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FOREWORD BY THE VICE CHANCELLOR

I would like to applaud the Faculty of Law, for its steadfastness in pursuing academic excellence and knowledge advancement, as demonstrated through the debut hosting of the **International Conference on Children and Women (ICWC2016)**.

In fact, its focus on legal and social issues reflects thoughtfulness, empathy and conscience on the part of the organiser in championing the rights of women and children—two vulnerable groups of human beings whose needs and rights are often times relegated to the back seat, in certain world communities, for reasons only known to them.

Truly, an enterprise borne of a noble intent to alleviate the suffering and predicament of women and children is one which should be given unequivocal support. This is especially significant as the international community has taken special interest in addressing issues surrounding women and children. Hence, these issues can no longer fall exclusively within the ambit of domestic affairs of any one country, in particular for countries which have signed, ratified or acceded to the *Convention on the Elimination of All Forms of Discrimination Against Women 1981*, and the *Convention on the Rights of the Child 1989*, each of which affords protection to women and children, respectively.

In this context, it is hoped that **ICWC2016** will provide the needed platform from where participants are able to discover new knowledge, recover lost information and uncover hidden facts about matters that have a bearing on the well-being of women and children today and in the future. Thus, I wholly commend the initiative undertaken by the faculty to address issues of common concerns which affect women and children globally, particularly so, concerns brought about by human greed and the scourge of society, the likes of human traffickers, warlords and extremists.

On this score, I must say that I have great faith in the legal community, including conference participants, to persist and resist in their quest to seek justice for women and children, in the face of transgression against their basic rights to lead a protected life, wherever they are, whatever their station in life.

I am also hopeful to see the end of this inaugural conference leading up to the beginning of fresh efforts to form research collaborations the outcome of which will translate into deliverables to further strengthen the legal protection afforded to both women and children, in diverse aspects of their existence.

On a final note, I would like to wish all participants two days of insightful experience through a journey to bring about change and a better future for women and children of the world. To participants who are guests of the country: I wish you a memorable stay in Malaysia and a safe journey home.

Prof. Emeritus Dato' Dr Hassan Said
Universiti Teknologi MARA (UiTM)

GREETINGS FROM THE DEAN

Assalamualaikum wbt...

On behalf of the Faculty of Law UiTM Shah Alam, it gives me great pleasure to extend a very warm welcome to each and every participant to the inaugural International Conference on Children and Women (ICWC) 2016 at Dorsett Grand Subang.

The objectives of organising ICWC 2016 are to provide an excellent platform to gather all academicians from both local and overseas, government and institutional regulators, non-governmental agencies, institutions and organizations, stakeholders in the private sectors, legal practitioners, students and other interested parties to discuss and to exchange opinions concerning legal and social issues relating to women and children. In addition, this conference provides opportunities to all participants to build linkages and to deliberate on ways to strengthen the legal protection afforded to women and children.

I sincerely hope that this conference will give opportunities to all participants to engage in meaningful intellectual discourse that highlights a myriad of legal and social issues relating to women and children. I believe this conference will be of great benefit, particularly for those who share a common goal of providing a better future for women and children. On behalf of the Faculty of Law, I would like to express my deepest gratitude to each participant from both local and overseas for participating in this conference.

I would also like to record my heartfelt appreciation to the Organising Committee for their commitment and continuous effort in making this conference a reality.

Wishing all participants a fruitful, productive and enjoyable conference.

Thank you and wassalam.

Assoc. Prof Dr Haidar Dziauddin
Dean, Faculty of Law, UiTM

MESSAGE FROM THE CHAIRPERSON

In the name of Allah, the Most Gracious, the Most Merciful.

Assalamualaikum wbt. Welcome to the Inaugural International Conference on Women and Children 2016: Legal and Social Issues, organised by the Faculty of Law, Universiti Teknologi Mara Shah Alam. Based on the premise that “the hand that rocks the cradle rules the world” and “children are our future”, it is strongly felt that the main theme of this conference is apt and timely.

I fervently hope that this conference will serve as a platform for academicians, researchers, practitioners, as well as students to share and exchange ideas and experience within their field of expertise, especially with the presence of local and international presenters and participants.

It is also my wish that this conference not only serve as a catalyst to share knowledge but it will also create the path for greater exploration and improvement in the legal framework governing the legal and social issues pertaining to women and children. It is hoped that this will create a better future and greater harmony within our society.

I wish to thank and congratulate my dedicated organizing committee for their hard work in making this conference a reality. I would also like to take this opportunity to thank our sponsors for their generous support.

Finally, I wish all the participants and presenters an enjoyable and fruitful conference. Happy conferencing to all.

Thank you.

Dr. Suzaini Mohd. Saufi
Chairperson ICWC2016

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The Role of Family Support Division of Syariah Court of Selangor in Protecting the Rights of Women and Children to Maintenance

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Abstract

The problem of neglecting the maintenance order issued by the Syariah Court is nothing new. The lack of enforcement and execution impede the rights of women and children as written in the order which makes the order itself meaningless in its application. Aggrieved party spends a lot of time and cost in the process of obtaining the order from the court but still, the one that should bear the responsibility to observe it get scot free and left unpunished. Such provisions on enforcement and execution of court's order are stated in the Act or Enactment. However, the aggrieved parties do not have the ability in terms of knowledge of the law, financial and advocacy to fight for their rights. This paper intends to explore the role of Family Support Division (FSD) of Selangor as part of the component of Syariah Court in enforcing and executing the maintenance orders. Among the aims of FSD is to ensure the rights of those who supposed to get the maintenance are not jeopardised. This paper will analyse the services offered by the FSD especially in Selangor in facilitating the women and children. The discussion will focus on the philosophy behind the Islamic judiciary system, the role and functions of FSD and challenges faced by FSD in Selangor. This paper hope to impart an adequate understanding of the principles of judiciary in Islam as well as protecting the rights of women and children by establishing a specific channel.

Keywords: Enforcement, execution, Family Support Division, maintenance, Syariah Court.

Introduction

Maintenance order is part and parcel of Islamic Family Law in Malaysia. As mentioned in the Ninth Schedule, List II, State List of Federal Constitution, family matters involving Muslims including maintenance falls under the jurisdiction of Syariah Court. Maintenance order has always been highlighted as never ending problem happened with regard to Syariah Court. The issues of inefficiency in terms of executing and enforcing the maintenance order issued by the Syariah Court is deemed crucial especially among the women and children. Women and children are fragile whenever the non-

compliance of maintenance order by the former husband and father happened. Definitely, their rights are actually protected and covered by the provisions stated in the Act or Enactment, but it is far too hard for them to ensure their rights can be regained.

In order to tackle the weaknesses with regard to execution and enforcement of maintenance order, a concrete initiative was constructed. In the 46th meeting of the National Council of Malaysia Religious Affairs on 7th June, 2007 in Putrajaya, chaired by honourable former Malaysian Prime Minister, Tun Abdullah Ahmad Badawi had decided that the Department of Syariah Judiciary Malaysia (DSJM) to set up Family Support Division (FSD) to enforce and execute maintenance orders that were not complied with by the ex-husband or father. Consequently, FSD was officially established on October 22, 2008 in Putrajaya, which was officiated by YB Dato' Seri Dr. Ahmad Zahid Hamidi, Minister in the Prime Minister Department (as he then was).

The main goal of FSD is to enforce the maintenance order issued by the Syariah Court. There are three types of order that may be enforced by FSD which are wife maintenance, 'iddah and child maintenance. The establishment of FSD would protect the interest and facilitate the women and children to get the better from the order. It was reported that almost 12,300 former husbands had neglected in paying maintenance¹. To make things worse, most of women did not notify the court. The reasons are due to lack of knowledge on how to take action against their former husbands. Moreover, other obvious reasons came into their picture that the procedure to file an action is costly and a waste of time. They prefer to just live with it rather than initiate any possible steps towards enforcing and executing the orders they have obtained. Thus, the setting up of FSD is to support and encourage women to fight for justice and claim their rights especially for the benefit of the children. Generally speaking, the intention of FSD is noble to show that Syariah Court's order has its own bite and value. But how does this division prove to be different, effective and practical?

Materials and Methods

A discussion on Family Support Division (FSD) for the purpose of this paper is qualitative in nature. This paper intends to highlight the FSD as part of the significant body in the Syariah Court. The study will look into the Qur'anic authority and jurisprudence as well as traditional Islamic literature behind the duty of the court. These authorities would be taken into consideration while comparing with the

¹ Khazi, Haika (2010, March 20). 12,300 bekas suami ingkar bayar nafkah, ramai wanita tak maklum kepada mahkamah. *Berita Harian*.

philosophical thought on the court's role in civil system. Provisions concerning with the Islamic Family Law in Malaysia will also be referred to as a basis of jurisdictions. Case review will be included as a sample in order to determine the efficiency of this division and the effects to the clients. General observations about the practical aspect of FSD services in different states would further assist in clarifying the efficiency of FSD.

The methods used include case studies to examine the enforcement actions taken by FSD and analysis of existing data based on the statistics gathered by FSD of Syariah Court of Selangor since its establishment in 2009 till 2016.

The Framework of Family Support Division

The Family Support Division (FSD) was established to protect the interest of women and children. This is in line with the injunction in Syariah principle to uphold justice, promoting good and prohibiting bad. It was mentioned in the Qur'an:

“No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. Nor father on account of his child and heir shall bear obligations in the same way.”²

Generally, maintenance of wife and children is under the responsibility of a husband or father. He shall prepare the basic necessities in terms of foods, accommodation, clothes, medicines and education for the children. Section 73 of Enactment of Islamic Family Law (State of Selangor) 2003 provides inter alia that a man apparently a father should provide maintenance to his children according to his reasonable capacity.³

The Syariah philosophy as enshrined in the Islamic jurisprudence emphasizes on the duty of the court to ensure any order or judgment was executed and the deserved party got benefit from it. As a comparison, the philosophy in the civil court works differently whereby the court is *functus officio* once an order is given. In the event of non compliance, it is up to the aggrieved party to take an action. The establishment of the Syariah Court in Malaysia is based on the existence of dualism system of judiciary in the country. In other words, the Syariah Court operates independently from the civil court

² Al-Baqarah:233

³ Section 73, Enactment of Islamic Family Law (State of Selangor) 2003

concept and it stands on its own. Supreme Court judge in *Mohamed Habibullah v Faridah*⁴ mentioned that Article 121(1A) of the Federal Constitution provides exclusive power to the Syariah Court to administer the Islamic Law in the country.

Abdul Kareem Zaydan in his magnum opus stated that “when a judge delivers a judgment, he should execute it himself, if he is able.”⁵ Another scholar, Abdul Wafa’ in his literature wrote that if there are any obstacles in the enforcement of an order, then all such resistance must be overcome in order to avoid any complications that will affect the reputation of the court. Justice is not only upheld once the court granted the right to parties disputed, but justice will only be achieved when both parties get their rights as ordered.⁶ Similarly, the view of Ibn Khaldun in *Muqaddimah* stating that Islamic judicial system is not only limited to decide a dispute brought before it, but a wider jurisdiction that account for all domestic affairs and family as the financial monitoring of the use by the disabled, such as orphans, the person who has mental illness as well as those bankrupt.⁷

The views from these three scholars were coinciding with the message of the second Caliph, Umar ibn al-Khattab to a companion, Abu Musa al-Ash’ari. In *Risalah al-Qada’*, Umar states to Abu Musa that “an order will be useless if it has not been executed.”⁸ Similarly, the same emphasis was also been given by Umar to Muaz bin Jabal with regard to the importance of a judge executing his own orders. It brings us to the attention that in Islamic judicial system, an order is not absolutely concluded when it is passed by the judge but until and unless the order was followed and executed.

Manoeuvring on this premise brings to the setting up of a specific agency known as Family Support Division. It is not an alien agency after all due to the fact that in developed countries such as United Kingdom, Australia, New Zealand and Singapore, they already have institution like Child Support Agency to manage the maintenance claim. At least, it shows some seriousness on the part of the authority to curb with the enforcement and execution matter.

Each division of FSD in every state has three main units namely the consultation and legal advice, enforcement and execution of order and fund management. The consultation and legal advice unit provides legal advice to the clients on maintenance order. This unit would receive complaints from those wives and children who have experienced non compliance of the maintenance order by husbands

⁴ [1992] 2 MLJ 793

⁵ Abdul Kareem Zaydan (2000). *Nizam al-Qada’ fi al-Syariah al-Islamiyyah*, Beirut: Resalah Publishers, 241

⁶ Abdul Wafa’ (1990). *Al-Murafa’at al-Madaniyyah wa al-Tijariyyah*, 15th edn., 440

⁷ Ibn Khaldun (2002). *Muqaddimah*, Kuala Lumpur: Dewan Bahasa dan Pustaka Malaysia

⁸ Husseiny Zamburi (2012). *Biography of Umar al-Khattab*, Selangor: Al-Hidayah Publication, 536

or ex-husbands or fathers. Later on, a mediation session between the parties involved will be conducted for further investigation. Notice of appearance will be issued against the former husband or father for this purpose. The FSD officer will act as a mediator and guide the parties to resolve the dispute by conciliation and facilitate the parties to reach into amicable settlement. If a settlement is reached, parties will sign the agreement and subsequently endorsed before a judge. Agreement which has been endorsed by the court shall be final and bound on the parties. In the event where any of the parties fails to appear at the mediation session or both parties fail to seek a solution, the case will proceed to Enforcement and Execution Unit. Another method used by FSD to obtain information is through electronic system known as e-Maintenance. All maintenance order made by the court in the respective state would appear and allows the FSD officers to monitor directly with the clients in case of non compliance.

The second unit which is the enforcement and execution of order unit shall initiate the enforcement action. This unit will handle the case by representing the complainant as a Syariah lawyer to enforce order from the Syariah Court. Right after receiving files from the consultation and legal advice unit, the officer in charge will determine the appropriate modes of enforcement and execution order and make a report in the form of pleadings to be filed in court. The enforcement and execution actions vary such as by way of judgment debtor summon, show cause notice or committal, an order of seizure and sale, an order of seize and deliver to the judgment creditor any chattel ordered to be delivered by the judgment debtor, *hiwalah* or garnishee proceedings, judgment notice or attachment of salary.⁹ Just like other lawyer, he will then file a case to get a mention and serve the summons and pleadings to the judgment debtor.

The FSD officer will represent its client by attending trial until the court issued the enforcement and execution order. He would then hand over the order to the bailiff to carry out the execution order such as seizure and sale and so on.

Another strategic unit is fund management unit. During the mediation process, the officer will gather relevant information which includes the financial capability of the woman. If she fulfils the criteria to get the advanced financial assistance, the officer will recommend her to fill up the application form and once completed, it will be processed and forwarded to the Trust Account Committee for approval. The financial assistance is given for a period of six months only. The FSD officer who acts as a lawyer shall collect the maintenance from the ex-husband or father of the children and deposit them into trust account before maintenance payment being made to the deserved party. To put it in perspective, the

⁹ Syariah Court Civil Procedure (State of Selangor) Enactment 2003

fund is available for those who are qualified and meet several criteria. Firstly, the woman has obtained an order from the Syariah Court. Secondly, she is willing to file an application for enforcement of the Syariah Court order. Thirdly, she agrees to give cooperation in ensuring that appropriate action can be taken against the judgment debtor. Last but not least, the reliability that the former husband or father can be traced or contacted.

The fund for the purpose of advancement of maintenance was allocated by the federal government to FSD in every state. At the same time, the states through the States Religious Council would match the grant according to the sum given. Basically, it is a revolving fund in nature. In Selangor, the principal fund allocated was RM500, 000.00. From the early operation of FSD in 2009 till 2016, almost RM280, 000.00 has been disbursed to 80 applicants as advancement.

Apart from legal services, the FSD of Selangor also provides another facility which is called FSD Transit located in Shah Alam, Selangor. It is a temporary accommodation services to the parties who attend the proceedings in Syariah Court. It is meant for those who have any court cases so they can stay at the transit house especially who resides outside jurisdiction and needy. The service is available to all litigants in Syariah Court and not restricted to FSD clients *per se*. The purpose is to ensure all cases including maintenance to be settled without undue delay.

Results

From the early stage of Family Support Division of Selangor in 2009, more than 600 complaints on maintenance were received and registered. Majority of it involved child maintenance order while the rest were wife and *'iddah* maintenance. Almost all complaints had gone through the mediation process. An average of 100 complaints is reported each year. Almost 60% was successfully settled through amicable settlement. The rest was forwarded to the Enforcement and Execution Unit. The common reasons given for non-compliance of maintenance order are financial problems and having no opportunity to meet the children.

Table 1. Maintenance complaints registered under Consultation and Legal Advice Unit of Selangor FSD (2009 – August 2016)

CASES	SUM
Registered	564
Settled	382
In proceeding	182

Source: Family Support Division of Syariah Court of Selangor

Table 2. Cases registered under Enforcement and Execution Unit of Selangor FSD (2012 – August 2016)

MAINTENANCE ORDER	
Registered	698
Settled	683
In proceeding	15

Source: Family Support Division of Syariah Court of Selangor

As of August 2016, 564 cases were registered to the Enforcement and Execution Unit. 382 cases were disposed off while the remaining 182 still in proceeding. It should be noted that the Enforcement and Execution Unit in Selangor operated in structured from 2012. Before that, the FSD was focusing solely on mediation process at the early stage of FSD establishment.

Discussions

In so far as the Syarie lawyers are concern, almost all FSD officers in every state are qualified to represent its clients. Nevertheless, the situation in Selangor is still pending in process as the FSD officers don't have the accreditation yet. The accreditation of Syarie lawyers for FSD officers is very important in order to help single mother to enforce maintenance order issued by the Syariah Courts. In addition, it allows more comprehensive action towards achieving the aim of FSD itself to ensure the neglecter to be held accountable. Furthermore, by having the ownership to represent the clients, it

allows more aggressive enforcement action to compel the judgment debtor to settle the outstanding arrears.

Be that as it may, the Selangor FSD played significant role within its own capacity and capability. The FSD officer has applied legal and negotiation skills during mediation session and stressed upon the repercussion for non-compliance. As a result, significant number of cases was settled by conciliation. In *Zubidah@Zubaidah Abdul Ghani v Jarident Waising@Zulkifli*¹⁰, judgment debtor satisfies the arrears of maintenance of RM44, 000.00 ranging from 2006 till 2013 to the judgment creditor. The sum was paid in cash after mediation session was conducted. In *Hamidah Abdul Wahab v Jamaludin Mohamad*¹¹, the judgment debtor satisfies the arrears of RM100, 000.00 after the issuance of judgment notice by FSD by selling his house. Bailiffs of Selangor FSD correspond very well dealing with executing warrant of arrest. In *Wan Asiah Wan Othman v A. Rasad Rahman*¹², judgment debtor agreed to pay the sum of RM2, 900.00 to the judgment creditor after the FSD's bailiff executed warrant of arrest. Consequently, the FSD managed to recover the advancement paid to the creditor earlier on at the sum of RM1, 800.00. In *RoZIAH Begam v Azlan bin Othman*¹³, the judgment debtor paid RM20, 000.00 in lump sum after FSD's bailiff executed warrant of arrest a day before case proceeding.

Apart from ordinary enforcement and execution process, FSD also executed an order of seizure at judgment debtor's premise at Padang Jawa, Shah Alam¹⁴. The judgment debtor agreed to pay RM5, 000.00 to judgment creditor while the balance due around RM14, 000.00 would be paid by instalment. As a result, a sum of RM2, 400.00 was recovered from judgment creditor for repayment of advanced financial assistance given earlier on.

Not having the ownership to represent FSD's clients proved to be a hindrance towards the efficiency of enforcement and execution process. Compared with FSD in other states who can act on behalf of their clients, their performance is much better. Currently, the FSD in Selangor made an engagement with Legal Aid Department and Legal Syariah Unit of Selangor Islamic Council (MAIS) to represent the clients. Without a doubt, this approach could cushion the needs of the clients to be legally represented. But, the application is still subject to the salary income of the applicant. Furthermore, these agencies already have their policies and priorities in terms of cases and with bulk of cases to handle, thus it is understandable that some cases did not get thorough and meticulous attention. FSD

¹⁰ FSD case number: 60002-01-025-0003-2013(M)

¹¹ FSD case number: 60002-01-024-0045-2012

¹² FSD case number: 60002-01-055-0104-2012

¹³ FSD case number: 60002-01-037-0016-2014 (M)

¹⁴ *Emilda binti Md Salleh v Abu Bakar bin Latif*. FSD case number.:60003-01-037-0152-2012

clients in Selangor came from various backgrounds, from housewives to professionals. For those whose incomes are above the parameters, they are not qualified to be represented by those two agencies. Thus, the option is either to represent themselves or hiring private lawyers which are costly.

On the other hand, without having accreditation to represent the clients, it affects the process of reclaiming back the fund from the judgment debtor. However, the Selangor FSD's bailiff remarkable contribution put a balance to the inability to represent the clients. Stationed at the most populated state due to the socio-economic factor and better job opportunities, it puts the FSD staffs in Selangor in great character to manage and executed the order particularly with people with different background. Limited man power imposed the members of FSD to adjust the schedule meticulously to carry out the investigation, executing warrant of arrest order apart from daily tasks.

Since many of the judgment debtors are residing in Selangor, the FSD of Syariah Court of Selangor often received letter of cooperation from other states to execute warrant of arrest against the debtor. Interestingly, the bailiffs are all women but the determination and passion to carry out the order always at the highest level.

As the cases are getting more complex, the concern on the legal issues particularly maintenance are increasing. Due to the increasing number of divorce in Selangor, it is predicted that many maintenance order will be issued by the court. Therefore, it could be foreseen that there will be more complaints to FSD in near future. As such, it is hoped that there will be more support by individuals, non-governmental organisations (NGO's), intellects and authorities in order to strengthen the role of FSD.

Conclusion

The Family Support Division's role to help the women and children is a continuing process. Since it was launched in 2008 until 2016, hundreds of single mothers and their children get assistance. The establishment of this division is the correct mechanism to protect the rights of women and children. In a way, it corresponds with efforts in uplifting the integrity and prestige of Syariah Court in the eyes of the public. As for the position of FSD in Selangor, a kind of dynamic approach needs to be determined. As the Department of Islamic Judiciary of Selangor encourages the idea of creativity and innovation, the FSD must accept the challenge in order to overcome the deadlock. Many stakeholders including academics, public at large, women's non-governmental organisation (NGO) and legal fraternity would welcome any improvements for the merit of FSD especially in Selangor. ⁱ

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Abstract

In Zanzibar, educational right is guaranteed under Zanzibar Constitution, and also under Zanzibar Education Act no.6 of 1982 inconformity with the United Nation's Convention on the Rights of the Child 1989. However, poverty is a main contributing factor and the main reason toward the inadequate educational rights protection in Zanzibar. Many people in Zanzibar live below standard of life, they cannot afford the school fees payments, hence the children become victims. The government of Zanzibar initiates various programmes and set aside resources for the implementation of child educational right. Nevertheless, it is evident that the impact is not been effective. Education is not affordable because quality education is expensive for children who live below standard. Such children are therefore vulnerable and deprived. Due to the prevailing poor economic conditions, many families continue to live in severe poverty.

The reasons of writing this paper are; to discuss the inadequacy of educational rights protection and difficulties in accessing a quality education due to poverty in Zanzibar, to highlight the government's efforts in combating poverty by organizing different programmes and the extents of the effectiveness of the programmes organized to reduce such poverty so as the educational rights should be adequately protected. The paper involved an exploratory legal research, therefore it employ an analyses of both primary and secondary documented data.

The findings show that the government policies and effort on education is inadequate and therefore there is a need to reform the whole educational system to ensure the success welfare of children of getting a quality education is preserved.

Important key words: children, education, poverty, protection, Zanzibar.

Introduction

Education as a right is provided by number of international instruments such as; The Child Rights Convention (CRC) under article 29, Universal Declaration of Human Right of 1948 under article 26(1), the International Covenant on Economic, Social and Cultural Rights 1966 under section 13), the African Charter on human and people's rights. In Zanzibar, the right is guaranteed under Zanzibar Constitution as part of fundamental objectives and directive principles and policies, which one can enforce in the court of law (Article 10 (f) of the Constitution of Zanzibar). It is also provided under Zanzibar Education Act no.6 of 1982 as amended by Act no. 4 of 1993, which explains the aims of protecting and promoting education for all people without discrimination (Report: Revolutionary Government of Zanzibar, (2016)) Accordingly, every Zanzibarian has the rights to education, that is to say every child between the age of 7 and 13 years, must be enrolled for primary education. However, in reality, many of the children have no opportunity to have access to education because of poverty and illiteracy.

Discussion

The discussion is mainly based on the deprivation of educational right in Zanzibar due to poverty as the main contributing factor. The attention will be drawn on government policies and its implementation on education and poverty, poverty as a causative factor which creates the inadequacy of educational rights protection and government efforts towards poverty reduction.

Government's Policy on Education.

Education means knowledge, skills, norms, values transferred from one generation to another. On the other hand, poverty means living below standard. Considering, The Zanzibar education system presently offers 10 years of compulsory education beginning from standard one to form two. This changed from 2015 when the education policy of 2006 is set in a motion and Zanzibar begins offering two years of secondary schooling (Report: Education Policy, 2016; MKUZA II; Vision 2020).

All children in Zanzibar are expected to complete the first seven years of primary school and despite a number of challenges, the education sector has been prioritized as a key area for action in recent macro-development frameworks (Report: Revolutionary Government of Zanzibar, (2011)). The education sector has received considerable funding from government from Tanzania Shillings 59 billion in 2010/11 90 billion in 2014/15.

With the majority of expenditure being taken up by salaries, there is little scope to address the wider needs of the education system.

As a result of the low level of capital investment, “there are limited opportunities for core activities around education quality, such as teacher development, improvements to teaching and learning materials, school inspections and professional teacher support. The proportion of spending given to development projects has fallen, and this mostly reflects a reduction in donor funds, which make up 90% of development expenditure (Report: Policy Management 2016).

In building the capacity of the education sector, the Ministry of Education and Vocational Training and its partners are joining efforts to step up progress. With support from UNICEF, the Ministry implemented a plan of Early Childhood Education Standards. To alleviate the severe shortage of professional pre-primary teachers, the State University of Zanzibar (SUZA) has developed a two-year diploma course, to be launched in October 2015 (Report: UNICEF, (2015)).

Policy on poverty and government programmes towards poverty reduction.

As poverty is a main factor of inadequate educational right in Zanzibar is poverty, children’s issues have also been integrated into Zanzibar’s Strategy for Growth and the Reduction of Poverty 2010-2015 (Report: MKUZA I 2007-2010 and MKUZA II 2010 – 2015), which includes a focus on improving equitable access to quality social services both as an end in itself to improve quality of life and promote social wellbeing, and also as an instrument for fostering economic growth. The government’s commitment to ensuring children’s well-being has been integrated into national goals under (Project: Cluster II: Social well-being and Equitable Access to Services), particularly to ensure equitable access to quality education and improved safety nets and social protection for poor and vulnerable groups. Until this time this remains as a plan and more children becomes vulnerable and the government support is difficult to implement.

The frameworks for national development in Zanzibar are also supported by a number of sectoral laws and policies governing different aspects of children’s well-being and development, examples of laws and policies of Zanzibar relating to children are:- Children’s Act, No.6 of 2011 2006; National Health Policy 2010; Education Act No. 4 of 1993; Education Policy, 2006; Zanzibar Social Protection Policy, 2014; Spinsters and Single Parent Children Protection Act 2005; Penal Act No 6 of 2004; Sexual Offences Special Provisions Act, 1998; National Plan to Respond to Violence against Children 2011-2015; Children’s Court Rules 2015;

Education of Offenders Act 2015; Criminal Procedure Act No. 7 of 2004; The Kadhis' Courts Act No. 3 of 1985; Evidence Decree (Cap 5.)1957; Zanzibar Persons with Disabilities Act Rights and Privileges (2006); Employment Act No. 11 of 2005. Even though there are so many Acts and policies, still the problem remain is the implementation of the provisions of law, for instance it is obvious that the parents have duty to enroll their children at school at the age of 6 but till today many children stay home helping their parents due to poverty and illiteracy, at the same time there is no single case before the court of law in such relation.

Causes of Deprivation of Educational Rights

1. High rate of poverty

According to government reports and policies, Zanzibar continues to grapple with high rates of poverty and inequality, despite maintaining a healthy economic growth rate. Currently, there are two official measures for poverty. These are:-

“Food poverty”, which measures the inability to meet minimum food consumption needs. In 2010, “the food poverty line was set at TSh. 960 per adult per day”, The food poverty rate, which is used as a measure of extreme poverty, “remained unchanged at 13 per cent between 2005 and 2010, partly due to high inflation of food prices (averaging 14 per cent per year) which made food unaffordable for low-income consumers whose incomes did not keep pace with price rises. In the real sense parents cannot afford educational cost as they suffers or not afford the daily costs. The 2010 Demographic and Health Survey (DHS) found that “almost half (46.4%) of Zanzibar households reported being food insecure (they had problems satisfying their food needs in the past year), while slightly over half (53.6%) reported that they were not food insecure (Report: The Zanzibar Social Protection Policy, Revolutionary Government of Zanzibar (2011)). When food insecurity in Zanzibar was disaggregated by wealth, 31 per cent of poorest quintile households, but less than 10 per cent of richest quintile households, reported having frequent problems in satisfying their food needs (Report: UNICEF, 2015 and Situation Analysis of Children and Women in Tanzania - draft version, Dar es Salaam).These findings clearly establish the close links between poverty and food insecurity and point to a reality where children are simultaneously facing a number of different determinants of vulnerability as they grow and develop, hence drop of education.

“Basic needs poverty”, which measures the inability to meet a broader range of basic consumption needs, including education, clothing, shelter, as well as food”. In 2010 “basic needs poverty line was set at TSh.1, 465, or approximately one US dollar a day”. However, the basic needs poverty rate measure of moderate poverty and fell from 49.1 per cent in 2005 to 44.4 per cent in 2010” (Report: Ministry of Empowerment, Social Welfare, Youth, Women and Children (2014)). Statistically, poverty “is much higher in rural Zanzibar than in urban Zanzibar.

Poverty in Zanzibar geographically is higher in Pemba than. More than half of all farmers (58%) and fisher folk (55%) are living in poverty, above the national poverty rate in 2010 (44%)”. The population of Zanzibar is urbanizing rapidly and as a consequence, the proportion of people living in poverty in urban areas increased from 9.4 per cent in 2005 to 42.9 per cent in 2010. Although two-thirds of the population still live in rural areas, there is an increase in the urbanization of poverty and the proportion of people living in poverty in urban areas is rising and now estimated to be just over 35% (Report: Stopping Violence Against Children, A National Plan to Respond to Violence Against Children in Zanzibar (2011)).

2. Early pregnancies and marriages;

It is found that many young female students drop out of school each year because of early marriage and pregnancy. This become a common problem in Zanzibar even though the Education Act of 1982 strictly prohibits a school child from getting married. Students shall be expelled if they contracted a marriage while studying at primary or junior secondary school. Article. 20 (40) of this Act therefore stress the importance for a child to complete his/her compulsory (Form II) basic and secondary education. The early child marriage deters the girl child from pursuing their education. In the year 2014, about 21 cases of early pregnancy had been reported together with 18 cases of early marriage. This leads to school dropout, a factor that contributes to gender education deprivation. (Report: The speech of the Minister of, Employment, social welfare, Youth and Women and Child Development on the Implementation Report on the Rights and welfare of the Child by the year (2013/2014).

3. Cost contribution in education;

Another challenge and constraint facing educational sector in Zanzibar is the indirect costs that are incurred by families in accessing education. In 1964 the revolutionary government of Zanzibar through

its president the late Abeid Amani Karume (the first President of Zanzibar) announced free education to all Zanzibar. However it has been difficult for the government of Zanzibar to continue covering education expenses without the support of the parents. In this regard the parents are asked to make a nominal contribution to public school which range from TZS 20,000 to TZS 30,000 per a year. (Report: Legal and Human Rights Centre and Zanzibar Legal Services Centre, Tanzania Human Rights Report, (2014). Nevertheless, majority of the parents could not afford to pay due to poverty and this lead to more school dropout. Access to education and achievement of learning outcomes needs to be understood within the context of students and communities living in poverty. (Report: UNICEF, Children and Women in Tanzania (2013).

4. Failure of early school enrollment.

Although the Education Policy (2006) calls for two years of compulsory pre-primary education and a starting age of six for primary education, progress on achieving this objective has been slow. In 2012, net enrolment was estimated to be 17.9 per cent, suggesting that 68,678 children of preschool age were not in school, gross enrolment was 26.5 per cent, in (2014) it is estimated that 600 preschools in Zanzibar are community preschools about 20 per cent are government-run preschools, and the remainder are private. There is considerable variation in quality (Report: URT 2013).

Despite prioritizing education as an area for government spending and the development of new plans and strategies, a number of challenges still remain. In 2013, out of the population of 247,504 children aged 6 to 12 years, only 176,512 were in school, leaving 71,082 6-12 year olds out of school. Females and males are equally likely to attend school, with a gender parity index of 1.02 in Zanzibar. Retention is an on-going challenge; according to 2012/13 EMIS data, almost three in ten eligible children (71,082 in total) in Zanzibar aged 6 to 12 were out of school (Barlett Sheridan, 2014).

