas, C K Thakker, Ratanlal and Dhirajlal's Law of Crimes, New Delhi, *Bharat Law House*, 2013, (27th Ed), p. 1708.

[150] [1988] 1 MLJ 156.

the doctor's advice, the complainant lodged a police report about the incident. The relevancy of the complaint made to the police officer strengthened the prosecution's case considering the complaint made without any delay.

TESTIMONY OF CHILD VICTIMS

A child's naivete makes them not only the easiest target for sexual predators, but also the most likely to delay reporting the crime. The law is found in Section 118 of the Malaysian Evidence Act 1950 which prescribes all persons, including a child, as competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. Thus, the trial judge must determine a child's competency to testify by ensuring that he understands the oath he takes. If he is able to understand, then the child may pursue his testimony. If he is unable, then the trial will proceed with his unsworn testimony. Section 118 of the Evidence Act must be read together with Section 133A of the Evidence Act 1950, where children are considered competent to give unsworn testimony so long as they possess sufficient intelligence to justify the reception of evidence and understand the duty of speaking the truth.

In *Tajudin bin Salleh v Public Prosecutor*[151] Hamid Sultan JC stated that there is a danger in placing absolute reliance upon the uncorroborated testimony evidence of a child as he can easily be influenced by adults who have an interest in the case. As a matter of strict law, the court can act on the uncorroborated testimony of a child. However, it is a sound rule in practice not to act on it. This is only a rule of prudence and not of law.

In *Public Prosecutor v Asmad bin Akdim*[152] the complainant gave unsworn evidence during the trial. The accused was acquitted because the allegation of rape by the victim was not corroborated by any other evidence as required under Section 133A of the Evidence Act 1950. The old tear observed by the medical doctor could not be linked with

[151] [2008] 1 MLJ 397.

[152] [2019] MLJU 1415.

the date of the alleged rape as there were inconsistencies, thus incapable of being corroborated with the complainant's unsworn evidence.

It was reported in *Sidek Bin Ludan v PP*[153] per Abdul Malik Ishak J (as he then was):

> "The proviso to s 133A of the Act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness…. This amendment distinguishes between the testimony of a sworn and unsworn child witness. In the case of a sworn child witness the old rule of prudence applies viz, the need to give exhaustive warning on the dangers of convicting on such uncorroborated evidence. Whereas in the case of an unsworn child witness, s 133A of the (Evidence) Act applies."

TESTIMONY OF ADULT VICTIM

The Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal*[154] decided that the law on corroborated evidence of a sexual offence victim, as a matter of practice and prudence, is typically required for a sexual offence. In most sexual offence cases, the victims often appear unconvincing due to the traumatic incident that they underwent. Consequently, corroboration is required in all sexual offence cases.

In *Pendakwa Raya v Huang Qiang*[155] evidence of the CCTV recording demonstrated no change in the facial expression of the victim after the alleged incident. Though there is evidence from several divers who testified that the respondent had the propensity for violent behavior, which was a reason relied on by victim for her reluctance to report the alleged incident - a serious crime of rape-, there were still numerous opportunities for her to have alerted others; instead of lodging a police

[153] [1995] 3 MLJ 183.

[154] [2015] 2 MLJ 293.

[155] [2020] MLJU 895.

report five days subsequent to the alleged rape, after consulting her cousin. This shows that delayed complaints should be assessed as a case-to-case basis, while taking into account the totality of other available evidence.

POSITION UNDER MALAYSIAN EVIDENCE ACT 1950

Evidence of Conduct under Section 8

Section 8(2) of the Evidence Act 1950 allows evidence of previous and subsequent conduct of the accused person, victim or third party to be tendered in court. The conduct must directly affect and be related to the fact in issue or relevant facts.[156]

Previous conduct refers to conduct of the person before commission of the facts in issue. For example, the act of the accused such as verbal sexual assault may constitute his previous conduct prior to raping the victim. Subsequent conduct refers to the action of the accused or victim after the crime happens.

Explanation 1 to Section 8(2) of the Evidence Act 1950 stipulates that conduct refers to an action and a statement will not be a part of conduct except when such statement explains acts. Illustration (j) of the Act states that the fact that shortly after the alleged rape the victim made a complaint relating to the crime, the circumstances, and terms in which the complaint was made are relevant.

The fact that without making a complaint the victim claims she was raped is not relevant as conduct under this section, rather it may be relevant as a dying declaration under Section 32(1)(a) of the Evidence Act 1950 and as corroborative evidence under Section 157 of the Evidence Act 1950. Thus, when a victim lodges a police report, it is a complaint and tendering it in court is similar to tendering the evidence of the conduct of the victim under Section 8(2) of the Evidence Act.

[156] Habibah Omar, Siva Barathi Marimuthu, Mazlina Mahali, Law of Evidence in Malaysia, *Sweet & Maxwell Malaysia*, (2018), 2nd Edition, p. 77.

In *Aziz bin Muhamad Din v PP*[157], a complaint by a rape victim is relevant under Section 8 of the Evidence Act 1950, illustration (j) where it distinguishes between a complaint and a statement. In regard to complaint, the illustration highlights that the fact of the complaint having been made and the circumstances are relevant. The statement made by the complainant to her father did not amount to a complaint as it had only been made after questioning by her father, therefore it was not spontaneous.

A complaint that is made contemporaneously does have a greater probative force than a delayed complaint, but failure to complain does not make the evidence of the victim or complainant less credible. Thus, the previous conduct of the victim through complaint, police report, act may be relevant to establish conduct.[158]

Evidence of Former Consistent Statement under Section 157 of the Evidence Act 1950

Under this section, the former statement of a witness may be proven in order to corroborate his current testimony. Firstly, the witness should have given evidence of the fact in issue. Secondly, he should have made a statement on a former occasion regarding the same fact in issue or any circumstances of the fact before any relevant authority which shall investigate the fact. The statement supports the credibility of the witness and if it was made immediately, it contained the truth as there is no time interval. There are two views on the interpretation of Section 157 of the Evidence Act 1950; that the previous statement amounts to corroboration and that it does not amount to corroboration. The first view opined that the former statement of a witness may be proven in court to corroborate his testimony.[159] The second view opined that evidence in corroboration must be independent testimony which affects

[157] [1996] 5 MLJ 473.

[158] Hamid Sultan bin Abu Backer, Janab's Key To The Law of Evidence, Advocacy And Professional Ethics, *Janab (M) Sdn Bhd*, 5th Edition, (2018), p. 152.

[159] PP v Samsul Kamar bin Mohd Zain [1988] 2 MLJ 252.

the accused by linking him with the crime.[160] As a matter of fact, the whole idea of corroboration under Section 157 of the Evidence Act 1950 is only for the purpose of showing that the witness is consistent.[161]

Convicting the accused on the charge of rape based on the evidence of the complainant alone is dangerous as experience shows that complainants have told false stories for various reasons.[162] In *Aziz bin Muhamad Din v PP*[163], the court stated that in sexual offence cases where evidence is given by a young girl, the court must be satisfied that the danger of conviction upon the uncorroborated evidence of the girl was present to the minds of the jury. Also, in Balwant Singh v PP[164], it was stated that a witness cannot corroborate his own testimony and independent evidence is required because for sexual offences, it is unsafe to convict where there is no independent evidence. For instance, in *Mohamad Nazeril bin Mohamad Hamidi v Public Prosecutor*[165], a plain reading of Section 157 of the Evidence Act 1950 shows that the evidence of the complaint to the mother, doctor, and enforcement officer is admissible as corroboration of the victim's own evidence as to the incest.

Demeanour of Victim

This is one of the strong corroborative types of evidence in sexual cases. The victim's demeanour when giving the statement and during cross-examination by the counsel will reflect upon the truthfulness of the incident and prove that the story is not fabricated.[166] In *Mohamad*

[160] Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401.

[161] PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1.

[162] PP v Emran bin Nasir [1987] 1 MLJ 166.

[163] [1996] 5 MLJ 473.

[164] [1960] 1 MLJ 264.

[165] [2020] MLJU 353.

[166] Mohamad Ismail bin Mohamad Yunus, Evidential Weight of Recent and Delayed Complainant Sexual Assault Trial Proceedings, *Lexis Nexis Malayan Law Journal* [2016] 6 MLJ, p xxviii.

Nazeril bin Mohamad Hamidi v Public Prosecutor[167] the demeanour of the victim was observed, but there were inconsistencies in her statement which could have arisen due to not understanding the questions posed by the lawyers; further, the events took place quite a while back. Nonetheless, the existence of inconsistencies does not in way displace the proof of the fact in issue, which is that incest was committed by the accused. The victim remained frightened and cried after this sexual assault.

In *Public Prosecutor v Awang Alai Bin Awang Hamdan*[168], the immediacy of the complaint by the complainant to two witnesses and their evidence of the complainant's emotional state of mind at the time of the complaint can be regarded as corroborative evidence. The two witnesses testified that the complainant was crying and sounded stressed when she made a phone call to them – this shows the distraught demeanour of the victim.

Evidence of Fresh in Memory

Evidence of fresh memory also carries weight as a corroborative factor in sexual offences as the complainant can provide an explanation on how the incident took place. This is to rebut the defence's argument about the credibility of the complaint if it was delayed. In *Muhammad Zakwan bin Zainuddin v Public Prosecutor and other appeals*[169] the testimony by the victim was clear, lucid and detailed, thus her account was credible. Although the police report was lodged late, specifically after two months, the delay was sufficiently explained by the victim in her testimony; she was traumatised. There were four factors that the court considered in convicting the accused; namely credible and reliable evidence by the victim, the victim's demeanour when she carried herself in court, positive identification of the accused and mere denial of the accused. The court was of the view that it is illogical to expect corroborative evidence of the ordeal the victim has suffered throughout the wee hours of the morning as it was her presence alone

[167] [2020] MLJU 353.

[168] [2015] MLJU 896.

[169] [2020] 8 MLJ 420.

confined with six men. The medical evidence was consistent with the ordeal the victim went through.

For statutory rape, the defence would always cast a doubt that the victim is a child and that they are unable to illustrate the incident in a clear manner. Plus, the delayed complaint would be a key factor that it is a false rape case against the accused. As a rule of law, there is no statutory limitation to file a criminal suit, thus delayed complaints remain relevant. Also, every allegation must be backed with evidence and in sexual offence cases, evidence that is fresh in memory is vital to ascertain that the victim does not fabricate stories. The ability to detail out what exactly happened in a consistent manner alongside the demeanour of the victim inside the court is proven to be one of the strongest types of evidence for the prosecution to negate the delayed complaint.[170]

Evidence of Identification

The victim can rely on Section 9 of the Evidence Act 1950 by identifying the accused person. This can be used when the victim was gang-raped, or she cannot recall the identity of the accused person. It is emphasised that the victim's evidence of identification which forms part of the prosecution case is based on her recollection which is of good quality. It would eventually strengthen the complainant's case regardless of if the complaint was delayed.

COMPARISONS

Australia (Commonwealth Country)

Section 4A of the Criminal Law (Sexual Offences) Act 1978 provides that evidence of any sexual offence complaint is admissible regardless of when it was made while subsection 4A(4) prohibits a trial judge from warning or suggesting that the complainant's evidence is any more or less reliable only by reason of the length of time of the making of the

[170] Muhammad Zakwan bin Zainuddin v Public Prosecutor and other appeals [2020] 8 MLJ 420.

complaint. The High Court in *Jones v R*[171] confirmed this rule and described the fresh complaint rule as evidence of the consistency of the conduct of the victim with her account of the offence. In *R v Lillyman*[172] the rule was seen as strengthening the credit of the complainant as a complaint made at the earliest reasonable opportunity is expected of a truthful person. To be admissible, it must be made at the first reasonable opportunity after the offence.[173] This is determined through the sensitivities of the complainant and the circumstances at the time.[174] For example, it is not expected that a child would promptly report such an offence due to the factor of their youth and possible trust towards the adult perpetrator. Thus, a delay would still be considered as made at the earliest reasonable opportunity in light of those circumstances.[175] The legal significance of delayed complaint was explained in *Kilby v R*[176], and summarised in *Crofts v R*[177] where it was held that delayed complaint for sexual offences has "no probative value as to any fact in contest but goes merely to the credibility of the complainant." Thus, any doubt on the reliability of the evidence would be put to rest upon there being an explanation for the delay.

United States (Non-Commonwealth Country)

In the state of California, the statute of limitations puts a time limitation on filing a sexual assault case. Nevertheless, it only applies to civil cases depending on whether the victim is an adult or a child. For adults, the time limitation is within 10 years from the date of the last act or within 3 years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness has resulted; while for a child,

[171] [1997] 143 ALR 52 at 53.

[172] [1896] 2 QB 167.

[173] R v Roissetter, [1984] 1 Qd R 477.

[174] R v Sailor [1994] 2 Qd R 342.

[175] R v W [1996] 1 Qd R 573.

[176] [1973] 129 CLR 460 at 472.

[177] (1996) 186 CLR 427 at 434.

it is within 5 years of the discovery of the abuse. However, criminal charges can be commenced at any time.

The state is of the view that delayed complaints can damage the case in terms of the difficulties in retrieving the evidence. In *Commonwealth v. King*[178], the Massachusetts Supreme Judicial Court (SJC) abandoned the widely followed fresh complaint rule and instead coined the First Complaint Doctrine where the admissibility of complaints will no longer be conditioned upon whether it was reasonably prompt.[179] Hence, delay per se will not result in inadmissibility.

Similarly, the New Jersey Supreme Court deems irrelevant any evidence that an alleged victim of sexual abuse had delayed her disclosure of the crime if she is a young child.[180] However, the same is somewhat unclear for adult victims. The rule that the complaint must have occurred "within a reasonable time" to be admissible is flexible and would depend on reasons such as the physical or emotional condition of the victim. However, evidence of delay without special impediments can still be admitted as such evidence is often logically relevant to the alleged victim's credibility as well as the substantive question of guilt or innocence, since her period of silence may be inconsistent with her testimony at trial or tend to show that there was in fact, no sexual assault.[181] Hence, the probative value of delayed evidence would depend on the length of and reasons for it.