5. Large number of family

The majority of poor households have a larger number of dependents and low or no education attainment of the household head. According to the Social Protection Policy Report 2014, larger households are more likely to struggle with poverty than smaller ones. Less than 10% of households with 1-3 members are poor, but more than 50% of households with more than 6 members are poor. The tendency to have larger families is both a consequence and cause of poverty, especially given the

high rates of child mortality. In such a context, large families are more often a response to poverty than a cause. In a context of high child mortality rates and in the absence of social security, having more children increases the number of family members who can provide care and support in times of illness and old age (Report: Ministry of Empowerment, Social Welfare, Youth, Women and Children (2014)). It is found that, in Zanzibar the main contributory factor facing education sector is “**poverty**” which contributes to other multiple cause in education

6. Child labour

The Zanzibar Government made a pilot project working to eliminate the worst forms of child labour focusing on legal frameworks, strengthening the capacity of local and national institutions, providing educational alternatives, alternative income-generating activities for families, and enhanced corporate social responsibility. By February 2014 a total of 3,094 children under 18 years of age who were either working or were at risk of entering into labour were withdrawn or prevented from entering into labour in Zanzibar. These children were sent back to school and were given scholastic materials such as uniforms, stationery (pens/pencils/exercise books), shoes, and satchels. By the end of 2013 a total of 672 most vulnerable families of children withdrawn from labour had been supported to start income generating activities (IGAs). Some of the families are engaged in goat keeping, poultry keeping, bee keeping, horticulture and tailoring. However, poverty and culture reduce the governmental efforts in implementing its projects example. According to the norms and traditions of the people living along the coast, their main activity is fishing. Participation of boys in fishing activities such as scraping fish, picking bait and other related activities is not regarded as child labour but ordinary activities of fishermen community. However, researchers have witnessed some children engaging in activities that seem to be worst form of child labour, which is against, International Labour Organization Convention of 1982, and some laws of the land, which prohibit worst forms of child labour. This portray bad image of the country since there are some laws eg employment Act no,6 Of 2005etc, to implement programmes that prohibit worst forms of child labour. Children have rights to be protected from economic exploitation, performing any work that is likely to be hazardous. These works interfere with the child's education, or likely to be harmful to the child's health, physical, mental, spiritual and moral or social development. Children's rights are violated when parents/guardians are forced economically to employ children to do difficult work for the sake of earning family income and other expenditures. (Report: Social Protection Policy (2014))

7. Illiteracy

In Zanzibar most of parents are illiterate due to poverty, this also affect many children in Zanzibar as the parents do not see any importance of sending their children to schools, they end up with studying in Madrasa and helping their parents in handling the daily activities and daily life Report: Ministry of Empowerment, Social Welfare, Youth, Women and Children (2014))

Findings, Recommendations and Conclusion

Firstly, it was found that, the basis of violation of educational right to children is bad government management system and poverty which contributes to lack of scholastic materials, basic education, adequate finances and lack of cost contribution in education. It is recommended that the government of Zanzibar to should allocate sufficient fund in ensuring educational system is work properly and systematically. Secondly, the government fails to the adequately monitoring of a systematic and appropriate plans which can reduce early pregnancies. In addition to that, it fails to view global changes and make necessary adjustments to benefit their recipients. It fails to create structures and strengthen existing structures that respect local culture and educational traditions and draw on local movement mechanisms e.g. reduce large number of pupils in the classes. It also fails to investigate community responses to the need of educational right. Accordingly, the government effort to raise fund is still needed for restructuring the buildings and increase more buildings so as to reduce the number of students in one class. Furthermore, in helping children in the sector of education the parents' participation is paramount.

Thirdly, the government is not functioning effectively at the local level to support children or assist their parents. It is indicated that there is no direct government support for families. The community members do not rely upon the government as a source of support because they generally consider it ineffective to address their problems. In Zanzibar children's do not depend on government aids. It is therefore recommended that the policy should be called a "Child and Family Policy", not a Child Policy, as the issues facing children and families are inseparable.

Fourthly, the laws and policies have been developed in the past but were not fully implemented and have had no impact on their livesany policies are apparently designed to advance commitments under international treaties and conventions and this can lead to challenges when it comes to implementation or the development of clear and concise work plans. While international treaties and conventions provide a useful reference point as to what ultimately might need to be achieved, if this results in a

policy that is overly ambitious or overly general, this can lead to a lack of precision in terms of what needs to be achieved in the short to mid-term.

Fifthly, a significant human and financial resource limitation in Zanzibar have implications for the scope, strategies and implementation modalities to be used for the Integrated Child Policy. Even the better resourced sectors face significant challenges in terms of building human resource capacity or even accessing funding to be able to meet all of their proposed program activities.

It will therefore be necessary to analyze the resources currently available across the different sectors and to look at these collectively and to explore how they can be maximized within the context of the policy. It is also likely that the policy will need to contain provisions for capacity development of staff across different sectors.

Sixthly, the large number of population still persists in Zanzibar community, yet the government did not put any effort in having a policy in relation to mortality rate reduction. The problems creates large number of children whose less care and unable to pursue their studies due to the lack of support e.g. scholastic materials; such as pencil, pen, book, uniform etc. It is therefore, recommended that the government should put the policy for mortality rate reduction.

Seventhly, the illiteracy in Zanzibar is a big problem. Many people who live in rural areas are uneducated. The children therefore are expected to assist their parents in daily activities.

Eighthly, the child labour has created a big impact toward the achievement of adequate educational rights. Therefore, he children are fighting for money rather fighting for their education right. The policy and rules in combating child labour in Zanzibar should be well implemented to reduce the problem.

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Overlaps and Gaps in Understanding Filicide in Malaysia: Framework Analysis of the Perspectives of Convicted Women and Service Providers

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Abstract

Despite strategies in Malaysia to reduce filicide—the crime of a parent killing a child—rates have not decreased. We used framework analysis to identify commonalities and disparities in understanding among service providers and women convicted of filicide, ascertained in individual interviews. While service providers believed that filicide was predominantly neonaticide of ex-nuptial newborns, women explained that it occurred in the context of violence. Service providers suggested that unmarried mothers were perpetrators, whereas women reported that men were responsible. Service providers accused young people, women, and girls of being naïve, under-informed about sexuality, and insufficiently religious. In contrast, women emphasised that filicide was attributable to having an irresponsible, violent, or drug-addicted spouse or partner who abandoned them to experience pregnancy and birth alone; who oppressed, drugged, and sexually assaulted them, often inducing psychological disturbance (denial of pregnancy, dissociative states, or major mental illnesses); or who imprisoned and abused the women and their children. Service providers believed the pathway to filicide was the failure of the younger generation to conform to religious norms, but women described filicide occurring because of social and gender inequalities. Both acknowledged the contribution of low socio-economic position, limited educational opportunities, lack of knowledge about mental health and sexuality, women’s lack of agency, inaccessible services, inflexible work cultures, marginalisation of women and children, and sociocultural stigma of unmarried mothers. National strategies are more likely to be effective if gender-based violence and discrimination against women and children in Malaysia are addressed.

Keywords: filicide, infanticide, neonaticide, violence against women, violence against children, violent spouse

Introduction

Filicide, the act of a parent killing a child, is a rare but disturbing phenomenon. In countries with good economic and social development, such as Finland, Australia, New Zealand, the United States, and the United Kingdom, rates of infanticide (in which the victim is aged less than 12 months) range from 0.8 to 6.3 per 100,000 live births. In countries with less well-developed economic and social systems, such as China, India, and Tanzania, infanticide occurs in 12.3 to 27.7 per 100,000 live births (Razali, Kirkman, Ahmad, & Fisher, 2014). In Malaysia, in the years 1999 to 2011, 1069 cases of infant abandonment were recorded, half of which were infanticide (Razali et al. 2014). Razali et al. (2014) demonstrated that rates of infanticide in Malaysia fluctuated between 4.82 and 9.11 per 100,000 live births, double the rates found in well-resourced countries.

Concern about filicide in Malaysia has led to various attempts by the authorities to reduce the number of deaths, such as creating awareness through campaigns and seminars, implementing sexuality education, providing baby hatches in which unwanted babies can be safely deposited, and enforcing severe punishment (Rahim, Zainudin, & Shariff, 2012; Termizi, Jaafar, Abdullah, Tagaranao, & Safian, 2014). Despite these efforts, there appears to be no reduction in the infanticide rate. Gaps in understanding filicide, in particular the delivery of services to people at risk of filicide, are likely to be undermining efforts to prevent filicide. The aim of this study was to identify some of the overlaps and gaps between different perspectives of understanding filicide in this country.

Material and Methods

Drawing on interviews with women convicted of filicide in Malaysia and with key informants (professionals or service providers working with women who have committed filicide, have been convicted of filicide, or are at risk of filicide) (Razali, 2015), we conducted framework analysis to identify where their views coincided (“overlaps”) and where they diverged (“gaps”). The five steps in framework analysis are familiarisation, identifying a framework, indexing, charting, and mapping and interpretation (Ritchie & Spencer, 2002). Professionals were purposively recruited to ensure diverse perspectives. Interviews (by telephone or email) sought their opinions on the social context of filicide, causes of filicide, and steps that could be taken to prevent it. In-depth interviews (in person) with all eligible and consenting women convicted of filicide and incarcerated in prisons or forensic psychiatric

institutions in Malaysia sought their reflections on their experiences. All transcripts and interview notes were translated into English and analysed thematically (Razali, 2015).

Results and Discussion

Nine women incarcerated in five prisons or hospitalised in a forensic psychiatric institution following conviction for filicide-related offences (infant abandonment, concealment of a dead body, accessory to murder, and murder) and fifteen key informants (mental health professionals, a forensic psychiatry professional, a social worker, managers of shelters for disadvantaged women and girls, an obstetrician-gynaecologist, a representative of a baby hatch unit, and a teacher) were interviewed. Framework analysis revealed gaps and overlaps in understanding filicide between the perspectives of these two groups. We first report the gaps, summarized in relation to important questions about filicide.

Who Is the Victim of Filicide?

Key informants constructed the victim of filicide primarily as a newborn or infant, in particular an unwanted baby born ex-nuptially who has been abandoned. Their views are consistent with the prevailing social perception of filicide evident in newspapers and local publications (Noordin et al., 2012; Razali et al., 2014). In contrast, the women identified the victims as children of diverse ages who had been harmed directly and not necessarily abandoned. Women themselves were also victims of the distal and proximal causes of filicide: social inequality and intimate-partner violence.

Who Is Responsible for Filicide?

Women's accounts revealed that their convictions for filicide frequently arose from their lives with violent partners who were often the direct or indirect perpetrators of filicide. Key informants said that adolescents and young adults put themselves at risk of perpetrating filicide. However, their suggested solutions were primarily directed at girls and women, thus implicitly removing responsibility from men and boys. They attributed to young women most likely to commit filicide the undesirable characteristics of immaturity, naivety, limited education, and poor religious knowledge and practice. Key informants' opinions reflected those of local scholars who investigated "baby dumping" in Malaysia (Noordin et al., 2012). Young women were described by key informants as though they had agency and could choose whether or not to kill a baby; there was no sign of reflection on social injustice and gendered violence. Our analysis of Malaysian data indicates that public authorities share the views of our key informants: the (incomplete) data on filicide and infant abandonment revealed that women, especially the most marginalised women, are most likely to be arrested and charged with filicide

(Razali et al., 2014). In attempting to explain filicide, no key informant mentioned men's responsibilities or actions.

Internationally, there is some evidence that neonaticide and infanticide are usually committed by women (Friedman, Horwitz, & Resnick, 2005; Porter & Gavin, 2010). However, men are as likely as women to commit filicide in general (Mariano, Chan, & Myers, 2014).

What Are the Pathways to Filicide?

Various pathways to filicide were evident in the women's accounts. Women convicted of neonaticide revealed its origins in two explanations for an unwanted pregnancy: one was rape, most often by an acquaintance; in the other, young women who participated in consensual sex and conceived were abandoned by their partners. The women were not in a position to take charge of their own bodies and faced barriers in seeking support or appropriate services for discontinuing the pregnancy. After going without pregnancy care, the women gave birth alone, in very difficult circumstances, and were unable to care for their babies who died of exposure. Women convicted of killing older children were themselves victims of the violence perpetrated by their partners, who were often addicted to drugs. It was clear that women convicted of abetting or becoming an accessory to murder had not harmed or intended to harm their own or their partner's children, who had usually been killed by the man concerned. Another path to filicide described by some women was altered mental states, such as denial of pregnancy, dissociation, severe panic attack, severe depression, or psychosis. They regarded their difficult lives as contributing to mental illness.

In contrast, key informants emphasised inadequacies in and undesirable attributes of girls and young women as the primary reasons for filicide in Malaysia. Failure to conform to religious norms, being naive and immature, and lacking knowledge of sexuality and relationships not only rendered them vulnerable to perpetrating filicide but also acted as explanations for the phenomenon. Responsibility is thus seen to lie with individual people. Key informants' assessments of perpetrators and their pathways to filicide are consistent with the literature, in which the limited evidence is acknowledged (Friedman, Horwitz, & Resnick, 2005; Porter & Gavin, 2010).

It might be argued that increasing awareness of the role of women in society should have made us more alert to systemic and relationship factors in such complex and troubling crimes. For example, it has been established internationally that 30% to 60% of child maltreatment occurs concurrently with

intimate partner violence (Dixon, Hamilton-Giachritsis, Browne, & Ostapuk, 2007). This was not mentioned by key informants. Neither did they consider the role of women's mental health problems or social circumstances in their involvement with filicide nor what else might be contributing both to mental illness and to filicide in Malaysia.

What Are the Roots of the Problem?

A question emerged in the analysis of whether a highly gendered society adversely affected women's mental health and acted as a distal cause of filicide. Each woman described a lifetime of being enveloped in social injustice, gender inequality, and poverty. These had severely restricted women's opportunities for an adequate education and access to skilled, fairly-remunerated occupations, depriving women of agency in choosing a life course. Women also had difficulty gaining access to appropriate services for sexual information, contraception, fertility management, mental health care, and general counselling. They were further hampered by the adverse perceptions and stigmatisation of unmarried mothers. According to social theories such as general strain theory and social disorganisation theory, living in social inequality increases the likelihood that a person will directly or indirectly become involved in criminal behaviours (Agnew, 1992), largely because of their marginalisation from socially approved activities.

Instead of reflecting on systemic problems such as marginalisation and victimisation, key informants held individual women responsible for failing to conform to social and religious norms. They specified that filicide occurred because women and girls, in particular, failed to abide by Islamic rules that discourage free relationships between women and men and forbid extramarital sex. It is neither new nor confined to Malaysia to claim that religious observance will prevent filicide (vom Saal, 1994).

Overlaps in Understanding Filicide

In addition to their divergent views, the women and key informants offered some common observations: "overlaps". Both groups recognised strong negative perceptions of unmarried mothers and of their children throughout their lives. They identified stigma as potentially leading to filicide through mediating factors such as financial insecurity, fear, shame, and rejection by the woman's family. Stigma decreases unmarried mothers' opportunities for fulfilling, adequately remunerated work. In Malaysia, the absence of social and legal protection for unmarried mothers entrenches their marginalisation and the lifelong ostracising of their children: an unmarried mother must raise her children alone without financial or social support (Evans, 2011).

Key informants and women also spoke of poor support for women at all levels of the socio-ecological system. At the proximal level, women (and their children) tend to lack support from a husband or partner, the woman's parents, family, neighbours, colleagues, and employers. Distally, minimal support is available from communities and authorities. It was clear from women's accounts that they lacked access to services that might help them to manage sexual relationships, fertility, and mental health, including preventive counselling and assistance as well as crisis intervention. Key informants also acknowledged these gaps in support, although they tended to focus interventions on individual women rather than on the systems of support. It was also evident from the women's and the key informants' interviews that service providers' judgemental attitudes could deter women from seeking help when it was available, a deterrent experienced by other victims of violence in Malaysia (Othman, Goddard, & Piterman, 2013).

Conclusions and Recommendations

The discourse of filicide should not merely be the story of a bad or mad woman who kills her child. Filicide is a complex phenomenon, the culmination of intersecting social failures including lack of support for vulnerable women and their children. In documenting significant gaps in understanding filicide in Malaysia, we hope to have discouraged the belief that filicide can be prevented solely by controlling the behaviour of girls and women. If the roots of the problem of filicide and its causes are seen in individual lives, solutions that endeavour to change individuals will be sought. If systemic problems of inequality are recognised, solutions will be directed at reforming social, legal, and welfare processes. Filicide prevention in Malaysia demands comprehensive systemic reform: eradicating poverty, combating social injustice and gender inequality, and reducing violence against women and children. Individual solutions have been shown to be unsuccessful in reducing filicide. These results indicate that more systemic interventions are required.

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Labour force participation of single mothers in Malaysia: An implication on their economic well being

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Single motherhood has been well shown to have adverse impact on the economic and financial wellbeing of women and their children. Oftentimes employment becomes the most important source of income for single mothers though results may vary geographically due to different policies on financial assistance for single mothers across countries. This study presents the characteristics of single mothers' employment in Malaysia. We use the data for widowed, divorced and permanently separated (WDPS) women as a proxy for single mothers' workforce participation as these two categories are officially used in Malaysia. We analyse official published data from the Malaysian Department of Statistics and within the limited available data, we suggest that employment level of single mothers is unsatisfactory due to a relatively substantial number of them are unemployed or outside the labour force. Further, the economic wellbeing of employed single mothers does not seem to fare well as their mean and median incomes are consistently lower than that of employed married women and men in general. This issue warrant further investigation as participation in paid work is supposed to be their main source of income for themselves and their children. This is enhanced by the fact that public welfare assistance is limited as well as ongoing battle with child support issues from absent fathers. Official reports do not dwell into the causes of relatively low employment among level among single mothers neither the data separate divorced and permanently separated women because this cohort may face different economic challenges to employment.

Keywords: *Employment, divorced, Malaysia, permanently separated, single mothers, widowed*

Introduction

A larger proportion of single mothers in Malaysia come from death of husbands (7.2 per cent) followed by divorce and permanent separation whilst in Western countries the route to single motherhood predominantly comes from marital break downs/cohabitations and unmarried mothers (Amato 2000; Baxter and Renda 2011). The population and housing census 2012 shows that there are 1.2 per cent women are widowed, divorced or permanently separated from its 28.9 million population (over 15 years of age) and there are 831,860 single mothers (Department of Statistics, 2012). The permanently separated category used in official data is defined as a woman who is separated from her spouse for a long duration without any possibility of reconciliation. However, the actual number of single mothers in working age is undetermined from this figure. While we are clear about widowed and divorced categories,

Research has shown that divorced women are usually financially worst off after marital breakups due to loss of income from spouse, children staying with the mothers and limited wealth accumulated during marriage (Aassve et al., 2007; Smock, 1993). Child support payment has been continually shown as hard to enforce globally (Cook 2013; Cuesta & Meyer, 2014; Evans, 2011) that negatively affect the livelihood of single mothers and their children. Limited research on Malaysian single mothers shows that income from employment is the main source of income for single mothers in general (Hew 2003; Idris and Selvaratnam 2012; Pong 1996; Rusyda, Lukman, Subhi, Chong, Abdul Latiff, Hasrul & Wan Amizah, 2011). An employment gives a certain amount of certainty and stability in manoeuvring their lives around the children and daily activities (Ridge & Millar 2011).

On individual level, while contributing their human resource to childcare and family care are plausible, in the event of death of husbands or marital dissolutions, the risk of financial hardship and decrease standard of living may be higher for previously unemployed married women (Millar and Ridge 2009; Sorensen 1994; Gjertson 2016). More so with the caring responsibility of children befalls on them such that single mothers are considerably more likely to fall into poverty (Aassve, Betti, Mazzuco & Mencarini, 2007; Rusyda et al. 2011; Christopher, 2005). Childcare is one of the most crucial issues faced by single mothers when they want to enter paid employment (Doiron & Kalb 2005). Paid childcare does not come cheap and many single mothers are in need to seek help from relatives and

friends to look after their young children indicating the importance of social network (Harknett, 2006; Hew, 2003). Apart from living with the children alone, it is also common for single mothers to live with their parents and this kind of living arrangements has many advantages such as free childcare and by sharing the cost of living that could increase their chances of getting into paid work (Teh et al., 2013; Smock, 1993). Therefore becoming single mothers are often disruptive of employment (Ridge & Millar 2011) and put them at risk of poverty (Idris & Selvaratnam, 2012; Iwata 2007; Tan & Tho, 2007; Walter, 2002).

Employment has been shown to have the most profound effect on the wellbeing of single mothers and their family. Although some literature have pointed out that, having jobs do not necessarily help to increase income and material wellbeing for single mothers when they may be working in unstable working environment that saddled with low earning jobs in the lowest hierarchy (Gyamfi, Brook-Gunnet & Jackson, 2001; Walter, 2002). This is because of their low educational attainment (Lyngstad, 2004) and persistent gender wage gap (Lee & Nagaraj, 1995). Coping strategies that used by single mothers apart from getting into employment include getting public assistance and remarriage (Jansen, Mortelmans & Snoeckx, 2009; Millar & Ridge 2009; Sorensen, 1994; Uunk, 2004). In this paper, we investigate the employment characteristics of single mothers as the wellbeing of many single mothers' households depends on their ability to generate income for the family. While this area of research has been comprehensively studied in developed countries, it is lacking for developing countries like Malaysia. Our study is descriptive in nature but it will shed some light on this important issue.

Methodology/Data

An official complete data on single mother's employment is not readily available in Malaysia however there are limited data on employment is available for widowed, divorced and permanently separated women. For the purpose of this paper we use data on widowed, divorced and permanently separated women as a proxy for single mothers and they will be known as WDPS in our discussion forward. There are four official categories of women used on national surveys and censuses done by the Malaysian Department of Statistics i.e. never married, married, widowed, and divorced/permanently separated women. We acknowledge the differences between divorced and permanently separated women and their economic consequences. Yet this is the best available option that can be used in our

paper to represent single mothers in Malaysia. The primary data for this paper are derived from the Labour Force Survey Reports 2013 and the Salaries & Wages Survey Reports 2013 from the Malaysian Department of Statistics. Both surveys use working age population between the ages of 15 to 64. The data are published in Malaysian Ringgit (MYR) but for the purpose of this paper, we use the exchange rate for 2013 at USD 1.00 = MYR3.20 and for other years it is assumed to be approximately USD1.00 = MYR3.00. In addition, other published data from verified resources are cordially used to support the narratives in the paper.

Findings and Discussion

The data derived from the Labour Force Survey Reports 2013 and the Salaries & Wages Survey Reports 2013 present an interesting insight into the employment characteristics of single mothers, proxied by data on WDPS women. Table 1 shows that there are a total of 371,100 WDPS women from 13.9 million workforces in 2013 but the number of employed WDPS are much lower at 365,500. The number of WDPS women working in urban areas is higher than that of rural areas which indicates that better job opportunities are available in urban areas with factories and businesses are concentrated on urban areas as well as its surrounding areas. Geographical location of single mothers is also one of the important employment determinants for single mothers (Dawkins, Gregg & Scutella, 2002; Hew, 2003).

Table 1 Labour Force Statistics for Female Workforce 2013

		('000)	Percentage
<i>Labour force</i>	Female	5,149.2	
	Widowed	209.6	4.1%
	DPS	161.5	3.1%
	Total WDPS	371.1	7.2%
<i>Employed</i>	Female	4,972.6	
	Widowed	207.0	4.2%
	DPS	158.5	3.2%
	Total WDPS	365.5	7.4%
<i>Unemployed</i>	Female	176.6	
	Widowed	2.6	1.5%
	DPS	3.0	1.7%
	Total WDPS	5.6	3.2%
<i>Outside labour force</i>	Female	4,669.8	
	Widowed	229.5	4.9%

DPS	38.3	0.8%
Total WDPS	267.8	5.7%

Source: Labour force survey report 2013, Malaysian Department of Statistics. DPS represents divorced and permanently separated women

It can be noted from the table 1 that a total of 5,600 of WDPS women are unemployed and that is an alarming signal for Malaysian workforce. These are supposedly the single mothers who want to work but are not able to find jobs. It would be very interesting to understand the real reason behind this particular unemployment issue. The wellbeing of mothers and children in jobless households are in questions. Further, the number of WDPS women is the highest among the Malays and the average number of children in Malay families is 2.8 which are higher compared to the Indians (2.0) and Chinese (1.8).

Another pressing issue is the number of WDPS women who are outside the labour force. The main reason given for not seeking employment is stated in the report as ‘doing household chores’ followed by ‘schooling’. We cannot be certain of the actual reason for their absence from the labour force but it is likely due to their caring responsibilities (Dawkins et al., 2002). Earlier study done on women employment, using the data from 1980 and 1991 censuses, also shows that high proportion of WDPS women are not working or involved in marginalized jobs (Tan & Tho 2007).

Table 3 Mean and median monthly salaries and wages for female by marital status

(MYR)	Mean	Median
	1,992	1,500
<i>Marital Status</i>		
Married	2,241	1,765
Widowed	1,452	900
DPS	1,545	1,160

Source: Salaries and Wages Survey Report 2013

The Salaries and Wages Survey Report 2013 shows that the median income for Malaysian workforce is MYR1,500 and the median income of SPM holders is also MYR1,500 - emphasizing the fact that the workforce is overrepresented by SPM holders. However, table 3 shows that the median income for widows is MYR900 per month whilst for DPS is MYR1,160. It indicates that widows’ education

attainment stands somewhere between PMR and primary levels while it's probably a bit higher for DPS. Nevertheless, the median income of WDPS is relatively much lower than that of married women's incomes and may affect their consumption levels (Heady, 2008). The economic wellbeing of single mothers' households seems to be worst off compared to married women's households.

Hence, the contribution of single mothers in workforce is important not only to increase the overall percentage of women in workforce but more importantly for their own households' wellbeing. Data from 2007 to 2013 show that employed WDPS contributes within the region of only 6.8 per cent to 7.7 per cent of employed women and these percentages seem relatively small to married women's employment that stands around 60 per cent over the same period. Single mothers have been documented to face obstacles and discrimination in obtaining work (Abdul Kadir & Ali, 2012; Gyamfi et al., 2001) yet these mothers are driven, hardworking, ambitious and dedicated to work ethics (Wright, 2013).

Our findings enhanced the importance of having an official and comprehensive database for single mothers in Malaysia. The reports that we use in this study do not have detailed information from the reports regarding these women's education attainment, sources of income, age, number of children, ages of children and housing arrangement – all are basic information required to infer the material wellbeing of their households. Therefore we suggest that official database to be formed by relevant ministry or by the Department of Statistics to better understand the underlying causes of unemployment or for being outside labour force amongst single mothers. The dearth of data prevent us from providing conclusive results and hamper the effort to run a more advanced statistical analysis.

Conclusion

This study contributes to the literature on employment of Malaysian single mothers represented by widowed, divorced and permanently separated women in the workforce. Within the data limitation we find that WDPS women's employment is not on satisfactory level given a huge number is still unemployed or outside labour force altogether. We are more interested at looking at the number rather than percentages related to these women due to their sole responsibilities in maintaining the wellbeing for themselves and their children. Given the limited welfare assistance available for single mothers in

Malaysia, employment is the main source of income that provides them with a certain kind of assurance that they will be able to survive.

Despite the many assumptions used in this paper, we suggest that financial hardship is most likely to occur among single mothers' households. Their mean and medium income are consistently smaller than that of married women's and man headed households, indicating a lower material wellbeing and standard of living within their households (Mok, Gan & Sanyal, 2007; Smock, 1993; Uunk, 2004). Being in work for these mothers does not only spell reliable income to put food on the table but work may also means added benefits such as increased self-esteem and wider social network which is also important for their personal well being (Gyamfi et al. 2001; Harknett, 2006; Ridge & Millar, 2011). Nevertheless, our study with limited data and information, raise concerns about the wellbeing of single mother and their children.

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Children & Administration of Justice System

Title: Interfaith Custody and The Best Interest of The Child

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Abstract

Child custody tussle is distinct from majority of cases in that in most cases, court consider the past event between the parties, review the facts and make a decision. In custody disputes however, the courts must consider the future and deliberate on what is in the best interest of the child before deciding on the better custodian for the child. Custody disputes create a traumatic impact not only for the parents but badly affects the child who is torn between the two warring parents. In recent times, custody battles between a non-Muslim and a Muslim spouse has been in the forefront in Malaysia. The dualistic nature of the Malaysian legal system: Civil and Islamic law governing the non-Muslim and Muslim respectively has caused undue conflict as a result of religious conversion of a non-Muslim spouse to Islam. When the marriage terminates as a result of the religious conversion, the issue in respect of child custody becomes a tug-a-war between the Muslim and non-Muslim spouses igniting an interfaith custody battle between them. Conflicting legal provisions and contrary court decisions has left this controversy in a muddle under the current administration of justice in Malaysia. In all custody dispute, the best interest of the child is considered paramount and should be in the forefront. In this regard, the courts are to be guided by various factors: age, sex, wishes of the child, wishes of the parent and other consideration. However, case law depicts that the factors are not expounded fully by the courts especially in interfaith custody arrangements. This paper aims to highlight to what extent the welfare and best interest of the child is considered paramount by the Malaysian Courts in awarding custody to the respective parents in an interfaith custody dispute. The recent landmark decision by the Federal Court of Malaya in *Viran a/l Nagapan v Deepa a/p Subramaniam*ⁱⁱ (*Deepa's case*) would be analysed to address the discrepancies and suggest the way forward in making an interfaith custody order.

Keywords: custody, child, interfaith, legal system.

Introduction

Malaysia is well known for its pluralistic society as it is made up of a multi-racial community practicing diverse religions and cultures. The legal system in Malaysia is considered unique as there are two parallel legal systems one governing the Muslims and the other for non-Muslims. The Muslims are regulated by Islamic Laws and subjected to Syariah Courts jurisdiction whereas, non-Muslims are governed by Civil laws administered by the Civil Courts respectively. The dual legal system works well when the legal system within its respective private laws are clearly demarcated. However, the laws are blurred when there is an overlap between Islamic laws and Civil laws without a definitive solution as to which law should prevail. Of late, the conversion to Islam by a non-Muslim spouse has resulted in an upsurge of bitter custody battle between the Muslim and non-Muslim spouses in Malaysia. It is noteworthy, that conversion to Islam by a non-Muslim spouse not only changes his/her religious observances but results in a total change in the law to which the convert is subjected to and the jurisdiction of the court that will enforce the law in relation to his/her family matters. This paper aims to analyse the interfaith custody dispute as a result of conversion of a non-Muslim spouse to Islam and to gauge to what extent the best interest and welfare of the child is considered paramount by the courts in awarding custody to the respective Muslim and non-Muslim spouse. The paper will also highlight the landmark decision by the Federal Court of Malaya in the Deepa's case *of* in trying to resolve interfaith custody dispute by analysing to what extent the judgment has resolved or compromised the issue in relation to interfaith custody of minor children. In conclusion some recommendation to plug the gap and suggestions for further research would be advocated.

Child Custody Laws in Malaysia

The personal laws in respect of Muslims and non-Muslims in Malaysia are varied. Muslims are governed by Syariah Law and non-Muslims are administered by the Civil laws. Hence, the legal provisions governing the issues in respect of custody of minor children are contained in different legal provisions, federal and state enactments under the corresponding laws.

Non-Muslim and the Civil Law

The law governing custody in respect of non-Muslim children in Malaysia is contained in the Law Reform (Marriage and Divorce) Act 1976 ('LRA') and the Guardianship of Infants Act 1961 'GIA'. Neither the 'GIA' nor the 'LRA' has defined the word 'custody'. The Interpretation Act 1967 (IA) too, is of no assistance in this regard. The closest reference to the term custody is provided in Section 89 (1) of the 'LRA', which states that, 'the person given custody is entitled to decide on all question that relates to the upbringing and education of the child.' In *Sivajothi a/p Suppiah v Kunathasan a/l Chelliah* (No. 2)ⁱⁱⁱ, the courts used the phrase 'custody, care and control' and not the word 'custody' purely to show that custody denotes more than care and control and that care and control is merely a fundamental element of custody. Hence, it is submitted that custody encompasses all matters in relation to the upbringing inclusive of education, care and control of a child. In determining the issue of custody, the courts first and paramount consideration is the welfare of the child.^{iv} Decided cases are in consonant with this requirement. In addition, the courts have considered matters such as the conduct of the parties^v, their financial and social status, the sex and age of the child^{vi}, the wishes of the child as far as they can be determined depending on the age of the child^{vii}, the confidential reports which a social welfare officer may put up^{viii} and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. These factors were outlined and consider at great length in the case of *Mahabir Prasad v Mahabir Prasad*.^{ix} In addition, there is also difficulty when the child expresses his or her wish to be with both parents. In such a situation, the main consideration would be the overall welfare of the child in determining the right of one parent over the other. Nevertheless, if the child's preference is in line with the overall best interest of the child, the duty of the judge in coming to a decision would be made very much easier.^x Apart from considering the wishes of the child, the 'GIA' and 'LRA' give the impression that the wishes of the parents in custody cases are equally important.^{xi} The question, however, arises as to how far the wishes of the parents will be followed by the court. In *Teh Eng Kim v Yew Peng Siong*,^{xii} the court considered the welfare of the children to be paramount and that it should prevail over parental claim if they are in conflict with the welfare of the child. Thus, it can be concluded that wishes of the parents most of the time will not be that significant unless it can be shown that those wishes are in line with the interests of the child.

Muslim and Syariah Law

Custody or better known as '*Hadanah*' under Islamic law originates from the root verb '*hadana*', which denotes the caring, nursing, raising and protection of children who are considered still

dependent^{xiii}. Islamic law recognizes ‘*hadanah*’ as the right of the mother and her female ancestors through women, in order of proximity. In default of a mother and her female ancestors, through women, the ‘*hadanah*’ goes to the father’s mother and her female ancestors through women, and subsequently to the grandfather’s mother and her female ancestors through women.^{xiv} A Muslim mother to a Muslim minor child is allowed custody for the purposes of rearing the child by default until the child reaches the age of discernment or also known as ‘*mumaiyiz*’. The period of ‘*hadanah*’ applies to a child below the age of seven for boys and nine for girls. However, it may be extended by the court on the application by the ‘*hadinah*’ (the person who has custody) to nine year for boys and eleven years for girls respectively.^{xv} After termination of the right of ‘*hadinah*’, the custody devolves upon the father, and after the child reaches ‘*mumaiyiz*’, the child may choose which of his parents he wishes to stay unless the court orders otherwise^{xvi} subject to certain conditions provided they are not insane, a non-Muslim or of notorious conduct and provided the mother has not remarried. In *Nooranita bte Kamaruddin v Faeiz bin Yeop Ahmad*^{xvii}, the court took into consideration the fact that the mother had remarried, and granted custody to the father. The mother then appealed the decision. As the appeal took a long time to be heard and the child had by this time reached the age of discernment or ‘*mumaiyiz*’, hence, the child’s views as to her preference of parents she wished to stay could be taken into consideration. However, as the child was unable to make a choice, the duty fell on the court to decide for her. The court ruled that the right of the child over whom custody is claimed must be given preference over the right of the person claiming custody. Further, the purpose of custody is for the interest and welfare of the child and not for the interest or welfare of the parties contending for custody. The court subsequently, dismissed the mother’s application for custody but granted her access.

In determining the issue of custody, the paramount consideration for the court would be the welfare of the child and subject to that consideration, the Court shall be guided by the wishes of the parents of the child and the wishes of the child, where the child is able to express an independent opinion.^{xviii} Further, there is also a rebuttable presumption that it is for the good of the child during his or her infancy to be with his or her mother. In deciding whether the presumption applies to the facts of a particular case, the court would have regard to the undesirability of disturbing the status quo of the child by the changes in custody.^{xix} The *Shafii* School of thoughts which has been adopted in the “Islamic Family Law Federal Territories Act 1984 (‘IFLFT’), restricts the right of ‘*hadanah*’ to Muslims. Hence, the provision on custody is applicable to Muslim families, where the child and parents are all Muslims.^{xx} It is noteworthy that the legal provisions in respect of ‘*hadanah*’ is applicable to Muslim mothers only. According to Kuek, the Shafi’i and Hanbali school of thought have laid down strict rules that the

custodian must be a Muslim as a non-Muslim custodian may influence the child to denounce Islam by his or her teaching and this is a great detriment in Islam.^{xxi}

Effects of Conversion To Islam By A Non-Muslim Spouse on Custody of Minor Children

Custody of minor children have been the most controversial issue in relation to the conversion to Islam by a non-Muslim spouse. In a normal custody dispute between two parties both married either under the civil law or Islamic law respectively, the judge would have to consider the welfare and best interest of the child against the suitability of one parent over the other. However, in conversion to Islam by a non-Muslim spouse, the issue of custody gets complicated. This is because the non-Muslim spouse and Muslim spouse are subjected to different laws and different courts.^{xxii} Judicial decisions in the following cases demonstrate the unsatisfactory position of the law as reflected in the bitter custody battles in cases such as *Indira Gandhi v K. Patmanathan (Mohammad Ridzuan Abdullah)*^{xxiii}, *Shamala v Sathiaselvan*^{xxiv}, *Genga Devi Chelliah v Santanam Damodaram*^{xxv} where both the Syariah Court and High Court have granted custody of the minor children to the Muslim and non-Muslim parties respectively. The difficulty faced by the parties is to ascertain which court order should be enforced as the decision of the courts are at odds. The Civil High Courts have generally been reluctant to quash an order obtained ex parte by a convert spouse from the Syariah Court as the said order is considered an order made by a court of competent jurisdiction.^{xxvi} Further, High Court decisions are not binding but only persuasive authority, so the views of the courts may differ with varied reasons.

The Islamic law provision on custody of minor children according to the Shafi'i school of thought, states that, custody cannot be given to an insane, a non-Muslim, or the child's mother, if she remarries a *non-muhram* of the child, (unless to a person related to the child within the prohibited degrees). Therefore, it is pertinent to note that the non-Muslim spouse has no right whatsoever to custody of minor children under Islamic law. However, she would not be deprived of the right to visit the child.^{xxvii} This predicament has resulted in a longstanding tussle between the non-Muslim and Muslim spouses in Malaysia without a definitive solution.

Recent Development in The Law

The recent landmark decision by the Federal Court in *Viran a/l Nagapan v Deepa a/p Subramaniam*^{xxviii} needs some scrutiny. The Federal Court ruled that, '*the civil courts are solely empowered to*

dissolve civil marriages and deal with the custody, care and control of children born from such union.'

It is submitted that this is not a new ruling as this has been ruled in previous decisions by the High Court^{xxix} but has not been followed in later decisions. Although, the decision is much applauded, it still raises grave concerns. Firstly, the Federal Court split the custody of the two children between the non-Muslim and Muslim parent. The decision on the split custody was made after conducting just one interviewing with the minor children, a girl aged 11 years and a boy aged 8 years respectively in chambers. The factors that were considered by the Court prior to coming to their decision were: the welfare of the children, the individual child's wishes to be with one parent as opposed to the other and the undesirability of disturbing the current status quo of the children. Is this decision on split custody by just conducting one interview in the best interest of the children? Most cases seem to suggest that it is in the best interests not to separate them from one another.^{xxx} This last minute decision to interview the children in chambers to vary the custody orders is considered unfitting and a very daunting experience for the children.^{xxxi}

Secondly, the non-Muslim mother, a Hindu, was granted custody of the daughter who is now a Muslim by reason of the unilateral conversion to Islam without attaching any orders as to the child's religious upbringing. It is noteworthy that propagation of non-Islamic religion amongst Muslims can be a grave offence in Malaysia.^{xxxii} In addition, as the subject matter in respect of Islam falls within the jurisdiction of the Syariah Court, the non-Muslim mother may have an uphill tasks at hand in pursuing a declaration annulling the conversion *vis a vis* the certificate of conversion for the 11 year old child. Thirdly, both the minor children by reason of the unilateral conversion to Islam by the Muslim father are now Muslims. The Federal Court has failed to address this crucial issue in regards to religious upbringing when considering the issue of custody as it is submitted that the issue of custody and religion is intertwined. In addition, whether the unilateral conversion of the minor children is constitutional. Fourthly, the Federal Court did not consider the irresponsible and violent behavior of the Muslim convert parent^{xxxiii} in granting the custody of the boy to the Muslim father. The non-Muslim wife had lodged 7 police reports from 2007 until 2012 for acts of domestic violence against her and an interim protection order was subsequently granted against the husband in August 2013. The Seremban High Court took this factor into consideration when granting custody of both the children to the non-Muslim spouse. It is interesting to note that other jurisdiction, in particular, United States, have taken domestic violence seriously and considered it as a factor in deciding custody issues and whether it is in the best interest of the child.^{xxxiv} It is submitted that by omitting to consider this issue, it would seem that acts of domestic violence is being condoned and not considered a factor that is taken into consideration in

granting custody of minor children. Hence, it is observed that the Federal Court's decision in this case is not in the best interest of the minor children. Some notable future developments are the pending appeal before the Federal Court in the case of *Indira Gandhi v K. Patmanathan (Mohammad Ridzuan Abdullah)* in respect of unilateral conversion of the minor children. As the issue of custody and religion is intertwined it would be interesting to await another landmark decision by the apex court. In addition, there is also a proposal from the Government of Malaysia to introduce a bill at the next Parliamentary sitting to reform the Law Reform (Marriage and Divorce) Act 1976 to address the issue of religious conversion.

Conclusion and Recommendation

In conclusion, it is observed that both the Civil Court and Syariah Court consider the welfare of the child as paramount in deciding the issue of custody of a minor child. The mother is considered a better custodian in relation to minor children and this is apparent in both Civil and Syariah law provisions. However, when one spouse is a non-Muslim and the other a Muslim the issue of custody gets complicated. Earlier cases seem to suggest that the custody orders from both the Civil High Court and the Syariah Courts are equally enforceable. This has left the issue of custody of minor children in a dilemma. The Federal Court in the recent landmark decision in Deepa's case has now ruled that Civil Courts have the ultimate jurisdiction to hear all cases in relation to conversion to Islam by a non-Muslim spouse and to address all matters incidental to marriage which includes custody of minor children. The decision of the Federal Court although commendable has not plugged all the loose ends as there are still unresolvable issues that needs urgent intervention by all stakeholders, such as the legislature, the judiciary and representatives from both sphere of the law to reach a probable and workable solution to resolve this longstanding conflict.

This paper ends with the following recommendation. Firstly, it is submitted that the Federal Court has failed to consider whether the split custody order would be in the best interest of the children and the respective custodian in the long run. An alternative approach would be to grant an interim custody order pending a confidential social welfare officer's report to gauge the suitability of the split custody order and the adaptability of the child to the respective custodian. In custody cases, the social welfare officer's report can be considered by the court in deciding the suitability of one parent over the other. Nevertheless, it is acknowledged that the courts are not bound by the welfare officer's advice^{xxxv} and

it is subject to case by case basis. Nonetheless, considering *Deepa's case* involves inter-faith custodians', a Muslim and non-Muslim parent where the children are both Muslims, and the fact that Syariah law does not permit a non-Muslim to have custody of a Muslim child, the welfare officer's report is considered important in ascertaining the suitability of the custody arrangement and to ascertain whether the best interest of the child is protected. Hence, it is recommended that in all interfaith custody dispute, a welfare officer's report is made compulsory.

Secondly, the Federal Court has failed to address the effect of the unilateral conversion of the minor children to Islam when ruling on the issue of custody. Custody and religion are intertwined as it relates to the upbringing of the minor child. The Muslim custodian, the father who has custody of the boy would face no problems in respect of religious upbringing of the boy, as he is a Muslim. However, the non-Muslim mother, a Hindu by religion, would have an arduous task in nurturing the Muslim girl who by reason of the unilateral conversion to Islam by the father is now a Muslim. As Syariah law clearly prohibits a non-Muslim from having custody of a Muslim child, it is unclear how this predicament with regards the religious upbringing of the Muslim child would be effected without interference from the Islamic religious bodies. It is further submitted that the Federal Court's failure to rule on the position of the unilateral conversion of the minor children and attaching proper orders in respect of the custodianship of the non-Muslim parent has created a vacuum in the law. It is acknowledged by the researcher that this issue was not raised in the current appeal. However, as the split custody order does raise some inter-faith religious concerns, the Federal Court should have taken this golden opportunity to address this issue for purposes of clarity and streamlining the law in relation to unilateral conversion to Islam of minor children. It is recommended that the religious faith of minor children remain status quo and be maintained as their birth religion until the child reaches the age of majority and is able to decide on his or her own religious faith.

Next, the interviewing process of the minor children in chambers is debatable. It is observed that it can be an intimidating experience for a minor child being in chambers before a panel of five male judges as in the present case who are complete strangers to the child, trying to illicit the child's wishes and preference of one parent over the other. This approach although is common practice in divorce and custody proceedings, should be done with caution. It is recommended that staggered interviews be conducted by trained child psychologist and trained welfare officers during the course of the trial to ascertain the wishes of the child. Once the report is made available, the judges can then interview the

child to illicit the true wishes of the child. Hence, protecting the best interest of the child which is considered paramount.

Further, it is also recommended that the composition of judges hearing the appeal be reviewed. As the subject matter before the Federal Court involves an inter-faith and inter-jurisdictional dispute with regards custody of minor children, it is submitted that the panel of judges should be of a mixed racial composition and not of one ethnic group, Muslims only as was in the present case. This would not only reflect a fair trial but also boost the public perception and confidence in the judiciary resulting in a better acceptance of the unanimous decision.

To encourage further research, it is recommended that a comparative study be undertaken to gauge how interfaith custody disputes are resolved in other jurisdiction so that Malaysia can learn, adopt and reform the current provisions of the law to bring this dispute to closure.

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- i
- ii [2016] 1 MLJ 585
- iii [2002] 2 MLJ 645.
- iv Section 88(2) Law Reform (Marriage and Divorce) Act, 1976.
- v See *Re KO (an infant)* [1990] 1 MLJ 494, where adultery was considered by the court.
- vi Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 states, "There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother ...".
- vii *Viran a/l Nagapan v Deepa a/p Subramaniam* [2016] 1 MLJ 585
- viii See *Tan Chong Pay v Tan Swee Boon* [1997] 4 CLJ 625 where the court accepted guidance from the welfare officer's confidential report.
- ix [1982] 1 MLJ 189.
- x Normi Abdul Malek, "Factors Determining Welfare of the Child in Malaysia Civil Law of Custody: An Analysis of Decided Cases", [2011] 15 JUUM 169-178.
- xi See Sections 11 Guardianship of Infant Act 1961 and 88(2) of the Law Reform (Marriage and Divorce) Act 1976.
- xii [1977] 1 MLJ 234.
- xiii Mahdi Zahraa & Normi A Malek, "The Concept of Custody in Islamic Law" (1998) 13 Arab LQ 155 at 155-156.
- xiv Mimi Kamariah Majid, *Family Law in Malaysia* (Malayan Law Journal, 1999) referring to Minhaj-et-Talibin, a manual of Muhammadan Law according to the School of Shafi'i at p 391-392.
- xv Section 84(1) Islamic Family Law Federal Territories Act 303.
- xvi Section 84(2) Islamic Family Law Federal Territories Act 1984.
- xvii [1989] 2 MLJ cxxiv.
- xviii Section 86(2) IFLFT Act 1984.
- xix Section 86(3) Islamic Family Law (Federal Territories) Act 1984 & Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976.
- xx Section 82 (a) Islamic Family Law (Federal Territories) Act 1984.
- xxi Kuek, Chee Ying, Tay, Eng Siang, 'Unilateral Conversion of a Child's Religion and Parental Rights in Malaysia', (2012) 24 SAcLJ 107 L.
- xxii See Article 121(1A) of the Federal Constitution of Malaysia which states that the Civil High Court has no jurisdiction in matters under the jurisdiction of Syariah Court
- xxiii [2015] 7 MLJ 153.
- xxiv [2004] 5 AMR 75.
- xxv [2001] 2 CLJ 359.

^{xxvi} Nor Kursiah bte Baharuddin Shahril bin Lamin & Anor [1997] 1 MLJ 537.

^{xxvii} Nuraisyah Chua Abdullah, "Conversion to Islam- "Effect on Status of Marriages and Ancillary Reliefs" (Selangor: International Law Book Services, 2004) at p 42.

^{xxviii} Supra n6 at p4.

^{xxix} See Tey Siew Choo v Teo Eng Hua [1999] 6 CLJ 308; Kung Lim Siew Wan (P) lwn Choong Chee Kuan [2003] 6 MLJ 260.

^{xxx} Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; Adams v Adams [1984] FLR 768,772

^{xxxi} Steven Thiru, "Federal Court should have granted Deepa custody of both children", The Malay Mail online, 23 February 2016.

http://www.malaysianbar.org.my/legal/general_news/federal_court_should_have_granted_deepa_custody_of_both_children_malaysian_bar_says.html accessed 30 September 2016.

^{xxxii} See Part II of the Control And Restriction (The propagation of Non-Islamic Religions Amongst Muslims) (Negeri Sembilan) Enactment 1991, also Clause 5 (1) which talks about subjecting a Muslim under the age of 18 years to influences of a non-Islamic religion.

^{xxxiii} See para 44 of the Federal Court Judgment vide Civil Appeal No : 02 (f)-5-01-2015 & 02(f)-6-01-2015.

^{xxxiv} Goh Su Li, "Federal Court Judgment of S Deepa: Domestic Violence & Child Custody reported in The Malay Mail Online dated 15th February 2016.

<http://www.themalaymailonline.com/what-you-think/article/federal-court-judgment-of-s-deepa-domestic-violence-child-custody-goh-siu-l>.

^{xxxv} Section 100 of the Family Law (Marriage and Divorce) Act 1976.

Jurisdictional Conflict on Interfaith Custody Dispute in Malaysia: Challenges and Prospect for Reform

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Abstract

Interfaith custody dispute is one of the area in which the conflict of jurisdiction between the civil court and the Syariah court arises. The conversion to Islam by one party to a non-Muslim marriage has an impact on the legality of the marriage, and more importantly the determination as to the custodial right of a child is very much in dispute since the parties are no longer subject to the same set of laws and courts. The current practice suggests that the converted father received custody more often than the non-Muslim mothers regardless of the age of the child. In most cases this has caused dissatisfaction particularly among non-Muslim community and given rise to an issue of whether the decision has been made in the best interest of the child especially when it involves the custodial right of a child at their tender years. Thus, this paper seeks to examine the extent of the jurisdictional conflict on interfaith custody dispute in Malaysia. The research method employs in this study is mainly a textual analysis of relevant materials and cases law relating to interfaith custody dispute. The study suggests several mechanisms to resolve the conflict where the emphasis on the best interests of the child shall be paramount.

Keywords: child, conflict, interfaith custody, jurisdiction, interests

Introduction

This paper examines the jurisdictional conflict between courts in Malaysia in matters pertaining to the custody of child involving interfaith parents. Basically, the conflict of jurisdiction between the civil and Syariah courts stems from the dual system of family law. Despite the introduction of English law, Islamic law and Malay custom are still applicable to Muslims in Malaysia but only in matters relating to personal law and the Islamic religion. Consequently, there are two sets of law governing the matrimonial matters, namely civil law for non-Muslims and Shariah law for Muslims. The conflict between the two laws is not so obvious until one of the parties to a non-Muslim marriage converts to Islam and they fail to reach an “out of court” settlement regarding the child custody.

Over the last few years, the cases involving interfaith custody has received greater attention not only from the legal practitioners but also the government, legal authorities, researchers, media and the public. In a custody dispute where it involves parties with different religion, the issue of conflict of laws would normally arises since the parties are now being subject to different sets of courts, applying

different sets of laws. In such a situation, two main questions to be asked are which court should assume jurisdiction and which law should be applied. Recently, there was an announcement made by the Prime Minister of Malaysia that provides for the amendment of the LRA whereby the jurisdiction to settle all matters pertaining to civil marriage including the custody disputes will be vested in the civil court. However, it is worthy to take note that since the issue of custody is closely related with the religious upbringing of the child, it has become a thorny issue which has caused much confusion and tension in our multiracial society. The cases of S. Deepa,^{xxxv} M. Indira Gandhi^{xxxv} and S. Shamala^{xxxv} are among the high-profile cases involving interfaith custody that have attracted a lot of concern from the public. In most cases, the child was converted to Islam by the converted father without the knowledge of the non-Muslim parent. This situation has caused dissatisfaction amongst the non-Muslim community in Malaysia and sparked debate on the legal avenues of justice available to them. Therefore, this study will come out with several suggestions to resolve the jurisdictional conflict involving interfaith custody dispute where the overriding principle that shall be applied is the best interests of the child.

Materials and Methods

The main method used by this study in researching into the details of all materials relevant to the subject is library based research. The purpose is to identify the extent of the conflict between the civil and Syariah courts and to provide the theoretical foundation of the study. A textual analysis of relevant statutory provisions of several legislations namely the Federal Constitution, the Law Reform (Marriage and Divorce) Act 1976, and the Islamic Family Law (Federal Territories) Act 1984 is adopted in order to examine the position of law in Malaysia and determine the intention of the legislative in drafting the provision.

The study also adopts content analysis approach in examining selected decided cases on jurisdictional conflict particularly cases involving interfaith custody disputes. The judicial interpretation and the judgment of the court is analysed in order to identify the principle that has been applied by the court in coming to its decision.

Results and Discussion

The study suggests that in resolving the issue of jurisdictional conflict between the civil and Syariah courts in cases involving interfaith custody, several methods or mechanisms need to be established. Since both Shariah and civil laws give recognition to the concept of the best interest or welfare of the child, it is not impossible for these two laws to be harmonised with the best interests of the child be the paramount consideration in deciding any custody disputes.

Jurisdictional Conflict between the Civil and Syariah courts: An Evaluation

Malaysia is a country that adopts a dual-system of law, namely civil law and Syariah law and both are administered by different systems of court, i.e. the civil court and the Syariah court. With regards to the Syariah court, the Federal Constitution ('the Constitution') limits its jurisdiction only to persons professing the religion of Islam and it only has jurisdiction over matters as has been conferred by the Constitution.^{xxxv} Prior to the establishment of the Syariah court, the High Court had jurisdiction to hear cases involving Muslims.^{xxxv} After the establishment of the Syariah court, all Shariah matters fall within the jurisdiction of the Syariah court. However, a problem arose in a situation where the decision of the Syariah court is subject to a judicial review by the High Court and in the case of conflict between the decisions of both courts, the High Court's decision shall prevail. Therefore, to overcome such a conflict, Article 121 of the Constitution was amended by inserting new article 121(1A).^{xxxv} In *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib*,^{xxxv} the Supreme Court affirmed that the effect of the amendment was to take away the High Court's jurisdiction in matters that are within the jurisdiction of the Syariah court.^{xxxv} This view was accepted in *Sukma Darmawan Samitaat Madja v Ketua Pengarah Penjara Malaysia*,^{xxxv} where the Court of Appeal concluded that the purpose of the amendment was to prevent the High Court from exercising its power of judicial review over decisions of Syariah court.

Notwithstanding the amendment made to Article 121 of the Constitution, the conflict between the civil and Syariah courts remains unsettled.^{xxxv} The cause of the conflict stems from the existence of grey areas between Article 121(1) and 121(1A) after the 1988 amendment. One of the areas is in the field of family law in matters involving interfaith custody dispute.

Conflict in Interfaith Custody Disputes and the Application of the Best Interests Principle

The main reason for a conflict of law is due to a statutory provision under the LRA which provides for conversion to Islam as a ground to dissolve the non-Muslim marriage.^{xxxv} Under the provision, the right to petition for divorce is only granted to the non-convert spouse. In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*,^{xxxv} the court was of the view that, by enacting section 51, the legislature clearly envisaged a situation that where one party to a non-Muslim marriage converted to Islam, the non-convert party may petition for divorce to the High Court and seek ancillary reliefs. Until and unless the non-converting party petitions for divorce and the marriage is dissolved by the court, the marriage between the parties is regarded as still subsisting under the LRA.^{xxxv} This position of law has to some extent contributed to the conflict between the civil and Syariah courts because the converting party

would normally commence proceeding in the Syariah court for the dissolution of the marriage together with an order of custody of child.

With regards to the issue of custody, a conflict of laws situation arises when the parties fail to reach to an agreement on the custodial right of the child outside the court. As the physical custodian will normally have the right to determine the religious upbringing of the child, in most cases, both parents would battle for the custody so as to ensure that the child's religion is the same as theirs. The non-Muslim party will bring the custody case to the High Court whereas the Muslim will seek a custody order from the Syariah court. In this situation, it would give rise to several issues; first, which court shall assume jurisdiction to determine the custodial right of the child and second, where both courts gave their orders on the same case, which court's order shall prevail.

In determining the right of custodianship, there are several factors that will be taken into considerations and both Islamic and civil laws recognise that the paramount consideration is the welfare or interest of the child.^{xxxv} Although religion of the parties is one of the main considerations to decide on the welfare of the child, it should not be the sole factor to determine the right of custody. In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*,^{xxxv} the High Court held that the overriding principle in determining the custodial right is the welfare or interest of the child. In this case, the non-Muslim wife applied to the High Court for the right of custody of her two minor children who had been converted to Islam by her Muslim husband without her consent and knowledge. After considering the interest of the two infant children to be under the physical custody of their mother, the court decided that the actual custody of the children was to be given to the mother while the legal custody was given jointly to both parents. However, the award of actual custody to the non-Muslim mother is qualified with a condition that she will not influence the children's religious belief. The court in this case relied on section 5 of the GIA in acknowledging equal parental rights and authority in the custody and upbringing of the children.^{xxxv} In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*,^{xxxv} the parties to the case were originally Hindus who were married under the civil law and have their marriage registered under the LRA. Out of the marriage, there were two infant children. The husband later had converted himself and the elder son to Islam and he commenced proceeding in the Syariah court for the custody of the elder son. The High Court in this case has clearly declared that despite of a party's conversion to Islam, the civil High Court has exclusive jurisdiction over the dissolution of a non-Muslim marriage and all ancillary reliefs. The issue of conflict of jurisdiction and the best interest of the child had been considered thoroughly by the Federal Court in delivering their judgment in the case of *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals*.^{xxxv} In this case, the parties contracted their marriage under the LRA and they got two children, a girl named Shamila (11 years old) and a boy named Mithran (8 years old).

The husband converted himself and his two children to Islam and later applied for the dissolution of his civil marriage at the Syariah High Court where the court granted the order together with temporary custody of his two children and subsequently granted permanent custody order of the children to him. In the meantime, the non-Muslim wife filed a petition for divorce at the High Court and she was granted permanent custody of the children. The situation became worse when Mithran was abducted by his father from the mother's custody. The non-Muslim wife then applied for recovery order before the High Court. On appeal by the husband against the decision of the High Court, the issue arises as to whether the civil court has jurisdiction to make a conflicting order in a case where a custody order has been made by the Syariah court. In this respect the Federal Court declared that the civil courts have the exclusive jurisdiction regarding all matters pertaining to civil marriage under the LRA. Thus, it is an abuse of process for converted spouse to file custody proceedings in Syariah court in respect of children of the civil marriage.

The next issue is whether the High Court has properly exercised its discretion in granting order of custody of the children to the wife. The court referred to section 88(3) of the LRA and decided that the paramount consideration in determining the custody of a child is the child's welfare. With regards to the welfare of the child, matters such as the conduct of the parties, their financial and social status, the sex and age of the child and his/her wishes need to be taken into account. The court also acknowledged that a custody order is never final or irreversible. Taking into consideration the welfare of the children as of paramount importance, the court was of the view that there is a need to consider the wishes of the children. Consequently, the Federal Court varied the custody order granted by the High Court and ordered that the daughter shall remain with the mother while custody of the son was given to the father.

The Methods of Resolution

The finding of this study suggests that even though the issue of conflict of jurisdiction between the civil and Syariah courts in matters involving interfaith custody has been standing unresolved for many years, there must be resolution to the problem. Although amending the current laws is one of the options, to date, there seems to be no satisfactory solution to resolve the problem.^{xxxv} There is also suggestion to empower the civil courts with jurisdiction to decide all disputes arising out of civil marriages using the civil law as the marriages concerned are registered under the civil law.^{xxxv} Again, this suggestion also requires for the amendment of law and it should be noted that to amend the federal law is not something that can be done easily and it would normally take a long period of time for the law to be enforced. Furthermore, the proposed amendment should be examined carefully so as to make it acceptable to both Muslim and non-Muslim. The present study, however, comes out with several

other methods and mechanisms that may be considered to address the issue. First, an establishment of a tribunal to deal specifically with family cases involving interfaith parents is worth to be considered. The tribunal shall be empowered to decide all matters regarding interfaith custody disputes and other related issues. The panel of members of the tribunal should be selected among persons who possess knowledge in both areas of laws i.e. civil law as well as the Shariah law. Hence, they would have a better understanding on the concept of the best interests of the child under both laws and there will be no issue of biasness in their decision. With regards to its establishment and procedures, it would require a further research.

Second, it is proposed that the parties should be encouraged to settle their disputes through an extensive mediation forum. Instead of going through a litigation process, the parties should be convinced that the matters can be settled amicably through a negotiation conducted by a proper forum. The main function of the forum is to help the parties to reach to an agreement to settle the matters out of court guided by the principle of the best interests of the child. In order to avoid non-compliance, the agreement must be properly codified.

Third, looking to the current situations and challenges, there is a need to develop a harmonised law to deal with the dispute involving two different jurisdictions. The harmonisation of Shariah and civil laws can be done in respect of the determination of the child custody since both laws are in agreement that the welfare and interests of the child shall be the main consideration in determining the right of custodianship.^{xxxv} This method will ensure that there is certainty in law because no matter where the case is brought to and which forum determines the case, the same principle will be applied and thus the same result would follow.

Finally, as parents are still sharing their responsibilities towards their children, the change of religion of either spouse should not be the reason why they cannot maintain a good relationship between them. Though the marriage has come to an end, they have to ensure that the best interest of the child is not affected by their separation. Therefore, the award of joint custody could be another alternative to solve interfaith custody issue. In joint custody, both parents will have an equal right of access to their children and this will provide the child with the feeling of love and affectionate from both parents which in fact is very important for his/her mental and emotional development. Normally, the care and control of the child will be given to one party, whereas the other party has the right of access.

Conclusion

The issue of jurisdictional conflict between the civil and Syariah courts is an unsettled issue in Malaysian law for many years. The purpose of the current study was to determine the extent of the conflict between these two courts and its cause particularly in the case of interfaith custody disputes. The need for a permanent settlement in child custody cases involving interfaith parents is very obvious since the issue implicates religious sensitivity and has become a matter of public interest. Although the amendment of law is the most awaited solution to the problem, other mechanisms should also be considered. Further research in this field would be of great help in determining the best mechanism and procedures to resolve the problem regarding the conflict involving interfaith custody dispute. Nevertheless, the best interests of the child as a guided principle would be the best solution to decide on the issue of interfaith custody.

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RELIGION AS A DETERMINANT OF CHILD WELFARE IN CUSTODY CASES

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Abstract

It is paramount to consider the welfare of a child when it comes to determining the custody of a child. However, in the event of a parent converts to Islam, the issue of religion arises. The typical question arises on whether the religion of a parent is considered the main factor or one factor in determining the interest of the child. In Malaysia, since both Islamic and civil law recognise conversion as a ground for divorce, the question concerning the custody of children and the determinants of religion for the best interest of children will be the main issue. This research aims to examine the significance of religion in determining the welfare of children in custody. Besides this, it aims to search for possible solutions from the perspective of Islamic jurisprudence relating to custodial conflict upon conversion of one spouse to another religion particularly in a multiracial country like Malaysia. The type of research used in this research is Qualitative method. In this regard, secondary materials are used to study religious determinant and child welfare from the Islamic jurisprudential perspective as well as the current Malaysian laws. Secondary materials as part of data collection are sought through library search, a literature review in the form of books, journal articles, relevant statutes, verses from the Quran and the traditions of the Prophet and recent court cases. Our findings show that religion is the primary criteria in determining the welfare of children in custody cases from the classical Islamic point of view. However, Islam offers various other solutions if there is a conflict involving non-Muslim parents.

Keywords: child welfare, custody, conversion, religion.

Introduction

Child's custody refers to the upbringing of children which includes protection, love, care, education, sheltering and management of the child (Che Soh, R. & Abdul Hak, N. 2011). Generally, in determining the legal custodian of a child, the court will ensure that the welfare of a child is well-preserved. In Malaysia however, there are two different laws that govern the issue of children's custody

i.e., Law Reform (Marriage and Divorce) Act of 1976 (hereinafter called LRA 1976) which is applicable for non-Muslims and Islamic Family Law Act/Enactment for Muslims. Interestingly, there are also two different courts dealing with this issue, i.e. civil and Shariah courts. The problem arises when one of the spouses in a marriage converts to Islam because conversion is recognised as one of the grounds to dissolve the marriage by both the LRA 1976 and the Islamic Family Law/Enactment. Both courts' system in Malaysia have jurisdiction on this issue since one of the parties is Muslim. The dissolution of marriage for Muslim is governed by the Shariah Court, while for the non-Muslim, it will be under the Civil Court. As a result of law and jurisdictional conflicts, there are certain matters consequential to the divorce that provide different remedies which include division of matrimonial assets, maintenance of children, custody and guardianship of children.

In determining the custody of a child, both Islamic law and civil law agree that the interest or welfare of the child is the paramount consideration. Factors that are taken into consideration in determining the interest of the child, to certain extent, can be found parallel in both Islamic law and Civil law, except in the matter of religion. Both Islamic and Civil law considered age and gender of the child, wishes of the child (if the child is of an age to express independent opinion) and ability to bring up the child and conduct of the parties (Zain N. 2006). However, when a parent to the marriage converts, the question arises whether the religion of the parents or the parties involved is considered as the main factor in determining the interest of the child, or whether the religion of the parties should be the only factor in determining the custody of the child.

Although numerous researches have been done on the issue of custody in Malaysia, there is no single study which comprehensively discusses it from the Islamic jurisprudential perspective of religion as determinant of child welfare in custodial conflict involving conversion parents. Research by Yee, C. P. (2014) and Lin, G. S. (2013) for example, pointed out the contradictory rulings by the Civil and Shariah Courts on the case of a child's custody and commented that the parallel legal system in Malaysia complicates matters of justice. This dual system enables a spouse who had contracted a civil marriage to convert to Islamic faith and uses Shariah court as a means of wresting custody of the children and evading financial responsibilities imposed upon the husband under the civil law. For that reason, the International Institute of Advanced Islamic Studies (IAIS) Malaysia has proposed policy and reforms relating to conversion in Malaysia (Adil, M. A. M. & Abdullah, A. B. 2016; Mohamed Kamali, M. H. *et al.*, 2012). Among the recommendations made are to ensure that issue of conversion does not come in the way of making a decision on child welfare matters and custodial responsibilities

of the disputing parents and secondly, to amend article 51 of the LRA 1976. Thirdly, to establish a special branch of mixed jurisdiction where both Syariah and Civil law judges sit and adjudicate issues of conversion and religious identity of the child. From the Islamic jurisprudential context, Che Soh, R. & Abdul Hak N. (2011) examine the application of *maslahah* (interest) in custody cases particularly in Shariah Court practice. Their finding shows that *maslahah* is highly considered particularly when it relates to children's interest.

In light of the above custody issues, this research aims firstly, to examine the significance of religion in determining the welfare of a child in custody cases. Secondly, it aims to search for possible solutions from the perspective of Islamic jurisprudence relating to custodial conflict upon conversion of one spouse to another religion, particularly in a multiracial country like Malaysia.

Methodology

This research employs qualitative method. In this regard, library research is used in order to obtain the data, in which a plethora of references derived from Quranic verses, Prophet's tradition and his companions' stories, books, journal articles and online websites. In maintaining its relation with Islamic jurisprudence, this research draws insights from the earlier works of classical Muslim jurists who have provided information related to the area of discussion. Beside this, the current laws are also analysed, particularly the Islamic Family Law Act (Federal Territories) 1984 and related administrative procedures, to represent other States in Malaysia. Federal Territories are selected as they are the capital of Malaysia and directly administered by the Federal government, whereas other territories are under State's government. For this legal discussion, legalistic and textual approaches are used in which the classical texts, as well as the laws are thoroughly analysed in order to highlight the previous rulings relating to custody. The discussions also examine several decisions of court cases in order to identify the current approaches taken by judges in handling the custodial conflict.

Result and Discussion

Significance of Religion in Custody

In Islam, religion is the most important criteria to be considered in children's custody. Ibn Qudama, a well-known Muslim scholar of the 12th century, stresses on the importance of religion in the issue of custody. He said that "custody is aimed at looking after the child, so it should not be given in a way that will be detrimental to his welfare and his religious commitment"(Ibn Qudama, n.d). In a famous Hadith by 'Abd. Al-Hamid b. Ja'far, it is told that Rafi' ibn Sinan embraced Islam but his wife refused to do so. She came to the prophet and said:

"My daughter, she is weaned or about to wean". Rafi' said: "My daughter". The prophet said to him: "Be seated on a side". And he said to them: "Call her". The girl inclined to her mother. The prophet said: "O Allah! Guide her." The daughter inclined to her father and he took her away" (Sabiq, S. 1990).