[178] (Mass. 2005) 834 N.E.2d 1175.

[179] Carman S.D. (2008) , In Memoriam: Justice Martha B. Sosman, Comment: Commonwealth V. King's "*First Complaint Doctrine*": The Voice of Injustice May Speak Loudly When Rape Victims are Silenced, 42 New Eng. L. Rev. 631.

[180] Coombs R.M. (1994), Articles, *Reforming New Jersey Evidence Law on Fresh Complaint of Rape*, 25 Rutgers L. J. 699.

[181] Ibid.

RECOMMENDATIONS AND CONCLUSION

From back in the day, a delayed complaint has very little evidential value, that too if a reason is given to substantiate the delay. The current law on delayed complaint takes into consideration the psychological damage of sexual offences on victims and thus, places greater value on such complaints that are substantiated by such evidence.

Rather than rejecting delayed complaints, the court should take a greater approach by considering other types of evidence such as fresh in memory, demeanour of victim and evidence of identification. These types of evidence can rebut the defence as to show the propensity and the likelihood of the offence committed by the accused. In fact, the fresh in memory evidence can cover complaints that are delayed by months or even years. However, caution should be administered by the court in accepting such evidence. The court also should properly construe cases involving child victims where the probability of delayed complaint is very much likely due to many factors. The Malaysian Criminal Procedure Code should include provisions that would not necessarily label a delayed complaint as false.

Conclusively, it can be deduced that despite the negative stereotypes towards delayed complaints by sexual offence victims, the law in most countries is firm on the fact that such delay would not negate the evidence per se but would still be deemed admissible and relevant for the prosecution of the crime. Its value would depend on other corroborated evidence such as the demeanour and mental state of the victim. The same can be said of the Malaysian law on evidence which considers delayed complaints as relevant and admissible. The value of such evidence would then be determined based on factors such as conduct, demeanour and former consistent statement.

Although the law seems to be just on both the sides of the perpetrator and the victim, it is still yet to be seen whether the same could be said of societal perceptions towards victims of sexual offences who have delayed in lodging complaints. Has society shaped the law or does the law now need to shape society? Despite the force of the law backing sexual offence victims who have delayed complaining the incident, societal perception is nevertheless important in ensuring that these victims do not suffer trauma throughout the process of reporting and

trial. The stigma against such victims and doubts surrounding their credibility, besides fear of further violations from the offender, are what withholds victims from speaking out in the first place. Hence, to truly make a lasting impact on the number of sexual offence cases, the law on delayed complaint must not only be more considerate towards the psychological impact of sexual offences on their victims but society itself must acknowledge the lasting mental scars forever etched in the minds of their victims and treat such wounds with compassion. Sexual offence victims should not only be able to seek the remedy they so justly deserve but also air their grievances without fear of immediate judgment. Only when victims are empowered to tell their truth can the evidence be deliberated and the wheels of justice work on devising a panacea.

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7 2020 LM 94 – 111

A CONSTITUTIONAL STUDY ON MATTERS RELATING TO RIGHT TO PRIVACY IN MALAYSIA

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ABSTRACT

It is without a doubt that the Federal Constitution plays an important role in securing the basic human rights of Malaysian citizens. This notion can be deduced from the inclusion of Article 5 until Article 13 in the constitution, which primarily deals with the fundamental liberties of a person. Nevertheless, with the constant shift in society and the global community, technological advancement in information necessitates for more active legislation being made to curb or for better word 'help regulate' on matters involving individual's privacy. There has been several discussions on whether concerns on privacy should be dealt with through an explicit recognition of the right in the Federal Constitution, since technically it has been partially recognised by our court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*. In the case, Gopal Sri Ram FCJ (as then he was) defined personal liberty, as mentioned in Article 5(1) of the constitution, as to also include the right to privacy. However, the position of right to privacy is still a quite vague concept in the eyes of our law, with such a right seeming to only encompass on female's privacy rather than acting as a fundamental right for all. To add into the discussion, it is also a fact that improvements in communication energy have made it easier for any invasion of privacy of any individuals. This study aims to answer the following questions: a) What is the status of right to privacy as currently recognised in the Malaysian legal landscape? b) Is it relevant to introduce an explicit article concerning the right to privacy in our Federal Constitution?

Keywords: Right to privacy, personal liberty, Federal Constitution, human rights.

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ABSTRAK

Perlembagaan Persekutuan tanpa sebarang keraguan memainkan peranan yang amat penting dalam menjamin hak asasi rakyat Malaysia. Hal ini dapat dilihat dengan penyertaan Perkara 5 sehingga Perkara 13 dalam perlembagaan, yang berkaitan dengan hak kebebasan asasi seseorang. Walau bagaimanapun, dengan perubahan yang berlaku dalam masyarakat dan komuniti global serta kemajuan teknologi dalam bidang maklumat, undang-undang yang lebih inklusif dan relevan perlu dikenalkan untuk membendung atau 'membantu mengawal' perkara-perkara yang melibatkan privasi individu. Terdapat beberapa perbincangan sama ada privasi perlu ditangani melalui pengiktirafan jelas hak dalam Perlembagaan Persekutuan, kerana secara teknikalnya sebahagiannya telah diiktiraf oleh Mahkamah dalam kes *Sivarasa Rasiah lwn Badan Peguam Malaysia & Anor*. Dalam kes ini, Gopal Sri Ram FCJ (ketika itu) telah mendefinisikan kebebasan peribadi merangkumi hak privasi seperti yang dinyatakan dalam Perkara 5 (1). Namun begitu, kedudukan hak privasi masih merupakan konsep yang agak samar-samar dalam undang-undang Malaysia, dengan hak sedemikian seolah-olah hanya merangkumi privasi wanita dan bukannya untuk hak asasi untuk semua secara menyeluruh. Selain daripada itu, peningkatan dalam tenaga komunikasi telah memudahkan aktiviti pencerobohan privasi mana-mana individu. Kajian ini bertujuan untuk menjawab soalan-soalan berikut: a) Apakah status hak privasi semasa seperti yang diiktiraf dalam landskap undang-undang Malaysia pada masa ini? b) Adakah relevan untuk memperkenalkan artikel yang jelas mengenai hak privasi dalam Perlembagaan Persekutuan kita?

Kata kunci: Hak privasi, kebebasan peribadi, Perlembagaan Persekutuan, hak asasi manusia.

INTRODUCTION

General Concept of Right to Privacy and Overseas Examples

The right to privacy refers to the concept of protection over one's personal information, most often by statutory law from public scrutiny. It is an element of various legal traditions to restrain governmental and private actions that threaten the privacy of individuals.[185] Over 150 national constitutions mention the right to privacy. The United States Justice Louis Brandeis called it "the right to be left alone" in his article entitled The Right to Privacy. Together with Samuel D. Warren, they approached privacy by focusing on protecting individuals as a response to then technological developments, such as photography and sensationalist journalism, also known as yellow journalism.[186] While it is not explicitly stated in the United States Constitution, some amendments do provide some protection. Privacy uses the theory of natural rights and generally responds to new information and communication technologies; hence privacy rights are congenitally intertwined with information technology. In the case of *Olmstead v. United State*s[187], Brandeis, in his widely cited dissenting opinion, still rely on thoughts he developed in his 1890 article, but changed the focus in his dissent, whereby he urged making personal privacy matters more relevant to constitutional law, going so far as saying "the government identified…as potential privacy invader". He also added, "Discovery and intention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

The interpretation of privacy varies according to different countries. In western countries mostly, particularly the United Kingdom (UK) and the United States of America (USA), it is seen as a protection against the invasion of one's privacy either by the government, company, and other individuals. Some countries have also incorporated these rights

[185] "*The Privacy Torts*" (December 19, 2000). Privacilla.org.

[186] Warren and Brandeis, "*The Right to Privacy*", 4 Harvard Law Review 193 (1980).

[187] 277 U.S. 438 (1928).

into their privacy laws and constitutions. Many countries have laws limiting privacy such as in the case of taxation law, which requires individuals to share their personal information regarding earnings and income with the government. Moreover, in some countries, freedom of speech may be in conflict with individual privacy laws and in particular where some laws require public disclosure of matters which other countries and cultures consider to be private.

The right to privacy has been firmly established to be fundamental in the USA as portrayed in the controversial case of *Roe v. Wade*[188]. In this case, the court ruled that the state's compelling interest in preventing abortion and protecting the life of the mother outweighs a mother's personal autonomy only after viability. Before viability, the mother's right to privacy limits state interference due to the lack of compelling state interest. In the case of *Lawrence v. Texas*[189], where the ruling was overturned and Texas had found to violate the rights of two gay men when it enforced a law prohibiting sodomy, Justice Anthony Kennedy wrote, "The petitioners are entitled to respect for the private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

In defining privacy, it can be said as an inherent human right and is required for maintaining the human condition with respect and dignity. In recent years there have been only a few attempts to clearly and precisely define the right to privacy. Article 12 of the Universal Declaration of Human Rights states that, "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". The privacy of individuals may be termed as the right to determine how information concerning the individual is communicated to others and how that information is controlled.

[188] 410 U.S. 113 (1973).

[189] 539 U.S. 558 (2003).

In 2005, students of the Haifa Center for Law and Technology in Israel asserted that in fact the right to privacy "should not be defined as a separate legal right" at all. On the other hand, another ideology was that the "right to privacy should be seen as an independent right that deserves legal protection in itself", about privacy in the digital environment. There were also other experts, such as William Prosser, the Dean of the College of Law at UC Berkeley, who had attempted to define right to privacy but failed due to the lack of legal precedents to formulate a clear definition.

The privacy of individuals can also be termed as the right to determine how information concerning the individual is communicated to others and how that information is controlled. Therefore, the working definition for a right to privacy is "The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets, and identity. The right to privacy gives us the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner, and timing of the use of those parts we choose to disclose"[190] has been proposed by Yael Onn.

In addition, privacy has been determined to be as the right to be left alone; freedom from interruption, intrusion, embarrassment, or accountability; control of the disclosure of personal information; protection of the individual's independence, dignity and integrity; secrecy, anonymity and solitude; and the right to protection from intrusion into personal life. The right to privacy involves rules governing the collection and handling of personal data, the protection of physical autonomy, the right to limit access to self, and the right to control one's identity. Privacy is often found conflicting with freedom of speech, national security, police powers of surveillance, personal morality, freedom of information, and electronic commerce.

Alan Westin, the former publisher of "Privacy and American Business", believes that new technologies alter the balance between privacy and disclosure. He also believes that the privacy rights may

[190] Yael Onn, et al., *Privacy in the Digital Environment, Haifa Center of Law and Technology*, (2005) pp. 1-12.

limit government surveillance to protect democratic processes. He therefore defines privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". According to him, the four states or privacy are solitude, intimacy, anonymity, and reserve. In his 1968 book Privacy and Freedom, he stated that "Each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives."[191] Therefore, privacy should be creating a space separate from political life and allows autonomy while ensuring democratic freedoms of association and expression under a liberal democratic system.

A person has the right to determine what sort of information about them is collected and how that information is going to be used. For example, in the marketplace, the Federal Trade Commission enforces this right through laws that are intended to prevent deceptive practices and unfair competition.[192] The same rule should be applied for only privacy. Most people who use the Internet are familiar with tracking cookies. These small stores of data keep a log of your online activities and reports back to the tracker host, usually for marketing purposes. For browsers and social media platforms such as Facebook and Twitter, users are allowed to customise their privacy settings, from only sharing with friends, or sharing only the minimum. Majority of the users find it as an invasion of their privacy. Hence, internet users can protect their privacy by taking preventive measures from getting their information being collected.

United States of America

Although the Constitution does not explicitly include the right to privacy, there are only a few fundamental rights that has been recognised by the United States Supreme Court under the classification of privacy against governmental intrusion from the First Amendment,

[191] Westin, A. (1968). *Privacy and Freedom* (5th edition). New York.: Atheneum.

[192] Federal Trade Commission Act.

Third Amendment, Fourth Amendment, and the Fifth Amendment.[193] The United States Supreme Court uses the concept of privacy to designate a zone surrounding individuals, the family, and the home, into which the government may not intrude without compelling interest. This right to privacy has been the justification for decisions involving a wide range of civil liberties cases, one of them being the *Pierce v. Society of Sisters*[194], in which a successful 1922 Oregon initiative requiring compulsory public education has been invalidated. The earlier mentioned 1890 article by Warren and Brandeis, The Right to Privacy is often cited as the first implicit declaration of a United States right to privacy although this right is frequently debated by the civil constructionists and the civil libertarians. As for the right to privacy and social media content, laws have been considered and even enacted in several states, such as California's online erasure law protecting minors from leaving a digital trail. However, the United States is still far behind from the European Union countries in terms of protecting privacy online that has the right to be forgotten ruling by the European Court of Justice that protects both adults and minors.[195]

United Kingdom

Despite having no right to privacy even after the Human Rights Act 1998 and the Parliament having shown a lack of enthusiasm to create such a right, the judiciary has developed the doctrine of breach of confidence that provides a limited right to privacy, especially since the Human Rights Act 1998. Article 8 of the European Convention on Human Rights has provided for the right of respecting private life, it is distinctive from the right to privacy. In addition, Article 8 must be read together with Article 10 that guarantees freedom of expression that is important when an individual's right to privacy is alleged to have been

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[193] Wang, Hao. *Protecting Privacy in China: A Research on China's Privacy Standards and the Possibility of Establishing the Right to Privacy and the Information Privacy Protection Legislation in Modern China*. Heidelberg: Springer, 2011.

[194] 268 U.S. 510 (1925).

[195] Zurbriggen, Eileen L.; Hagai, Ella Ben; Leon, Gabrielle. "*Negotiating privacy and intimacy on social media: Review and recommendations*". Transnational Issues in Psychological Science. 2(3): 248-260.

breached. In the case of *Malone v Metropolitan Police Commissioner*[196], the United Kingdom courts held that wiretapping by the police could never be unlawful in the United Kingdom, as there was no right to privacy at common law that would be breached. Privacy in the United Kingdom can be protected in two ways, first is the right to confidence and secondly, through Article 8 of the European Convention on Human Rights.

India

On 24th August 2017, a nine-judge bench of the Supreme Court headed by Chief Justice Jagdish Singh Khehar ruled that the right to privacy is a fundamental right for Indian citizens under Article 21 of the Indian Constitution and additionally Part III. Hence, no further legislations passed by the government can violate that right. Specifically, the court adopted a three-pronged test required for encroachment of any Article 21 right which is legality, necessity, and proportionality. This clarification was extremely important to prevent the right from concocting under a different government in the future.[197] However, the new data sharing policy of WhatsApp with Facebook after being acquired in 2014 that has been challenged in the Supreme Court has yet to be decided in India. It must be decided whether the right to privacy can be enforced against private entities.[198]

CURRENT STATUS OF THE RIGHT TO PRIVACY IN MALAYSIA

Federal Constitution

Similar to the United States' constitution, our Federal Constitution is silent in regard to the matter, as there is no explicit provision that mentions as such. The fundamental liberties mentioned only encompass generally on the right of a person towards his life,

[196] [1979] Ch 344.

[197] "*For the Many and the Few: What a Fundamental Right to Privacy Means for India – The Wire*". The Wire.

[198] "*Whatsapp-Facebook Privacy Case – Supreme Court Observer*". Supreme Court Observer.

movement, speech, beliefs, as well as ones that he shall rightfully acquire such as equal platform, education, and maintenance of property.

These rights are indeed vital towards creating a well-functioning society which may be the Reid Commission's intended objective when drafting the constitution. This notion can be inferred from the commission's proposal, where fundamental liberties that were to be included in the constitution must be accompanied by expressed procedures or limitations under which such rights are secured and cannot be infringed by the government.[199]

Nevertheless, the Federal Constitution was never intended to be interpreted in a rigid manner to impede one's right to enjoy their life. Thus, when such issue concerning to right of privacy was brought into question in *Sivarasa Rasiah*, the Federal Court Judge stated;

> *"It is patently clear from a review of the authorities that 'personal liberty' in art 5(1) includes within its com-pass other rights such as the right to privacy."*

Such inclusion of right to privacy under Article 5(1) was a rational decision since it was argued that any rights that are essential for the fulfilment of important human needs are part and parcel of one's liberty.

This interpretation of Article 5(1) by the Federal Court also means that the right of privacy falls under strict control or regulation by the authority in situations where the government may exercise their power by virtue of Article 149 and 150. This means that the government through its special power may deprive a person from any rights concerning privacy, including security of personal information, communication, as well as the right to be left alone.

[199] Reid., Mckell, W. J., Malik, B., Hamid, A., and Jennings, I. (1957). *Report of the Federation of Malaya Constitutional Commission 1957*.

Legislation

Although the constitution had not clearly spelled out the right to privacy, the Parliament had taken some initiatives through the avenues available to them to legislate some Acts to regulate on issues revolving around such matters. Some of these Acts were in force long before the court in *Sivarasa Rasiah*[200] had come to conclude on the inclusion of rights to privacy in the definitions of Article 5(1). For example, the Computer Crimes Act 1997 which makes misuse of computers, a device people usually use in work that may contain precious personal information, a crime under the law, and the Communications and Multimedia Act 1998 that regulates on different kinds of communications which is a vital instrument towards the dissemination of any information.[201]

Nevertheless, the one bearing the most impact which gives a heavy emphasis to the general idea of privacy in terms of security of one's information, would be the Personal Data Protection Act 2010 (PDPA). The Act was considered as a breakthrough law for Malaysians, during a time in which information started to be regarded as a precious commodity among the public. It was made clear under the PDPA that any personal information pertaining to an individual that was retrieved through commercial dealings, such as through online surveys or account creation, must be handled in a manner made clear under the Act itself. Such handling mainly revolves around;

1. Collecting data through forms, by phone or via the web
2. Publishing data
3. Selling data
4. Using administrative data
5. Using data for marketing purposes
6. Recording data
7. Disclosing or providing data to other organizations

[200] [2010] 2 MLJ 333.

[201] Daud, M. (2016). *A Legal Analysis Of Digital Expression And Online Content Regulation In Malaysia* (Unpublished doctoral dissertation). International Islamic University Malaysia.

8. Disposal of data

The Act is seen as a step-up of the previous Acts which dealt more on intellectual property and the hardware that contains such information. It was at this point that the Parliament seemed to recognise the value of information. However, it should be noted that the Act only revolves around information obtained in a commercial context and that the Federal and State governments are exempted from complying with the provisions in the Act.

Another legislation that can be construed to deal with right to privacy is the much controversial Security Offences (Special Measure) Act 2012 (SOSMA). The Act in general deals with the procedure to which the authority may follow special procedures in specific circumstances involving threats towards public order. This includes the fact that the Act was intended to be an exercise of the government's special power prescribed in Article 149 of the Federal Constitution, in which it was also stated in section 5(3) of the Act;

> "This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution."

Since Article 5 was defined previously to also cover right to privacy, in a general understanding, the government expressed their intention to infringe such right through section 5(3). However, this raises a really intriguing question in regards to section 6 of SOSMA, of which part of it stated;

> Power to intercept communication
>
> 6. (1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorise any police officer or any other person—
>
> (a) to intercept, detain and open any postal article in the course of transmission by post;
>
> (b) to intercept any message transmitted or received by any communication; or

(c) to intercept or listen to any conversation by any communication.

If Article 5(1) is said to include right to privacy, which deals with information communicated by individuals, why does the government include a separate provision under SOSMA to allow authority to intercept communication when such matter should have been implied to be covered in the previous section? We believe such separation is due to the differing views held by Judiciary and Legislative.

Decided Cases

Although the right to privacy was recognised by the court in 2010 through the case of *Sivarasa Rasiah*[202], there has been little to no cases which intended to clarify on the practicality of such right, as well as its operation under a constitutional context. However, there were indeed some discussions on the matter, particularly in cases involving tort. *Lee Ewe Poh v Dr. Lim Teik Man & Anor*[203] was one of the earliest reported cases that may be related to the right to privacy. In the case, the defendant was sued by the plaintiff for taking pictures of her private part during a medical procedure without getting her consent. One of the issues raised by the court was whether invasion of privacy is an actionable cause of action recognised in Malaysia, to which the learned Court of Appeal judge agreed based on an analogy made in the previous case of *Maslinda Ishak v. Mohd Tahir Osman & Ors*[204].

The mentioned cases illustrate how right to privacy operates in Malaysia as both of the cases were seen to only concern modesty of a woman, a scope that is indeed very limited and it seemed to only deal with the individual rather than a subject matter relating to the particular individual.

Another point to be noted is the fact that both cases never mentioned 'right to privacy' but rather 'tort of invasion of privacy'. This notion

[202] [2010] 2 MLJ 333.

[203] [2010] 1 LNS 1162.

[204] [2009] 6 CLJ 653.

can be further understood from the case of *Toh See Wei v Teddric Jon Mohr & Anor*[205]. In this case, the plaintiff accused that the defendant had been hacking into his private computer, which diverted the plaintiff's personal email account to other accounts. The plaintiff brought the matter to court, claiming that his right to privacy has been violated and requested for compensation. We must commend the learned Judicial Commissioner in this case for taking a precautionary method in analysing such claims.

In that case, Abdul Wahab bin Mohamed JC define the right to privacy as follows:

"The right to privacy is a multi-dimensional concept. In this modern society, right to privacy has been recognised both in the eye of law and in common parlance. The right to privacy refers to the specific right of an individual to control the collection, use and disclosure of personal information. Personal information could be in the form of personal interests, habits and activities, family records, education records, communication [including mail and telephone] records, medical records, to name a few. An individual could easily be harmed by the existence of computerised data about him/her which is inaccurate or misleading and which could be transferred for an unauthorised third party at high speed at very little cost. Innovative technologies make personal data easily accessible and communicable and there is an inherent conflict between the right to privacy and data protection."

Following the brief introduction, he proceeded to recognise the right to privacy to be a part of personal liberty by virtue of the case of *Sivarasa Rasiah*. However, in regard to whether it is an actionable cause of action, the learned judicial commissioner referred *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors*[206] in which he arrived to the following conclusion;

> "Thus recognition of such constitutional right may not be enforced by an individual against another individual for the

[205] [2017] MLJU 704.

[206] [2005] 3 MLJ 681.

> infringement of rights of the private individual as Constitutional Law will take no recognisance of it."

This decision made by the learned Judicial Commissioner denoted a few pointers; (1) that the right to privacy does exist in our legal landscape and (2) that it remains to be a right of which only the government may act upon it with individual disputes shall not be settled on such right.

RELEVANCY OF EXPLICIT RECOGNITION OF RIGHT TO PRIVACY IN MALAYSIA

After exploring the concept of right to privacy in the first part of this article and identifying its current status of recognition in Malaysia in the second part, the discussion now aims to answer the following issue – whether it is relevant to have an explicit provision pertaining to right to privacy in Malaysia.

1. It should be noted that each fundamental liberties that are prescribed in Part II of the Federal Constitution served a particular purpose towards the life of an individual. These fundamental liberties were structured in scrutiny, with the Reid Commission believed in creating a distinct section in the Federal Constitution to safeguard these rights from any tyrannical intention that the government may have. Article 5 until 13 were argued to be the reflection of the needs and concerns of the people and what should be considered as their essential rights.[207] The extensive elaboration in each Article were indicative of this notion which were seen to be vital for the growth of democracy among the Malaysian society.

2. Right to privacy is an elaborative concept, which application and extension is exhaustive. The common misconception around this right is that the right only concerns the individual,

[207] Fernando, J. M., & Rajagopal, S. (2017). *Fundamental Liberties In The Malayan Constitution And The Search For A Balance.* International Journal of Asia Pacific Studies, 13(1), 5-9. http://dx.doi.org/10.21315/ijaps2017.13.1.1.

on having his life secluded from the views of the public. Thus, it should be made clear that privacy also deals with the surrounding of the individuals i.e. any information that is indicative of the person's life. The PDPA is a clear example of such understanding by the government, although it remains hopeful that the Act would be amended to include other circumstances of which a person's information may be retrieved.

3. In a judicial context, there have not been many precedents to determine the practicality of the right to privacy. The court in *Toh See Wei v Teddric Jon Mohr & Anor*[208] being the first to attempt interpreting the concept clearly shows a lack of awareness. Nevertheless, the current information age may create some change, as issues revolving around information disseminated on the Internet, which is an alien dominion for the law, may eventually force the government to be more active in the area.

Therefore, the authors opine that for the time being, such a constitutional amendment would be irrelevant and thus there is no urgent need to draft an article separating right to privacy from the ambit of personal liberty. The current recognition of the right to privacy under Article 5(1) of the Federal Constitution may be sufficient to enable the government to deal with privacy issues against the rise of invasion on information.

However, the authors do not oppose if such an amendment is proposed, especially since concerns on government surveillance and monitoring are on the rise in recent years. An article under the purview of fundamental liberties may be the next step for right to privacy since only through such matter that the public could be made clear of what the government can do to impose any regulation to privacy, including

[208] [2017] 11 MLJ 67.

the limits and boundaries of such regulation on a society that is fully connected today through social networks.[209]

Nevertheless, in the current constitutional standpoint, it remains unclear on how the government perceived personal liberty in Article 5(1), whether the right under it is limited to a particular scope or is in fact open for a liberal interpretation. However, considering the creation of PDPA and SOSMA, it is safe to assume that there are avenues for the government to expand its understanding on privacy, either through MCMC or other non-governmental organisations (NGO) that are experts in such fields.

CONCLUSION

As the information age is upon us, not to forget the prospect of the fourth Industrial Revolution, information has been regarded as a quintessential commodity. Hence, protection of personal information is seen as a new battleground for individuals, companies, and the government, who struggle to control the overflowing and endless possibility of future technologies which may be used to harm them.

However, considering such sentiment, it remains suggestive that to propose a constitutional right to be secured in the same manner as a fundamental liberty would be a hasty action, especially considering that the nature of cases involving such issues of privacy usually involves disputes between private individuals. There is also the possibility that the introduction of a right infringes another right such as in this context, the impact right to privacy may have towards the right to freedom of speech and expression. Hence, the lawmakers must be cautious in approaching in this matter. Even though the constitution is supposed to be amenable to adapt to the current needs of society, there needs to be strategic planning in governing matters as intricate as the right to privacy.

[209] Harvey, D. (2017). Collisions in the digital paradigm: Law and rule-making in the internet age. Oxford: Hart Publishing. p. 283.

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7 2020 LM 112 – 134

AN OVERVIEW ON THE USAGE OF ARTIFICIAL INTELLIGENCE (AI) IN THE MALAYSIAN LEGAL INDUSTRY: CHALLENGES AND THE WAY FORWARD

Siti Sarah bt Kamaruzzaman [210]

ABSTRACT

Artificial Intelligence (AI) is gaining popularity in various industries globally, including the legal industry. AI has been "employed" by law firms in several developed countries like the United States and Singapore. Nonetheless, AI development is comparatively slow in Malaysia and earlier instances have banned its usage in the legal industry based on several reasons, among others, are the legal restrictions of doing so. Hence, this paper would discuss the issues relating to the implementation of AI in the Malaysian legal industry. This paper employs a qualitative research methodology and library research is conducted where references like statutes, case laws, journal articles and online articles are relied on. The discussion would range from the perception and responses of lawyers on the adoption of AI in the industry, to the assessment of the impact of the usage in the current legal landscape, and some legal issues that might arise as the consequences of allowing AI to take part as one of the players in the legal industry. At the end of this paper, some suggestions are proposed with regards to the measures to be devised and possibilities that must be considered before implementing AI in the legal industry. This is of prime importance to minimise any possible setbacks that could tarnish the good reputation of the legal industry which is considered as one of the important mechanisms in the process of administration of justice in Malaysia.