The above Hadith shows that the Prophet did not deprive the non-converted mother from custodial rights of her daughter. However, the Prophet indirectly indicated his preference towards the Muslim father by invoking the prayer "O Allah! Guide her" when the child demonstrates an inclination towards the mother. This story indicates that the Prophet preferred the child to stay with the Muslim father for fear that the child would be influenced by the non-Muslim mother in the aspect of faith (Abdullah, N. C. 2004). However, the Muslim jurists have dealt with this issue in detail. According to Shafi'i and Hanbali schools of law, the custodian must profess the religion of Islam, otherwise he or she does not have the actual custody of a child (Al-Jaziri, A R. 1986) According to Sabiq, S. (1990), this view was based on the Quranic verse:

"And never will Allah grant to the unbelievers a way (to triumph) over the believers" (Quran, (4): 141). Notably, the above verse hints that if a child is given to the non-Muslim custodian, he or she would influence the child's belief and the child would not be brought up according to the religion of Islam (Sabiq, S. 1990; Ariffin, M. 2006). The preservation of child's religion proceeds with the concept of *maqasid al Shariah* in Islam. The concept refers to the objectives of Shariah in implementing laws and policies in all aspects of life including family matters. These objectives consist of protecting the five essential values namely religion, life, intellect, lineage and property. Any measure which secures these values falls within the scope of *maṣlaḥah*, and anything which violates them is *mafsadah* (evil), and preventing the latter is also *maṣlaḥah* (al Ghazali, 1997; Badran, A. A. 1984). Since religion is the first value that should be preserved in administering child's custody, effort should be taken in order to comply with this requirement.

On the other hand, Hanafi's and Maliki's school have different opinions. According to them, Islam is not the requirement of being a custodian. Thus the non-convert parent will be entitled to the right of custody of their children. However, the Hanafi's and Maliki's school have laid down certain restrictions. For example, the custodian should not influence their children on matters pertaining to

religious belief, except for Islam. In this regard, restrictions include taking children to church, teaching them religious teachings other than Islam, asking them to eat pork or consume alcohol (Al-Jaziri, 1986; Al-Marghinani, n.d).

The significance of Islamic religion in custody cases can be seen in the implementation of custodial laws in some Muslim countries as they allow the non-Muslim parent to become the custodian but strict conditions are incorporated. For example, Article 62 of the Algeria Personal Status Law states the condition that the non-Muslim mother should bring up the child in the faith of Islam. Article 192 of the Kuwaiti Personal Status Law provides that the non-Muslim custodian shall be entitled to the custody of the child until the child starts to understand about religion, or until it is feared that he or she may become familiar with faith other than Islam, even though the child does not understand about religion. The child shall not remain with such custodian after he or she has reached the age of five. Tunisia (Article 59) and Moroccan (Article 108) deal in almost identical terms that the non-Muslim mother could be given custody and she will lose such right after the child has reached five years old unless there is no fear that the child will be brought up according to a religion other than Islam (J. J. Nasir, 1990).

Malaysia, on the other hand, has adopted a strict approach to custody issue. Section 82 of the Islamic Family Law Act (Federal Territories) (hereinafter called IFLA 1984) stated that the first qualification necessary for custodian is that the person must be a Muslim. It is also stated in Section 83 that the right of custody is lost if the custodian *murtad* (apostatize). Such laws are in line with the views of al-Mawardi, a great Muslim scholar, on important duty of Islamic government to preserve religion (al-Mawardi, 1990). Similarly, El-Awa (1990) stated that the purpose of Islamic State is to establish *al-din* (the faith) and to secure the interests of the ruled. The establishment of faith, then, is the fundamental goal in which the Islamic State has to prioritize. Since Islam is understood to be *al-dīn* which means a complete way of life for humanity, so the state has to render help to Muslim society in order to achieve this form of spirituality.

Solutions from the Islamic Jurisprudential Context for Custodial Conflict

Malaysia is a plural society, which makes conversion from one faith to another an inevitable event. In the case of husband's and wife's conversion, prevailing issues on legal implications such as custody of a child arise when one of the parties in a marriage converts to Islam. Regarding this matter, The Civil Court in Malaysia has different approaches to its judgment. For example in the case of *Sharmala Sathiyaseelan v Dr. Jeyaganesh C Mogarajah & Anor.* ([2004] 3 CLJ 516), the court tends to give joint

custody to both parents, even though one of the parties is a non-Muslim. In this case, Sharmala and Dr Jeyaganesh were married on 5 November 1998 according to Hindu's rites and their marriage was registered under the LRA 1976. Four years later, the husband embraced Islam and also converted their sons. Sharmala had applied to the High Court for custody of the children.

In the judgement, Justice Faiza Thamby Chik gave joint legal custody to the parents. However, actual custody or the care and control of the children, daily care and responsibility for looking after them belongs to the mother. In addition, the judge put caveat that the children were *mualaf* (Muslim converts) and the mother would lose the right to actual custody if there are reasonable grounds to believe that she would influence the children's present religious beliefs, for example, teaching them the articles of her faith or making them eat pork. Even though this judgment corresponds to Islamic Law, the judge unfortunately did not suggest or propose any guidelines on how to ensure that the non-convert mother follows such restriction. This judgment was inconsistent with Justice Chin's reasoning in *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam* [2003] 1 CLJ 458, that the mother who had a custody of an infant whose father converted to Islam should not be compelled to send the infant to Islamic religious school, noting that the Quran stated that there be no compulsion in religion.

In the case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* (2013, 7 CLJ 82), the estranged husband Mohd Ridzuan Abdullah had unilaterally converted their three children (aged 12 years, 13 years and 18 months respectively) without the consent of his non-converted wife. It could be understood that by converting the children, it is easier for the husband to get custody from the Shariah court as the court has no jurisdiction over non-Muslim. The High Court held that the conversion was unlawful and unconstitutional as it was done without the mother's consent, breaching Articles 3, 5 and 11 of the Federal Constitution. On appeal however, the Court of Appeal, in a 2-1 majority ruled that the matters relating to Islam fell exclusively under the jurisdiction of the Shariah Court Mansor, W.N.W., 2016). Similarly, in *Saravanan Thangathoray v. Subashini Rajasingam & Another*, [2007] 2 CLJ 45, where the Court of Appeal, by a majority, dismissed the wife's appeal for an injunction restraining the husband from converting either child of the marriage to Islam.

This type of case prevails in Malaysia and it causes unease to our multi-religious society. For example, the recent case of *Deepa v Izwan Abdullah* (<http://www.nst.com.my/news/2016/02/126694>) shows that some Malaysians are disappointed with the court's decision. In this case, the Federal Court has set aside the orders of the High Court and Court of Appeal with regard to custody. It has granted custody

of their eight-year-old son to the father and eleven-year-old daughter to the mother. Interestingly in this case, the court made the order after interviewing the children for forty minutes in chambers. This new approach which was taken by the Federal Court has been criticised on the basis that it is a last-minute decision. Interviewing the children in court before the custody order is said to be improper and intimidating the children. It is suggested that child psychologist and expertise should be referred in order to ensure that the children's best interest will be preserved. It is observed from the court cases that have been decided, different judges have different opinions concerning the custodial issues as the result of conversion. This will create tension and dissatisfaction to society, hence, jeopardising the social fabric of multicultural and multi-religious society in Malaysia.

In view of the cornucopia of custody issues mentioned above, Islam provides significant solutions to prevailing custodial conflict. One of the solutions from Islamic jurisprudential context that can be referred to is the doctrine of *siyasa shar'iyah* (Shariah-oriented policy). Ibn Qayyim defined it as any measures that actually bring people closer to good and virtuous and prevent them from disruption on matters for which no specific ruling could be found in the Quran and the Sunnah of the Prophet (Ibn Qayyim, 1961). In other words, this policy authorises the ruler to determine the manner in which the Shariah should be administered. Under this doctrine, the ruler or the government is deemed to take any discretionary measures, enact rules and establish policies which are considered for the best interests of the people, provided that no substantive principles of the Shariah is violated (Kamali, M. H. 1989). With regard to the custodial conflict, by applying *siyasa shar'iyah*, the government of Malaysia has been urged to be proactive in resolving the issue. One of the recommendations is setting-up a special bench of mixed jurisdiction where both Shariah and civil law judges sit and adjudicate disputed issues of conversion. The civil court will determine which case needs to be referred for adjudication to the court of mixed jurisdiction. It is also suggested that the law should stipulate that the court may issue a joint custody order which specify among others that the custodian should expose the child to religious education in both of the respective religions of his /her parent. The present practice of having a shared jurisdiction between two different courts of Civil and Shariah in handling *Muamalat* cases is a good example to be followed. Another suggestion is forming Judicial Committee by Conference of Rulers (Majlis Raja-Raja) in which the function deals only with conversion cases. Rulers will formally entrusted with powers to appoint the judicial committee but will not decide on cases. (Adil, M. A. M & Abdullah, A. B. 2016; Kamali, M.H., 2012).

The other solution from Islamic jurisprudential context is the application of the *maslahah* (welfare) doctrine. This doctrine authorises the government to take necessary measures, including legislation, to attain the well-being of its citizen (Kamali, M. H. 1989). The State has the discretionary power to ascertain the items that could bring *maslahah* to its citizens. Nonetheless, the State shall not take excessive actions which could lead to abuse of power in ruling the society. The power should, as prescribed by Kamali, M. H. (1989), be governed by a set of principles to which any action taken by the State must be precise for the interests of the public.

The doctrine of *maslahah* can also be referred to as unlimited approaches taken for the interests of the public which have not been regulated by the Lawgiver and no textual authority can be found, neither to support, nor to reject its validity (Badran, 1984). In this regard, when the *maslahah* is identified and the explicit ruling in the Qur'an and Sunnah could not be found, necessary steps should be taken to secure it. It is therefore, in this area, where the State enjoys greater freedom and has discretion to introduce laws and policies and adopt measures in realization the public interests. This is justified by several verses of the Quran, including al-Anbiya' (21):107, Yunus (10):75, al-Haj (22):78, al-Maidah (5):6 stating the purpose behind the revelation of the Shariah is to promote human's welfare and to prevent corruption in the world.

With regard to the custodial conflict, by applying *maslahah*, it is advisable for the Malaysian authority not to confine to one particular *mazhab* (school of law) and abandon the rest. Even evidence that has great deal of influence from any particular *mazhab* must be carefully examined and the suitability of *fatwa* (religious edict) must be thoroughly assessed. One view of *mazhab* might be appropriate to a specific context in a specific time, but it might not be replicate in other contexts at the same time (Safian, Y. H. M. 2016). In the case of custodial conflict in Malaysia, since the country is a multiracial country, the opinion of Maliki's and Hanafi's school should be taken into consideration instead of Shafii in order to maintain harmonious relationship between the parents (Malik. N. A. 2004). Thus, religion of the parties should not be the only factor in determining the custody of the child. All factors should be taken into consideration. Then the court will decide which parent will be given the custody so that the welfare of the child will be protected. It is a duty of the Muslim parent who is not given the care and control of the child to portray the good image of Islam that can attract the child to the religion (Zain, (2006).

The other solution available in the Islamic jurisprudence is applying the concept of *'adalah* (justice). Stressed by Allah in few verses in the Quran (al-Nisa' (4): 58; al-Maaidah (5): 8; al-Nisa' (4): 59), the practice of justice is one of the pivotal principles in Islamic governance. In Islam, justice applies to Muslims and non-Muslims. Human dignity and justice, social harmony and equitable treatment are meant not only for Muslims but for everyone. Indeed all human beings must be treated with dignity and justice. Law in Islam is meant to ensure people's welfare and peace corresponding to normal order in social relation (Kamali et al., 2012). Thus, any proposed laws for custodial conflict in Malaysia must provide satisfactory solutions to the public and at the same time acceptable to both the Shariah and civil law.

Conclusion

In addressing current problem of custodial conflict involving Muslim and non-Muslim parents, the renewal of Islamic jurisprudence must be taken into consideration, aiming to balance the dictates of foundational texts as stated in the Quran and the Hadith and the reality of the society. Malaysian authority should take moderate approach in resolving the issue. Even though Shafi'i is the official *mazhab* (school of thought) in Malaysia, views from other *mazhabs* must be carefully examined and the suitability of *fatwa* must be thoroughly assessed. No *mazhab* is superior over another, and Muslims scholars should not confine to one particular *mazhab*. For the welfare of the child in custody, Islam recognises religion as significant determinant. However, in a multiracial country such as Malaysia, different approach should be taken by the Malaysian authority in handling the issue. From Islamic jurisprudence, this research found significant principles available for the solution of custodial conflict particularly when it involves conversion of parent, such as principles of *siyasaḥ syar'iyah*, *maslahah* and *'adalah*. All those principles are equally important and they supplement each other. Thus, religion of the parties should not be the only factor in determining the custody of the child. Therefore, in the case where one of the parties converts to Islam, our proposal remains that all the factors will be taken into consideration, and the court will decide which parent will be given the custody so that the welfare of the child will be protected.

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HUMAN RIGHTS FOR CHILDREN WITH DISABILITIES IN MALAYSIA: ISSUES AND CHALLENGES

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Abstract

Children with disabilities require protection of their rights from the society. They are disabled because society excluded, discriminated and encouraging negative stigma against them. The UN Convention on the Rights of Persons with Disabilities (CRPD) especially Article 7 has mentioned that the State Parties shall promote and protect the rights of children with disabilities including providing necessary measures on an equal basis with others. The concept of the best interest of child has become a primary consideration, together, with expressing their views freely in accordance with their age and maturity has been embodied within the convention. Malaysia has ratified the said Convention in 2010 and enacting Persons with Disabilities (PWD) Act 2008 to fulfil their international obligations. Furthermore, the new Education (Regulation) Special Education 2015 has been gazetted to show government's commitment to upholding their rights in all aspects of life. However, various issues and challenges being faced to ensure the human rights approach in accordance with the CRPD being implemented, to improve the condition of children with disabilities. This article will elaborate the Malaysian commitment to improving the life of children with disabilities in accordance with human rights approach towards disabilities. It would assist the agenda to recognize their full potential to live fullest which will be important and significant for developing nation like Malaysia. The final analysis showed that there is the need for full cooperation between government, private sectors, non-governmental and disabled people organisations to promote and protect the rights of children with disabilities in all aspects of life.

Keywords: Children with disabilities, human rights approach, CRPD, PWD Act 2008, issues and challenges.

Introduction

Children with disabilities (CWD) are the vulnerable groups opened for negative stigma and systematic discrimination from the society. The image of disabled people is being represented negatively in children's literature which either a kid to recover from personal tragedy or taking revenge from society

due to their impairment (Johnstone, 2012). They may face ‘*double silencing*’ where it hard *to be seen* and *be heard* due to isolation by their family and little attention from society (Gilligan, 2016). Therefore, it is undeniable that they are being marginalized in various aspects of life especially in right of life and getting a proper education. Historically, the promotion and protection of the rights of CWD were proclaimed in several soft laws and hard law cater specifically for the CWD. The term ‘soft law’ within international human rights mechanism referring to the general statement, declaration by international organisations where it has no legal binding mechanisms while ‘hard law’ referring to the treaty signed and ratified by States Parties to be implemented within the domestic jurisdictions (Haniff Ahamat, 2012).

As State Parties to both Conventions, Malaysia has obligation to fulfil within the domestic legal, policy and institutional frameworks. It has been materialising with the introduction of new Special Education Regulations 2015 under the Education Act 1996 with the intention to fulfil international obligations stipulated under the CRPD. In addition, rapid development on the rights of CWD especially on the education has lead other institutions such as SUHAKAM and UNICEF to prepare a report on the position of CWD in Malaysia. With the implementation of the UNESCAP Incheon Strategy to "Make the Right Real" for Persons with Disabilities in the Asia Pacific Region and Sustainable Development Goals (SDG), the issues of CWD has become mainstream and special attention is given to improving the protection of their rights at global and regional level. Therefore, it is crucial for this article to address the issues and challenges involving CWD through the human rights-based approach.

International Legal Framework

The international framework are mostly dealt with educational rights such as Jomtien World Conference on Educational For All 1990 (“Jomtien Declaration”), The Standard Rules on The Equalization of Opportunities for PWD 1993, The UNESCO Salamanca Statement and Framework for Action on Special Needs Education 1994 (“Salamanca Statement”) and UNESCAP Biwako Millennium Framework 2002 and the recent Incheon Strategy (2015-2022) and UN Social Development Goals 2015. The Salamanca Statement has set up the first comprehensive commitments to reaffirming rights of education stipulated under the UDHR and the latter declaration regardless any differences. The Salamanca Statement also urged the cooperation between government and international funding agencies to support inclusive education and development of special needs

education integrated within all kind of educational system (Zalizan M. Jelas & Manisah Mohd Ali, 2012).

The development of binding legal mechanism or ‘hard law’ under international system has significantly given more opportunities to promote and protect rights of CWD in various aspects of life. It leads other countries to give full support and commitment to uphold their rights within domestic legal and policy frameworks. Two main human rights treaty are dealt with rights of CWD; the CRC and the CRPD. Malaysia has ratified the CRC in 1995 while the CRPD is in 2010. These two main conventions are crucially in setting the international standard and commitment for Malaysia taking seriously on issues related towards the development of CWD domestically.

The protection of rights of children has been accepted worldwide with the endorsement of the CRC by most countries. The Convention covers the protection for a child from birth till the aged of 18 years old. The CRC is based on four main principles for the realisation of human rights for CWD such as non-discrimination, the best interest of the child, survival and development and finally respect the view of children (UNICEF, 2014). CWD has been specifically described in the Article 23 has described the duties of State Parties to recognize special needs for CWD who facing physical and mental disabilities to enjoy full and decent life, ensuring their dignity, self-reliance and promoting the active participation of society. It includes special care, assistance, access to the education, training, health care, rehabilitation, preparation of employment and recreational in terms of financial resources and international cooperation with the objectives to improve their capabilities and skills for the cultural, spiritual development of the child and actively full participation within society. The UN CRC also stated the assistance shall be free whenever possible, by taking into consideration the needs of children in developing countries on the financial matters. However, most of the issues relating to the implementation of children rights in Malaysia was lack of political will and economic factors. The need for international interventions and cooperation with various agencies are crucial to developing nations like Malaysia to treat the child in accordance with human rights approach rather than ‘welfare-oriented’ based (Farah Nini Dusuki, 2012).

The existence of the UN CRPD has strengthened the attention towards children with disabilities (CWD). Article 7 has outlined several important measures needed to be taken up by State Parties. Firstly, to take all necessary measures to ensure full enjoyment of rights for CWD on an equal basis with others. Secondly, every action taken must be in the best interests of the child and become a primary

consideration. Thirdly, rights of CWD to express their views according to their age and maturity, and State Parties to provide appropriate assistance developing their rights. The key words of ‘equal basis’, ‘best interests of the child’, ‘full enjoyment of all human rights’ have become main attention within the CRPD where each State Parties shall taking into consideration when amending their domestic laws, policies and any measures taken to improve the rights of CWD.

Human Rights Approach to Disability

Persons with Disabilities (PWD) especially the children facing negative stigma and continuous discrimination from the society. Most issues and challenges facing PWD including forceful institutionalized, lack of legal capacity to make independent decision and denial of rights and accessibility to various sectors. The rapid development of the UN CRPD has strengthened the development of human rights approach within the realm of disability. According to Rioux, Jones and Bassier (2011), three main concepts of human rights is much inter-related with disabilities which are dignity, equality and inclusive. These three concepts are important to address the human rights approach towards PWD especially the children with disabilities which are relevant for the successful implementation of the CRPD within the domestic legal framework.

Dignity can be defined as the basic existence of individual through fulfilling their needs and respecting each other as a human being (Basser, 2011). It leads towards respecting their honour and ability to make the decision independently and actively participate within society. It has similarities with the inherent reputation of individual and dignity which available to every human being. Article 1 of the CRPD has stressed the importance of dignity to uphold fundamental freedoms and human rights of PWD. The CWD, for instance, has been denied their dignity where they are opened for abuse not just from their parents but also from authority.

The concept of equality indisputably has expanded the development of human rights discourse towards minority group including disabled people. It may define as an equal position in terms of status, opportunity, law, and various aspects belong inherently to every individual. Through several historical backgrounds from American Revolution 1776 till the inception of UDHR in 1945, the concept of equality has remained to flourish and influence the promotion and protection of human rights globally. Quinn & Degener (2002) explain the application towards PWD through formal, substantive and opportunity. The suitable types of equality applied for PWD are substantive and equality where their

rights are protected due to the recognition of their disabilities and potential to succeed in life together with active participation in the society (Quinn & Degener, 2002). The CWD, for example, has the ability to get proper education on an equal basis with other children if the parents and authorities recognized their disability differences with proper health care services and early detection and intervention of their development.

Inclusion may be defined as the ability of every single individual to be included as a human being. Everyone has the potential and actively responsible for contributing towards humanity development. There are three main principles applied towards PWD. Firstly is non-discriminatory attitude, secondly access towards participation within society and thirdly facilities to assist the impact of disabilities (Jones, 2011). These are crucial towards the involvement of various parties to improve the life of CWD. The involvement of parents, for example, is crucial to provide early intervention to understand their child abilities to adapt with the appropriate level of education suit to them.

Malaysian Legal Framework

Federal Constitution has described everyone is equal under the law as stated in Article 8 and guarantees the equality applied to education under Article 12. The legal framework for children with disabilities in Malaysia may observe through various legislations such as Child Act 2001, Persons with Disabilities 2008, Education Act 1996 and Education (Special Education) Regulations 2013.

In Malaysia, the definition of persons with disabilities (PWD) has been stipulated under Section 2 PWD Act 2008 as *'include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society.'* ("Persons with Disabilities Act 2008 ", 2008). There are seven (7) classification of disabilities has been mentioned specifically in the guidance provided by the Ministry of Woman, Family and Community Development including hearing, visual, speech, physical, learning, mental and multiple disabilities. The definition of child under the Child Act 2001 as *'person under the age of 18'* has extended to include CWD (UNICEF, 2014).

The Child Act 2001 has implemented four main principles stipulated within the CRC and any offences related to health and welfare of children shall be punishable. Section 31 of Child Act 2001 described any abuse, ill-treatment, abandonment or exposure of children which causing them physical or

emotional distress including sexual abuses shall be punished with a fine not exceeding RM 2000 and imprisonment for not less than 10 years or both. Anyone who leave a child without reasonable supervision also shall commit an offence up to fine not exceed RM5000 and imprisonment not exceeding 2 years. These are two sections which relevant if CWD being abused and ignored by their parents and guardians.

The Persons with Disabilities (PWD) Act 2008 is the reflection of the commitment by our government to obey international obligations of the CRPD. The main objective is to provide registration, protection, rehabilitation, development and wellbeing of PWD. Furthermore, it has described the duty of National Council for PWD to foster an attitude of respect for CWD at all level of education, especially at the early stage under Section 9 (1) (i) of the PWD Act 2008. The access towards education has been mentioned under Section 28 where the role of Government and private sector to provide reasonable accommodation suit to their level of education including infrastructure, equipment, teaching materials, methods, curricular and other relevant to support diversity requirements for CWD. Comparing with Child Act 2001, this act, however, lack on remedial provisions and enforcement mechanism where it becomes disadvantages towards human rights protection for disabled people (Ikmal Hisham Md. Tah, 2013).

The Education Act 1996, as stated in the preamble, has the objective to enable the effort towards developing the potential of individuals in the holistic and integrated manner in order to develop their intellectually, spiritually, emotionally and physically balanced and harmonious in accordance with National Philosophy of Education. In addition, the general principle of pupils are educated in accordance with their parents' wishes are relevant in the context of CWD. The early detection, intervention, and rehabilitation are relying much on the role of parents of CWD with assistance from other stakeholders such as government and private educational providers (UNICEF, 2014). The government has made primary education as compulsory as stated under Section 29A Education Act 1996 and requires the Education Minister to provide special education under Section 40 of the Act.

The Education (Special School) Regulations 2013 which was enacted on 18 July 2013 is the latest regulation after the ratification of the CRPD in 2010. It revokes the earlier 1997 regulations where it becomes controversial due to insertion of 'non-educable' words which restrict the access of educational programmes for the CWD (SUHAKAM, 2015). This is welcoming progress in promoting and protecting the rights of CWD in getting proper and on an equal basis of education as stipulated under

the CRPD and PWD Act 2008. Under this new regulations, the probationary period of no more than three months given for the CWD to access their suitability attending special needs education stated under Regulation 4. The probation period report needed to submit to a panel consists of following members, such as the Principal, Head of Teacher or Senior Assistance of Special Education, State Education Department Officer or District Education Officer and the Social Department Officer or PWD Department Officer. However, according to SUHAKAM report (2015), the National Early Childhood Intervention Council (NECIC) argued that the new probation period has the same effect as 1997 Regulation where only 'educable' CWD may accept into enrollment in school.

Issues and Challenges

Despite new laws and regulations, there are various issues and challenges dealing with the rights of CWD. According to the UNICEF Report 2014, the issues such as violation of rights and discrimination by society, the absence of coordination and lack of awareness for early detection and intervention programmes, no standardize of data and number for CWD and inadequate facilities and support system, especially in education and health sectors. These problems may hinder their individual potential especially in education including contributing fully and meaningful participation within society.

In Malaysia, the violation and lack of care towards CWD may happen due to inadequate information relating to the abuse and exploitation facing them. They are subjected three to four times to become a victim of oppression even by their family members. Media had reported the neglected and malnourished CWD who was confined by his mother within an abandoned low-cost flat. This case, which shocked the nation, has shown the reality facing a disabled child who lacks support from family and society. The government has taken measures to protect the child within child welfare institution and the mother facing four months' jail and fined RM10,000 by the Sessions Court under Section 33 (1) of the Child Act 2001 (Anon., 2014). Besides violation and lack of care, another concern involving CWD is their relations with non-disabled peers especially in the situation of inclusive and integrated education system. Gilligan (2016) observes the CWD has become potential victims from their non-disabled peers and keep silence from an adult. This silence would lead towards the perpetrator to be more aggressive including the tendency to include sexual abuse. It shows CWD has a greater risk of being manipulated in terms of physical, mental and sexual abuse for the long term if no further action and response taking by their parents/guardians or authority. Therefore it is crucial for parents to establish support-based group among themselves to advocate the rights of CWD. The mainstream effort

made by The Global Partnership on CWD at the international level to create a network among various stakeholders is relevant to advance the human rights approach towards CWD (Gilligan, 2016).

Another important issue relating to the CWD is the early detection or intervention programmes. This is important to access the types of disabilities with the involvement of parent and experts on child development. The effort from Ministry of Health (MOH), Ministry of Education and Department of Social Welfare are crucial to addressing this concern. On the part of healthcare service for CWD, it is crucial to monitor their progress especially at the age between 0 – 6 years old. The Family Health Department of MOH has improved the early detection of for child health at the age of 5 months, 12 months, 18 months and 4 years to identify their development and learning problems at the early stage (Amar Singh, 2008). However, the UNICEF Report found out that there are inadequate numbers of health specialist such as a psychotherapist, occupational therapists, clinical psychologists and psychiatrists who may offer services towards CWD. This is due to the location and accessibility of such facilities that only applicable in an urban area rather than rural region. Furthermore, there is also lack of awareness and affordability from parents from lower background to get proper healthcare services for their CWD (UNICEF, 2014). The SUHAKAM Report suggested that medical degree curricula should include courses related to the assessment and identification for CWD especially learning disabilities (SUHAKAM, 2015).

At this moment, there is no comprehensive and systematic data on statistics of CWD in Malaysia (Amar Singh, 2008; UNICEF, 2014). Most of the number scattered between Department of Social Welfare, Ministry of Health and Ministry of Education, therefore no single sources collect the exact number of CWD in Malaysia. For example, there was 50, 738 students enrol in special education programmes in 2012 while the registration for CWD requires special needs is 2012 was 2, 776 new children. According to data obtained from Social Welfare Department, 29,289 out of 85, 803 new registration in 2012 were CWD (UNICEF, 2014). The inconclusive number of CWD in Malaysia is due to voluntary registration and lack of coordination between three different stakeholders that responsible for CWD. The fact that attributed to the low registration is also based on fearing that the child might be stigmatised (UNICEF, 2014).

It is crucial for the support towards CWD in terms of facilities and services provided by Government and other stakeholders. The proper educational facilities such as schools, transportation system, and Community-based Rehabilitation Centre (CBR) heavily influence the development and potential of

CWD within society. In the case of Jakob Renner (An Infant Suing Through His Father And Next Friend, Gilbert Renner) & Ors. V Scott King, Chairman Of Board Of Directors Of The International School Of Kuala Lumpur & Ors. [2000] 5 MLJ 254, the court had granted an injunction against school authority for prejudicing special needs students where the school authority fails to provide facilities to cater the needs of a student with disabilities. According to the reports by UNICEF and SUHAKAM, there are insufficient numbers of facilities in schools and CBR that might cater the needs for CWD. Furthermore, the lack of special education teachers and personnel especially in the CBR centre would deter the efforts to implement inclusive education. The shortage of human resources is pertinent to ensure continuous and adequate supports for CWD in getting proper education on an equal basis with others.

Recommendations and Conclusion

This article showed that Malaysia has fulfilled its international and domestic legal framework to promote and protect the rights of people with disabilities especially the child. However, Malaysia still faces the issues and challenges mentioned above in order to carry out the human rights-based approach towards disabled people especially the children. The experience of CWD facing negative stigma and discrimination must be taken into account by policy makers and professionals to develop and improve new laws and policies related to them. It is suggested that the Government should work closely with other stakeholders such as private sectors, non-governmental organisations (NGO) and disabled people organisations (DPO) to address the concern involving CWD in various aspects of life with the goal to become a barrier-free and fully inclusive society for better future of Malaysia.

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Using Images In Enhancing Learning Skills Among Pre-School Children

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Abstract

Preschool education has become one of the fundamental aspects in our society. Most of the parents today realized that their children need to be exposed with proper early development process. This process includes in the aspects of understanding and recognizing skills in pre-reading, language, vocabulary and numeracy skills. In some parts particularly in advanced countries, the use of photographic images have become as one of methods in teaching and learning. In Malaysia, using photographic images has not practiced this type of learning by using photographic images in pre-school education level. This is might be due to the lacking of skills and manpower among respective staff. The objective of this study is to explore the impact of photographic images in enhancing learning skills among pre-school children. The main two methods of observation and interviews are employed in gaining relevant data at selected pre-schools. The findings of this study indicated that children are likely reacting positively and effectively when the teachers used various photographic images. In conclusion, using photographic images in learning activities can absorb information given in faster way and it also becomes more enthusiastic in learning the subject in full of fun and non-stressful.

Keywords: Cognitive, photographic images, pre-school children, teaching and learning

Introduction

Education creates an impact on human development growth. Education provides people with the tools and knowledge they need to understand and participate in today's world. It helps to sustain the human values that contribute to individual and collective well-being. It is the basis for lifelong learning.

Education can be justified into two parts; formal and informal. Simkins (1976) analysed non-formal education programme in terms of purposes, timing, content delivery systems and control and contrasted these with formal educational programmes. According to Jeffs and Smith (1990, 1999) formal education would broadly approximate to curriculum formation and informal education would arguably be a non-curriculum or conversational form.

Parents are a child's first and most important teachers. A child's cognitive development during early childhood, which includes building skills such as pre-reading, language, vocabulary and numeracy, begins from the moment a child is born. There is a strong connection between the development a child undergoes early in life and the level of success that the child will experience later in life. When children reach five years of age they go to school to embark on "proper" or formal learning. The teacher delivers this curriculum and children learn what they are told to learn.

According to Tommy G. Thompson (2002), the years from birth through age six are a time of extraordinary growth and change. Therefore, in these years children develop the basic knowledge, understandings and interests they need to reach the goal of being successful learners, readers and writers. All young children deserve experiences that will help them to achieve this goal.

Children's development process can be influenced by characteristics of the physical setting. Kindergarten being a place for them to learn should provide effective physical environment to assist the children to display their genius. Young children need good instruction to develop the thinking, language abilities and early literacy skills needed for continued school success.

Furthermore, an important role in ensuring that "no child is left behind" is a big responsibility. As a researcher, we need to help children to increase their knowledge to the highest level that suit their ability. There are ways to create an environment in preschool classrooms that will nurture children's natural curiosity and their zest for learning. Growing up in a visually dominant culture, young children know that images communicate and to distinguish harmful stereotypes and apprehend the various sides of more complex statements. Learning artistic medium provides the types of engaging activities that educators strive to bring into the curriculum. By becoming image readers, children learn powerful communication and problem-solving skills and become more equipped to navigate our challenging and visual culture.

By using the photographic images practices of a group of 5 and 6-year-old children participating in a one school term research project, this research enhance the learning skills assigned to the images role. Photography has become a key aspect of identity in a visual world. An essential argument to this end, is that images operate similarly to language as a symbolic system with which people participate in

culture, as a “tool for establishing (that is maintaining, creating) social and psychological realities” (Ochs, date, p.210).

Today, words are the dominant venue for delivering information to students in the classroom (Flood & Lapp, 1997). Most instruction is presented in lecture form or from textbooks (Darby & Catterall, 1994). However, limiting academic communications to this extent may have unfavorable effects on children. Children who are not as fluent and comfortable with linguistic modes of expression may have difficulty learning and expressing their knowledge (Hornig, 1981). Researchers have found more ways of knowing in addition to linguistic (Gardner, 1983; 1999). Another way many students can process and assimilate information is through the use of visual information (Sinatra, 1986).

One observation of Silverman’s (2012) study was support the children who come equipped with powerful right hemisphere need to be cherished for their tremendous potential as artists, builders, designers, musicians, innovators and actors. Our society needs their gifts. She suggested that further research is necessary to understand the relation between visual-spatial learners and school. Silverman (2012) stated that:

...stop treating them as defective if they can’t read by six, if their handwriting is poor, if their spelling is atrocious, if they’re hopelessly disorganized or if they turn in assignments late. They are all left-hemispheric values. Instead, we need to look at what they can do well, what fascinates them, what deliciously lovable about them. That is how we will reach them. Teach to their delights. Believe in them. Love them and they will blossom. (p15)

Research from above mentioned sources suggests the need for larger samples and longer interventions. In addition, the information derived from this research could be used in giving a broader spectrum of results and also support the validity for other studies. If indeed there were a relationship between learners and visuals, this would provide a benefit to visual education as a whole. The results of this study could also be instrumental from the perspective of visual in the curriculum and the holistic education of children as a result of their experiences in visual. The school where this study would be conducted is particularly suited to the above type of research because of the sample of kindergarten students and the fact that the theory of visual learner has been a practice in their teaching method.