Keywords: Artificial Intelligence, legal industry, perceptions, legal restrictions, measures.

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ABSTRAK

Teknologi kecerdasan buatan (AI) sedang mendapat populariti dalam pelbagai jenis industri di seluruh dunia, termasuklah industri perundangan. AI telah digunakan oleh firma guaman di beberapa negara maju seperti di Amerika Syarikat (AS) dan Singapura. Walau bagaimanapun, perkembangan AI di Malaysia agak ketinggalan jika dibandingkan dengan negara maju yang lain. Sehubungan dengan itu, terdapat beberapa contoh yang menyekat penggunaannya atas sebab-sebab seperti kekangan undang-undang. Oleh yang demikian, artikel ini akan membincangkan isu penggunaan AI dalam industri guaman di Malaysia. Artikel ini menggunakan kaedah kualitatif dan penyelidikan perpustakaan di mana bahan-bahan rujukan seperti statut, kes, artikel jurnal dan artikel yang diakses melalui atas talian telah dirujuk. Perbincangan artikel ini akan meliputi persepsi peguam tentang penggunaan AI dalam industri guaman, penilaian impak penggunaan AI dalam situasi perundangan terkini, dan juga sesetengah isu undang-undang yang mungkin wujud disebabkan penggunaan AI sebagai sebahagian daripada tenaga kerja dalam industri guaman. Pada akhir artikel ini, beberapa cadangan akan diusulkan berkenaan langkah-langkah yang harus diambil dan kemungkinan yang harus dipertimbangkan sebelum menggunakan teknologi AI dalam industri guaman. Perkara ini penting untuk mengurangkan impak buruk yang mungkin berlaku dan akhirnya mencalarkan nama baik dan reputasi industri guaman sebagai salah satu mekanisme penting dalam pentadbiran keadilan di Malaysia.

Kata kunci: Teknologi kecerdasan buatan, industri guaman, persepsi, kekangan undang-undang, langkah-langkah.

INTRODUCTION

In the advent of rapid development of technology and its role in various aspects of human life, one can observe that almost all sectors in the world are depending on technology to enhance the effectiveness and efficiency of their operations, and such use of technology has also impacted the legal field. One of the technologies that is evolving and is heavily affecting the legal sector is Artificial Intelligence (AI). One can only look at the examples of an American Law Firm that hired AI named Ross, whose operation is supported by IBM's Watson, and also DoNotPay, a robot lawyer whose function is to draft legal document and challenge traffic tickets, and also an AI "lawyer" who has defeated 20 top lawyers in a standard business contract review competition[211], to know that AI is slowly affecting how the legal market and the legal ecosystem would work in the future.

What is Artificial Intelligence (AI)?

First and foremost, it is important to understand what Artificial Intelligence (AI) is. Erroneous understanding and misconception on the subject matter might lead to wrong analysis. With regards to the definition of AI, there were a lot of attempts made by scholars to define AI. One of the early attempts made was by John McCarthy in 1956 whereby AI was defined as "the science and engineering of making intelligent machines, especially intelligent computer programs."[212] Arising from this definition, it may be concluded that AI means a machine which has been embedded with intelligent programs. Further definition specifies that the intelligence possessed in AI is like that of

[211] Teng Hu and Huafeng Lu, "Study on the Influence of Artificial Intelligence on Legal Profession". *5th International Conference on Economics, Management, Law and Education (EMLE 2019), Advances in Economics, Business and Management Research 110 (2019)*: 964, accessed August 27, 2020, https://www.researchgate.net/publication/338598111_Study_on_the_Influence_of_Artificial_Intelligence_on_Legal_Profession.

[212] Miriam C. Buiten, "Towards Intelligent Regulation of Artificial Intelligence". *European Journal of Risk Regulation 10 (2019)*: 43, accessed on August 27, 2020, https://doi.org/10.1017/err.2019.8.

humans. One of the recent definitions is that Artificial Intelligence (AI) is the "term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognising speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind."[213] Like the name suggests, it is an intelligence that is "artificial" or can be programmed. With that, AI has certain human-like intelligence characteristics like self-autonomy, learning capabilities, processing capabilities and the ability to adapt and evolve.[214]

However, before AI could attain this intelligence, it needs to be programmed first. The program would require an algorithm to be developed in order for it to function. Algorithm means "a set of instructions or rules given to a computer to follow and implement."[215] With algorithms, the machine will receive input in the form of problems and the machine will use the algorithms to solve the problems and produce output which is the solution or result. AI takes a more advanced form where it does not only use simple algorithms. Instead, it utilises machine learning (ML) algorithms, whereby it will continuously be adjusting and improving its program in light of new data.[216] In this respect it is said to attain human intelligence as human intelligence is something that is continuously developing as the brain administers new data or new circumstances which emerge and require AI to adapt itself.

AI works by processing the data using an algorithm that has been programmed and AI produces the intended output accordingly. AI has found its place in the medical sector whereby there are AIs that serve to diagnose illnesses and prescribe treatment. The same can be said of the journalism industry where there are AIs that receive input in the

[213] Laura Donahue. "A Primer on Using Artificial Intelligence in the Legal Profession" *Jolt digest*, January 3, 2018, accessed on August 24, 2020 , https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession.

[214] Buiten, "Towards Intelligent Regulation of Artificial Intelligence", 44.

[215] Buiten, "Towards Intelligent Regulation of Artificial Intelligence", 49.

[216] Buiten, "Towards Intelligent Regulation of Artificial Intelligence", 49.

form of data on current news and produce output in the form of writing down reports in a faster and more accurate manner as compared to humans. AI has what is described as a "sophisticated algorithm" where data can be processed and structured, and more functions can be derived ranging from conducting due diligence on documents and drafting legal documents like contracts or instruments like will.

Pertaining to the use of AI in the legal industry, there are about five key areas in which AI would play an important role, namely in legal search, discovery, making brief and memoranda, drafting documents and outcome prediction.[217] These five areas are among the tasks that can be automated by AI through programming the algorithm and making use of the existing data to optimise the outcome.

ADVANTAGES AND DISADVANTAGES OF ARTIFICIAL INTELLIGENCE (AI)

As mentioned earlier, the introduction of AI in the legal industry has sparked various responses from the community. Some have given their support, and some have rejected. For lawyers, they tend to describe AI as a "disruptor" in the legal industry. This is because AI would take over certain functions or tasks of a lawyer. For instance, AI can draft legal documents, give legal advice, and predict outcomes of a Court hearing.

Artificial Intelligence (AI) offers a lot of benefits to the operation of the industry. Among them is that AI is time savvy, whereby more work can be done in a shorter span of time. Research conducted by Blue Hill Research together with 16 panels of researchers made research on ROSS, a legal research tool with the combination of Legal Cortex, a proprietary legal AI framework and cognitive computing technology

[217] John O. McGinnis and Russell G. Pearce, "The Great Disruption: How Machine Intelligence Will Transform The Role of Lawyers In The Delivery Of Legal Services". *Fordham Law Review* 82 (2014): 3046, accessed on August 23, 2020, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5007&context=flr.

of IBM Watson.[218] The result has pointed out that the time spent on research has been reduced by 30.3%. This is considered highly profitable for law firms as the same research has found that an associate spent about 743.6 hours conducting legal research and this represented up to 26% of unpaid hours of work. Thus, if AI can save time in doing such tasks, the result would be that the hours spent by lawyers to work would be shorter and more work can be done.

Furthermore, AI also improves the efficiency of research. This is measured by the ability to find more relevant legal authorities that can help in solving a legal problem, which would result in greater value. The result of the study shows that the research efficiency of using AI is 40% more than the traditional methods.[219] The quality of the retrieved information is gauged by three main standards, namely thoroughness, accuracy, and ranking effectiveness. This outcome is highly contributed by the fact that AI can analyse more data. With the innovation of Big Data whereby massive amounts of information and data can be stored, this would enable AI to analyse as much information as possible and would produce more accurate outcomes. In this respect, the ability to store massive information is where humans are lacking, making it a plus point for AI.

In addition, AI also saves cost to a certain extent. If things are made faster and easier by AI, then the employer would need a lesser workforce and lesser number of wages to be paid and subsequently lesser quantity of money to be spent for human capital. This scenario triggers worry to legal graduates and those working in the legal sector on their job opportunities. This part will be clarified in the later section of this writing. Moreover, AI also optimises human capital by undertaking long and repetitive work and letting lawyers do other jobs which are more crucial rather than technical.

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[218] Andrew Arruda and Matt Scherer, "*Artificial Intelligence: Will it Replace Lawyers*?" (paper presented at ACLEA 54th Annual Meeting, July 28, 2018) accessed on August 23, 2020, https://docplayer.net/161106336-Artificial-intelligence-will-it-replace-lawyers.html.

[219] Arruda and Scherer, "*Artificial Intelligence: Will it Replace Lawyers*?", 20.

Nonetheless, there are also criticisms on the feasibility of implementing AI in the legal industry, especially in Malaysia.

Legal Restrictions

Referring to section 37 of the Legal Profession Act 1976, unauthorised persons performing law services in consideration for money are committing an offence and are punishable under the provision. This issue will be addressed in the later part of this article. Nonetheless, the Bar Council has taken the initiative to amend the Legal Profession Act to include the provisions relating to technology used in the legal industry.[220]

Transition Cost

Despite the allegations that the use of AI will save cost. The cost to employ AI at the initial stage might be quite high.[221] While such expenditure might not be a big problem to big firms, it is no doubt risky for small firms. Small firms consisting of 1- 5 lawyers, making up 80% of the legal services in Malaysia.[222] Hence, this shows that a lot of firms may not be able to benefit from AI and cease to be relevant. Nonetheless, it is worth noting that despite the possible high cost incurred in procuring AI in specific or the technology in general, the cost in the long run would be cut down as opposed to not using AI.

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[220] Qishin Tariq, "*Tomorrow's law today: More legal firms embracing tech than before,*" The Star, February 11, 2019, accessed 22 August 2020, https://www.thestar.com.my/tech/tech-news/2019/02/11/tomorrows-law-today/.

[221] "*The Current State of Legal Innovation in Malaysia: an Interview with Daniel Lui, Co-Founder of Lawtech Malaysia*," *Asia Law Portal*, March 1, 2020, accessed 21 August 2020, https://asialawportal.com/2020/03/01/the-current-state-of-legal-innovation-in-malaysia-an-interview-with-daniel-lui-co-founder-lawtech-malaysia/.

[222] Daniel Lui, "*The Current State of Legal Innovation in Malaysia: an Interview with Daniel Lui, Co-Founder of Lawtech Malaysia*,".

AI Can Never Replace Human Judgment

It is also argued that AI cannot be used to replace human judgment and that big data as the foundation of predictive analysis is overstated. This argument is further substantiated that in law, as a branch of human sciences, is full of subjectivities and uncertainties, unlike natural sciences which is more objective in nature. However, as a counter argument, it is submitted that while it is agreed that AI could never be completely human, there is no harm for humans to collaborate with AI. By doing this, a more improved version of legal services can be offered to the community.[223] Moreover, research has shown that AI's judgment can be relied upon. This is evident in the instance where IBM's Watson has formulated several different answers based on its judgement in Jeopardy.[224] Moreover, there is a case study in the United Kingdom (UK) where a contest was organised between 100 lawyers and an AI program called "Case Cruncher Alpha" where both were given facts of hundreds of cases and are required to foresee the possibility of the claim being allowed.[225] In the end, AI won with an accuracy rate of 86.3% compared to the lawyers at 66.3%. In addition, some repetitive works such as conducting due diligence and drawing will be almost automatic in nature and can easily be executed by AI without exercising much judgment.

Based on the aforementioned, it can be concluded that the best route is to harmonise both opinions by opting for collaboration between AI and humans. AI will never replace lawyers completely as there is still the need for oral advocacy skills, the human touch and the imperfections

[223] Mark McKamey. "*Artificial Intelligence and The Future Of Law Practice*" *APPEAL*, 22 (2017): , accessed on 12 May 2020, https://journals.uvic.ca/index.php/appeal/article/view/16750.

[224] Ibid.

[225] "*Legal Profession in the Age of Disruption*", UM Law Review, accessed on 28 August, 2020, https://www.umlawreview.com/lex-in-breve/legal-profession-in-the-age-of-disruption-5-key-discussions-in-lextech-conference-2017.

of machines in novel areas of law.[226] In addition, AI also cannot negotiate or structure complex deals.[227] In the mentioned areas, humans cannot be replaced by AI, at least for now.

LEGAL ISSUES ARISING FROM THE USAGE OF AI IN THE LEGAL INDUSTRY

Thus, the incorporation of AI in the industry is not so much as to fight humans rather than to cooperate with them. After all, anything that could ease the process of the administration of justice has to be embraced and AI is no exception. However, it must be determined whether there is any issue with the reception of AI in the legal industry. It is submitted that there are four main legal issues that need to be further deliberated before deciding the feasibility of AI in Malaysia.

Is AI an Authorised Person to Give Legal Services?

In Malaysia, unauthorised legal advice is made an offence under the Legal Profession Act (LPA) 1976. Section 37(1) of the LPA 1976 provides, in brief, that any unauthorised persons cannot act as advocates and solicitors and receive money in return. In addition to that, section 37(2) also states that the unauthorised person cannot draft documents or matters relating thereto as specified in para (a) to (e).

Moreover, in Rules 51 and 52 of Legal Profession (Practise and Etiquette) Rules 1978 (LPPER) also bans the act of sharing fees between an advocate and solicitors and other unqualified persons. Fees sharing might happen when a legal practitioner employs AI from a legal technology service provider to do legal work and the fees received from the client is divided among them. This is a breach of lawyer's etiquette as reflected in LPPER. The definition of qualified persons can be found in Section 3 of LPA 1976. The said provision defines qualified persons as the persons who passed the final exam leading to

[226] McGinnis and Pearce, "*The Great Disruption: How Machine Intelligence Will Transform The Role of Lawyers In The Delivery Of Legal Services*," 3046.

[227] Donahue, "*A Primer on Using Artificial Intelligence in the Legal Profession*", 2.

a Bachelor's degree in Law at the named universities, is a barrister of law at England or any other qualifications as may be specified by the notification of Gazette. Based on this definition, AI did not fit into any of the qualifications as AI does not read law and enrol in tertiary education to earn a degree in law. Thus, the current law in Malaysia as evident in this section 37 of LPA 1976, prohibits the use of AI in legal industry.[228]

Therefore, functions of AI, like generating legal advice and writing legal briefs and documents or instruments are prohibited under the law and regulation. Furthermore, in *Bar Malaysia v Index Continent Sdn Bhd*[229], the Federal Court held that the Bar Council would have the locus standi to sue the firm providing AI that performs legal service for breach of section 37 of the LPA 1976 and Rules 51 and 52 of LPPER. The issue before the Court is about a system called Answers in Law that provides a prepaid legal service of connecting clients to law firms as against section 37(3) of LPA as Answer in Law is an unauthorised person. Later, another system which serves to guide clients to draft their own legal document called Dragon Law was introduced in 2016. In response to this, another ruling was published by the Bar Council which bars this program from operating as it violates section 37 of the LPA.[230] As a result of the Bar Council's ruling, both Answer in Law and Dragon Law have withdrawn their service.

The same stance as the one adopted by the Bar Council is also prevalent in other jurisdictions. For instance, in *Unsed Practice of Law*

[228] Fatimah Zahirah Mohd Damanhuri, "Malaysia Embracing Technology in the Legal Industry - Adapt, or be dropped," *Conventus Law*, April 3, 2019, accessed August 23, 2020, http://www.conventuslaw.com/report/malaysia-embracing-technology-in-the-legal/.

[229] [2016] 1 MLJ 445.

[230] Marcus Van Geyzel, "Malaysian Bar Council's scrutiny of Dragon Law continues legal innovation debate," *The Malaysian Lawyer*. June 15, 2016, accessed October 4, 2020, https://themalaysianlawyer.com/2016/06/15/malaysian-bar-dragon-law-legal-innovation/.

Committee v. Parsons Technology, Inc.[231] which was decided in Texas, USA, the Court granted injunction against Parsons Technology, a company which developed Quicken Family Lawyer, an AI that helps draft will instruments on the basis that this is an unauthorised legal service. Despite the ruling being not binding in Malaysia, it reflects the like standing that had been taken by the Malaysian Bar Council.

Thus, it is concluded that AI is not an unauthorised person under section 37 of LPA 1976 and thus, AI cannot be used in the legal industry to do lawyer's works unless and until it is amended. Several initiatives are made by the Bar Council on this matter. One of them is the establishment of the Future in Technology Committee. The latest alternative is the suggestion by the Bar's Committee to Reform the Legal Sector led by George Varughese and Kuthubul Zaman Bukhari whereby some amendments are proposed to the LPA 1976, among them are changes to allow the implementation of legal technology, including AI. The following is the excerpts from the proposed new Section 35 of LPA 1976.[232]

> *(1) For the purposes of this section:*
>
> *"legal technology" means any technological product or service used or to be used in the provision of any service or any act which is within any function or responsibility of any advocate and solicitor, or places at the disposal of any other person the services of an advocate and solicitor;*
>
> *"legal technology provider" means any person or entity that provides legal technology;*
>
> *(2) The Bar Council may make rules and rulings for the regulation of any legal technology or legal technology provider, taking into account the promotion of technological innovations,*

[231] No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).

[232] Foong Cheng Leong,"*Introduction of Legal Technology Provision in the new Malaysian Legal Profession Act*," January 28, 2019, accessed October 10, 2020, https://foongchengleong.com/2019/01/introduction-of-legal-technology-provision-in-the-new-malaysian-legal-profession-act/.

public interest and the interests of members of the Malaysian Bar.

(3) The Bar Council shall have the power to exempt any legal technology or legal technology provider from any rules and rulings of the Bar Council and from section 33, with or without any condition, as may be deemed fit by the Bar Council from time to time.

(4) Any contravention of this section by any legal technology provider, shall result in the revocation of any approval or any exemption granted by the Bar Council.

(5) The Bar Council shall have the power to conduct any inquiry to identify or determine any contravention referred to in subsection (4), and may apply to the High Court by way of originating summons, to compel any person or entity to produce any document for the purpose of the inquiry.

(6) Where the Bar Council concludes that there has been a contravention of this section, the Bar Council shall have the power to apply to the High Court. –

(a) for an order to restrain the legal technology provider from providing its product, service or solution;

(b) for an order to compel the relevant authority to disclose any further relevant information related to the contravention; and

(c) for an order to compel the relevant authority to restrain or limit access to such legal technological providers that contravene subsection (2).

(7) Any person or entity who contravenes subsection (2) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and where such person or entity is an advocate and solicitor or limited liability law partnership, he or it shall also be liable to disciplinary proceedings under Part XI.

The amendment on LPA was submitted to the Attorney General on 9 January 2019.[233] The said amendment includes the regulation for legal technology, specifically on the use of any technology by the advocates and solicitors in the course of their work and such technology also includes Artificial Intelligence (AI).[234] The power is being given to the Bar Council to device the rulings for the purpose of implementing legal technology, including AI.

If AI Stores Data and Uses It for Analysis, Will It Violate Privacy and Personal Data Protection Laws?

There are possible issues of privacy laws and leakage of data if AI were to be used in the legal industry. This is because, if law firms decide to use AI to aid its operations, they might have to update the data and information on their clients in the AI system. However, one of the duties of a lawyer is to keep the information on their client as private and confidential. According to section 126 (1) of the Evidence Act 1950, advocates cannot disclose communications between him and the clients and cannot reveal the contents of the documents between them. Based on this provision, it is evident that it is the lawyers' duty to keep the information private and confidential by not disclosing them. Even so, this may be resolved with a consent form provided by the firm to notify clients and obtain their consent. This is also specified as one of the exceptions of Section 126(1) of the Evidence Act 1950 where if client has consented, then the disclosure of communication can be made.

Who Would Own the Works Produced by AL?

There are several known ways in which law firms, or any organisation can use AI. Among them is by purchasing the system or the machine

[233] George Varughese and Kuthubul Zaman Bukhari, "*Proposed New Act to Govern the Legal Profession Submitted to the Attorney General*", Bar Council Official Website, January 11, 2019, accessed October 4, 2020, https://www.malaysianbar.org.my/article/news/bar-news/notices/proposed-new-act-to-govern-the-legal-profession-submitted-to-the-attorney-general.

[234] Qishin Tariq, "*Tomorrow's law today: More legal firms embracing tech than before*."

itself. If this is the case, then it can be safely inferred that whatever AI produced is the work of the purchasing organisation itself. Nonetheless, if the organisation just uses outside lawtech firm services, then the issue of ownership arises. Who would own the works? The AI service provider or the law firm? Alternatively, would the work belong to the AI service provider until being paid by the firm or organisation seeking for the works? These things must be taken into consideration as it involves the rights to Intellectual Property.

In the Event of Malpractice, Who Will Be Liable?

As discussed earlier, if AI becomes an authorised person within the ambit of the LPA 1976 and can process information and deliver legal advice, what will happen if such advice is wrong or there is a breach of lawyers' duties. Although the accuracy rate of an AI is higher than human lawyers, such breach, if not exactly about legal advice, must be foreseen. In terms of privacy, if the AI has breached the privacy and confidentiality law, would it become liable? The question on whether AI can be held liable is also affecting other sectors like the transportation sector. For example, if there is a driverless car driven by AI and it causes an accident, who would be liable? Furthermore, there is also the issue of who will be held responsible for the information rendered in AI and who would train this self-managed machine?

Referring to a working paper produced by LexisNexis on the impact on AI in the legal industry, in examining the liability of AI, Prof Karen Yeung from King's College London is of the view that:

> 'This is a question about proximity, and causation. My gut feeling at this stage is that it is unlikely, but that depends upon whether the damage meets the test of reasonable "foreseeability" in negligence—as with a firm being accused of overreliance on automation, it would depend very much on the facts.'[235]

[235] Karen Yeung, Gary Lea, Roger Brownsword and Kristjana Çaka "What happens when the robots get it wrong?" Lawyers and Robots? Conversations Around the Future of the Legal Industry. *Lexis Nexis Publication*, February 21, 2020, accessed August 29, 2020,

Based on this statement, it indicates that the issue of who would be rendered liable would be decided on whether it is foreseeable that such negligence would happen. If it is foreseeable to the firm, then it is negligence on part of the firm and they are liable. However, further discussion should be made on this point of law.

AI IN THE LEGAL INDUSTRY: THE WAY FORWARD

Willingness to Co-Exist with Technology

First and foremost, the players of the legal sector need to understand AI, its usage, and benefits that it can bring to improvise and enhance the efficiency of the legal services. Law firms must start considering using the technology. Instead of having the mindset that AI will "replace" lawyers, lawyers should reset that into AI being a mechanism of "augment, support and enhance."[236] This is because AI would do works that are repetitive in nature and consume a lot of time if the works are done manually and thus, allowing the lawyers to attend to more important matters, like meeting clients or drafting oral submission and any other tasks that AI cannot perform as yet. AI is designed not to be lawyers per se despite it being tasked with lawyers' jobs. Instead, it aims to ease and accommodate lawyers' jobs and to promote efficiency and to optimise resources. Lawyers should be working "alongside" AI and it is not a question of "AI or lawyers."

Nonetheless, it is admitted that job opportunities for legal professionals might be adversely affected as evidenced by what had occurred to the journalism industry whereby employment shows decrease of 17 000 people in the course of eight years.[237] However, looking at the current progress, locally and globally on the adoption of AI in assisting legal services, it is inevitable that AI would become one of the industry players and the fear that lawyers would lose its grip in the legal service

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https://www.lexisnexis.com.au/__data/assets/pdf_file/0003/187644/Lawyers_and_Robots_Whitepaper.pdf, 20.

[236] Ibid.

[237] McGinnis and Pearce, "*The Great Disruption: How Machine Intelligence Will Transform The Role of Lawyers In The Delivery Of Legal Services*," 3046.

industry would be substantiated. Thus, lawyers would have to have added values to stay relevant in the market. Quoting from Professor Campbell in the LexTech Conference:

"One thing is for sure, AI does not exist to give humans employment. Like it or not, AI is here to stay, in the legal sector and elsewhere, legal practitioners will have to figure out how to live in a world where AI is both a tool and a competitor."[238]

Moreover, the government, specifically the Judicial and Legal Service is also considering the use of Artificial Intelligence in Data Sentencing.[239] This allows the data of previous cases to be analyzed by AI and AI will further suggest the sentence. This is because the law needs certainty and like cases are decided alike (the doctrine of stare decisis). With AI, this can be achieved. These modifications may reasonably cause fear and worry among the public as that would be perceived as putting fate into the hands of a machine. Nonetheless, people need not to worry because it is not the AI who will be the "machine judge". This is because AI's recommendation remains a recommendation and at the end, judges are at liberty to adopt the view of AI fully, partially with some adjustment, or to totally reject the suggestion. The output of this AI in sentence will not be binding and maybe a binding guideline or law can be devised to assure people of it.

The Importance of "Human Touch"

Although technology makes things faster, the justice system involves humans, and thus, human touch is needed despite the ability of technology to accelerate things. That said, the human touch involved here is the ability for a lawyer or prosecutor to entertain the client's complaint and to present the "foreseen results" generated by AI. This means that the lawyers themselves must relay what had been produced

[238] Ibid.

[239] *Speech of Fomer Chief Justice of Malaysia Tan Sri Richard Malanjum on the Opening of Legal Year 2019*, January 11, 2019, accessed on August 26, 2020, http://www.kehakiman.gov.my/sites/default/files/OLY%202019%20CJ%27s%20Speech%20-%20Final_0.pdf.

by AI. This is what makes lawyers irreplaceable, the humanistic values which AI might never replicate. As can be quoted from a LexisNexis report, "While the use of AI is proving a slow but certain game changer in legal practice, what's clear is that legal practice—and clients—will always need the human touch."[240]

Moreover, lawyers should always improve on their legal knowledge especially on the areas of law that have yet to evolve and are still green. This way, lawyers can maintain their relevance in the legal profession. Despite all the hype on this human-like intelligence that is ever evolving, it cannot be denied that AI works on data and the absence of data means that it cannot produce the desired output. Therefore, in developing AI, lawyers are needed so that their knowledge and expertise can be consulted upon forming algorithms. Thus, the lawyers specialised in areas of law that are considered as novel would be undaunted by AI.

Amendment to Laws to Enable Lawtech to Operate

As discussed earlier, one of the restrictions in the application of AI in the legal industry is our legal framework which bans AI into the legal industry and cases have illustrated that this is so because AI is an unauthorised person. Hence, there is a need to amend the Legal Profession Act (LPA) 1976. This may come to conclusion soon as the Bar Council has already proposed the amendments to the Legal Profession Act (LPA) 1976 to include regulation on the use of technology in the legal service, including AI.[241]

[240] Isabel Parker and Charles Kerrigan. "AI in law firms, a game changer in the legal practise." Lawyers and Robots? Conversations Around the Future of the Legal Industry. *Lexis Nexis Publication*. February 21, 2020, accessed August 26, 2020, https://www.lexisnexis.com.au/__data/assets/pdf_file/0003/187644/Lawyers_and_Robots_Whitepaper.pdf.

[241] Varughese and Bukhari, Malaysian Bar Website.

Ensuring the Existence of a Proper Framework to Enforce Lawtech

Prior to this, it has been highlighted on certain legal issues that might arise out of the introduction of AI in the legal industry, namely the issue on data protection and privacy, intellectual property, and liability of the AI. Thus, it is an urgent need for the lawmakers to consider this along with the permission to use AI in the industry. This is because while it is true that AI makes things easier, the industry would not want to be backfired by the potential risks of breach of laws that it may bring forth.