Research by Wendy Paige Free's (2004); study for the view that images instruction at younger ages was more likely to result in improved learning outcomes. She also suggested that further research is necessary to understand the relationship between image and text. Wendy (2004) stated that:

...it would be useful to study how text and images interact to produce greater factual understanding in order to develop instruction to guide students to draw highly effective pictures for assisting comprehension. A cooperative effort by visual and language arts educators to promote the technique of illustrating text towards gains in understanding would be fruitful. (p.166)

Aims & Objectives

Children are now growing up in a visual age. They use images to make sense and make meaning of their social worlds.

This study aims to explore the role of photographic images play in the kindergarten-learning environment to enhance their learning skills. It is the goal of this research to address the uses of images through a visually based research project studying the photographic practices of a group of children through “be smart with stanger” lesson.

Objectives:

- i. To examine the current practice of learning and teaching in the kindergarten school.
- ii. To explore the fundamental of photographs images in learning process in the kindergarten school.

It is hope that by focusing on the functional and directly communicative aspects of photographic images as medium tools, students, in addition to experience the aesthetic appeal contain within an artwork, would also experience a gain in factual information from a picture to clarify an intellectual concept. That may positively affect students' performance in many academic classes that will enhance their learning skills.

The primary question of this study is:

Do photographic images in a form of learning process be an alternative way to educate and encourage children to foster practical learning skills?

Supporting questions include:

- Is there a difference in learning the levels of text that is accompanied by a photographic images and text that is not supported by the images?

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- Do photographic images affect knowledge adoption in a specific way?

In general, the use of this study application allows for new research possibilities and approaches appropriate with children's natural development. Every child has the inherent potential to achieve great accomplishments. The key is to identify children's unique strengths and build on them while providing sufficient opportunities to develop other abilities as well.

This study will add to the growing body of knowledge relating to photographic images task performance and its relationship to active learning environment. It will also investigate one area of learning practice in an art lesson that may improve the education of students holistically.

The researcher and practitioner can begin to understand how learning occurs, which practices are most effective in relevant to learning processes and how students can be helped to learn more effectively, along with the effects of the relationships between these elements. Learning is not an isolated experience, but rather a series of integrated events.

What Does The Literature Says

Learning to understand pictorial language is essential if pictures are carriers of information (Twyman, 1985). There is a need for the students are able to create and use picture to help worth learning (Lanshear & Knobel, 2003; Larson, Lanshear & Knobel, 2002; Levin, 1982).

Motivation is essential for learning. Children are motivated when they are engaged in an activity that is directed to a goal which they aspire and when they receive positive feedback and encouragement. For this reason, we need to connect to children's interests, experiences, knowledge and skills. According to Piaget (1962), a child is portrayed as a lone scientist, creating his or her own sense of the world. The individual will interpret and act accordingly to conceptual categories or schemas that are developed in interaction with the environment. The active processes of internal assimilation, accommodation and equilibration construct the knowledge of relationships among ideas, objects, and events. Until children construct a certain level of logic from the inside, they are nonconservers because they can only base their judgment on what they can see.

Piaget (1962) also proposed that development follows an invariant sequence. The early childhood years are characterized by two stages. During the sensorimotor period (birth to 2 years), children acquire

schemes for goal-directed behavior and object permanence. In the preoperational stage (2 to 7 years), children begin to use words, numbers, gestures and images to represent objects in their environment.

Naturally, children are natural problem solvers who create new ways of thinking towards a new problem or solving an old one. They get away from the conventional ideas and arrive at the solution of problem in an unusual way. “The thoughts and behaviors characteristics of creative individuals are termed creative processes; those products which come to be valued are termed creative achievements” (Gardner, 1988). In early childhood settings, children interacting with one another can offer countless opportunities for children to grow in their problem-solving abilities. These important experiences help children learn to value different kinds of thinking.

Research has demonstrated that pictures are helpful in acquiring and retaining knowledge (Goolkasian & Foos, 2002; Horng, 1981; Levin & Lesgold, 1981; Pressley & Levin, 1983; Schallert, 1980). There was one students sat in rows of straight-backed chair facing the teacher. Teacher talked; students listened and recited facts and numerical properties that had been committed to memory. This curriculum designed to prepare children to enter the work force in their adult lives.

All of this is changing as we move into a new millennium. Reading, writing and arithmetic are the curriculum of the sequential left hemisphere. We are now in the midst of an enormous cultural transformation that began with movies, then television and then computers.

Children with different characteristics may absorb the learning and teaching skill in a different way. Each child develops to his or her age and mental ability. One of the teaching methods which can accommodate for this problem is The Multiple Intelligences Theory introduced by Dr Howard Gardner. Recent research has been proven that Multiple Intelligence Theory could interact directly to the children in a fun way which may educate children to learn more about what they are triggered to do.

Spatial Intelligence, identified by Gardner (1983) as one of his original seven intelligences, involves “picturing things in head” and includes the abilities to imagine folding and turning an object, to visualize the three-dimensional object associated with two-dimensional drawing and to recognize pictures of the same object drawn from different perspectives. Gardner (1999) also identified visual communication as a part of spatial intelligence which involves the abilities of visual perception, manipulation. Representation – recognizing, working with and reproducing what is seen.

Photography images are appropriate for children with a variety of communication or social deficits. Photography images can be simple reminders of the words needed to get assistance or provide suggestion for phrases to initiate conversations. Much of the research supporting the use of images demonstrates their use with children; this could increase student success in building and demonstrating knowledge. (Charlop-Christy & Kelso; Krantz & McClannahan, 1993). With reading comprehension readers increase understanding by providing picture illustrations which is imperative. (Krantz & McClannahan, 1998).

Promoting the photographic images as an effective and acceptable form of communication in the school setting and providing instruction to students on how to work with images may address the problem of overdependence upon linguistic expression in schools. Students who receive instruction in working with information from images will be able to choose to use them as a means of communication. They will not be limited to words as their only venue for gaining and expressing knowledge. Formally defining images as a distinctive form of communication creates another route for information to flow from students.

Photographic images not only could be one of an effective tools for enhancing learning skills, but also as one of the medium that will be a part of continuous role in life. The complete saturation of our lives by visual media, including television, the internet, video games, movies, advertising of all forms and camera phones among others has fundamentally changed they way we see ourselves, our relationships with others and our environments. Images and practices of image-making have come to play a primary role in communication and in the shaping of social experience (Becker, 1998; Evans and Hall, 1999; Banks, 2001). Children are growing up and forming their identities in the era of the image (FisherKeller, 2002; Vinson and Ross, 2003).

Materials and Methods

The purpose of this study was to determine if photographic images instruction that includes the ability to read and understand the images notation can increase kindergarten students scores. Objectively, this study will restore children puzzle to memorize the images instead of the words that in turn give the word to them.

Research Design

The study is limited to kindergarten students enrolled in Malacca Town area; CEC REAL Kids, Melaka and Yippie Childcare & Development Centre Melaka. The findings may not reflect kindergarten students in other school or students in other area.

This study will only be tested to the preschoolers (ages 5-6). 24 children are selected respectively from two different kindergarten based on Read Krejcie and Morgan (1970), 'Determining sample size for research activities', Educational and Psychological Measurement, 30, 607-10; and Cohen (1969).

This study will provide a product prototype that will be tested on the students. This is because little is known about the relation between photography images lesson and children's acceptance; a qualitative approach was used to gain more insight and understanding about this relationship. According to Jane Ritchie, Jane Lewis (2003), qualitative research provides the opportunity to explore new topics and directions; thereby using the respondents' own words to give meaning to their world (p.4).

A case study protocol contains more than the survey instrument, it should also contain procedures and general rules that should be followed in using the instrument. It is to be created prior to the data collection phase. It is essential in a multiple-case study, and desirable in a single-case study. Yin (1994) presented the protocol as a major component in asserting the reliability of the case study research. A typical protocol should have the following sections:

- An overview of the case study project (objectives, issues, topics being investigated)
- Field procedures (credentials and access to sites, sources of information)
- Case study questions (specific questions that the investigator must keep in mind during data collection)
- A guide for case study report (outline, format for the narrative)

The overview should communicate to the reader the general topic of inquiry and the purpose of the case study. The field procedures mostly involve data collection issues and must be properly designed. The investigator does not control the data collection environment (Yin, 1994) as in other research strategies; hence the procedures become all the more important. During interviews, which by nature are open ended; the subject's schedule must dictate the activity (Stake, 1995).

Case study questions are posed to the investigator, and must serve to remind that person of the data to be collected and its possible sources. The guide for the case study report is often neglected, but case studies do not have the uniform outline, as do other research reports. It is essential to plan this report as the case develops, to avoid problems at the end.

Stake (1995), and Yin (1994) identified at least six sources of evidence in case studies. The following is not an ordered list, but reflects the research of both Yin (1994) and Stake (1995):

- Documents
- Archival records
- Interviews
- Direct observation
- Participant-observation
- Physical artifacts

Therefore, in this case study, researcher employed two types of research design:

- Interview
- Observation

The Usability Measurement

This test is based on the Wechsler Preschool and Primary Scale of Intelligence (WPPSI). This is an intelligence test designed for children ages 2 years 6 months to 7 years 3 months^{xxxv} developed by David Wechsler in 1967. It is a descendent of the earlier Wechsler Adult Intelligence Scale and the Wechsler Intelligence Scale for Children tests.

The current revision, WPPSI–III, is published by Harcourt Assessment. It provides subtest and composite scores that represent intellectual functioning in verbal and performance cognitive domains, as well as providing a composite score that represents a child’s general intellectual ability.

Tests Format : Information - For Picture Items, the child responds to a question by choosing a picture from the given instruction.

Style : For Verbal Items, the child answers questions that address a broad range of general knowledge topics.

Scoring: Table for scores were provided according to the age range. These scaled scores for tests are converted into Pass or Fail; which tables are provided in manual.

Usability Test : The following is a complete list of the tasks used in the study and the rationale behind the creation of each.

Phase 1

Pilot Test: **Introduction to a concept.** How children get acquainted with colors? Use the images of fruits to determine the color.

Rationale: This is a simple search task to observe how participants search for a known item. Help the children learn to distinguish colors, so that children learn colors associating them with the subjects of corresponding color.

Phase 2

Task 1: **Processing the information.** What is the main part of the picture? What does the picture remind you of that you have seen before?

Rationale: The purpose of this task was to see if participants found the identification information about the image and to see if they used the information icon or text link to access the data.

Phase 3

Task 2: **Recall data or information.** Look at the picture carefully. Start with the main part of the picture, the part that seems biggest or most important. Continue studying each part of the picture, moving in a clockwise motion, until you have looked at each part.

Rationale: Similar with task two this task was designed to test the participants' interaction with the images. It is also to link with the use of colors to mark the things, which you don't want your children to play with.

The primary question of this study was: Do photographic images in a form of learning process be an alternative way to educate and encourage children to foster practical learning skills? More specifically, researcher set out to examine the current practice of learning and teaching in the kindergarten school and to explore the fundamental of photographs images in learning process in the kindergarten school.

Along with testing the product prototype researcher developed, it was necessary to test whether varying presentation of images affected students' learning skills. Since the test focused upon 3 different tasks, it was important to know the significance of the photographic images on the students' ability.

Researcher measured study participants' scores on three different tasks for which photographic images were shown by the teacher to determine the impact of these variables on the learning basis. Once researcher procured that data, researcher was able to study the effects of the testing by comparing test scores.

Results and Discussion

Along with testing the product prototype researcher developed, it was necessary to test whether varying presentation of images affected students' learning skills. Since the test focused upon 3 different tasks, it was important to know the significance of the photographic images on the students' ability.

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Based on the result of usability testing, more children likely react positively and effectively compare to them who cannot understanding the basic elements in these testing. This can be proven based on the results in Chapter 6. From the result, majority of the students can understand what they learn through these learning methods.

Observation (during Pre-Posttest)

Results from the pre-posttest analysis showed children that were exposed to the use of photographic images in lesson skills exhibited higher degree of understanding. They also became more enthusiastic about learning the subject and they were also in an environment which was fun, non-stressful and one in which they felt comfortable and were enjoying themselves.

Children aged 6 years old showed slightly an impressive result compared to children aged 5 years old. However, both groups of children aged 5 and 6 years old showed an excellent performance and results in the particular test. The results confirmed the research question, which is stated that photographic images in a form of learning process be an alternative way to educate and encourage children to foster practical learning skills.

Interview Session

The interview session provided much feedback and positive views from the teachers. The positive feedback was obtained not only from the teachers who taught the focus groups but also from other teachers who taught at the particular preschools.

Teachers who had successfully taught the focus group using the photographic images flash cards and posters in return showed a positive development. Among the positive developments that were stated by the teachers were:

- i. Respondents, who were silent, react more quickly to questions and instructions from the teachers.
- ii. Respondents who were weak and were not really able to recognize letters, successfully learned to recognize images in a few lesson.

Colors and large images are among the most important contributions in childrens' development. The study incorporated the use of both these aspects and that is also one of the factors that made this study a success, helped by the right approach taken by the teachers. The use of a variety of colors and large images, simplicity clarity are the best ways to make children understand faster.

Time also plays an important role. If implementation period is too short, the students might not be able to grasp what was being taught and if it is too long, the children may lose focus, which makes it harder for teachers to handle the situation. However, the interviews also pointed out that the teachers and researcher to achieve the goal of this study had implemented method.

Finally, the results from all the above show that there are many factors which need to be taken into consideration in ensuring children achievements. At this stage, they need to be exposed to good approaches and methods so that they can understand faster and become more successful in every thing that they do.

Conclusions

Throughout this research, researcher has explored the ways in which selected preschoolers use photographic images as visual aids in their lesson. Through their descriptions, constructions and representations, these associations of images become diagrams with which to navigate those situations. As they move through the images and use them to locate the actual conditions, they identify the meaning all over the instructions of the images. The photographic images make sense of their social experiences and place themselves in relation to others within these arrangements.

Hall (1996) writes:

We shouldn't consider the photographs themselves to be illustrations of the children's understandings of their identities. Rather, it is how the images are first made and then used that reveals how the children enact identities and ascribe meanings to them within a particular social context. The photographs were often used to talk about the process of growing up and what means to them.

In parallel, when creating lesson with addition of photographic images, students were eager to share their knowledge with others. They were enthusiastic about displaying their efficient and accurate approaches to translate the lesson content. They were also anxious to see how others had solved the lesson objectives, identifying similarities and differences in their responses.

This research also found that preschool teachers were very receptive to the photographic images teaching aid because indirectly it can help them to ease any lesson for their students. Results from the research also showed that children absorbed this method of learning faster.

With the availability of these teaching and learning aids, it is hoped that preschool children will feel more enthusiastic and confident about their structured lesson structure, so that the number of students not interested in reading, eager to learn something that can encourage them to do so.

Recommendations

Although photographic images and development of preschoolers' task performance appears to be flourishing, additional research is needed to test the validity of this claim.

- i. Replicate the study using kindergarten students several elementary schools to determine if the outcomes are similar to those found in the present study.
- ii. Replicate the study using children enrolled in preschool to determine if teaching involved photographic images to compare outcomes with previous research using children in this age group.
- iii. Investigate the age-levels that may be most receptive to development of cognitive processes involved in photographic images and the development of visual task performance.
- iv. Use an experimental research to examine the effects of photographic images on visual task performance beginning with early childhood and continuing through elementary school.

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- v. Further research should be extended to include a wider variety of tasks or lessons to measure the ability of the preschool children to absorb the learning based and then compared with the results of this study.

For optimal results in the long term, children's thoughts, perceptions, decision arguments and abstraction capacities should be taken into account in the development of interventions for encouraging photographic images aids among children.

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Bullying at Schools and Its Prevention through the School Rules (Case Study in Ten Senior High Schools in Semarang, Indonesia)

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Abstract

Given that bullying at school is rampant in Indonesia, a study on bullying prevention in order to obtain the experience of teachers and students and the response of school management through the school rules is needed. The study was conducted in 2015 in ten schools in Semarang city. Data were undertaken from 65 students and 5 teachers of each school as participants. The study has demonstrated that bullying was committed by teachers to students and inter-students. Teachers have had name calling to students and physical violence; meanwhile, students bullied other students verbally, physically, and socially. Most of the school rules have regulated violence but they do not mention about bullying. Most of students seemed to keep silent when they become victims and bystanders. The effort to establish a school rule in order to socialise bullying and its prevention has been facilitated by authors (as researchers in this study) through a workshop and focus group discussion. The school rules have initiated the schools participants to create anti-bullying program by providing anti-bullying poster and other activities.

Keyword: bullying, prevention, school rules

Introduction

The United Nations has stated that forty per cent children in Indonesia become the victims of bullying in Indonesia (Wike, 2015). In the past, the study on violence against Indonesian children which was conducted by Global School-based Student Health Survey (GSHS) identified that forty percent out of eighty millions Indonesian children aged between 13 and 15 have had the experiences of being bullied physically in school.

Bullying at school is rampant in Indonesia (the Jakarta Post, 2015). It is caused by a misunderstanding paradigm in parenting. The paradigm takes a value that punishment (physically) must be undertaken to discipline children. According to him, Indonesian parents mostly-approximately 80 percent- hold such value (Ahmad Romadoni, 2014; Nafisul Qodar, 2015; Tim Liputan 6 SCTV, 2014)). Bullying at schools is one of the leading reasons for child suicides in Indonesia. The suicides highlight a worrying trend in the country where as many as 30 children aged six to 15 either committed or attempted suicides in the first half of the last decade (2001 to 2005) (SEJIWA, 2008; Wahyudi, 2011).

Given that bullying practices at schools have taken the children at risk in Indonesia, the authors conducted a research on students's participatory in developing school rules to prevent bullying at school. In this article, the issue was discussed in three parts. The first part describes the practice of bullying at ten schools in Semarang City; Second, the discussion was on student's opinion of being participated in making school rules, and the last part discusses the rules made by the students.

Methods

The study was conducted in ten high schools in Semarang city either public or private schools in 2015. The respondents were seventy students at tenth and eleventh grades from each school, and five teachers in each school. The aims of the research were to develop a school rule on bullying prevention by investigating bullying at schools and students' opinion on the rule, and also developing the formulation of the rules. The data were collected through questionnaires and focus group discussion.

Definition of Bullying

Mestry et al. (2006) state that bullying is an action with an intention from someone to other in order to hurt repeatedly. According to Coloroso (2005), "bullying is not about anger, or even about conflict. It is about contempt – a powerful feeling of dislike towards someone considered to be worthless or inferior, combined with a lack of empathy, compassion or shame". Article 19 of Indonesian Ministry of Education Regulation no. 82/2015 defines bullying/*perundungan* as an action to disturb, to tease and to distress continuously. Based on these definitions, bullying occurs because of power imbalance between two individuals; individual in groups or two groups (Raj Mestry et al, 2006).

In most cases, bullying occurs when the victim is vulnerable, displaying physical and psychological qualities; these are triggering factors. The victim usually has a lack of support. As a consequence she/he feels isolated, exposed and scared. In these cases, the victim experiences anxiety, fear, depression, a decrease in academic achievement, lowered self-esteem, and, in severe cases, even suicides (Susan P Limber, 2011; De Wet, 2003; Smit Me, 2003; Kamman, 2000).

Bullying at Ten High Schools in Semarang City

The study on safe school and bullying at schools in Semarang City has demonstrated that the school rules in ten schools have regulated physical violence and its sanction, but they never mention about bullying and its prevention as well as the solution. The study has also showed that bullying had been committed by teachers to students and inter-students. Teachers have had name calling to students and physical violence; meanwhile, students bullied other students verbally, physically, and socially. Most of the students were familiar with the word bullying. The students got the information about bullying

from various sources, such as television, social media, friends. However, few of them got the information from their teachers or schools (Rika Saraswati and Venatius Hadiyono, 2015).

The studies on bullying have demonstrated that more males become the victims than females. The gender of the students who committed to physical bullying mostly was male, but female sometimes has also committed to bully other students physically (Shu-Ling Lai et al., 2008). Sometimes female students have a corporation with male student bully other students collectively. Therefore, both male and female students can commit to such bullying regardless of their gender. There is a stereotype that only male (students) who commits to physical bullying, while female (students) commits to verbal and social/relationship bullying (Shu-Ling Lai et al, 2008).

Table 1. Doer, Gender, Type, Place and Time of bullying

No	Name of Schools	Doer			Gender			Type of bullying			Place					Times		
		T	S	SS	M	F	M/F	V	P	S/R	C	Sy	Cn	T	Pr	6mt	1yr	2Yr
1	PHS 3	5	30	25	8	8	28	21	14	23	27	13	9	2	3	14	14	13
2	PHS 9	6	44	22	25	8	32	40	23	22	49	13	3	6	6	33	8	13
3	Sedes Sp	6	50	13	25	6	34	39	15	42	50	9	4	5	1	34	21	11
4	YSKI	4	52	15	21	3	39	40	17	18	49	11	5	5	0	34	7	11
5	Teuku U	1	35	9	19	14	17	19	9	17	31	11	2	3	2	27	5	4
6	Saint L	2	34	22	20	25	8	28	27	19	28	13	6	5	8	25	10	9
7	Don B	1	53	14	27	8	27	28	25	23	44	17	6	8	6	20	24	15
8	Karang T	7	36	10	20	6	23	31	22	20	37	5	3	3	3	29	7	7
9	Institut	2	44	9	22	7	21	31	10	21	45	8	7	2	4	21	6	7
10	Nasima	4	49	11	7	15	38	39	17	21	49	8	7	4	4	21	4	0

Sources: Rika Saraswati and V.Hadiyono, 2015

Explanation: T-Teacher, S-Student in the same class, SS-Senior Student, M-Male, F-Female, M/F-Male and Female, V-Verbal, P-Physic, S/R-Social/Relational, C-Class, Sy-School yard, Cn-Canteen, T-Toilet, Pr-Park, 6mt-six months, 1yr-one year, 2 yr-two years

Students' Responses on Bullying

The students' responses when bullying occurred were various, such as reporting to teachers or principal, telling to other students, sharing to parents, keeping silent and complaining to doers. The report to teachers was more often compared to principal because only a special teacher who had an authority to give counselling psychologically or to handle other students' problem.

Studies have demonstrated that bystander or witnesses kept silent because of some reasons, such as affraid of being bullied, being isolated, having conflict with others, and trying to ignore the problem (Raj Mestry et al, 2006). In this study, the students seemed to believe that keeping silent is a right choice because they did not have to take any risks; however, this behaviour has kept bullying existing and did not change the doer's behaviour and did not help the victims' behaviour. To encourage the students to speak about bullying, an education for that matter is needed. This program is important to teach students about what the students must do when they see bullying or become victims. Furthermore,

this program should have a program to rehabilitate not only the doers but also the victims. This program has never been designed by schools through their school rules, although the government had issued the regulation on violence (including bullying) prevention and solution.

Students' engagement in designing school rules on bullying prevention

The questionnaires about whether the student must be involved or not in designing school rules on bullying prevention program had been raised in order to investigate the implementation of the children's rights to speech. The right to speech for children is guaranteed by Indonesian government through the Children Protection Act Number 23 of 2002 and Act Number 35 of 2014 as amended.

The Act is passed to support the right of the children to speak out their rights, including giving their opinion. The right to speech is a universal principle for all children in the world, including Indonesia. Therefore, this Act has accommodated this right to be implemented; however, the main barrier to implement this right is the difficulties to change Indonesian culture. As mentioned above, the misunderstanding of Indonesian adults on parenting mindset has also affected the children to speak out. Adult is superior to children- as a consequence, what adult said whether it is right or wrong must be obeyed by children. Children have no power to object the words or orders which are said by adults because they will get a stigma as disobedient ones; sometimes they will get (physical) punishment because of the disobedience.

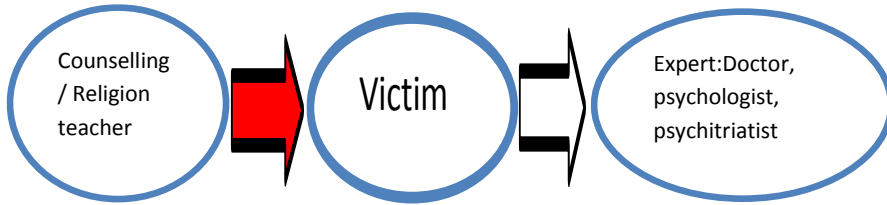
In the context of bullying, the right to speech must be given to the students at the ten schools in the research because they are the persons who potentially become bullies and who might not aware of bullying. Most students of this study argued that their participation in making the school rules on bullying prevention is a democratic process in which the students can participate actively to determine the content of the rules (including the sanction or punishment) for their interest and to fulfil their rights as students – in the future, there is an expectation that the students will have a responsibility to implement and to obey the rules because they understand the consequences if they break the rules.

A Model of School Rules on Bullying Prevention Program

The formulation which was made by teachers and students contained the definition of bullying, prohibition of conducting bullying, type of bullying and responsibilities, scheme of rehabilitation (for the victim), scheme of reporting and resolution.

Victims of bullying will have rehabilitation service which is given by counselling or religion teachers. These teachers are expected to support the victims to cope with the trauma which is caused

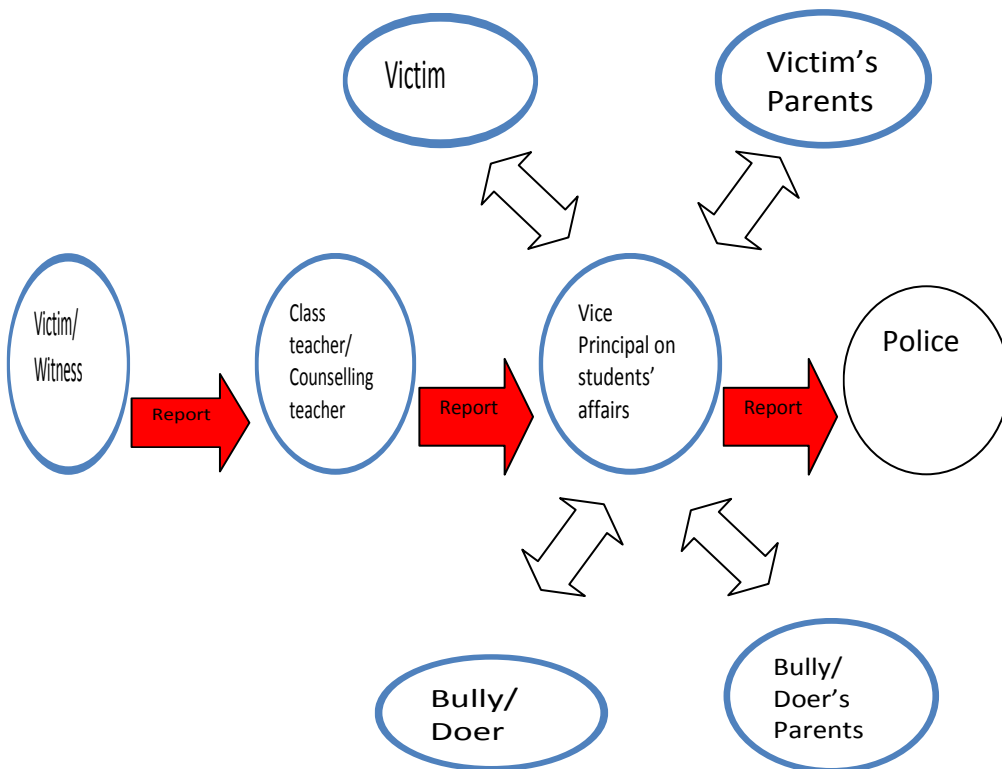
by bullying. If the victims can be healed through this program which is provided by school, the scheme stops until this stage.



Source: Rika Saraswati and V.Hadiyono, 2015

However, if the victims cannot be healed by counselling which is provided by school, the next step is to contact with the experts, such as doctor (for physical injury), psychologist and/or psychiatrist (for nonphysical injury).

Scheme of Reporting and Resolution when Breaking the Rules Has Social Impact on School Community and Police Have Not Been Involved



Source: Rika Saraswati and V.Hadiyono, 2015.

If the vice principal on students' affair cannot mediate the parties because there is no agreement to be reached, he/she will report to the principal. The principal will mediate the parties in order to get a settlement among them. Only if mediation does not meet with success, the principal can report the case to police. In order to increase the awareness of students and teachers, the researchers have given posters on bullying prevention; and the response of the schools are positive because they have put it on the notice board and other medium at schools.

Conclusion

The study has demonstrated that bullying which occurred in ten schools in Semarang. The issue has never been mentioned on the schools rules because of the lack of the school manajement's concern dealing with bullying although the legislation on the rights of the children is issued in 2003 and the regulation on violence (including bullying) is issued by Education Ministry in 2015.

The bullyings were committed by teachers to students and students to students. The types of bullying committed by the teachers and students were various. Some of the students in every school have choosen to keep silent when bullied because of some reasons, such as feeling of shame, feeling of safety, and afraid of revenge. The students agreed to engage in making school rules on bullying prevention program because of some reasons, such as to fulfil a democraton process and to channel students' opinion, to determine the same perception on the rules especially on the sanctions because the rules will be implemented to students, to protect all members of school community and for the best of the school, and to create a safe school.

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Developing a Grading System to Measure Quality of Childcare Centre in Malaysia

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Abstract

The implementation of the grading system in Malaysia is intended to assist and facilitate the users to evaluate and choose the best services offered by service providers. In addition, the grading system can also encourage providers to conduct the proper practice and in accordance with the guidelines and laws set by the government. In Malaysia, the grading system has been carried out on the food premises, driving institutes and public toilets. However, we have found that there is a research gap related to the implementation of the grading system on childcare centre in Malaysia. The implementation of grading system was an attempt to reduce the anxiety of Malaysian parents to send their children to childcare centre. Thus, this study aims to develop a set of guidelines to authority agency namely the Social Welfare Department to establish a grading system on childcare centre in Malaysia. The development of a quality childcare centre scale is according to the following six major steps: (1) literature search, (2) scale development, (3) panel of experts' review, (4) scale purification on pre-test sample, (5) scale verification on survey sample, and (6) grade estimation to develop a grading system.

Keywords: quality childcare centre, developing scale, grading system

Introduction

Although monitoring of childcare centre are often made by the department, cases of accidents due to negligence and deaths of infants or children in childcare centre continue to occur every year. The results of monitoring by the Social Welfare Department found that about 90 percent of 4,240 registered childcare centre failed to comply with the guidelines of the Social Welfare Department which can be dangerous to children. This has raised concerns among parents to send their children to childcare centre. It also raises questions among parents about the characteristics of quality childcare centre. The question

were also raised about how to determine the quality of a childcare centre before deciding to send their children to these childcare centre.

In short, although monitoring is often carried out by the Social Welfare Department, issues related to non-quality childcare centre continue to rise. This situation illustrates the monitoring by the department did not have an impact on the quality of childcare centre. This implies there is a space for researchers to improve the instrument used by the department to assess the quality of childcare centre in Malaysia. In addition, the childcare centre in Malaysia is also not graded, as restaurants are given a grade A (very clean), B (clean) and C (unsatisfactory) by the Ministry of Health (MOH).

The implementation of food premise grading system by the MOH has long been carried out in Malaysia. Even the ABC grading system for restaurants is also carried out in other countries such as Brunei and Singapore. Apart food premises, the grading system in Malaysia also applied on driving institutes and public toilets. Public toilets in Malaysia currently has stars grading system that is controlled by the District Council. The implementation of the grading system is intended to assist and facilitate the users to evaluate and choose the best services offered by service providers. In addition, the grading system can also encourage providers to conduct the proper practice and in accordance with the guidelines and laws set by the government.

Previous research on childcare centre in Malaysia, however, do not clearly measure the quality of childcare centre from Malaysian parents' perspectives. Previous studies also have not been applied grading system on the childcare centre as the implementation of grading system on restaurants, driving institutes and public toilets. Accordingly, this explains the existence of research gaps in measuring the quality of childcare centre from Malaysian parents' perspectives, and in particular to apply the grading system on quality childcare centre. Therefore, this study attempts to fulfil this research gaps.

The aim of this study is to develop scale to measure the quality childcare centre from Malaysian parents' perspective. This scale will provide a new conceptualization related to the characteristics of quality childcare centre from Malaysian parents' perspectives. The findings of this study may suggest the grading system to be implemented by the Social Welfare Department in measuring the quality childcare centre in Malaysia. With the specific instrument, it may be able to reduce the parents' anxiety towards quality of childcare centre and our country may be able to reduce many cases related to the poor quality childcare centre.

The paper is structured as follows. Section 2 describes the current scenario of childcare centre in Malaysia. Section 3 discusses available measures of quality and considers what the literature says about which measures are most relevant for quality of childcare centre. Section 4 discusses the theoretical foundation that is referenced in the measurement of quality childcare centre. Section 5 to 7 elaborates on the research procedure, theoretical and practitioner significance, meanwhile section 8 is the conclusion.

Childcare Centre in Malaysia

Till July 2016 only 4240 registered childcare centre been listed in Malaysia under Social Welfare Department. These statistical data has been mentioned by YB Dato' Sri Rohani Abdul Karim minister in Ministry of Woman, Family and Community Development in her official opening speech in conjunction with the ceremony of Childcare centre Day 2016 and the launching of www.asuhan.my portal. It is such a small number compared to the real numbers of operating childcare centre in Malaysia. As in Pahang itself for instance, the table 1 shows the statistical number of registered childcare centre.

Table 1: Registered Childcare Centre in Pahang, Malaysia

District	Registered Childcare Centre
Kuantan	99
Raub	8
Pekan	9
Bentong	3
Bera	2
Cameron Highlands	3
Jerantut	4
Lipis	11
Rompin	4
Temerloh	13
Maran	0

Literature Review

Childcare centre is an institution where children are get ready to enter a social and educational based environment (Dahari & Ya, 2011). In Malaysia, infants as early as 2 months and children until the age of four years old are registered at childcare centre to be equipped in a structured academic atmosphere under the supervision of trained childcare centre’s teacher before they go into kindergarten. Some researchers (Dahari & Ya, 2011) suggested that there are 12-basic things that should be considered by parents before they choose childcare centre for their children namely suggested twelves dimensions that should be considered by parents before deciding the twelve dimensions are curriculum, language of instruction, qualified teachers, quality of teaching, friendly staff, facilities and infrastructure, transportation, cleanliness and hygiene, safety, class size, nutrition, and location.

There are some dimensions that are proposed by previous researchers to measure the quality of childcare centre in the field of early childhood development. The following instruments are among the measurement tools, which have high validity and reliability that are commonly used in measuring the quality of early childhood education in abroad.