In this control or regulatory mechanism, inclusion of provisions relating to personal data and data privacy protection is vital. It needs to be specified on the consent of the client's data being introduced into AI, how the data will be protected and who would have the access to the data. In the event of failure to comply with the provisions, the law or regulation will specify on who will be liable if that happens. Will it be the AI itself, or the law firms or organizations engaging the AI, or the AI developer or service provider.

Improving Legal Education

Last but not least, it is submitted that in the face of the ever changing world and the ever revolving development in the legal industry, the higher education institutions from where the legal industry derives its human resources and capital would need to revamp the way in which it has been educating the law students.[242] One of the initiatives to familiarise the future graduates with the use of technology in the legal service is by conducting classes via online platforms and also adjusting the assessment methods from the traditional approach to an open book and problem solving questions.[243] This is so as to suit the current demands in the legal services and to allow the graduates to remain relevant players of the industry.

CONCLUSION

In a nutshell, this paper has discussed on the basic features of Artificial Intelligence (AI), the reactions of the legal community on the introduction of AI, the impact of AI on the relevance of the legal professionals, the possible legal issues that need to be considered in using AI and the suggestions to move forward. As repeatedly emphasised in this writing, AI is approaching the industry and there is no way for us to deny that. Quoting Justice Richard Malanjum from his speech at the 2019 Legal Year Opening, "To sum up, the legal profession must embrace technology. There is no option. It is coming soon to the legal profession. Adapt or be dropped."[244] This stresses on the importance to be prepared for whatever the future has to bring and to embrace the technology and work alongside it.

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[242] Kevin Paul Lee, "The Citizen Lawyer in the Coming Era: Technology is Changing the Practice of Law, but Legal Education Must Remain Committed to Humanistic Learning," *Ohio North University Law Review*, (2013), accessed on August 27, 2020, SSRN: https://ssrn.com/abstract=2444011.

[243] Ashgar Ali Ali Mohamed, Mohamed Hassan Ahmad and Puteri Sofia Amirnuddin, "*Transforming Legal Education In The Era Of Fourth Industrial Revolution,*" [2020] 2 CLJ ix.

[244] Fatimah Zahirah Mohd Damanhuri, "*Malaysia Embracing Technology in the Legal Industry - Adapt, or be dropped."*

There are concerns like the possibility of having a "digital lawyer" in the future. It is opined that with the current legal scenario and AI market development in the Malaysian legal industry, AI or "digital lawyers"[245] would not be feasible alone as of now. This means that AI will serve as the aid or helper of the lawyers in the law firms, or in organization or for judges in their chambers. AI would not take over the places of individuals yet. In addition to that, with the former reception of the Malaysian legal community to AI and technology, it can be observed that Malaysia is a bit off radar from practising legal technology, as compared to the United States, Australia, and Singapore, where the legal practitioners are using AI and legal technology in an extensive manner. Singapore is a leading country in practising legal technology in Southeast Asia.

Addressing the main concern of the emergence of AI in the legal industry, which is the employment issue, it is reiterated that there is no need to be concerned over that matter as AI has yet possessed the capability to replace lawyers totally. Despite taking over certain lawyer's tasks, it does not do all of them. This is also supported by the President of Malaysian Bar, Abdul Fareed Abdul Gafoor, "the past decade has seen the advent of blockchain technology and artificial intelligence which the Bar believes should not be a source of concern but a heralding of a new age in the way in which legal services are provided."[246] However, lawyers still need to improve themselves to be more marketable in the industry.

Moreover, in applying legal technology, several steps and initiatives need to be taken by the Malaysian Bar Council, Malaysian Government, education institutions and lawyers themselves so as to avoid any setbacks in the application of AI in the legal industry.

[245] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (United Kingdom: Oxford University Press, 2013).

[246] *Speech by President, Malaysian Bar*, at the Opening of the Legal Year 2020 [2020] 1 MLJ xxxiii.

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https://www.lexisnexis.com.au/__data/assets/pdf_file/0003/187644/Lawyers_and_Robots_Whitepaper.pdf, 20.

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7 2020 LM 135 – 159

ISLAM AS THE RELIGION OF THE FEDERATION: AN OVERVIEW

Muhamad Haiqal Mohd Anis[247]
Ahmad Firdaous Mohd Saleh[248]
Muhammad Ikhlas Mohd Shafe'e[249]

ABSTRACT

Malaysia is known throughout the world as a prominent Islamic nation, evident from its population predominantly composed of Muslims. The presence of Islamic influence in this country is ostensive through many aspects, particularly in the predominantly Malay Muslims' culture. However, it is debatable whether Malaysia is an Islamic state, as Islam has little to no influence in the Federal Constitution and the Malaysian legal system, save for its position as the religion of the federation and the limited application of Islamic law in personal and family law matters. This paper aims to shed light on Malaysia's status as an Islamic state in detail other than concluding the actual nature of relationship between Islam and the Federal Constitution. This paper begins the discussion by detailing the history of Islamic influence in the country and the development of Islam from its colonization until its independence. Next, this paper will also analyse the position of Islam in the Federal Constitution and identify the application of Islamic law in the Malaysian legal system and its features. Furthermore, this paper also aims to distinguish the differences between Islamic and secular states as well as their features.

Keywords: Islam, Constitution, Malaysia, Shari'ah.

[247] 4th year, LL.B, AIKOL, International Islamic University Malaysia.

[248] 4th year, LL.B, AIKOL, International Islamic University Malaysia.

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ABSTRAK

Malaysia dikenali di seluruh dunia sebagai negara Islam kerana majoriti penduduknya terdiri daripada penganut agama Islam. Kehadiran pengaruh Islam di negara ini dapat dilihat melalui pelbagai aspek, terutamanya pada budaya orang Melayu Islam. Namun begitu, kedudukan Malaysia sebagai negara Islam boleh dibahaskan bahawa Malaysia kerana agama Islam tidak mempunyai pengaruh yang kuat dalam Perlembagaan Persekutuan dan sistem perundangan Malaysia selain daripada kedudukannya sebagai agama persekutuan dan penggunaan undang-undang Islam yang terhad kepada urusan peribadi dan undang-undang keluarga. Penulisan ini adalah bertujuan untuk menjelaskan kedudukan Malaysia di samping menyimpulkan sifat sebenar hubungan antara Islam dengan Perlembagaan Persekutuan. Penulisan ini bermula dengan membincangkan sejarah pengaruh Islam pada negara dan perkembangannya daripada era penjajahan sehingga kemerdekaan. Seterusnya, penulisan ini akan menganalisis kedudukan Islam dalam Perlembagaan Persekutuan dan mengenal pasti penerapan undang-undang Islam dalam sistem perundangan Malaysia dan ciri-cirinya. Selain daripada itu, penulisan ini juga akan mengetengahkan perbezaan antara negara Islam dan negara sekular serta ciri-cirinya.

Kata kunci: Islam, Perlembagaan, Malaysia, Shari'ah.

INTRODUCTION

Malaysia is a country predominantly populated by Muslims, amounting to 61.3%[250] of the population professing the religion Islam, thus making it as one of the most well-known Islamic countries in the world. However, Islam does not play a big role in the Malaysian Federal Constitution, nor its legal system, as it only assumes the position of the religion of the federation and its application is only limited to a variety of personal and family laws at the state level.

Article 3 (1) of the Federal Constitution provides that the religion of the federation is Islam, but all other religions may be practiced in harmony and peace.[251] Additionally, State legislatures may legislate the application of Islamic law to Muslims in areas pertaining to family and personal laws such as betrothal, marriage, divorce, succession, and maintenance among others.[252] State legislatures are empowered to form and inflict punishments upon Muslims for committing offences that contravene Islamic teachings, and this is provided in Article 74 (2) of the Federal Constitution and List II of Ninth Schedule, whereby the State has power to enact law relating to religion. State legislatures may establish Shari'ah courts whose jurisdiction presides over Muslims only and are free from the jurisdiction of the civil courts as evident in Article 121 (1A).[253]

In this paper, the overview of the relationship between the Federal Constitution and Islam will be discussed as thoroughly as possible. It will begin with the historical aspect of the topic, highlighting the coming of Islam since Parameswara, the Palembang-born ruler of

[250] "Malaysia Demographics Profile," Malaysia demographics profile, accessed December 9, 2021, https://www.indexmundi.com/malaysia/demographics_profile.html.; Andrew Harding, "Malaysia: Religious Pluralism and the Constitution in a Contested Polity," *Middle East Law and Governance* 4, no. 2-3 (2012): pp. 357, https://doi.org/10.1163/18763375-00403007.

[251] Article 3 (1), Federal Constitution.

[252] Schedule 9, List II, Paragraph 1 of the Federal Constitution.

[253] Article 121(1A), Federal Constitution.

Melaka's marriage to the Pasai Muslim princess, consequently adopting the religion and changing his name to Iskandar Shah, back in 1414.[254] As such, rapid Islamisation occurred amongst the people of Melaka which spread over the Malay Peninsula and Archipelago when Melaka extended its rule and sovereignty all over, thus becoming a centre of Islam before its fall in 1511 to the Portuguese. Two important characteristics on the propagation of the religion will be highlighted, which are peaceful preaching or dakwah and the positive acceptance of Islam by the Malay rulers who incorporated Islamic law into the states' legal system alongside with the practice of local custom law or *adat*, which will be discussed alongside the application of the Islamic law during that time.

Next, the development of Islamic law in Malaysia will be discussed, particularly, during its colonization era by foreign powers such as the Portuguese, the Dutch, the Japanese as well as the British. The policies of foreign powers in stifling Islamic law will be highlighted as well as the local reformation against them. Furthermore, the topic of the development of Islam during the establishment of the federation during its independence from the British rule will also be discussed, highlighting the significant role of the first Prime Minister in institutionalizing Islam in the Federal Constitution.

This paper will also address the position of Islam in Malaysia, particularly, on relating to the question of whether Malaysia is an Islamic state or a secular state. Whilst there is no mention of the word 'secular' and anything of its association in the constitution, evidence has been found in the papers of the Reid Commission regarding the intention to establish the federation as a secular state.[255] The establishment of Islam as the official religion of the federation was done out of ceremonial reasons, proven by the statement of the White Paper, "*There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular*

[254] Wan Arfah Hamzah, A First Look at the Malaysian Legal System, (Kuala Lumpur: Oxford Fajar Sdn.Bhd, 2009).

[255] Prof Dr Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, (Star Publications, (Malaysia) BHD, 2008).

state."[256] This paper will discuss the position of Islam in the Federal Constitution, the application of Islamic law in the Malaysian legal system and its features, the differences between Islamic states and secular states as well as its features, and a case review as an example for this topic.

BACKGROUND

Islam Before Merdeka Day

Islam arrived in Semenanjung Tanah Melayu (Malay Peninsula) specifically in Terengganu during the thirteenth century through the discovery of Batu Bersurat.[257] The most notable period of the spread of Islam was during the twelfth and thirteenth centuries[258]; when the preaching and message of Islam was embraced by the Malay rulers through various means, one of it was through the marriage of Parameswara, the Palembang prince who founded Melaka. He embraced Islam after his marriage to a Muslim princess from Pasai.[259]

As Melaka developed into an international entrepot and its sovereignty spread over parts of the Malay Peninsula and Archipelago, the Islamisation of its inhabitants made Melaka the centre of Islam at that time. It is noteworthy to bring forth the fact that Melaka (at that time) was not only the international entrepot but also used to be known as

[256] Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies* 37, no. 2 (2006): pp. 249-266, https://doi.org/10.1017/s0022463406000543, 262; M. Sufian Hashim, 'The Relationship between Islam and the State in Malaya', *Instisari*, Vol 1 No 1, p8 as cited in Prof Dr Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, (Star Publications, (Malaysia) BHD, 2008) p 124.

[257] Mardiana Nordin and Hasnah Husiin, *Malaysian Studies*, 2nd ed. (Shah Alam, Selangor: Oxford Fajar Sdn. Bhd, 2019), 237.

[258] Ibid, p. 469.

[259] Wan Arfah Hamzah, A First Look at the Malaysian Legal System, (Kuala Lumpur: Oxford Fajar Sdn.Bhd, 2009) p.13.

Malay-Muslim-Empire which consistently spread Islam and of course, the Malay culture.[260]

It is prudent to point out that before the coming of British, the rulers acted as the head of the religion of Islam[261] in their respective states and in which they institutionalised Islamic laws into the laws of their states, but these were mixed with *adat* (local customs) law. Examples can be found in Undang-undang Melaka (Malacca Laws) on matters of marriage, trade, criminal law, and rules of evidence and Undang-undang Laut Melaka (Malacca Maritime Laws). In the locus classicus of *Shaik Abdul Latif and others v Shaik Elias Bux*[262], the judge contended that "the only law at that time applicable to Malays was Mohamedan (Islam) modified by local customs." In *Ramah v Laton*[263], the Court of Appeal held that Muslim law is not foreign law but local law and the law of the land.

The tranquil way in which Islam spread and the Malay Rulers' acceptance of this peaceful religion not only assisted with regulating Islam in different structures, but it also expedited the spread of Islam among the Malays.

The Development of Islam in Malaysia

As far as the colonial era is concerned, the Malay Peninsula has witnessed four colonial foreign powers conquering its soil; the Portuguese, the Dutch, the British, and the Japanese.[264] It is prudent to

[260] Ibid.

[261] Farid Sufian Shuaib, Tajul Aris Ahmad Bustami, and Kamal Mohd Hisham Mohd, *Administration of Islamic Law in Malaysia: Text and Material* (Petaling Jaya etc.: LexisNexis, 2010), 36.

[262] [1915] 1 FMSLR 204.

[263] [1927] 6 FMSLR 128.

[264] Muhammad Haniff Hassan. "Explaining Islam's special position and the politic of Islam in Malaysia." *The Muslim World* 97, no. 2 (2007): 289.

point out that the British colonisation era was the most impactful[265], especially on the position of Islam in the Malaysian state.

Among the approaches by the British during the colonial time of the Malay Peninsula was the non-impedance in religious issues. There were cases where Islamic practices, particularly the execution of Islamic Laws, were restricted through direct and indirect interference; with only Islamic Personal Laws being permitted for practice.[266]

One of the most crucial policies imposed by the British in the Malay Peninsula was that religious matters have no application in the law.[267] The policy imposed by the British acknowledged the Malay Rulers as the heads of Islam in their respective states. As written in various agreements between the British and the Malay Rulers, when they accepted British residents as their advisers in managing the states, all matters related to Islam remained prerogative within the purview of Malay Rulers in their states respectively. The British's flexibility in policymaking for the maintenance of its power and its recognition of the "force of Islam" reflected that the British self-serving tolerance towards the influence of Islam among its subjects.[268] Therefore, it can be said that Shari'ah had been practiced and implemented before the colonial period.

It is also crucial to note that during the early twentieth century, the British policy of bringing foreign labour to the Peninsula resulted in the influx of non-Malays to the point where the indigenous Malays were outnumbered. Some reported that Malays at that time were considered as a minority.[269] Despite this, the British did not see any cause for concern and avoided making any changes to the status of Islam. This is due to the agreement that they made with the Malay

[265] Ibid, p 289.

[266] Hussin Mutalib, *Islam in Malaysia: From Resurgence to Islamic State?*, 20. as cited in Muhammad Haniff Hassan. "Explaining Islam's special position and the politic of Islam in Malaysia." *The Muslim World 97*, no. 2 (2007): 289.

[267] Ibid.

[268] Ibid.

[269] Ibid, p. 291.

Rulers[270] and from their realization that any attempts to meddle with the status would only elicit serious objection besides triggering rebellion from the Malays.

The Malays protested in disagreement when the British attempted to introduce the Malayan Union after World War II. It is pertinent to note that the idea of implementing the Malayan Union was pigeonholed (suspended) even though most of the Malay Rulers acceded to the proposal.[271] The rejection of the Malayan Union, among others, was because it elevated the status of other ethnic groups[272], impounded whatever power that was left vested in the Malay Rulers as protectors of Islam and centralised the administration of the Peninsular under one central British rule. Apart from that, the Malayan Union agreement was largely due to the unwillingness of the Malays to accept the dissolution of their traditional States and their forms of governance. Part of their cultural attachment to these was the association of the States with religion.[273]

Additionally, the Malayan Union was deemed to diminish the status of Malays, indisposing the rulers that they largely respected as symbols of "Ketuanan Orang Melayu" and, treated their much-revered religion of Islam sacrilegiously. Moreover, it would also abolish the previous residential system, where British residents were merely advisers to the Sultan, thus leading to the whole Peninsula being under the British

[270] Ibid.

[271] Ibid, p. 292.

[272] Mardiana Nordin and Hasnah Husiin, *Malaysian Studies*, 2nd ed. (Shah Alam, Selangor: Oxford Fajar Sdn. Bhd, 2019), 89.

[273] Andrew Harding, "Malaysia: Religious Pluralism and the Constitution in a Contested Polity," *Middle East Law and Governance 4*, no. 2-3 (2012): pp. 362, https://doi.org/10.1163/18763375-00403007.

colonial system once and for all.[274] The agreement was discontinued and replaced by the Federation of Malaya Agreement in 1948.[275]

POSITION OF ISLAM IN THE CONSTITUTION

A commission known as the Reid Commission spearheaded by Lord Reid[276] was established, to draft the constitution for the eventual autonomous Malaya, which at that period just included Malaya. The draft constitution proposed by the Reid Commission was largely accepted by the Alliance party (representing the major ethnic groups). Tunku Abdul Rahman played an important and significant role in institutionalizing Islam in the constitution, as the one who negotiated with the British for the independence of Malaya.[277] It is prudent to bring forth the fact that, by referring to the history of Malaysia whereby the Malay Rulers objected[278] to include Islam among the provision in the draft of Federal Constitution as they suspect that the proposed

[274] Mardiana Nordin and Hasnah Husiin, Malaysian Studies, 2nd ed. (Shah Alam, Selangor: Oxford Fajar Sdn. Bhd, 2019), 91.

[275] Shamrahayu A.Aziz. "*History Of The Malaysian Constitutions: An Exposition of Fundamental Elements*". p 16.

[276] Joseph M. Fernando, "A Playmaker and Moderator: Lord Reid and the Framing of the Malayan Federal Constitution*," Journal of Southeast Asian Studies* 50, no. 3 (September 12, 2019): pp. 431-449, https://doi.org/10.1017/s0022463419000390, 432.

[277] Muhammad Haniff Hassan. "Explaining Islam's special position and the politic of Islam in Malaysia." *The Muslim World* 97, no. 2 (2007): 296.

[278] The Rulers explained that their objection to the provision for an official religion was based on two grounds. First, under the existing Constitutional arrangement they were the heads of the Muslim faith in their respective states and, second, religion under both the existing and proposed new Constitutions was a state matter. In the circumstances, the Rulers argued that a provision declaring an official religion for the Federation would encroach upon their individual position as the Head of the Faith in their respective states and the rights of the states to deal with matters of faith as cited in Joseph M. Fernando (2006). The Position of Islam in the Constitution of Malaysia. Journal of Southeast Asian Studies, 37, p 257 doi:10.1017/S0022463406000543.

provision might have taken their powers in Islam.[279] It was the proposition given by the Alliance Party which won over the agreement of the Malay Rulers to include Islam. Among the propositions by the Alliance party were the position as the head of religion, rights, and privileges.[280] The Alliance Party further affirmed that the position of each of Their Highnesses as head of the religion in his respective State and the rights, privileges, prerogatives, and powers enjoyed by him as head of that religion will be unaffected and unimpaired.[281]

Tunku Abdul Rahman did not intend to establish Malaya as a state with a strong religious character.[282] When independence negotiations occurred between the British, the delegates from the Alliance and the Malay Rulers, there was a dispute between two parties' delegates concerning the proposition to include Islam as the religion of the Federation. However, Justice Abdul Hamid (one of the members of Reid Commission) said that a provision on Islam should be included in the Constitution as many countries in the world recognised religions

[279] Mohamed Adil, Mohamed Azam. Restrictions in Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy. *Muslim World Journal of Human Rights* 4, No. 2 (2007): 3.

[280] Ibid, p. 3.

[281] Ibid.

[282] Kazi Mahmood. "*Netauns Back Claims Malaysia a Secular State, Not an Islamic State,"* The Independent Singapore News, April 24, 2019, https://theindependent.sg/netizens-back-claims-malaysia-a-secular-state-not-an-islamic-state/.; The clarification by Prime Minister Tunku Abdul Rahman on a statement made by an Honourable Member in the Federal Legislative Council on 1 May 1958 that the Federation has 'been officially recognised as an Islamic State'. The Prime Minister responded "I would like to make it clear that this country is not an Islamic State as is generally understood, we merely provide that Islam shall be the official religion of the State" as stated through Legislative Council Debates, Official Report of the Second Legislative Council (Third Session) September 1957 to October 1958, col 4631 as cited in Wan Arfah Hamzah, A First Look at the Malaysian Legal System, (Kuala Lumpur: Oxford Fajar Sdn.Bhd, 2009), p. 165.

for the state and there is no harm in doing so.[283] Through the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*[284], it was contended that Article 3 (1) was not originally drafted and proposed by the Reid Commission. But it is highly pertinent to make a reference to a dissenting note of a member of the Reid Commission[285], whereby it was emphasised that:

> *"It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating, and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Article 2 in Part I or at the beginning of Part XIII: 'Islam shall be the religion of the State of Malaya, but nothing in this article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim.' A provision like the one suggested above is innocuous."*

Evidently, Article 3 (1) of the Federal Constitution provides that Islam is the religion of the Federation, but other religions may be practiced in peace and harmony. As far as the insertion of Article 3 alongside other provisions in the Federal Constitution is concerned, the wisdom

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[283] Ibid; According to Justice Abdul Hamid, a provision on Islam should be included in the Constitution. His argument was, it was the unanimous recommendation of the delegates. As cited in the Working paper presented by the author, Shamrahayu A.Aziz. (2013). History Of The Malaysian Constitution's An Exposition of Fundamental Elements.

[284] [2013] 6 MLJ 468.

[285] Reid Report page 35 as cited in Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies* 37, no. 2 (2006): pp. 249-266, https://doi.org/10.1017/s0022463406000543, 256.

behind the insertion is silent[286] but it must be noted the insertion of Article 3 implies the nation's obligation is to preserve and promote the religion.[287] It is of paramount importance to scrutinise the fact that nowhere in the Federal Constitution, the term 'Official Religion' could be found but the term itself carries the meaning of 'State Religion' and is therefore as an endorsement Islam is of no equal footing compared to other religion.[288]

There has been unsettled debate on the issue of whether Malaysia is an Islamic or secular state. The non-Muslims of the country are unwavering in their assertion that Malaysia's Constitution is and was from the very beginning, meant to provide a secular foundation.[289] Article 3 itself, in many ways, facilitated the Malaysian government's inclusion of Islam in state affairs and in the public domain. As mentioned by Prof. Dr. Shamrahayu in her working paper:[290]

> *Article 3 (1) of the Constitution declares Islam as the religion of the Federation. Although this provision is quite clear, it received different interpretations. The interpretation marked some*

[286] Shamrahayu A. Aziz, "Islam as the Religion of the Malaysian Federation: the Scope and Implications," *IIUM Law Journal* 14, no. 1 (2006): 37.

[287] Mohamed Imam "Freedom of Religion under Federal Constitution of Malaysia - A Reappraisal' [1992] 2 MLJ 119 at 128 as cited in Shamrahayu A. Aziz, "Islam as the Religion of the Malaysian Federation: the Scope and Implications," *IIUM Law Journal* 14, no. 1 (2006): 39.

[288] Shamrahayu A. Aziz, "Islam as the Religion of the Malaysian Federation: the Scope and Implications," *IIUM Law Journal* 14, no. 1 (2006): 38.

[289] The requests by numerous non-Muslim organisations urging the Commission to ensure the secular nature of the state, and their concerns over freedom of worship, as well as a confidential letter from the Secretary of State for the Colonies, Alan Lennox-Boyd, emphasising the need to ensure that the Constitution guaranteed the freedom of religion, greatly influenced the decision of the Commission not to insert an article providing for a state religion in Joseph M. Fernando (2006). The Position of Islam in the Constitution of Malaysia. *Journal of Southeast Asian Studies*, 37, p 255 doi:10.1017/S0022463406000543.

[290] Shamrahayu A.Aziz. "History Of The Malaysian Constitutions: An Exposition of Fundamental Elements." p. 14.

> *confusions. The court's decisions so far have not made the position clear about the position of Islam as the official religion. As decided in the case of Che Omar Che Soh, Islam is only used for rituals and customs only. It does not cover the country's legal system. This is deeply regretted. While some other courts' decisions, such as the decision in the case of Azlina Jailani, Meor Atiqulrahman and Kamariah Ali stating a special position of Islam in the Constitution.*

In addition to Article 3, Article 12 (2)[291] of the Federal Constitution states that it shall be lawful for the Federal or a state to establish or maintain Islamic institutions, provide instruction in the religion of Islam to Muslims and incur expenditure.[292] Furthermore, Article 12 (2) allows the government to allocate financial assistance for Islamic education. It should be noted that the constitution is silent on government assistance to educational institutions of any other religions. Besides these provisions, Prof. Dr. Shamrahayu[293] stated that the oath of office of the Yang di-Pertuan Agong[294] also gives a clear and significant position of Islam during the swearing in by expressing "in the name of Allah" on the appointment of Yang di-Pertuan Agong. Additionally, during the proclamation of emergency, there is a special position of Islam which restricts the executive from drafting laws relating to Islamic law.[295]

Apart from Article 3 giving more emphasis to Islam, it is also important to refer to the Article 11 (4) of the Federal Constitution, which gives the State Legislature and the Parliament at a Federal level, a constitutional right to enact laws to protect the sanctity of Islam as the religion of Federation. This shows the supremacy of Islam as prescribed in the Federal Constitution. In the case of *Ketua Pegawai*

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[291] Article 12 (2) of Federal Constitution.

[292] Prof Dr Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, (Star Publications, (Malaysia) BHD, 2008),p 128.

[293] Shamrahayu A. Aziz. "History Of The Malaysian Constitutions: An Exposition of Fundamental Elements". p 15.

[294] As stated in the 4th schedule of the Constitution.

[295] Article 150 (6A).

Penguatkuasa Agama & Ors v Maqsood Ahmad & Ors and another appeal[296] whereby the judge in this case had referred to the case of *Halimatussaadiah v Public Service Commission, Malaysia & Anor*[297], where in the case, the High Court held that the prohibition upon public servants from wearing any attire covering the face when on duty was justified. The court further clarified that there is a need for a plaintiff who is a public servant who deals with government's matters (documents) to be identified as an employee during work for security purposes. The defendant's action in prohibiting the plaintiff was justified under Article 11 (5) specifically on the ground of public order. Furthermore, through the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*[298], the Court of Appeal is of the opinion that the very purpose and intention of the insertion of the words, "in peace and harmony" in the Article 3 (1) of the Federal Constitution, is to protect the sanctity of Islam as the religion of the country and to insulate against any probable threat to Islam. The most probable threat to Islam in this country would be the propagation of other religion to the followers of Islam. That is the very reason as to why Article 11 (4) of the Federal Constitution came into place.

Article 121 (1A)[299] provides for the establishment of Shari'ah courts. The jurisdiction of the Shari'ah Courts is protected against any interference by the Civil Courts. Through the case of *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor*[300], where the Federal Court agreed with the decision made by the High Court and the Court of Appeal in the case, whereby in affirming, if the plaintiff is a Muslim seeking to renounce her faith in Islam, then the matter being 'an offence against the precepts' of Islam, is within the jurisdiction of the Shari'ah Court due to Article 121 (1A) of the Federal Constitution. Apostasy cases, in particular, lie at very heart of the jurisdictional complexities arising

[296] [2021] 1 MLJ 120.