Table 2: Dimension of Quality Childcare Centre

	Authors	Measurement	Domain Observed	Observation Procedure	Scales
1.	Harms and Clifford, 1989)	The Family Day Care Rating Scale (FDCRS)	Measuring the environmental quality in family day care 1. Space and furnishings 2. Personal care routines 3. Listening and talking 4. Activities 5. Interaction 6. Program structure 7. Parents and provider	Questionnaire	37-items; Yes, No, or Not Applicable Response 5-point scale

Table 2: Dimension of Quality Childcare Centre (*Continued*)

2.	Abbott-Shim & Sibley, (1998)	Assessment Profile for Early Childhood Programs (PROFILE)	5 subscales: 1. Learning environment, 2. Scheduling, 3. Curriculum, 4. Individualizing, 5. Interacting	2-3 hours	60-items checklist; Yes/No response
3.	Harms, Clifford, & Cryer (1998)	Early Childhood Environment Rating Scale – Revised (ECERS-R)	Global quality & 7 subscales: 1. Space and furnishings, 2. Personal care, 3. Language and reasoning, 4. Activities,	3 hours + 20 minutes interview;	43 items; 7-point scale

			<ol style="list-style-type: none"> 5. Interactions, 6. Program structure, 7. Parents/staff 		
4.	High/Scope Educational Research Foundation, (1989 & 2003)	Preschool Program Quality Assessment – 2nd edition (PQA)	<ol style="list-style-type: none"> 1. Learning environment 2. Daily routines 3. Adult-child interaction <p style="text-align: center;"><u>4 domains via interview:</u></p> <ol style="list-style-type: none"> 1. Curriculum planning and assessment 2. Parent involvement 3. Staff qualifications 4. Program management. 	2-3 hours + teacher interview;	63 items; 5-point scale
5.	Harms, Cryer, & Clifford, (2003)	Infant/Toddler Environmental Rating Scale (ITERS)	<p style="text-align: center;"><u>Global quality & 7 subscales:</u></p> <ol style="list-style-type: none"> 1. Space and furnishings 2. Personal care 3. Listening and talking 4. Activities 5. Interactions 6. Program structure 7. Parents/staff 	3 hours + 20 minutes interview;	39 items; 7-point scale
6.	Sylva, Siraj-Blatchford, & Taggart (2003)	Early Childhood Environment Rating Scale – Extended (ECERS-E)	<p>Developed to supplement the ECERS-R with more focus on academic achievement (reflects the British national pre-k curriculum):</p> <ol style="list-style-type: none"> 1. Literacy 2. Math 3. Science 4. Diversity 	2 hours + 5 minutes interview;	18 items; 7-point scale
7.	Stipek & Byler (2004)	Early Childhood Classroom Observation Measure (ECCOM)	<ol style="list-style-type: none"> 1. Quality of instruction, 2. Management, 3. Social climate, 4. Cultural sensitivity, 5. Resources 	3 hours;	Time sample of specific behaviours
8.	Pianta, La Paro, & Hamre (2007)	Classroom Assessment Scoring System (CLASS)	<p style="text-align: center;">3 Teacher-child interactions domains:</p> <ol style="list-style-type: none"> 1. Instructional support 2. Emotional support 3. Classroom organization 	2-3 hours; 30-minute cycles of observe-code;	10 items; 7-point scale
9.	Han, Wang and Xu (2014)	Service quality childcare centre using SERVQUAL	<ol style="list-style-type: none"> 1. Tangibility 2. Reliability 3. Responsiveness 4. Assurance 5. Empathy 	Questionnaire	22-items; 7-point scale

In short, based on a review of the instruments that have been used abroad, this paper has identified the key dimensions to take into account when selecting childcare centre quality measures as components of quality rating and grading systems. Although many of the instruments that have been used to measure the quality of childcare centre in abroad, measurement used by the Social Welfare Department is considerably more complex. The inspection report by the regulatory body of the Social Welfare Department indicates that there are nine criteria evaluated whenever they do the inspection. The criteria are building / premises, space, cleanliness, safety, equipment / furniture, activities, menu and nutrition, communication and interaction, as well as management and administration.

The scale used in the form checklist provided by the department is a subjective scale. The use of subjective measurement scale that is “yes”, “no” and “not applicable” perceived as imprecise (Spector, 1992) and raised some questions among service providers. There are concerns and doubts among service providers related to the subjective assessment, i.e. the inspectors have made their own assessment of the quality of childcare centre. This is because the subjective assessment may vary according to the different groups of inspectors and at different times (Aziz, Ismail, & Samad, 2014).

The 'yes' or 'no' answers given by the inspectors in the checklist form also make it difficult for service providers to evaluate the quality of their services. In fact, they are also difficult to make improvements in terms of quality of services based on the reports provided by the Social Welfare Department. The absence of quantitative scale causes the reports prepared by the Social Welfare Department may be inaccurate and can be questioned by the service providers. The absence of a quantitative scale also may slow down the efforts to implement a grading system on childcare centre in Malaysia. Therefore, there is a need to have a specific scale to measure the quality of childcare centre in Malaysia.

Methodology

The procedure used to develop quality childcare centre scale largely follows the guidelines recommended by previous researchers (Aziz et al., 2014; Wotruba & Wright, 1975; Churchill, 1979; DeVellis, 1991). According with these researchers, there need aid six major steps with create scale, which are: (1) literature search, (2) scale development, (3) panel of experts' review, (4) scale purification on pre-test sample, (5) scale verification on survey sample, and (6) grade estimation to develop a grading system (see Figure 1).

The first step has already been done where we have referred to the previous instruments that have been used to measure the quality of childcare centre in abroad. The second step to be done is to change the measurement scale than originally using subjective measurement to use a Likert scale. The development of the scale is only involve the instrument that has been used by the Social Welfare Department in Malaysia.

The third step in developing quality childcare centre scale is by appointing a few panel experts from the academicians and a few representatives from Department of Social Welfare, to validate the contents of the first draft questionnaire. The panel experts will be asked to indicate the extent to which each

scale of item is appropriate to measure quality of childcare centre on the following scale ranging from: (1) for “very precise measurement scale”; (2) for “satisfactory”; or (3) for “need improvement”. This step is accordance with the study done by Aziz and colleagues (2014) in the process of developing scale of quality maid in Malaysia.

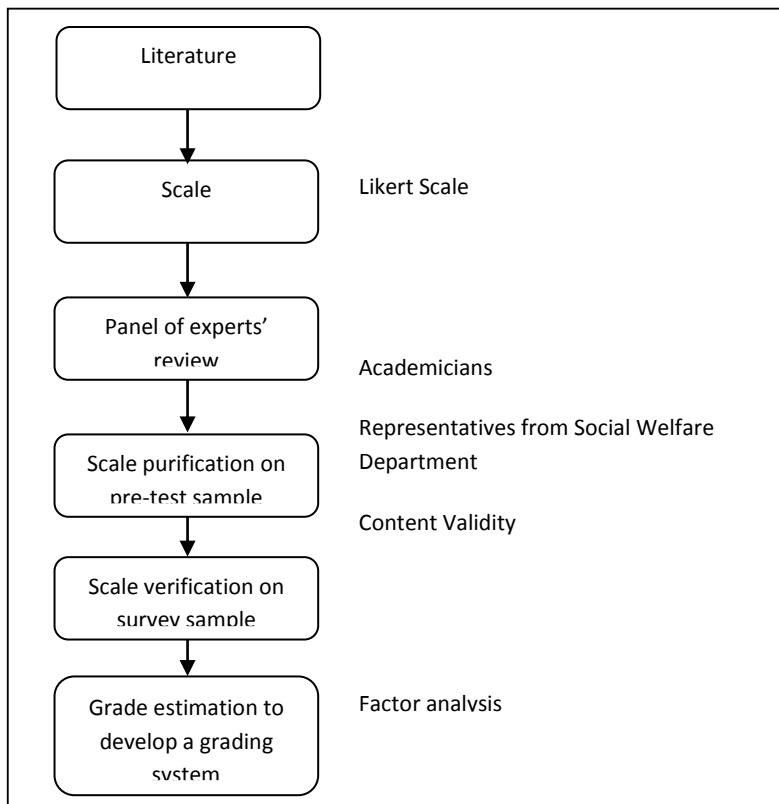


Figure 1: Steps in Developing Quality Childcare centre Scale

Once obtaining approval from a panel of experts on the development scale, the process of verifying the instruments will be initiated. In order to determine the reliability of the scale, the instrument will be pre-tested in a pilot study involving several childcare centre. The main purpose is to get feedback from service providers of childcare centre regarding the content, scale and format of pilot study instruments. Then; the various content validity tests will be conducted. The tests will involve exploratory factor analysis, Cronbach alpha coefficients, convergent validity and discriminant validity.

After statistical analysis carried out on the proposed instruments in the pilot study, modification and purification of instruments will be carried out once again. Then the actual fieldwork will be carried out where the instrument will be tested on more childcare centre that will be selected using simple random

sampling. Then, the statistical procedure will be carried out to verify the reliability and validity of the proposed instrument. The statistical procedure will involve exploratory factor analysis, Cronbach's alpha coefficient and criterion validity. After all these steps are carried out, and the instrument is ready to be used by the Social Welfare Department to implement a grading system on the childcare centre in Malaysia.

Significance Contributions

The originality of this study may contribute to a formation of a new body of knowledge and enrich the literature sources in the field of scale development that will benefit the academicians. This study also may serve as a starting point for further researchers to conduct a research that focusing on determining the impact of having a quality childcare centre on the early childhood development.

This study also may contribute to practitioners and policy makers. The development of a scale may provide a more accurate evaluation on the quality childcare centre in Malaysian. Also, the scale could be useful as a tool to capture the qualities dimensions of childcare centre in order to give knowledge and understanding for parent to make choice. In addition, this study also contributes to the policy-makers in formulating strategies to implement a grading system on childcare centre in Malaysia.

Conclusion

Collaboration between Ministry of Woman, Family and Community Development(KPWKM), Social Welfare Department and NGOs and together with Persatuan - Persatuan Pengasuh Negeri to advocate high quality standard of childcare centre in Malaysia that will provide a better practice among the childcare centre community in achieving professionalism in taking care of the children. Investing in the children is the investment of the betterments of the nation.

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Development of Women Netpreneurs for Digital Economy

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Abstract

Women SMEs in Malaysia have reached almost 1.18 million according to an analysis done by SME Corp. In relation to this matter, there is still a big gap of women entrepreneurs in Malaysia owns online business as compared to men. It was observed half of the population of online women entrepreneurs come from urban areas around Klang Valley. However, there is still a digital divide among women entrepreneurs around rural and marginalised areas and those at the urban area. Many are still not given chance to participate in this digital marketing. This paper explores the issues related to the low involvement of women entrepreneurs and online business such as low digital literacy, limited English proficiency and lacks of online marketing skills. This paper will share several initiatives taken by UKM in developing online women entrepreneurs.

Keywords: Digital literacy, English proficiency, netpreneur, online business, women SMEs.

Introduction

Women entrepreneurship is important for women's position in society, and economic development of women will lead to development of family, community and country. (Mishra & Kiran, 2012) Women entrepreneurship development is instrumental in developing woman's social economy status and to empower them. Empowerment through entrepreneurial activities lead to self-fulfillment and makes women aware about their status, existence, right and their position is in the society.

The number of women entrepreneurs in the small and medium enterprise segment is expected to increase 10% over the next four years. (smebank.com.my) At the moment, SMEs constitute of 97% of the businesses in the country, and contribute 31% to the country's GDP. Of these businesses, 20% are owned and managed by female entrepreneurs. According to the SME Masterplan 2012-2020, the government is targeting to increase SMEs' contribution to GDP to 41% by 2020, and women

entrepreneurs are expected to play an important role in achieving this. “If the target is achieved, SMEs led by women are expected to account for one-third of the total SMEs,”

In Malaysia, SME is the main sector as it dominates 98% of total companies, which is around 550,000 (smebank.com.my). SME Bank stated that women are good borrowers and highly responsible when it comes to settling their debts based on anecdotal evidence. Women involvement in the SMME industry contributes to the increase in family and national income. Their products are all cottage-based such as tapioca chips, frozen foods, sauces and crafts are gaining popularity via online marketing and getting global interest.

Problem Statement

Due to the increasing rate of technologies in education, entrepreneurial activities, marketing and branding and also decision making, there is a need to assist women of Malaysia to be digitally literate and take advantage of the ICT. The low e-inclusion rate among Malaysia women urge the government to initiate many programs that can increase the digital literacy and at the same time to get the value offered.

The digital economy forces the women to be involved almost immediately as they are the decision maker and they are the product-purchaser at home for their families. Women are also the majority purchaser of online products related to fashion, arts and crafts, food, accessories, ICT gadgets and books.

Due to this, several projects were undertaken by UKM to increase e-inclusion among women such as E-Usahawan Wanita, Inita Project and Smart Marketing Platform for Smart Scale Produces Project.

Objectives

This paper intends to present an overview in the development of women entrepreneurship for digital economy in Malaysia. Since Malaysia just gained its independence 56 years ago, it offers limited ground to cover on the role of women other than as a traditional home maker. In addition, this paper will also highlight UKM’s initiatives and contributions in empowering women entrepreneurship through various mainstream researches and programs.

Digital Economy: The Golden Opportunity

Currently, we are living in the Information and Communication Technology (ICT) revolution era, where our life is leading by the use of advanced technologies, especially in the growth of information

technology. In the economic aspect, this revolution has changed the world from industrial-based into the world of endless information supply. Internet offers unlimited services to suit our need. It changes the way we conduct our lives, the way we do our business and the way we spend our money. What is known as digital (using or characterized by computer technology) (Merriam-Webster) economy, it has a lot to offer.

Information and communication technology (ICT) is a key in the development of a country towards achieving a developed country status (Norizan, et al., 2007, Norizan et al 2009). ICT can also give rural communities the opportunity to empower themselves in terms of life-long learning and getting a job and marketing their products. (Norizan, et al., 2007) In order for business to grow it is necessary to apply the use of ICT efficiently and online transaction using PayPal or other online payment gateway. (Norizan et al. 2009)

Formally, the concept of digital economy itself does not have standard definitions. (Hojeghan & Esfangareh 2011) Because when referring to information technology, it refers to information processing and related equipment, software, semiconductors and telecommunication equipment. References to electronic commerce will mean the use of the Internet to sell goods and services. So ideally digital economy includes both information technology and electronic commerce. (Hojeghan & Esfangareh 2011). The idea of digital economy can be referred as an economy that is based on digital technologies, although it is increasingly perceived as conducting business through markets based on the internet and the World Wide Web (The British Computer Society).

However, in terms of coverage area, the digital economy is not limited to traditional business models. It encompasses every aspect of modern life, entertainment, health education, business to banking, the ability of the citizen to engage with government and society to stimulate new ideas and help influence political and social change. Digital networking and communication infrastructures provide a global platform over which people and organizations devise and employ new business strategies, interact, communicate, collaborate and seek information regardless of time and location. (The British Computer Society).

The ‘digital economy’ is still a relatively new concept in policy-making replacing terms such as “the information economy” (1970s), “knowledge economy” and “e-economy” (1980s), “new economy” (1990s), or “network economy” and “Internet economy” (2000s). Although there is no single definition of digital economy, there is general agreement on certain fundamental principles. The basic idea of the digital economy is that the manufacturing of products, services, lifelong learning and innovation are

made possible by modern technology support transmission and processing in the context of market globalization and sustainable development. (Ciocoiu 2011)

Women Entrepreneurship in Malaysia

Malaysia government begins to address women entrepreneurship formally in Sixth Malaysia Plan (RM6) (1991-1995). This is prior to the introduction of Dasar Wanita Negara (DWN) in 1989 which acts as a ground policy to acknowledge and recognize women as one of the key player for national development. This policy highlights women's roles and rights to be included economically, socially and politically along with the other respective gender. This policy can be seen as a start in increasing equality and promoting inclusive economic and social growth.

In RM6, government focused on providing education and financial aids in order to encourage greater women participation in business. In the RM6 book, government emphasized that women must be equipped with entrepreneurial skills to promote their own business in addition to further diversify their participation in the economic sector. Seventh Malaysia Plan (RMK 7) (1996-2000) continues to address women's needs and provide the appropriate atmosphere to enable them to participate as a partner in social and economic development more effectively. This effort has been strengthened with the establishment of Women's Institute of Management (WIM) in 1995, which the main role is to lay out business opportunity grounds for women by providing training in small business and entrepreneurial activities. Training in business-related fields such as marketing, financial management, budgeting and planning was carried out by governments and various agencies to enable them to become more skilled and knowledgeable in the field. In addition, government also provides guidelines for negotiators and coaches as well as providing financial assistance.

Eighth Malaysia Plan (RMK 8) (2001-2005) provides special training programs in skills and entrepreneurship for women to develop themselves and to seize the opportunities that exist in the market. In this regard, courses such as business management, organizational and financial management have been mentioned specifically as the critical skills to have. Training programs at Pusat Tenaga Pengajar dan Latihan Kemahiran Lanjutan has been expanded and has proudly reported an increase of 19.4 per cent participants' enrolment between 1995 and 2000. Financial aid was continued to be given. Tabung Usahawan Wanita was created in 1998 and a number of projects worth RM9.5 million were approved under this fund. Through the Small Entrepreneur Fund, a total of 6,000 women entrepreneurs have received total loans of RM65 million. Generally, various organizations and agencies have been set up as a foundation for building network, exchanging information and experiences and to run training

programs, seminars and workshops on motivation, leadership and business development. Women's Institute of Management (WIM) still actively involved at this time. In addition, the Institute for the Advancement of Women, Entrepreneurs Association and the Federal Association of Bumiputera Entrepreneurs held courses and seminars in skills development and entrepreneurship. A total of about 10,000 women have benefited from this course.

In the Ninth Malaysia Plan (2006-2010) shows the implementation of working from home concept. It was designed to encourage more involvement from women in business activities, however this time focus is given on industrial and agricultural sectors as biotechnology field has been identified as a new source of growth. Women entrepreneurs were encouraged to capitalize on its potential, especially in agriculture and health care. Single Mothers Skills Incubator program (I-KIT) was introduced to improve the skills of a single mother. I-KIT focused on seven areas, namely tailoring, handicrafts, tourism, beauty therapy, business, entrepreneurship and child care children.

RMK 10 shows development programs for single mother; Single Mother Skills Incubator (I-KIT) was expanded and strengthened. The smaller programs were expanded through the Smart Radius and Women Entrepreneurship Incubator (I-KeuNITA) such as stitching and beading activities. RMK 11 expands financial aids through multiple financial institutions.

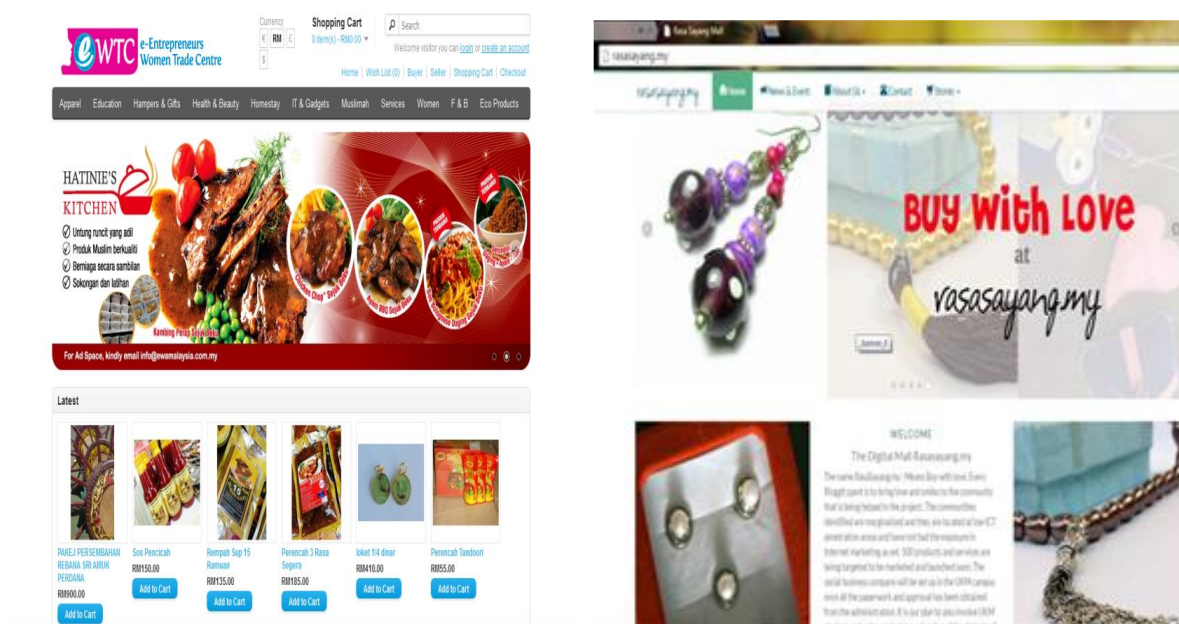
UKM's Initiatives

UKM realizes that business and entrepreneurships can be a solution to unemployment issue in this country. Seeing the importance of nourishing the students with interest in business as a source of income, UKM has established a training centre; Pusat Pembangunan Keusahawanan (CESMED with the objectives of training and guiding young entrepreneurs in order to prepare them into entrepreneurship. Students were exposed to online business where they can market their products in rasasayang.my as a platform for starting and marketing their business. They were taught with techniques and strategies of effective online advertising and marketing. Smart Marketing Platform is now fully developed with rasasayang.my brands and 60 student' entrepreneurs have been trained.

Smart Marketing Platform for Small Scale Produces Project was implemented in 2015 and in addition has successfully trained 200 women entrepreneurs from Mersing, Johor Bharu, Endau, Kulai Jaya and Kota Tinggi with the collaboration between UKM, e-Entrepreneurs Women Association Malaysia (eWA), Angkatan Kerjasama Kebangsaan Malaysia Berhad (ANGKASA) Johor, Koperasi Usahawan Nita Tenggara and .my Domain Registry. The impact of the program was analysed after 6 months and

it showed that 80 per cent of 200 women entrepreneurs has gained benefits. Their digital literacy increased up to 80 per cent from the first day of training. Their monthly sales also increased from 30 percent to 50 percent. 75 percent participants has successfully uploaded their products and services on the online platforms and digital malls. Those who have higher literacy tend to be more successful after training as they are able to manage their website on their own. (Norizan & Fatin Nadiah 2016).

Figure 1: Digital Malls: (a) ewtc.my and (b) rajasayang.my (Norizan & Fatin Nadiah 2016)



E-Usahawan Wanita is another project that has been implemented, a collaboration between E-Community Research Centre, Faculty of Social Sciences and Humanities, Universiti Kebangsaan Malaysia (UKM) and the .my DOMAIN REGISTRY. Other agencies involved in this project are the Ministry of Women, Family and Community, NWCO, SIRIM, SMIDEC, MDEC and an ICT company. This project is basically a program with the purpose to expand the use of e-commerce among the business community, particularly in facilitating women entrepreneurs to participate and capitalize the use of advanced technologies in this country. This program also aims to introduce a new business model by proving solutions through existed infrastructure. Other than that, it was designed to strengthen the position of women entrepreneurs using technologies through the use of e-commerce that is certified safe, effective and established. (Farah Hayati & Norizan 2009; Norizan et al 2009). Overall, the program intends to strengthen women entrepreneurs' position across Malaysia, especially Small and Medium (SME) companies. At the same time, the goal of this program is to facilitate them to

improve their business potential not only in small local market, but also in broader market. In addition, this program has developed a special platform called Platform WX. (Norizan et al, 2009)

Another significant project was INita, which is a national project that aims to increase women participation in digital platform especially in economic activities in Malaysia. The main objective of this project is to train Malaysian rural women, regardless of their racial background, economic status and age. The project is funded under the second stimulus package under the Ministry of Science, Technology and Innovation (MOSTI), with the main organizer .myDomain registry of Malaysia. .myDomain in a legal entity that is responsible for the registration of domain name for business enterprises in Malaysia. E-Community Research Centre from Universiti Kebangsaan Malaysia has been given the role to do the training (Fuzirah et al 2011).

So, based on the experience and projects completed the success of training women online entrepreneurs depend on three major factors:

a) Access

Access to the internet is a must. After training sessions women will go back to their respective places and need to get internet access to practice what they have learned. The access is also important for them to start putting up their products online and to market them.

b) Adoption

Adoption to the use of ICT is crucial and women must accept ICT as a way of life and part of their daily chores. It is important for them to update information, put new products online, manage their website, and answer all queries for twenty four hours and seven days a week. This will demand a lot of time and patience among women to be fully acknowledged as online entrepreneurs.

c) Value

Value of online engagement should exceed the face to face engagement among clients. The value added by using ICT is:

- i. Wider client-tell
- ii. Bigger business network
- iii. All purchases can be done at one place
- iv. Cost of effectiveness and minimal capital to start business

All of these should be the added value for women entrepreneurs to be engaged and start online business almost immediately.

Conclusion

We would like to conclude that due to the challenge of technology that continually changed, the training of women entrepreneurs cannot be done just in one pace. It should be continuous, regular monitoring and online marketing techniques need to be updated fast. For example knowing when your target group would be online, what is the catchy phrase words, what are the effective photography techniques and pricing, products and sales.

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Socio Legal Implications of Cross-Border Marriage among Muslims in Malaysia: An Empirical Evidence

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Abstract

Marriage is a sacred bond, a tie between a man and a woman. Such relationship is blessed by Allah as it is mentioned in the Quran and the tradition (Sunnah) of the Prophet (pbuh). The laws created by man are meant to streamline the conduct of marriage, apart from the already provided *hukm* laid down in Islam. However, there are people who tend to violate these laws due to their own ignorance and this violation affects the future of such marriage and as well other people who are attached to it. Cross-border marriage is a marriage without permission from the registrar of marriage in each States and its solemnisation can be contracted in Malaysia or outside Malaysia. The purpose of this study is to examine and analyse the differences between demographics information of respondents towards the implications of cross-border marriage among Muslims in Malaysia. The sample consists of four hundred respondents came from four regions in Malaysia. Survey using questionnaire was the main method in collecting the data. To support the empirical evidence, semi structured interview has also been conducted in this study. The research reveals that even though the respondents aware about the implications of cross-border marriage, still it requires a new mechanism to control this type of marriage from continuing in the future as it affects the people who are attached to it especially the women and children.

Keywords: *Awareness, Cross Border Marriage, Court, Implications*

1.0 Introduction

The Islamic family law in Malaysia provides clear guidelines that are understandable and observable by Muslims, who wish to marry. This is so because the particular law articulates specific provisions that assist in the management of matters relating to solemnising a marriage. One of the important requirements set under the law is to get permission to marry from religious authorities in the particular state where a couple wishes to marry. The religious authority authorised to grant such permission is Registrar of Marriage, Divorce, and *Ruju*^{xxxxv} of the Islamic Religious Department and such permission must be obtained before the wedding solemnisation. Despite the fact that available laws relating to solemnisation of marriage are reasonably observable and understandable, such laws are still violated, and this is primarily evident in the conduct of cross-border marriage. Muhammad Nasran explains that cross-border marriage refers to marriage solemnised by *Wali Hakim*, which

contradicts the Islamic Family Law in each state as the parties to such marriage had failed to get a prior approval or permission from the Registrar of Marriage to get married.^{xxxv} This issue is not a new issue in today's society. This unduly action, however becomes rampantly occurring when it is covered by the local newspapers and electronic media.^{xxxv} This is because; other than letting the society become aware of its rampant occurrence; it also indirectly influences the 'interested' members of society to go for this alternative way of getting married.

In view of the increasing occurrence of cross-border marriage, the research undertaken is based on the assumption that cross-border marriage actually leads to problems in marriage. The problems are like uncertainties in determining the status of the marriage and the status of other claims related to the marriage including matters involving children and inheritance. Therefore, there is an urgent need for a research to solve these issues.

1.1 Research Methodology

This article uses both the quantitative and qualitative approaches. A survey was conducted in selected states in Malaysia representing four regions namely the Northern, Central, East and South regions of Malaysia. Questionnaire was administered and distributed to collect the data from 400 respondents. Semi structured interview was also conducted with the informants who have the experience directly and indirectly involved in cross-border marriage. The collected data were analysed using SPSS version 22.

1.2 Research Objective

The purpose of this study is to examine and analyse the differences between demographics information of respondents towards the implications of cross-border marriage among Muslims in Malaysia.

1.3 Malaysian Legal Perspective

There are two effects that entail cross-border marriage. First, such marriage contradicts the Islamic Family Law (Federal Territories) Act 1984 and thus, is not registrable.^{xxxv} Second, if the said marriage contradicts any provisions in the Act, but is valid according to the Islamic Law, it may still be registrable provided that there is an order from the Court.^{xxxv} This provides the Muslim couples an opportunity to still legalise and register their cross-border marriage. However, the couples will be prosecuted and penalised before the marriage can be registered.^{xxxv}

Coming back to the first effect, where Muslim couples contracted their marriage outside Malaysia and their marriage is not in accordance with Islamic Law, the marriage is void. This basically illustrates the consequences of having cross-border marriage. In the case of *Re Zuraini Bt Mohamed & anor*,^{xxxv}

the first and second applicants filed an application to register their marriage that had been contracted in Thailand. They used the service of *wali hakim* in Pattani District of Thailand. However, in this case, the officer whose service was used had the authority to act as a *wali hakim* in Pattani District only and his power did not extend to other provinces. In this case, the particular officer had travelled across the border in order to seek approval and consent from the bride as she was in Rantau Panjang District of Kelantan. After obtaining her consent, only the officer and the groom returned back to Pattani District of Thailand. After that, the marriage had been contracted without the presence of the bride. The court in this case had to determine the validity of the marriage as the bride was not present in the marriage ceremony. The court held that the marriage between the applicants was invalid. The court's view was that the proper forum to solemnise the marriage was in Rantau Panjang, Kelantan, and not in Pattani, Thailand as she was at that time in Kelantan. Thus, this shows that even though the couples can choose to contract their marriage outside Malaysia and without the approval of the authorised body, they still have to register their marriage according to the laws in Malaysia. It is submitted that, the judge in this case had exercised his power in determining the validity of the said marriage. He made a comparison and drew the effects of contracting a marriage in Malaysian territory and Thailand territory. Subject to section 18, if the Registrar of Marriage satisfies with the truth of the matters stated in the applicants' application of the legality of the intended marriage, and where the man is already married, the permission required under section 23 has been granted by the court, the Registrar of Marriage shall, at any time after the application and upon payment of the prescribed fee, issue to the applicants their permission to marry in the prescribed form.^{xxxv} Thus, we can deduce that the permission to marry only can be issued by the Registrar of Marriage after all the conditions in section 18 or 23 of Islamic Family Law Act or Enactments be satisfied.

The Registrar of Marriage shall refer the application to a Syariah Judge who has jurisdiction in the place where the bride resides if she is a minor who is below the age specified in section 8; a divorcee (*janda*) on whom section 14 (3) shall apply or a woman who has no *wali* from *nasab* according to Islamic Law.^{xxxv} If the Syariah Judge has satisfied of the truth of the matters as stated in the application, the legality of the intended marriage that such case merit the giving of permission for the purposes of section 8, permission for the purposes of subsection 14 (3), or his consent to the marriage being solemnised by *wali Raja* for the purposes of section 13 (b); he shall at any time after reference of the application to him and upon payment of the prescribed fee, issue to the applicants his permission to marry in the prescribed form.^{xxxv} Thus, any Muslim parties who intend to contract their marriage must get the permission to marry from a Registrar of Marriage or a Syariah Judge having jurisdiction in their place of residence. This is as provided in section 19 of the Islamic Family Law (Federal Territories)

Act 1984.^{xxxv} It can be implied from the context of section 19 that where a marriage carried out without the permission of a Registrar of Marriage or a Syariah Judge, the parties will be subjected to the penalty provided by the same law.

The Yang di-Pertuan Agong may appoint any qualified public officer to be a Chief Registrar of Muslim Marriages, Divorces, and *Ruju'* for the purposes of Islamic Family Law (Federal Territories) Act 1984.^{xxxv} The person who has been appointed shall have general supervision and control over the Registrars and the registration of marriages, divorces, and *ruju'* under this Act.^{xxxv} In the case of *Khori Bte Ahmad v. Abu Samah Bin Abd Halim*,^{xxxv} the marriage between parties was solemnised by an appointed *Jurunikah*. In this case, the said *Jurunikah* was also appointed as *wali raja*. After the marriage, the certificate of marriage was issued by an assistant registrar of marriage. In this case, the issue was, whether the marriage contracted by the parties using *jurunikah* fulfilled requirements in the Administration of Islamic Family Law Enactment 1985. In this case, the court held that the marriage was voidable and could not be registered accordingly.

The Yang di-Pertuan Agong may also appoint qualified persons to be Senior Registrars, Registrars, or Assistant Registrars of Muslim Marriages, Divorces, and *Ruju'* for *kariah masjid*^{xxxv} in the Federal Territories as may be specified in the appointments.^{xxxv} For the purposes of granting permission for marriages to be contracted in a foreign country, the Yang Di Pertuan Agong may appoint any member of diplomatic staff to be a Registrar of Marriages, Divorces and *Ruju'* in that country.^{xxxv} It is submitted that failure to comply with this provision does not render a marriage as invalid, but a person will face prosecution and will be penalised by the court.^{xxxv}

2.0 Results

2.1 Descriptive Analysis

2.1.1 Implications for Practising Cross-Border Marriage

The question asked the respondents about implications of practising cross-border marriage (Table 2.1). Eleven items on the questionnaire have been responded. The highest items are; difficulty of registering their children at the school (80.2%) followed with difficulty of registering the birth of their children (80.1%), and difficulty to apply for divorce from the court (78.7%). On top of that, more than three-quarters of the respondents (77.6%) have been charged and penalised by the court and 73.6% found that it was very difficult to register their marriage and having the marriage acknowledged by the authority. The lowest item is they were involved in bad activities after getting married at the border

(61.3%). Overall, the results indicate that 71.2% of the respondents agreed with all the implications of practising cross-border marriage.