[297] [1992] 1 MLJ 513.

[298] [2013] 6 MLJ 468.

[299] Federal Constitution.

[300] [2021] 2 MLJ 181.

from the relationship between the civil and religious courts due to the sensitivity surrounding the issue of Muslims wanting to leave the religion coupled with the constitutional definition of a 'Malay', i.e. one who professes the religion of Islam.[301] In the case of *Lina Joy*[302], a woman born to a Malay-Muslim family, converted to Christianity, and applied to have this officially recognised as her legal status in order to marry her Christian fiancé. The Federal Court, in a two to one judgement, ruled that Muslims who wished to convert out of Islam could not do so without a certificate of apostasy from the Shari'ah Court. The decision focuses into a crucial and important discussion between Article 11 of the Federal Constitution, which guarantees the right to profess and practice one's religion, and Article 3, which declares Islam as the religion of the Federation. Apostasy is not listed under the purview of the Shari'ah Court. Furthermore, many state laws concern and deal with the conversion into Islam and not otherwise.

It is therefore, with affirmative connotation, that Islam is considered as the religion of the Federation. The provisions as mentioned above, is said to be the protection towards Islam[303] to indicate Islam as the religion of Federation is indeed in a higher position compared to the other religions in Malaysia.

[301] Article 16 of Federal Constitution.

[302] [2007] 3 All Malaysia Reports 693.

[303] Shamrahayu A. Aziz, "Islam as the Religion of the Malaysian Federation: the Scope and Implications," *IIUM Law Journal* 14, no. 1 (2006): 43.

SECULAR FEATURES IN FEDERAL CONSTITUTION

The definition of a secular state was established in the case of *Kamau and Others v Attorney General and Another*[304], which refers to a state that protects all religions equally and does not uphold any religion as a state religion. As an example, unlike England, where the Queen is titular Head of the Church of England, there is no provision in Kenya to make any religion 'the established church'. A secular state is to observe an attitude of neutrality and impartiality towards all religions. In a secular state, it is assumed that the state will minimally have to contend with and respond to each of the demands of equality, liberty, and neutrality.

Whilst the Federal Constitution does not explicitly state the word "secular", there is historical evidence in the early period of drafting the Constitution stating that the Reid Commission had proposed inserting a provision stating the country is a secular state.[305] At the final stage of drafting the Constitution, the Reid Commission finally came to an agreement to accept a provision that made Islam the religion of the Federation, with exclusions as it will not impose nor apply to non-Muslim nationals professing their own religions and it shall not imply that the State is not a secular State.[306]

In the White Paper containing the 1957 constitutional proposals, it was expressed that, "There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State…"[307] This proposal of secular history is challenged and rebutted by those who opine that Malaysia is indeed an Islamic state as

[304] [2011] 1 LRC 399.

[305] Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies* 37, no. 2 (2006): pp. 253, https://doi.org/10.1017/s0022463406000543.

[306] Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies* 37, no. 2 (2006):261.

[307] M. Sufian Hashim. *The Relationship between Islam and the State in Malaya*, Intisari, 1 (1) p. 8.

they argued that pre-British colonisation, Islamic Law was the law of the land.[308]

It is pertinent to refer to the early history of this country, most of the states in Peninsular Malaysia were impacted by various ways of life of traders and one of them were the Chinese traders who later opened the door to Chinese influence over the Malays. Not only that, the creeds of Hinduism from India and Buddhism from India and China held sway in South-east Asia between the first to the 13th centuries and left an ineffable imprint on various aspects of Malay political and social institutions, court hierarchy, marriage customary rites and Malay criminal law. Islam came to Malacca in the 14th century from various regions in Arabia, India and China as Malacca was the international entrepot for the traders. According to R.J. Wilkinson who contended that there can be no doubt that Muslim law would have ended by becoming the law of Malaysia had not British law stepped in and interfered.[309]

As far as the secular features existing in the Federal Constitution is concerned, Article 4 (1) of the Federal Constitution states that the highest law of the land is the Constitution and not the Shari'ah. There is no constitutional amendment which provides otherwise.[310] This impliedly means that Article 4 (1) has a higher status than the Shari'ah itself, even though Islam is the religion of Federation. Moreover, Article 160 (2) states that definition of law is to include written law, common law and custom or usage having the force of law, this is evidently clear, the term Shari'ah as part and parcel from definition of law is not included.

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[308] Ahmad Ibrahim & Ahilemah Joned (1987). The Malaysian Legal System. *Dewan Bahasa dan Pustaka*, Kuala Lumpur, p. 54.

[309] R.J. Wilkinson. "*Papers on Malay Subjects*". Law (Kuala Lumpur, 1971) as cited in Prof Dr Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, (Star Publications, (Malaysia) BHD, 2008), p. 125.

[310] Prof Dr Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia*, (Star Publications, (Malaysia) BHD, 2008), p. 126.

It is pertinent to note that through the case of *Che Omar Che Soh v Public Prosecutor*[311], it was held that although Islam is the religion of the Federation[312], it is not the basic law of the land, and the law of the country is secular law. Islamic law cannot be the general law of the land either at the federal or state level. It can only be applied to the Muslims in areas outlined in Item 1 of the List II of the Ninth Schedule. Therefore, it can be concluded that the law of Malaysia is characterised as secular due to the intention of the framers in drafting the constitution, further supported by the case of *Che Omar bin Che Soh v Public Prosecutor*.[313]

Despite the existence of secular features in the Federal Constitution that pushes the opinion that Malaysia is a secular state, such an opinion has been met with much criticism and challenges. The authors opine that it is certainly valid and plausible to challenge the opinion that Malaysia is a secular state considering the clear contradiction between intention of the Reid Commission to make the Federation a secular state and the position of Islam as the religion of the Federation in the Constitution. This contradiction finds its root back when Justice Abdul Hamid made a dissenting note to include Islam as the religion of the state in one of the provisions of the Constitution, while it was also emphasised that such a provision will not prevent the State from being a secular State. It begets the question if Malaysia can really be considered as a secular state when its Constitution itself recognises Islam as the religion of the state.

This contradiction sets apart the Malaysian law from the law of other secular countries, where the mention of a specific religion of the state is notably absent in the latter's provisions. Moreover, unlike countries

[311] [1988] 2 MLJ 55.

[312] Article 3 (1), Federal Constitution.

[313] Ibid.

like India[314] and Turkey[315], where the term 'secular' is clearly expressed in their respective constitutions, our Federal Constitution has no such clarity on the term. This can be seen as a contradiction to the intentions of the drafters in making our constitution secular, as Islam is mentioned in the constitution, while it neglects to denote the country's secularism. Hence, according to some, Malaysia is neither a secular nor a completely theocratic country.

CASE COMMENTARY: CHE OMAR CHE SOH

In pursuance, the authors will discuss the prominent case of *Che Omar bin Che Soh v Public Prosecutor*[316] critically. This was the first case which discussed the meaning of Article 3 of the Federal Constitution[317] by the Supreme Court (as the court was called at that time). This is an appeal case where the issue was on mandatory death sentence for the offence of drug trafficking and for the offence under the Firearms (Increased Penalties) Act which were argued to be against the injunctions of Islam and therefore unconstitutional and void.

It was contended that the imposition of death penalty for these offences, not being in the forms of Islamic law punishments like "huddud" or "qisas" contravenes Islamic injunctions, thus contravenes the Federal

[314] Preamble of Constitution of India; Ayushi Detha, "*India as a Secular State*," Legal Service India - Law, Lawyers and Legal Resources, accessed January 15, 2022, https://www.legalserviceindia.com/legal/article-1141-india-as-a-secular-state.html.

[315] ARTICLE 2 of the Constitution of the Republic of Turkey, The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

[316] [1988] 2 MLJ 55.

[317] Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge: Cambridge University Press, 2018), p 138.

Constitution[318] and the fact that the Constitution is the supreme law of the Federation.[319]

It was held that the argument held no basis as the word 'Islam' mentioned in Article 3 (1) of the Federal Constitution is restricted to matters relating to rituals and ceremonies, and such is not the case. The Supreme Court contended that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law (Shari'ah) was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. Hence, the reliance on the wording of Article 3 to uphold the submission and argument that punishment of death for the offence of drug trafficking or any other offence, is vague. The Supreme Court further denied the appeal and affirmed the secular nature as it was embedded in Malaysia.

It is in the view of the court that the framers of the Constitution understood the meaning of "Islam" in the context of Article 3 as only pertaining to Muslims' personal law, as there would have been another provision in the Constitution clarifying the effect that any law contrary to the injunction of Islam will be void If it had been otherwise. On the contrary, the preservation of secular law prior to the establishment of the Federal Constitution is provided in Article 162, unless there are contradicting laws.[320] Article 3 cannot be relied on to support the argument that the punishment of death for the offence of drug trafficking, or any other offence, will be void as being unconstitutional.

Therefore, the appellant's argument that the Parliament must instil Islamic principles in drafting the law, owing to their argument that Islam is the religion of the Federation and thus must conform to Shari'ah, cannot be accepted. This argument is contrary to the constitutional and legal history of the federation, and also to the Civil

[318] Article 3(1), Federal Constitution.

[319] Article 4(1), Federal Constitution.

[320] Article 162, Federal Constitution.

Law Act which provides for the reception of English common law in this country.

It is contended that however, it is a crucial matter to look back on the history and the intention of the framers in the insertion of Article 3 of the Federal Constitution. Islam has indeed a special position in the Federal Constitution. Not only as the only religion mentioned and written in the Federal Constitution but during the emergency state, the Parliament may make laws for any matter except those relating to Islamic and native laws as encapsulated through Article 150 (5) of the Federal Constitution.

In establishing the Federal Constitution as the supreme law of the federation, during the British rule in Malaya, the influence of Islam in the legal system was reduced to matters pertaining to family and inheritance. Despite the reduction to personal matters, it still shows that Islam is still a religion and part and parcel of laws of the land, and this will never cease to exist in Malaysia. By adopting Islam as the religion of the federation, it means Malaysia is not a 'full-time' secular state.[321] From a historical aspect, Islamic law was once the law of the land dating back to the establishment of the Sultanate of Melaka during the marriage of Sultan Iskandar Shah and the Muslim Princess of Pasai in 1414.[322]

The insertion of Article 3 (1) into the Constitution means Islam is the religion of the federation. Even prior to Independence, Islam was once the official religion of the Malay states.[323] During the negotiation process to include Articles 3, the Alliance Party's original proposal in its memorandum to the Reid Commission states, The religion of

[321] Prof Dr Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia, (Star Publications, (Malaysia) BHD, 2008), p. 127.

[322] Wan Arfah Hamzah, A First Look at the Malaysian Legal System, (Kuala Lumpur: Oxford Fajar Sdn.Bhd, 2009), p. 151.

[323] Wan Arfah Hamzah, A First Look at the Malaysian Legal System, (Kuala Lumpur: Oxford Fajar Sdn.Bhd, 2009), p. 167.

Malaysia shall be Islam.[324] It is further emphasised that through this case, the decision was only concerning the determination of a provision of a law whether it is constitutional and not the actual position and status of Islam as the religion of the federation.[325]

The other view by the very virtue of this case, it was settled and affirmed that the position of Malaysia as a secular state was more favourable. It was further emphasised that Malaysia was never a theocratic nor Islamic state since the decision of the case was never reversed.[326] As far as this view is concerned, Islam as a religion of the federation is restricted to rituals and ceremonies as Islam was never intended to be the law of the land.[327] It is no dispute, with due respect, the fact that both deputy public prosecutors were both Muslims at that time and as servants (agents) of government, they both were advocating the impugned law based on secular nature of the state. However, the judge was also a Muslim but he chose to put his personal interest and beliefs on hold in upholding justice and integrity.[328] Hence the decision favoured the position of Malaysia being a secular state.

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[324] Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies* 37, no. 2 (2006): pp. 266, https://doi.org/10.1017/s0022463406000543.

[325] Shamrahayu A. Aziz. Apostasy and Religious Freedom: A Response to Thio Li-Ann [2007] 2 MLJ i, page 5; Abdul Aziz Bari. Islam in the Federal Constitution: A Commentary on the decision of Meor Atiqulrahman [2002] 2 MLJ cxxix, page 8.

[326] Amanda J. Whiting, "Secularism, the Islamic State and the Malaysian Legal Profession," *Asian Journal of Comparative Law* 5 (April 16, 2015): pp. 1-34, https://doi.org/10.1017/s2194607800000338, 14.

[327] Ibid.

[328] According to Salleh Abas LP in the case of *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55, where the Lord President complimented the counsels who successfully brought forward the submissions on this particular issue while not being Muslims. Quoting what the Lord President has said, *"We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact that they were not Muslims. However, we have to set aside*

CONCLUSION

The debate over Malaysia's status whether it is an Islamic or secular state continues until today. Apart from the above discussion affirming the position of Islam in the federation, the view of Malaysia as an Islamic state was supported by notable figures such as Tun Mahathir[329], stating that Malaysia is an Islamic state due to the position of Islam as the official religion of the federation.

It was evident that the Reid Commission had proposed inserting a provision stating the country is a secular state in the early stage of drafting the Constitution. However, a provision that made Islam the religion of the Federation was included, but it shall not affect non-Muslims professing and practising their own religions and shall not imply that the State is not a secular State at the final stage of drafting the Constitution. Despite this fact, while members of other religions are free to practice their beliefs in peace and harmony, Malaysia is still considered as an Islamic state. Islam is recognised as the religion of the federation while nothing in the Federal Constitution explicitly states that Malaysia is a secular state.

our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law.".

[329] Mohamed Adil, Mohamed Azam. The Federal Constitution: is Malaysia a Secular State?. 121.; ; Andrew Harding, "Malaysia: Religious Pluralism and the Constitution in a Contested Polity," *Middle East Law and Governance* 4, no. 2-3 (2012): pp. 365, https://doi.org/10.1163/18763375-00403007.

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