Table 2.1 Implications for Practising Cross-Border Marriage

No.	Implications from Cross-border Marriage	Level of Agreement (%)*					Mean	SD	%
		1	2	3	4	5			
1	I find it difficult to register my marriage.	-	9.0	31.3	42.8	17.0	3.678	0.860	73.6
2	I find it difficult for my marriage to be acknowledged by the authority.	0.3	6.3	31.5	49.5	12.5	3.678	0.781	73.6
3	I find it difficult to register the birth of my children.	-	2.0	25.5	42.8	29.8	4.003	0.796	80.1
4	I find it difficult to register my children at the school.	-	2.8	24.8	41.5	31.0	4.008	0.818	80.2
5	I have been charged and penalised by the court.	0.3	1.5	27.3	52.0	19.0	3.880	0.729	77.6
6	I find it difficult to apply for a divorce from the court.	0.3	2.3	28.2	42.5	26.8	3.933	0.812	78.7
7	This cross-border marriage leads to the destruction of my family.	2.3	14.5	35.5	38.3	9.5	3.383	0.924	67.7
8	I am the one who has caused a gap in the relationship among the family members.	2.0	11.8	46.3	32.8	7.2	3.315	0.847	66.3
9	I have been involved in bad activities after getting married at the border.	6.0	21.3	40.3	25.5	7.0	3.063	0.993	61.3
10	I am the one who has caused disunity in my family.	3.0	19.5	42.5	28.7	6.3	3.158	0.911	63.2
11	I have destroyed my future.	4.3	26.0	33.3	29.5	7.0	3.090	0.999	61.8
Total							3.562	0.643	71.2

*1=strongly disagree (1-20%), 2=disagree (21-40%), 3=somewhat agree (41-60%), 4=agree (61-80%), 5=strongly agree (81-100%)

2.2 Inferential Analysis

2.2.1 Independent t-Test for Implications of cross-border Marriage with Demographic Information

For the independent t-Test, implications of cross-border marriage were tested with gender (male-female), residence (rural-urban) and type of marriage (polygamy-monogamy) dichotomy.

2.2.1.1 Independent t-Test for Implications of Cross-Border Marriage by Gender

The study looks at the differences between implications of cross-border marriage according to gender (Table 2.2). For the items, none of the items are found statistically significant.

Generally, results of the study show that there are no significant differences between male and female in terms of implications towards cross-border marriage ($t=-0.393$, $df=398$, $p=.694$). However,

there is a tendency that the females ($M=3.576$, $SD=0.620$) are higher than the males ($M=3.550$, $SD=0.661$) in term of awareness towards the implications of cross-border marriage.

Table 2.2 Independent t-Test for Implications of Cross-Border Marriage by Gender

Variable	Gender	N	Mean	SD	t	df	p																																																																																																																																
I find it difficult to register my marriage.	Male	220	3.705	0.860	0.695	398	.488																																																																																																																																
	Female	180	3.644	0.863				I find it difficult for my marriage to be acknowledged by the authority.	Male	220	3.705	0.799	0.765	398	.445	Female	180	3.644	0.759	I find it difficult to register the birth of my children.	Male	220	4.023	0.791	0.561	398	.575	Female	180	3.978	0.805	I find it difficult to register my children at the school.	Male	220	4.027	0.822	0.534	398	.594	Female	180	3.983	0.815	I have been charged and penalised by the court.	Male	220	3.886	0.747	0.193	398	.847	Female	180	3.872	0.709	I find it difficult to apply for a divorce from the court.	Male	220	3.896	0.840	-1.009	398	.314	Female	180	3.978	0.776	This cross-border marriage leads to the destruction of my family.	Male	220	3.341	0.945	-0.995	398	.320	Female	180	3.433	0.898	I am the one who has caused a gap in the relationship among the family members.	Male	220	3.259	0.866	-1.461	398	.145	Female	180	3.383	0.821	I have been involved in bad activities after getting married at the border.	Male	220	3.027	1.029	-0.784	398	.433	Female	180	3.106	0.948	I am the one who has caused disunity in my family.	Male	220	3.141	0.938	-0.402	398	.688	Female	180	3.178	0.879	I have destroyed my future.	Male	220	3.050	1.030	-0.884	398	.377	Female	180	3.139	0.962	Overall implications for practising cross-border marriage	Male	220	3.550	.661	-0.393	398	.694
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2.2.1.2 Independent t-Test for Implications of Cross-Border Marriage by Residence

Data were further analysed on differences between implications of cross-border marriage (Table 2.3) in terms of residence (rural and urban). Within the items, there is one item that is found to be not significant, that is, respondents have been charged and penalised by the court after practising cross-border marriage. In this item, respondents coming from the urban residence ($M=3.911$, $SD=0.708$) and rural residence ($M=3.805$, $SD=0.776$) received similar punishment in terms of implications for practising cross-border marriage.

Overall, the urban residents ($M=3.671$, $SD=0.636$) are higher in terms of implications for practising cross-border marriage compared to the rural residents ($M=3.302$, $SD=0.582$), and their difference is significant with $t=5.424$, $df=398$, $p=.000$. It reflects that the urban people are more aware about the implications of cross-border marriage compared to the rural people.

Table 2.3 Independent t-Test for Implications of Cross-Border Marriage by Residence

Variable	Residence	N	Mean	SD	t	df	p																																																																																																																																
I find it difficult to register my marriage.	Urban	282	3.794	0.873	4.288	398	.000																																																																																																																																
	Rural	118	3.398	0.764				I find it difficult for my marriage to be acknowledged by the authority.	Urban	282	3.770	0.809	3.700	398	.000	Rural	118	3.458	0.662	I find it difficult to register the birth of my children.	Urban	282	4.071	0.806	2.677	398	.008	Rural	118	3.839	0.751	I find it difficult to register my children at the school.	Urban	282	4.082	0.816	2.824	398	.005	Rural	118	3.831	0.799	I have been charged and penalised by the court.	Urban	282	3.911	0.708	1.330	398	.184	Rural	118	3.805	0.776	I find it difficult to apply for a divorce from the court.	Urban	282	4.011	0.829	3.004	398	.003	Rural	118	3.746	0.742	This cross-border marriage leads to the destruction of my family.	Urban	282	3.514	0.878	4.513	398	.000	Rural	118	3.068	0.958	I am the one who has caused a gap in the relationship among the family members.	Urban	282	3.447	0.822	4.951	398	.000	Rural	118	3.000	0.827	I have been involved in bad activities after getting married at the border.	Urban	282	3.216	0.998	4.927	398	.000	Rural	118	2.695	0.882	I am the one who has caused disunity in my family.	Urban	282	3.305	0.864	5.164	398	.000	Rural	118	2.805	0.927	I have destroyed my future.	Urban	282	3.262	0.992	5.526	398	.000	Rural	118	2.678	0.895	Overall implications for practising cross-border marriage	Urban	282	3.671	0.636	5.424	398	.000
I find it difficult for my marriage to be acknowledged by the authority.	Urban	282	3.770	0.809	3.700	398	.000																																																																																																																																
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2.2.1.3 Independent t-Test for Implications of Cross-Border Marriage by Type of Marriage

Table 2.4 shows the differences between implications of cross-border marriage in term of types of marriage (monogamy and polygamy). Within the items, there is one item that is statistically significant where respondents have been charged and penalised by the court ($t=-2.552$, $p=.011$). This data show that those respondents who practise polygamous marriage ($M=3.971$, $SD=0.708$) are more aware about the punishment by the court compared to those who practise monogamous marriage ($M=3.786$, $SD=0.741$).

For the overall score, it is found that the respondents practising polygamous marriage ($M=3.575$, $SD=0.615$) perceived higher in term of implications for cross-border marriage compared to those respondents who practise monogamous marriage ($M=3.549$, $SD=0.671$). However, their differences are not significant ($t=-0.414$, $df=398$, $p=.679$).

Table 2.4 Independent t-Test for Implications of Cross-Border Marriage by Type of Marriage

Variable	Type of Marriage	N	Mean	SD	t	df	p								
I find it difficult to register my marriage.	Monogamy	196	3.704	0.819	0.605	398	.545								
	Polygamy	204	3.652	0.900				I find it difficult for my marriage to be acknowledged by the authority.	Monogamy	196	3.658	0.751	-0.485	398	.628
I find it difficult for my marriage to be acknowledged by the authority.	Monogamy	196	3.658	0.751	-0.485	398	.628								
	Polygamy	204	3.696	0.810											

I find it difficult to register the birth of my children.	Monogamy	196	3.934	0.752	-1.698	398	.090
	Polygamy	204	4.069	0.834			
I find it difficult to register my children at the school.	Monogamy	196	3.939	0.795	-1.651	398	.100
	Polygamy	204	4.074	0.836			
I have been charged and penalised by the court.	Monogamy	196	3.786	0.741	-2.552	398	.011
	Polygamy	204	3.971	0.708			
I find it difficult to apply for a divorce from the court.	Monogamy	196	3.867	0.831	-1.576	398	.116
	Polygamy	204	3.995	0.791			
This cross-border marriage leads to the destruction of my family.	Monogamy	196	3.362	0.980	-0.429	398	.668
	Polygamy	204	3.402	0.868			
I am the one who has caused a gap in the relationship among the family members.	Monogamy	196	3.321	0.902	0.149	398	.882
	Polygamy	204	3.309	0.793			
I have been involved in bad activities after getting married at the border.	Monogamy	196	3.117	1.038	1.083	398	.279
	Polygamy	204	3.010	0.947			
I am the one who has caused disunity in my family.	Monogamy	196	3.230	0.994	1.554	398	.121
	Polygamy	204	3.088	0.820			
I have destroyed my future.	Monogamy	196	3.117	1.082	.536	398	.592
	Polygamy	204	3.064	0.916			
Overall implications for practising cross-border marriage	Monogamy	196	3.549	.671	-0.414	398	.679
	Polygamy	204	3.575	.615			

3.0 Discussions

This discussion highlights important findings in the implications of cross-border marriage. One interesting finding is that the majority of the respondents are found to be having difficulties in registering their children at schools. This finding confirms Noraini's study where she discovered that the most affected party in a cross-border marriage is children especially when it comes to fulfilling their welfare such as their right to education.^{xxxv} The finding is supported by an interview session with an informant.^{xxxv}

...yes, we agree that if our marriage is not registered, our children fate is going to be affected...we do not want our children's right to be denied...that's why we want to register...(Informant No. 2, Songkhla)

Another important finding is that the majority of the respondents are also found to be having difficulties in registering the birth of their children. This affects other matters relating to the welfare of the children. For instance, if a child is born in a marriage contracted across border, proper documents that prove the existence and legality of the marriage between the parents must be produced in order for the child to be recognised as legitimate. However, if there is a problem in producing such documents, the child's birth certificate cannot be issued under the name of his father and will only bear the name of the mother. This finding is in agreement with Nasran's where he claimed that improper cross-border marriage documentation and certification would result into difficulties in registering children who are born to the marriage.^{xxxv}

With regards to the differences between the demographic information with the implications of cross-border marriage, there are several differences that can be highlighted. The current study finds that the female respondents are more aware than the males in terms of the implications of cross-border marriage even though it is not statistically significant. This finding is also supported by an interview with the Registrar of the Marriage, Divorce and *Ruju* of the State of Perlis where she claimed that females are aware of their rights and there are many of them who come to her office to register the marriage compared to their counterparts.^{xxxv}

It is found that the respondents from the urban are more aware towards the overall implications of the cross-border marriage compared with the respondents from the rural area, and the differences between them are significant. This result may be clarified by the fact that the urban people have easier access transportation and communication. So, it is easier for them to get to the place and to get any information about cross-border marriage. Another possible explanation for this is that religious offices, courts, and other government agencies are situated at the urban area, and these facilities facilitate the urban people when they want to register their marriage. Specifically, it is discovered that those who practice polygamous marriage is more aware compared with those who practice monogamous marriage with regards to the punishment imposed by court as a result of marrying across border and without the permission of the court. So, it indicates that the respondents who practice polygamous marriage are more experienced in expecting the results of cross-border marriage.

4.0 Conclusions

4.1 Recommendations

A marriage solemnised excluding the sensitivities of families and members of society such as cross-border marriage is clearly against the norms. This kind of marriage is valueless in the eyes of Islam simply because it does more harm than good. One clear example of such harm is the victimisation of women and children born to the marriage. Therefore, it is submitted that cross-border marriage goes against family philosophy and the norms of Malay society, especially which appreciates the values of family institution. Therefore, several recommendations can be suggested to curb this phenomenon as it affects the family institution. The recommendations are as follow;

1. Religious Office must have a one stop center (OSC) or branch in every district as reference for the people in the rural area without having to travel to town. By having OSC, they can promote the importance of marriage registration through mosque or seminar especially in rural area;
2. Clear information on matters relating to Islamic family laws should be disseminated to the public, especially the young Muslims. It could be done using varieties of media channels that can reach them.

Nevertheless, the availability of such media might have contributed to the findings of this study that urban people are more aware about the implications of cross-border marriage when compared to the rural people. Therefore, the study suggests that the Legal Aid Department should organise more field campaigns on the illegality of this kind of marriage and the importance of registration of marriage in order to ensure the effectiveness of dissemination of such information to the members of public in the urban and rural areas.

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Maternity Protection In The Malaysian Workplace: Issues And Challenges From The Perspectives Of Female Employees In A Public Institution Of Higher Education²

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Abstract

Maternity is a condition experienced specifically by women. A large proportion of women in the workforce in Malaysia are of reproductive age and thus may be experiencing maternity issues at some point of their working life. In Malaysia, there have been a few cases of discrimination in the workplace on the basis of pregnancy. Further, women find themselves disadvantaged in career and job advancements due to gender roles and expectations connected with maternity. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Malaysia is a party, considers discrimination on the ground of maternity as a form of gender discrimination because it hinders women of their effective right to work and requires that special protection be provided for women during maternity to ensure their ability to enjoy the right to work (Article 11(2)). What are the maternity experiences of women employees in Malaysia? What is the extent of protection they receive at the workplace in relation to maternity? Are norms and practices in the workplace conducive or sufficient to offer protection for women during maternity and in relation to their maternal role? These are the questions that the paper seeks to answer by using a case study of a public institution of a higher education as a workplace site. The paper is based on two Focus Group Discussions (FGDs) conducted with female academic and administrative staff of a public institution of higher education. The study finds that although women feel that their employer gives adequate maternity leave, they are sometimes required to “double up” their work output in anticipation of the leave. While respondents are clear about maternity leave entitlements, regulations and policies about other matters connected with maternity are lesser available or known. Thus, women brought up issues which they desire improvements, which are in the area of entitlement to time-off for maternity medical check-up, spaces for breastfeeding or to express and store breast milk, on site childcare facilities and special leave to tend to sick children. The respondents also discuss how gender division of labour affects their maternity experiences.

Keywords: Gender, Maternity Protection, Women, Work

Introduction

A large proportion of women in the workforce in Malaysia are of reproductive age and thus may be experiencing maternity issues at some point of their working life. Currently, the age group of 25-29 forms the largest age group of women who are involved in the Malaysian labour force (Department of Statistics, 2015). More than 60% of women in the age groups of 25-29, 30-34, 35-39, 40-44 and 45-49 respectively are involved in the labour force in Malaysia (ibid.). Almost 62% of people involved in the Malaysian labour force are married, indicating a high possibility of involvement at one point or another in their marriages with child-bearing and child-rearing.

Working women who are experiencing pregnancy and related maternity situations may face health issues and other difficulties and disadvantages in the workplace as a result of their condition. In Malaysia, there have been a few cases of discrimination in the workplace on the basis of pregnancy. In the case of *Beatrice Fernandez v Malaysia Airlines and Anor.* [2005] 3 MLJ 681, a stewardess for an airline was dismissed by her employer due to her pregnancy. Beatrice was hired by the airlines based on the terms and conditions derived from a collective agreement between the airline and its employees' union that a stewardess must resign if she finds herself pregnant and the airlines reserves the right to dismiss a pregnant employee. The airlines terminated Beatrice's employment because she refused to resign when she got pregnant. Beatrice brought a case against the airlines on the basis that the provision of the collective agreement was discriminatory and went against Article 8 of the Federal Constitution of Malaysia. Beatrice lost her appeal at the Federal Court where the court reasoned that the protection of the Constitution did not extend over a collective agreement between private entities. The court further contends that "[t]here were special conditions applicable peculiarly to the job of a flight stewardess which [the airlines] was entitled to impose. Furthermore, the court took judicial notice that the nature of the job was certainly not conducive for pregnant women."

The reasoning of the court presents an attitude that rather than facilitating women's natural and biological attributes in the workplace, employers are justified in penalising and excluding them from taking part in livelihood activities.

In another case, Noorfadilla Ahmad Saikin signed a contract after being offered a position by the Ministry of Education as a temporary teacher. Before her school posting was determined, she and a few other women who had accepted similar positions, were asked to declare if they were pregnant. When she admitted that she was pregnant, the officer in charge dismissed her. The High Court held

that the dismissal constitute a breach of her constitutional right under Article 8. The court awarded her RM300,000 in damages but upon appeal by the government, the Court of Appeal reduced her compensation by about 90 percent. The appeal judge reasoned that the earlier award encouraged profiteering and that Noorfadilla was not blameless in the cases since she did disclose her pregnancy during her job interview.

The judgements in these two cases indicate how, while Malaysian society claims to support family life and nation building, of which the maternity experience is a large part, there is a lack of awareness of the need and extent of the role of the State and society in facilitating the two items.

An indicator of a nation's concern over the welfare of the family institution may be how well it protects and facilitates the maternity and related experiences of its female citizens. Since women's reproductive age fundamentally coincides with their age during which they optimally contribute productively to the nation through livelihood and economic activities, it is incumbent upon a democratic state to provide enabling conditions for women to work while establishing a family. Such enabling conditions can be in the form of law and legislation, policy and practices and the establishment or modification of norms that support women's substantively equal participation in socio-economic activities. In order to discover the best protection and practices in relation to this issue, it is pertinent to explore and examine the challenges women face in their maternity experiences, especially in the context of pursuing their livelihood and economic activities.

In this background, this paper aims to present a discussion of the maternity experiences of women employees in Malaysia by asking the questions: a) what is the extent of protection they receive at the workplace in relation to maternity?; b) are norms and practices in the workplace conducive or sufficient to offer protection for women during maternity and in relation to their maternal role? This paper investigates this issue using a case study of a public institution of higher education, which fundamentally consists of multiple categories of employment contexts. A public university is a site for learning and working that involves at least two distinct groups of employees: the academic employees and the administrative employees. Thus, a study of the university as a site of a preliminary exploration of the wider and diverse contexts of women's employment in relation to the maternity issue is justifiable.

Malaysia and the regulation of maternity at work

Maternity is the state or quality of being a mother. In the context of work, in many countries, maternity protection particularly focus on benefits given by employers to female employees in relation to the situation of their giving birth. Thus, maternity protection usually consists of the provision of maternity leave immediately after or just before giving birth and the provision of continued full or partial wage or allowance during the period of maternity leave. The International Labour Organisation (ILO) has gradually expanded the scope of its definition of maternity protection over the years since its first Maternity Protection Convention, 1919 (No. 3). Fundamentally, ILO's concerns with respect to maternity protection are "to enable women to successfully combine their reproductive and productive roles, and prevent unequal treatment in employment due to their reproductive role" (International Labour Office, 2010:1). Thus, in its work to address these concerns, ILO has included other issues such as protection from dismissal on the basis of pregnancy or maternity, health protection at work during pregnancy, paternity and parental leave and facilitation of breastfeeding.

Employment in Malaysia is generally regulated through statutory provisions (including subsidiary legislation) and employment contracts. The civil service is further regulated by the Constitution, administrative rules and circulars. The provisions for maternity benefits are generally contained in the Employment Law Act 1955 (EA), Part IX (sections 37-44). Section 37 of the Act provides that every female employee is entitled to maternity leave of not less than 60 consecutive days for each pregnancy. Female employees in the public service are entitled to 300 days of maternity leave throughout her employment and make take between 60-90 days of maternity leave for each confinement period (*Pekeliling Perkhidmatan Bilangan 14 Tahun 2010*). During maternity leave, a female employee is also entitled to receive a maternity allowance as long as she has fulfilled the requirement of the period of employment as provided in section 37(d) of the EA. It should be noted that a female employee is no longer entitled to maternity leave is she has five or more surviving natural children at the time of her current pregnancy. The maternity allowance is normally given based on the rate of a daily or monthly wage or a rate prescribed by the Minister, if any (sections 36(2)(b) and (c)). It is not legally prescribed for employers in Malaysia to provide medical benefits in relation to maternity. However, many employers do so in the form of allowance for hospital charges upon delivery. The public service gives its employees additional benefits in the form of paternity leave of seven days (*Pekeliling Perkhidmatan Bilangan 9 Tahun 2002*) and no-pay childcare leave of a total of 1825 days throughout an employee's services (*Pekeliling Perkhidmatan Bilangan 15 Tahun 2007*).

It should be noted that Malaysia is also bound by international legal instruments that it has ratified or acceded to in relation to maternity. Malaysia is a state party to the Convention on the Elimination Of All Forms of Discrimination Against Women (CEDAW) since 1995. Under Article 11 (1) of CEDAW provides that States must take appropriate measures to eliminate discrimination against women in employment by ensuring, inter alia, the protection of rights to health and safety at work including by safeguarding women's function of reproduction. Article 4(2) further provides that special measures taken to protect maternity shall not be considered a form of discrimination. This non-identical treatment of women and men is due to their biological differences. Furthermore, measure taken in pursuant of maternity protection can be of a permanent nature "at least until such time as the scientific and technological knowledge... would warrant a review" (General Recommendation No. 25, para 16). In Article 11(2), CEDAW enumerates various areas for which State must provide protection to prevent discrimination. This includes prohibition of dismissal on the ground of pregnancy, provision of paid maternity leave, promotion of the development of child-care facilities and provision of special protection for pregnant women in types of work that may be harmful to them.

Malaysia has a dual approach to international law. Although it acceded to CEDAW, in practice, provisions in CEDAW do not become law until they are transposed or their provisions clearly included in a domestic legislation. However, in the *Noorfadilla Case* the court and counsel have attempted to use the principles of CEDAW in conjunction with Article 8 of the Federal Constitution in considering whether Noorfadilla's dismissal for being pregnant was a form of gender discrimination.

There are few studies in the past about maternity protection in Malaysia. Perhaps, the most recent and comprehensive study of maternity protection for Malaysia is the thesis by Jashpal Kaur Bhatt in 2014. Bhatt critically examines the legal protection of pregnancy and maternity in the context of the private sector in Malaysia. She finds that the current approach to protection, which proves to be piece-meal and incomprehensive, is inadequate in accommodating women who are in a maternity situation. The available rules and regulations and the related practices fall short of the international labour standards and human rights principles. She recommends that State should expand their role in providing protection by reforming the law to provide more comprehensive benefits for women workers; to limit the negotiation of collective agreements that have detrimental effects on women's pregnancy and maternity situations and to provide better mechanisms for resolving work disputes involving maternity issues.

Other academic work in this area focus not specifically on maternity protection but may have high relevance to the maternity context. In 2011, Geetha Subramaniam wrote a thesis on flexible working arrangements that may benefit women. Her study concludes, inter alia, that workplace flexibility may improve the working women's work-life balance, especially amongst married women with young children. This is relevant in the context of postnatal situations for women, which are issues that fall in the wider framework of maternity protection. Noraini Mohd Noor and Nor Diana Mohd Mahudin (n.d.) wrote about work, family and women's wellbeing in Malaysia and discussed the existing gaps in Malaysia between the realities for women in achieving work-life balance and the policies available to allow women to achieve the balance. Women's work-life balance necessarily includes the consideration for their reproductive role.

Developing a study on maternity protection: brief methodology

The study on which this paper is based is part of a wider project to understand women's experiences of maternity in the context of work. Two focus group discussions (FGD) were conducted amongst women who work in a public university. Each FGD consists of five women. One group comprises lecturers or academic staff between the ages of 29-47 years. The other group is made up of administrative personnel between the ages of 27-36 years. The researchers engaged them in conversations in a work setting and each of the focus group discussions took between one and a half to two hours.

Maternity: lived realities for women in a university setting

Maternity experiences for women do not only involved the actual delivery of a baby but also includes the conditions immediately after conception and may extend to the whole experience of caring for a child long after birth. A woman's decision about getting pregnant is often not hers alone but have input from her spouse and partner. Social circumstances also determine women's choices to be pregnant or to carry through a pregnancy. A work situation may proof to affect a woman's decision to get pregnant if a pregnancy results in a zero-sum gain. For example, if a woman feels that pregnancy will detrimentally hinder her ability to advance in her livelihood activity, she may choose to postpone her pregnancy or may continue with pregnancy but bearing unhappiness about losses she has to incur in relation to her work. A work situation that decides women's access and opportunity based on her maternity condition will potentially create such difficult and unfair position for women. In the study,

women showed that they had experienced attitude and practice that made them feel their access and opportunities for advancements had been curtailed. F, a lecturer, said:

I remember in my first job...we were discussing something and people -- the man, would say, let's not get another female staff because, you know, they get married, they get pregnant and then who's going to do the job...And then I also worked on a research project [in a different institution] and the male researchers also said the same thing: oh! let's not get, you know, female staff, you know, we already have too many, you know, they get pregnant and, you know, who's going to do the job? Yeah, they have that kind of perception.

Based on C's experience, male colleagues didn't necessarily say they would not hire women due to the latter's potential pregnancy. However, the men would hint that there would be some obstacle or challenge if the organisation does.

Women said that they have different responses from their colleagues when they know they were pregnant. W, who worked in a technical department, said most of her colleagues were men and they were kind enough to take over her job while she went for maternity check ups. They would also ask her to do lighter work while they took over work like lifting heavy items.

Informing employers or colleagues about their pregnancies are sometimes a major issue for women.

C recalled:

... I had two assignments during my early pregnancy. [One in Batam and the other in Singapore]. [At] that time I just knew I had conceived but I was afraid to tell my boss. So I just [took] a risk and went to Batam, Indonesia by ferry and I vomited throughout the time. And then when I was in Singapore, I ran here and there to get to the airport. So we took risks. But [I don't] blame my superior because I didn't have the guts to tell him that I could not take this task, this assignment because I was pregnant.... I think it's the perception that if women take time off for maternity or for something related to maternity it's like we are taking time off for ourselves.... I think it's just the just the message that they are sending us that makes it difficult for us to share our experiences.

During the pre-natal period, a situation that is often overlooked by laws and policies is the requirement for expecting mothers to go for medical checks in relation to their pregnancy. These checks are required periodically, often monthly. In the university, there are no clear rules about taking time off for maternity check ups at the hospitals. The academic staff can make more independent decisions about going for check ups by rearranging their classes and research work. However, it may mean that they have to work longer hours for the particular day in order to compensate the hours "lost" during the check ups. The administrative staff has more structured working hours and thus taking time off requires

negotiations with superiors. The rule of thumb appears to be that if a medical check up exceeds two hours, the employee is strongly advised to apply for a half-day annual leave. Most of the women share the experience that these check ups would normally take up half or more of their working day, especially if they went for check up in public hospitals. One female employee said she had rather gone to a private hospital even if she could have gone to a public hospital for free, due to the time constraint. Her teaching workload does not allow her to take the longer waiting time in a public hospital even when, as a lecturer, her time to be in the office can be more flexible than an administrative staff.

For the administrative staff who had to clock in for work, negotiations with heads of department were key. A said that since she would already have known she was going for a check up, she would settle as much of the things that her boss required before her appointment. If the boss needed anything while she was at the hospital he would text her on her telephone to ask. R said that when she had gone to a public hospital, she would go very early so that she didn't have to take a half-day's off. She would frequently choose to go to a private hospital since she could go there in the late afternoon and this means that she would only have to ask the boss to leave the office one hour earlier.

The respondents were quite concerned and apologetic about their condition and about having to take time off for medical check ups. They would try to compensate the situation through various means:

... [I had a really bad morning sickness]. But because I understand that my faculty also needs my commitment, I try to make sure that the faculty planning is not affected by my condition. I still can be planning [work], only a little glitch in my concentration. I prefer to take my annual leave to attend my monthly check-up because I have many annual leave days that I have not yet utilized... Maybe at the end of my pregnancy, [when the checks up are going to be more frequent], I will request for time-off [without taking leave] from the Dean. [S, an administrative officer]

W said:

[We] shouldn't take advantage [of the half-day leave given by the boss for medical check up]. We should be embarrassed to do so. [We don't have to take up the whole half day] Once we finish [at the hospital], we should come straight to office. My boss had already given that kind of chance, I shouldn't be taking advantage of it.

Perceived impact of experiences of maternity and parenting on career paths and development

Although the women were generally happy with their current maternity leave benefits, sometimes taking them came with implied conditions. These were especially the experiences of the female lecturers:

If you are teaching [in a particular] semester and you had to take maternity leave, sometimes you are expected to double your lectures [before you take the leave]. So that's like you're not taking maternity leave right? Cause, you are, you already doubled your work! [G]

E had a similar observation:

[The management] will make sure you achieved the minimum teaching load that you need to achieve for that year...for example, if the minimum teaching load is three [courses], so they will make sure that if you go off one semester, you have to fulfil the minimum three [courses] work load. So you may be getting a very heavy workload in that particular semester before you go for you maternity leave... So, [during the time you are pregnant] you got more stress than others!

This situation is not restricted to women in the academic category. R, who is an administrative support staff shared:

Even before I was married, I was used to [having to work from home after office hours]. After I gave birth, I offered myself [to work from home during maternity leave]. I didn't want to make it complicated, so I just said never mind, you just give me at least one month [to exclusively use my maternity leave], after I was settled, just send my work to my home, I'll do for you and then collect them back from me. I am ok, [rather than] you asking me to come to office, you guys prepare something and come back to me, and then once ready I just give back to them, and they are ok with it. [R/M]

Although R termed her extra work as voluntary in nature ("I offered.."), the narrative shows that the offer was made out of a feeling of necessity since she would have been asked "to come to office" if she had not done that.

The impact of the lack of sensitivity to women's rights to maternity benefits may lead to a discriminatory situation for women. C shared her experience about this:

[Before I went for maternity leave], I made sure that I already achieved the [KPI, Key Performance Indicator, for the year]. I made sure I had the [required number of] publications, made sure that my supervisees [completed their work according to plans] so I could go and deliver my baby. When the time came for the assessment exercise, the panel that interviewed me, one of the remarks he gave me: "Okay. We cannot give you these marks because you enjoyed your times with your baby!". I went back to my office and cried [hard] because, you know what? I already ensured that I had the KPI achieved.... [They were practicing] double-standard because I had a baby. I enjoyed my time with my baby at home. [Just because I had] maternity leave for 90 days, they thought that I was just enjoying myself with my baby...I felt very frustrated. I told my colleague [about it]. I cried a lot. Because this was actually how they did assessment, [how they had] "appreciate" [me]. [C/A]

Conclusion: best practices and wish lists

In the university, the formal maternity benefits received by women have not gone beyond the minimum requirement of the law. This may be true for many other workplaces in Malaysia. Certain structures and work arrangements in the workplace may allow women to negotiate their maternity needs and rights. This is mostly in a more informal manner. In the absence of a more comprehensive legal framework on maternity in the wider context, a few recommendations emerge from the conversations with the women in this study. Women's knowledge about their rights to maternity protection, however limited it is, allow women to better negotiate with their employers for better conditions of work in relation to maternity. This is especially in a situation such as where women are expected to double-up their work in anticipation of taking the maternity leave. Employers should have a better strategy and plan to deal with absence due to maternity leave. There are different contexts of maternity experience for which employers could facilitate to improve the wellbeing of employees. These include safety at work during pregnancy, the right or freedom to breastfeed a child optimally and the provision for childcare or parental leaves. The establishment of these protections can be learnt from different nations around the world that have successfully implemented them. In the end analysis, employees should not see pregnancy of female employees as problematic and disadvantageous because reproduction is a function of nation building and there can be a business case for providing wide-ranging maternity protections. The authors would like to conclude this paper by quoting two of the female respondents:

I think we have to appreciate working mothers. [Staff with] excellent performance [in our faculty] last year were all women. So it meant that, women can do tremendously fantastic job even though they're busy with children; they could still be excellent in the office. [C]

I want [the employer] to understand that these are hardworking women. We are hardworking, we are very professional; we try to finish our work on time. Everything about motherhood is not an excuse. That's not an excuse. We are trying to juggle them, we try our best.... Perhaps our best bet to is [to put more] women in higher positions, more women professors... Then, we are in a better position to educate other people [G].

To reiterate, "Everything about motherhood is not an excuse".

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Civil court and Shariah Court Orders in Children Custody Cases in Malaysia : Recent Development

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Abstract

The recent case of *Indira Gandhi Mutho v Pathmanathan Krishnan(Muhammad Riduan Abdullah)* (Indira Gandhi's case) which was decided by the Federal Court of Malaysia in early this year has again raised a pertinent issue pertaining to children custody issue resulting from conversion to Islam. Simultaneous custody orders issued by civil and shariah courts in this case conflicting each other. Previously, disputes pertaining to custody of children as a result of conversion to Islam has gradually decreased, as both courts exercise their jurisdictions within the spirit of the amendment of article 121(1A) of the Federal Constitution. This has been attested by the decisions of *Shamala Satiyaaseelan v Dr Jeyaganesh* , *Subashini vs Saravanan's* and some other decisions. Nevertheless, this recent decision highlights other perspective and further finer point of law relating to jurisdictional conflict. Therefore, this paper examines this recent development and the Federal Court approach in resolving the disputes , in particular , the competing orders of civil and shariah courts. It employs library research in full and data is analysed in accordance to the content analysis method. The decision,being a precedent, deserves to be analysed thoroughly.

Keywords: Civil Court Order, Shariah Court Order, Children Custody, Recent Development

Introduction

The issue of jurisdictional conflict between Shariah Court and its civil counterpart has steadily rising in the recent decade, in particular arising out of the conversion of a non-Muslim spouse to Islam while the other spouse does not follow the same suit. This has been attested by the courts' decisions such as in *Shamala Satiyaaseelan v Dr Jeyaganesh*^{xxxv}, *Saravanan Thangathoray v Subashini Rajasingam & Another Appeal*,^{xxxv} *Subashini Rajasingam v Saravanan Thangathoray and Other Appeals*^{xxxv}, and recently, *Viran Nagappan v Deepa Subramaniam & Other Appeals*^{xxxv}. The jurisdictional conflict does not only relate to the substantive issue of courts' jurisdiction but also has gone beyond other supplementary issues ranging from conflicting orders of courts to the mandamus application. While it is not uncommon such technical issues being heard and argued in purely civil family disputes, it is a rarity in shariah related issue. While article 121(1A) of the Federal Constitution has attempted to

prevent such conflict, nevertheless, such cases still emerge in the Malaysian territorial legal landscape^{xxxv}. Therefore this paper discuss the case of *Indira Gandhi* which has many interesting legal issues ranging from the original substantive court jurisdiction to the application of mandamus, compelling the Inspector General of Police to execute the civil courts orders.

The Indira Gandhi Saga

The case has been reported in several reports^{xxxv}. Several simultaneous application had been heard by the courts. Summarily, the proceedings and decisions of this case are discussed in accordance to the date of decisions in the sequence of order as the following:

1. Jurisdictional Disputes and Legality of the Children Conversion

In the initial case, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*^{xxxv}, the applicant underwent a civil marriage under the Law Reform Marriage and Divorce Act 1976 with Pathmanathan Krishnan (being the sixth respondent in this case^{xxxv}) and had three children. On March, 11, 2009, he converted to Islam^{xxxv} and later on converted the children to Islam as well, without the consent of the wife. The children were of 12 years, 11 years and 11 months respectively. On discovering that the first respondent had registered the children conversion, certificates of conversion had been issued for the children and the Shariah High Court had granted the care, control and custody of the children to the husband, the Applicant had filed a judicial review seeking an order of certiorari to nullify the children conversion on the basis of non-compliance with the provisions of the Administration of the Religion of Islam (Perak) Enactment 2004. She further applied for a declaration that the certificates were null and void considering the breach of the enactment provisions, Sections 5 and 11 of the Guardianship of Infants Act 1961 and article 12(4) of the Federal Constitution. She also sought the declaration that the children had not been converted to Islam in accordance with the law. Preliminary objection was raised by the respondent that the Shariah Court and not the High Court which has jurisdiction to hear the application. The preliminary objection was dismissed by the High Court.

The High Court in quashing the certificates of the children conversion^{xxxv}, declared that they had not been converted to Islam in accordance with the law as they were not in compliance with the said Administration Enactment 2004. The Court upheld that both parent had equal status with regard to

the consent of children conversion and further held that this interpretation has conformed to the international norms and enhanced basic human rights. This is also in consonance to Article 8 of the Federal Constitution and section 5 of the Guardianship of Infants Act 1961.

The Court further stressed that Article 121(1)(A) of the Federal Constitution did not take away the powers of the High Court because the matter did not come within the exclusive jurisdiction of the Shariah Court, moreover, one of the parties was not a Muslim. Both the powers and the parties must come within the purview of the Shariah Court. The High Court not only had the general powers referred under section 23 of the Court of the Judicature Act 1964 but the additional powers in the Schedule of the Act and the residual power to hear the complaint relating to the infringement of constitutional right under the Federal law or State Enactment.

Previously, in a separate application, the wife -mother had been awarded with the custody of the three children, as the youngest was still breastfeeding, while her two siblings were already residing with the mother and applying the welfare principle, the custody remained with the mother. The respondent did not successfully contested the custody order.

2. Conflicting Custody Orders and Contempt of Courts

In the second case, reported as *Indira Gandhi a/p Mutho v Pathmanathan a/l Krishnan* (Anyone Having and Control Over Prasana Diksa)^{xxxv}, the applicant-wife filed for the contempt suit against the respondent-husband for wilfully refusing to comply to the High Court custody order which granted the custody of the three children to the wife previously. The respondent had not delivered the youngest child to the applicant despite of the order. Hence she prayed for an order of committal of the husband to prison until the contempt is purged. The respondent contended that he had a valid custody order by the Shariah High Court and the order did not deny the applicant the access to the youngest child. Several issues arose in this case. Firstly, whether the jurisdiction of the Shariah Court is only over matters where all the parties before the court are Muslims; whether the Shariah Court has jurisdiction over the subject matter, which is the custody matter in a civil marriage where one party has converted to Islam. Secondly, whether the respondent was in contempt of civil Court custody order in the circumstances of the case; whether, the Shariah Court order on custody was null and void and of no effect for lack of jurisdiction. Thirdly, whether a converted Muslim, who had obtained the

custody order from the Shariah High Court with respect to the child under the civil marriage, absolved from obeying a civil High Court custody granted to the non-Muslim spouse.

The decision was handed over by the Court on May, 30th, 2014. The High Court held that Shariah High Court had no jurisdiction over non-Muslims. They do not and could not come over under the jurisdiction of the Shariah Courts and its orders could not bind a non-Muslim.

Secondly, the Shariah High Court had no jurisdiction to grant the custody order to the respondent husband, as the other party named in the proceeding before the Shariah High Court is not a Muslim. The Shariah Court had no competency to deal with custody issue had one party was not a Muslim. The High Court further held that it had the necessary jurisdiction to deal with such custody issue as conferred by section 51(2) of the Law Reform Act 1976. In summary, the 1976 Act applies to all parties who are married or deemed to have been married under the Law Reform Act 1976 and all application of ancillary reliefs thereof. The court further held that the Shariah Court custody order was null and void, as it was in excess of jurisdiction.

Subsequently, the respondent-husband filed several appeals to the Court of Appeal in *Pathmanathan Krishnan v Indira Gandhi Mutho & Other Appeals*^{xxxv} These appeals were against the decision of the Learned Judicial Commissioner ruling that the conversion of their children were unlawful, unconstitutional, null and void and of no effect. The appellant's argument was that the High Court had no jurisdiction to determine the issue of children conversion as it lay exclusively with the Shariah Court. Further, there was no contravention to the provision of the State Enactment nor the Federal Constitution whatsoever. Finally, the learned Judicial Commissioner had committed a grave error when approaching jurisdictional issue by venturing into the constitutional construct of the fundamental liberties of the Constitution.

By the majority decision, the Court of Appeal allowed the appeal and ruled that the conversion of the children were in accordance with law. The lordships held that applying the "subject matter approach", the jurisdiction in determining the conversion issue vested under the exclusive jurisdiction of Shariah Court. Further, the learned Judicial Commissioner had approached the subject matter erroneously when he ventured into the constitutional construct of the fundamental liberties of the Constitution.

The Court followed the previous decision of the Federal Court in *Subashini Rajasingam v Saravanan Thangathoray & Other Appeals*, whereby Article 12 (4) of the Constitution does not confer the right

of choosing religion for underage children. Further, the exercise of the right of one parent shall not be taken to mean a deprivation of another's parent's right.

3. Final Case Pertaining to the Mandamus Order

In the final case, *Indira Gandhi a/p Mutho v Ketua Polis Negara*^{xxxv}, upon obtaining a successful committal order against the husband respondent, which order required the bailiff and a police officer to execute the order against respondent-husband. The applicant also had a successful recovery order to direct the officer in charge to search the husband premise and take custody of the child. The issue at stake was, the refusal on the part of the Respondent, The Inspector General of Police(the IGP), to execute the warrant of committal and the recovery order despites of the repeated reminder . The refusal to act on the basis of quandary as they are faced with two conflicting court orders, the Shariah Court granting custody order to the husband respondent and the High Court granting custody order to the wife applicant.

The respondent-IGP took the position that to execute the custody order of the High Court would cause him in contempt of the Shariah Court.

The High Court in the present case had to determine whether the IGP can refuse to execute the committal order for contempt against the respondent husband and a recovery order to enforce the custody order of the High Court.

The Court delivered the decision on October 27 2014, held that the respondent IGP was under the misconception that there were two conflicting orders, one from the Shariah Court and the other one from the High Court . Nevertheless, there was no order of recovery issued by the Shariah Court to search and recovery of the child. So long as the order of committal and recovery remain valid, it must be complied with.

Further, the IGP was erred when he misapprehended that he will be subjected to the contempt action by the Shariah Court or the civil court. Even if that was the case, no mandamus order that will be issued by the Shariah Court had he failed to carry out the said order. It is clear that Shariah Court does not have the power to issue a prerogative writ and it has no jurisdiction over the IGP. The court finally upheld that it was not for the IGP to refuse enforcement of the civil orders ,as it was the derelictions of his duty under the Police Act 1967.

Appeal by the Inspector General of Police

Unsatisfied with the High Court decision, the IGP filed an appeal to the Court of Appeal, Putrajaya in *Ketua Polis Negara v Indira Gandhi a/p Mutho*^{xxxv} . In this appeal, the IGP argued that the High

Court was wrong in granting order for mandamus on the basis of two reasons, firstly, the dispute between the respondent and the applicant was private matter involving personal law and did not concern public law. Secondly, the recovery order could not be justified under the said Child Act because the respondent husband had been granted with the custody order first and was a lawful guardian of the child.

Court of Appeal in allowing the appeal^{xxxv}, held that an order of mandamus is issued to enforce the public duty and not in private matter which already had a remedy, in this case, the committal and the recovery orders. The respondent could enforce the committal order with the assistance of the enforcement officer. In the words of the concurring decision, “public policy militated against the use of public resources to enforce private rights when those rights did not affect the public at large. The exercise of discretion by the High Court in this case ought to be interfered with and the order of mandamus be discharged on the ground of public policy

However, Tengku Maimun Tengku Mat, dissenting, did not concurred to the decision and held that the IGP had a discretion in the matter of execution of process to enforce a personal and private right as opposed to enforcement of public right. The duty must be exercised in the context of general duty of police to maintain law and order^{xxxv}.

Final Appeal by the Applicant-Wife

The Applicant had filed an appeal against the decision of the Court of Appeal in *Indira Gandhi Mutho v Ketua Polis Negara*^{xxxv}, the Federal Court overturned the decision of the Court of Appeal and allowing the appeal. In determining the primary question whether the IGP could refuse to command the execution of the said orders, the Federal Court held that the case did not purely relate to the private right but it had developed into a challenge to the administration of justice. The respondent husband had wilfully disobeyed the High Court’s order and it was not a lawful action. Therefore the warrant of committal needs to be executed and the police as the proper authority to carry out the task. As such the IGP can be compelled to command the execution of the warrant of committal and recovery order. The court citing the previous precedent in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*^{xxxv}, whereby mandamus can be issued against the State Government to compel the government to pay significant amount due to the respondent and it was not a matter of discretion.

The Federal Court also referred to the earlier case of *Viran Nagappan v Deepa Subramaniam & Other Appeals*^{xxxv} whereby the IGP was also confronted with two custodial orders, firstly by the Shariah Court and later by the High Court. Later on the ex-husband had taken away their son and the ex-wife

then applied for recovery order and it was duly granted by the High Court and subsequently affirmed by the Court of Appeal upon appeal .

: **Implications of the Decisions**

There are several issues as the consequences of the decisions, which deserve to be highlighted, as the following:

1. Jurisdiction of Shariah or Civil Courts

The issue of which court has the real and genuine jurisdiction to hear the case. The case related to the nullity of children's conversion certificate. Does the civil court has the jurisdiction to try the case? The approach adopted by the civil court in this case was exclusive jurisdictional approach. High court was not prevented by the article 121(1A) of the Federal Constitution to hear the case. The jurisdiction in determining the validity of the conversion is not within the exclusive jurisdiction of the Shariah Court. Nevertheless, this decision was overruled by the Court of Appeal in the subsequent proceeding.

The other point to be highlighted also is, in determining the jurisdiction of shariah or civil court , the decisions of the higher courts binds the decision of the lower courts. There are many decisions of the higher courts which give effect to article 121(1A) of the Federal Constitution

On the other note, interestingly , while delivering his note of dissent^{xxxv}, Hamid Sultan Abu Backer Judge Court of Appeal, opined that the most significant issue to be determined was whether the Certificate of Conversion which had been issued by the Registrar of Muallaf (Pendaftar Muallaf) came within the jurisdiction of Shariah Court and within the purview of Article 121(1A) of the Federal Constitution . The Court had to distinguish whether the issuance is within the Shariah Court jurisdiction or purely administrative decision .The Lordship ruled that it was the administrative decision by the Registrar and it was amenable to judicial review. As such the High Court had jurisdiction in it.

With due respect, the opinion deserves some thought. Applying the principle of subject matter approach, the issuance of certificate of conversion related directly to the Muslim conversion itself ,hence the subject matter is very much related to shariah issue , as such it is within the purview of

shariah court and not civil court. The “remedy prayed for approach” was wrongly applied in this situation.

2. Conflicting Decisions Pertaining to the Legality of the Children’s Conversion

They were two conflicting decisions pertaining to the legality of the children’s conversion , one by the High Court which declared that the conversion was unlawful, null and void and of no effect . Upon appeal by the respondent-husband , the Court of Appeal , by majority decision quashed the decision of the High Court and ruled that the conversion was lawful and had legal effect. Applying the precedent, it was clear that the decision of the Court of Appeal prevailed over that of the High Court decision.

3. Conflicting Custody Orders by the Shariah and Civil courts

There were two almost simultaneous orders issued by the courts .Shariah Courti initially had issued the custody order to the husband while concurrently it had also been issued by the High Court to the wife. It was decided by the High Court that the Shariah High Court order was null and void , as it want of jurisdiction. The order was not binding on the wife, non-Muslim. As such the civil High Court order was a valid order and the respondent was clearly in violation of the custody order .The wife subsequently filed for an application of judicial review of mandamus in the High Court . The wife successfully been granted with the mandamus to compel the Inspector General of Police to carry out the order. However, the IGP had appealed against the decision in the Court of Appeal and it was allowed by the Court . Unsatisfied with the decision , the wife-applicant filed the subsequent appeal to the Federal Court and it was granted by the Court , failing to carry out the order, the IGP amenable to contempt of court.

It is interesting to note that the wife-applicant application of mandamus and recovery order is a rarity in such cases. Fortunately, the Federal Court had followed the previous decision in *Viran Nagappan v Deepa Subramaniam & Other Appeals* in which the IGP also had been encountered with two conflicting custodial orders and the Federal Court affirmed the decision of the High Court in issuing the recovery order to the wife.

Nevertheless, none of other previous cases can be compared to these two cases, Indira and Viran Nagappan ‘s cases. These two cases has enlarged the scope and horizon of shariah related cases by their judicial review applications

Conclusion

To conclude, despite of Article 121(1A) of the Federal Constitution, cases like this keep emerging and bound to happen in the future. All parties concerned could not absolve the responsibilities and must work towards a workable and just solution. As the wise words of the Learned Judicial Commissioner in the initial case deserves a highlight, “This is not the case of one court striving for superiority over another. Much less, is it a case of pitting one court’s jurisdiction over another and see which would prevail. It is at the end of the day as basic as bringing to the proper court for the adjudication custody dispute arising out of a civil marriage even though one party in the marriage has converted to Islam. It is no more than resolving one’s outstanding obligations with respect to divorce, whether it be custody or maintenance or matrimonial assets issues, under which the law where one’s marriage was consummated and now stands dissolved”.

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VACCINATE OR UNVACCINATE? RIGHTS TO LIFE AND SOME LEGAL PRINCIPLES IN MALAYSIA

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Abstract

Malaysia was suddenly being shaken by the word diphtheria and the public went frenzy to look up in the internet of the growth disease. The social media was burst out by medical practitioner sharing their views on the disease that uproar lots of arguments that invites the National Fatwa Council also to discuss further about the disease. The disease is actually manageable through a proper vaccine called diphtheria toxoid. The aim of this article is to discuss and identify on the legal position and the implementation of the current laws available on child vaccination in Malaysia. This article also touches on the children's right to life, to survival and to develop because it is part of their fundamental right and acknowledged by all international treaties relating to Human Rights and the Rights of the Child. The study is based on the relevant statutory, cases and views of authoritative persons and personnel in the legal fraternity. A discussion is also to seek the conformity with the other international countries and Shariah perspectives on their legal standards and public awareness. The significant of this study is to seek suggestion and further enhancement or improvement to oblige the community to abide by a strict law as well as to create awareness on the importance for their children to get vaccinated. It is thus vital for governments and individuals to ensure the community is vaccinated against otherwise fatal diseases.

Keywords: Anti-vaccine, child law, child rights, diphtheria, disease.

Introduction

As at 26 July 2016, 25 cases of diphtheria were reported including 5 deaths and 1 victim of 41 years old housewife in Rembau, Negeri Sembilan. Diphtheria originally comes from the word Greek 'diphthera' which means leather, is an infection caused by the bacterium *Corynebacterium diphtheriae*. It was discovered by German bacteriologists Edwin Klebs in 1884. The bacteria can cause symptom which gradually beginning with a sore throat and fever. In severe cases a grey or white patch develops in the throat. This can block the airway and create a barking cough as in croup and may cause the neck swell in part due to large lymph nodes. A form of diphtheria that involves the skin, eyes, or genitals also exists. It is usually spread by people through air and in Malaysia the cases were affected young children as young as infant age. The disease is actually manageable which vaccine to prevent it which

called diphtheria toxoid. When diphtheria cases were reported, Malaysian medical practitioners were so alarmed by it as the disease was no longer be identified as a major outbreak especially in a develop country like Malaysia. According to Dr. Shaiful Ehsan in The Malaysian Medical Gazette^{xxxv}, the disease is a history which was not supposed to be repeated and even some medical practitioners have never seen or met with diphtheria patients in their lives, for the disease has been successfully controlled with vaccine in order to stop the spread of the disease. The rise of the disease is said to be caused by a group of people identified as anti-vaccine group which deny access of their children to be vaccinated or immunisations based on religious grounds. Although there were no concrete evidence claiming to such a group, report from a local daily the New Straits Times recently stating that Family Medicine Specialists Association of Malaysia president Dr Norsiah Ali as saying that the number of parents who refused to vaccinate their children increased from 470 cases in 2013 to 1,054 cases as of May last year and recently it has been reported that nearly 1,500 people nationwide refused vaccination, with nearly 500 as of March.^{xxxv} This article seek to discuss on the possible law of vaccination and its conformity with the public. This article will also discuss on the perspective of Shariah point of view. Since the issue has becoming more epidemic as lives are at stake, solution from other countries will also be relied upon. It is hope that suggestions and recommendations coming out from this article will assist a betterment for our future in tackling issues on infectious disease and vaccination.

The Law of Vaccination in Malaysia

Vaccination or immunisation is not mandatory in Malaysia but stands as a policy recommended by the Ministry of Health for the safety of population and also in order to prevent infectious diseases which including diphtheria^{xxxv}. It has been implemented in early 1950’s under a plan of National Immunisation Programme where it was given out to the public for free to protect the children from infectious diseases. Present, the plan will be given out in a schedule and will be introduced to newborn parents and is provided by all medical stations throughout Malaysia.

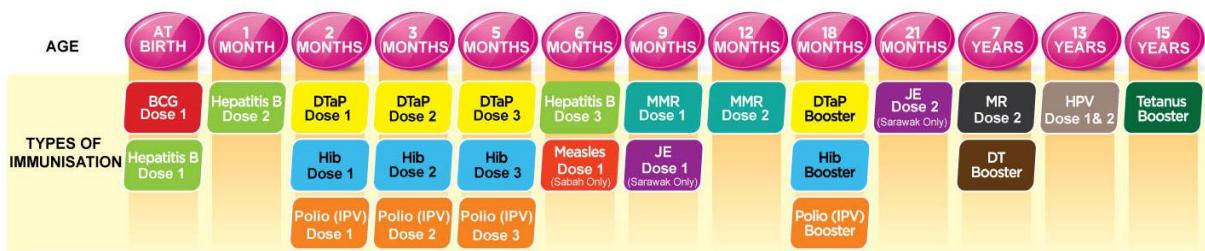


Figure 1: The Vaccination Schedule by the Ministry of Health Malaysia^{xxxv}

With recent outcry of the said disease, the government is now looking at the possible measurement to curb such mess including to enforce the vaccination to be mandatory. The Deputy Health Director-General Datuk Dr S. Jeyaindran has announced that the matter is now pending proposal to the Parliament and amendments can be done to the existing Acts for its corporation. The proposal which is seen to be a solution has become a public controversy due that such compliance will against the rights and freedom of a person. Argument and debates from the parents including religious basis as to the nature of the vaccine become sensitive issue to discuss. Issues against rights and freedom for their children has taken place and being debated by the parents of anti vaccine.

For the anti vaccine group, their argument relies under Article 1 of the United Nation Charter^{xxxv} which clearly depicts that everyone has to respect for human rights and for fundamental freedoms. Hence, if the compliance of the vaccination is mandatory such will violates the human rights. Some proponents of anti-vaccination also quote the Nuremberg Code which states that the “voluntary consent of the human subject is absolutely essential” and the International Covenant on Civil and Political Rights (ICCPR) which in its 1966 text, states that “no one shall be subjected without his free consent to medical or scientific experimentation.”^{xxxv}

However, it should also be noted that under Article 25 of the Universal Declaration of Human Rights states that:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, and medical care ... every individual and every organ of society ...shall strive ... by progressive measures, national and international, to secure its universal and effective recognition.”

As such, to deny the vaccine is to deny the right of the children for the health and well-being. Also, what about the right of others whom will be affected by one who has been infected by such disease? Shouldn't that be also taken as to violate the right and freedom of a person for a standard of living?

In a research study made^{xxxv} shows poor knowledge vaccine's acceptability. Although participants were in favor of the vaccine, the majority preferred to delay vaccination because they did not perceive

themselves to be at risk of infection or because of cost factors. Concerns were raised regarding the vaccine's safety, the potential to be perceived as promiscuous and sexually active, and whether the vaccine was halal.

The issue seem deteriorating when this group relies on the conspiracy theory behind the concept of vaccination or immunisation. Conspiracy theories are attempts to explain events as the secret acts of powerful, malevolent forces^{xxxv}. This anti vaccine group beliefs that there is conspiracy movement hidden with politics agenda and religious belief as such deny the treatment. Parents who are faced with the decision to have their children vaccinated may be more likely to seek information about vaccines via the Internet than through their doctor. This group is also actively spreading their data collection in their blogs, using convincing references that influence more and more parents to deny their children being vaccinated. Delusional or perhaps over protective, the anti-vaccine group convinced in keeping their children from not vaccinated and this by far is their choice of freedom.

However, as disease has emerged, another issue is now raise. Will the unvaccinated children danger the others?

Promotional and Awareness Effect

In an article written by Jennifer Schweppe^{xxxv} the article discussed on how far the effectiveness of vaccine. It stated that, "first, parents and non-traditional medical practitioners have strongly held, though medically disputed, reasons for refusing to immunize children. States support immunization policies, and this wide variation in belief as to the efficacy of the process, where opinions are intractable and unwavering, provides an interesting viewpoint from which to assess parental obligations. As stated by Kerr:

"Immunisation ... describes the successful outcome of a preventative medical intervention that utilises the immune response of children to build resistance to communicable diseases. As a 'counter-intuitive' biological process, immunisation has never been universally embraced by health consumers. Yet it is regarded by the vast majority of health professionals and commentators ... [as] one of the most safe, cost-effective and successful health interventions ever developed.

Secondly, if we accept that, while on an individual basis, it is seen to be acceptable for parents to choose not to immunize their children against certain diseases, if the levels of non-immunization reach a certain level, there is a possibility of illnesses such as polio, which have been practically eliminated, returning”.

A case study made by Ministry of Health in the Clinical Practise Guidelines^{xxxv}, *the most important factor of an age host response to immunity with diphtheria toxoid is the modifying effect of passively acquired maternal antibodies in young infants. This passive diphtheria antibodies seem to show a transient antibody response suppression to the second injection of DPT vaccine, although, there has been no response to the third injection of DPT vaccine (Ministry of Health Malaysia, 2002, level 1).*

A point to remember. The anti vaccine group is not from a rural area nor a low-educational group of people. These are well educated professional parents who has made their research based on books, studies and discussion from various of references. The Government (why Government?) through its agencies by far has taken various steps in order to prevent any outbreak to the public. Hence, the implementation (and free) of vaccination or immunisation to public has been introduced years back. The promotional and awareness has been made varies including to school children in their own school. In fact NGO’s as third party administrator has create a system to trace and to remind the parents who missed out their children’s vaccination-Virtual Health Connect (VHC) which is a a community-based lightweight web-based solution that helps to record and keep track of children’s immunisation schedules automatically^{xxxv}.

Because of the stubbornness or perhaps act of selfishness of the group, some parents have suggested that school should also start to play a serious role in curbing the problem. They suggest that the unvaccinated children to be isolated from the vaccinated children. A fair step to protect the vaccinated children from being affected. Immunisation or vaccination card has been introduced in few countries such as Uganda and other developed country like Australia and penalties to parents who deny their children from having vaccinated is imposed.

However, of course, such action will carry huge controversial issues from various aspect especially the violation of right to education for the unvaccinated children. But, other children have also the same

and equal right to live in a standard healthy environment without their parents having worry that their children will be affected by infectious disease at school.

Other suggestion also including to not allowed unvaccinated children to register into any public school and if they wish to, these children has to undergo a vaccine chase to ensure that they are not infectious. Some suggest to impose higher educational fees to the anti vaccine parents at the international or private schools if they wish to register their children. Biological (bioethics) fees and higher insurance fees to also be imposed to the anti vaccine group as they may endanger other innocent lives in the society. These are some of strict measurement that has being suggested to the government in fact it come from the medical practitioner point of view, as any infectious disease can lead to death to the innocent lives. The selfishness of the anti group has to be taken as a penalty says them.

Parents of a neglected children may be held responsible for ill-treatment of their children and could be possibly charged under the Child Act 2001^{xxxv}. In Uganda, parents who fail to vaccinate their children will face six months in jail. In some other countries, implementation of immunisation card is required to the children to allow them to go to school in preventing from any infectious diseases being spread to others.

Since one of the argument that the anti vaccine group raise was on the authenticity of the vaccine as to whether the source to it is *halal*, few Muslim scholars has discussed the issue and National Fatwa Council has announced the status in order to convince the public in becoming more humane in understanding taking vaccination.

Islamic law perspectives

The incidents which happened few months ago should be a lesson for all of us and we should be aware on the danger and the high risk of this infectious disease to the infants or small children who have yet to be vaccinated are easily exposed.

The below Figure 2 stated how Diphtheria is infected and the Fatwa of Muslim religious scholars in Malaysia about the disease:



Figure 2: Diphtheria Immunisation and Fatwa of Muslim scholars in Malaysia^{xxxv}

In Islamic law perspective, preventive measures are the core of all medicine. This is highlighted through the concept of *al-wiqayah khairun min al-‘ilaj* (prevention is better than cure). According to Dr Shaikh Mohd Saifuddeen Shaikh Mohd Salleh^{xxxv}, the modern medicine is based on the scientific approach has two important concepts, namely healthcare through prevention (*hifz al-sihhah*) and treatment (*al-‘ilaj*). Many scholars and historians of medicine are of the opinion that *hifz al-sihhah* is greatly influenced by the concept of *al-himya* from the prophetic medicine. Taking this spirit of *hifz al-sihhah*, we can argue that vaccination is an endeavour to prevent epidemics from occurring in our community and country. Should there be an outbreak, it would come with a great cost for all of us, in terms of financial and human capital, and life.

So when more and more parents do not vaccinate their children, the risks of an outbreak increase. This is because when the number of unvaccinated children increases above a certain point, then the “herd immunity” is compromised. Herd immunity refers to “the protection of a whole community from disease by immunising a critical mass of its populace.” When the threshold of the herd immunity is compromised, we will begin to see preventable diseases, and also eradicated diseases, returning to the community.

According to The Islamic Medical Association of Malaysia (Imam), the resurgence of diphtheria was due to the reluctance of some parents to comply with the policy and advice of the Ministry of Health (MoH) to vaccinate their children according to the National Immunisation Programme (NIP)^{xxxv}. Among the factors identified for this reluctance include misinformation, untruths and

myths on the Internet and social media about the vaccinated medicine's status. To add further, the refusal of vaccination also stemmed from adopting the religious arguments about the status of vaccines by a few religious groups and individuals that do not have any expertise in science and the complexities of medicine^{xxxv}.

The immunisation is a preventive public health that recognised and practised by many Muslim doctors who are experts, trusted and thiqah (reliable) worldwide. Muslim religious scholars and fatwa councils in Malaysia and the Muslim world have unanimously proclaimed that immunisation was consonant with the objectives of the *Shariah (Maqasid Shariah)*. Imam unequivocally concurs that immunisation is a preventive public health strategy which saves lives, prevents intellectual and physical disabilities and is an economic plus to the nation. It complies beautifully with the *Maqasid Shariah*, which preserves and protects human life.

Imam fully supports the NIP and urges the public to take advantage of this free immunisation policy. This is in line with the legal maxim of Fiqh, "*the common good (maslahah) of the community overrides the individual.*"

The Holy Al Quran says to this effect also:

"(O Muhammad), whenever We raised any Messengers before you, they were no other than human beings;(except that) to them We sent revelation. So ask those who possess knowledge if you do not know." (Al Quran, An Nahl: 43)

By observing the above maxim and verse, obviously the loss of life from diseases could have been prevented by vaccines. It is naive to say that during the time of the Prophet or before this, there were no problems even though vaccines never existed then. As Muslims, Allah is the One who sends diseases and its cures. We must also accept that as God's creatures, we are always subject to the rules established by Him. Among these are that we fall ill when pathogens such as bacteria and viruses infect us. He also created within the human body an immune system that can be activated either passively or actively against these pathogens. Medical experts through extensive research spanning decades have formulated effective and safe vaccines which are capable of actively stimulating the human immune system to produce antibodies to kill these germs and confer immune memory against future infections.

Immunisation of the community to achieve herd immunity is an act of *Fard Kifayah* of every individual in society to acquire and promote benefits and prevent and protect from harm. We must understand that vaccination does not only protect the person who is immunised. Vaccination also protects the people around the immunised person. The reverse is also true. A person who is not vaccinated, when he has contracted an infectious disease, would risk infecting the people around him. It is a regret to say that Malaysia as a moderate and progressive Muslim country is facing a decline in the number of children being vaccinated, which is indeed worrying. Therefore, it is imperative that the well-being of the whole nation is given priority. Personal choices that risk an outbreak or an epidemic should not be allowed. From this point of view, vaccination is crucial to protect the health of the community at large. It is not just about our own personal choice or preference. It is what is best for the community and nation.

Conclusion

Yes. One could agree that a vaccine could not stop nor eliminate infectious disease, but immunization has been proven to be an effective tool for “controlling and eliminating life-threatening infectious diseases”, and is estimated to avert between 2 and 3 million deaths each year, states by the World Health Organisation (WHO). It further states that “it is one of the most cost-effective health investments...while any serious injury or death caused by vaccines is one too many, the benefits of vaccination greatly outweigh the risk, and many, many more injuries and deaths would occur without vaccines.”

Prevent is better than a cure. In Islam, *ikhtiar* (initiatives) to have a better ending in lives in everything, is a concept that has been uphold by Muslim. Vaccination or immunisation is one way of *ikhtiar* that has to be taken into consideration seriously.

Whether or not the rights and freedom of a person is violated, the same will affect others. What should be first taken prioritise is what best for the children’s interest which is cover under Article 24 of the Convention on the Rights of the Child^{xxxv}. The children have all the right to have a standard right to live. The parents should not be too opinionated and research on vaccine should be more educative rather objective. The issue has to be handled as gentle as possible due to principles and beliefs which are sensitive to some people.

Perhaps it is time for an open discussion made maturely rather than discussing it at unofficial medium like blogs or other media-communication. Proposals of recommendations should be made with perspectives from various religious and beliefs should be taken into consideration to solve the issue. Hence, it is best for all agencies including Ministry of Health, Ministry of Education and relevant bodies of enforcement to work hand in hand in order to solve the issue before it became a tragic of an old relic epidemic.

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The Need for Anti Sexual Grooming Laws for Children

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Abstract

The response to episode one of ‘Predator In My Phone’ has outraged the public as well as the urge to introduce the law against child sexual grooming in Malaysia. Malaysia actually does have laws in place to protect children against harassment and exploitation. The Penal Code, Child Act, and Communications and Multimedia Act covers things like inciting a child to gross indecency, physical harm or abuse towards children and sending or receiving obscene material. But newer, technologically-enabled crimes like grooming often fall in a grey area, making it hard to charge the perpetrators, and even harder to get a conviction. The aim of this article is to discuss and identify on the possible legal framework and how a better implementation could be done in protecting the children against sexual grooming. This article also touches on the need to review and enhance legislations to better protect children, given the rapid expansion of communication technologies and the Internet penetration in Malaysia. The study is based on the relevant statutory, cases and views of authoritative persons and personnel in the legal fraternity. A discussion is also to seek the conformity with the other international countries and Shariah perspectives on their legal protection and standards on children protection as well as public awareness on the issue. The significant of this study is to propose new comprehensive laws against sexual grooming, where the perpetrators can be charged even before they physically meet their victims. By having Anti-sexual grooming laws will ensure a clear legal protection and obligation for public and authorities in combating this heinous act.

Keywords: Anti sexual grooming, child law, international standards, legal framework, protection.

Introduction

The recent case of sex crimes against children - a British paedophile Richard Huckle who was convicted on more than 200 counts of sexual molestation of children and babies in Malaysia, since then has been a general increase in concern about child sex offenders using the Internet to access victims for child sex abuse. It got worse when the local child protection non-governmental organisations and the media revealed more disturbing stories whereby there are local paedophiles in our midst. The online episode of ‘Predator In My Phone’ which was virally exposed in the internet^{xxxxv} has outraged the public and urged a concern to introduce a specific law on ‘child sexual grooming’. So what is child sexual grooming? Child sexual grooming can be defined as befriending and establishing an emotional connection with a child, and sometimes the family, to lower the child's inhibitions for child sexual

abuse. It lures minors into trafficking of children, illicit businesses such as child prostitution, or the production of child pornography. This could also happen over the Internet, with the offender arranging to meet the child in person or the ‘online friendship’. Today’s children are Internet-savvy but these children are not old or mature enough to rationalise, assess or filter what is right or wrong over the Internet. Since 2010, police have received over 400 reports of Internet-related rape cases, of which 339 involved minors. Sadly, these are only the tip of iceberg^{xxxv}. There is no doubt that it about time for Malaysia to legislate the anti-grooming laws. The creation of ‘sexual grooming’ legislation provides a much needed form of ‘intervening’ before physical contact offences with children take place. If the new legislation is introduced, it could be applied to a wider range of sexual grooming behaviours, including those that did not take place over the Internet as well. This article intended to identify further on the scope of the law and workability of such legislation. It is these scopes that are the focus of this article, which will be discussed of: defining, identifying and understanding of child sexual grooming; scope of legislation in relation to Internet and non-Internet grooming; continued focus on offenders with previous sexual convictions as opposed to any person with a sexual interest in children; and to ensure that the enforcement of such laws does not infringe the rights of the individual (suspect) as enshrined in our Federal Constitution. At the same time, the legislation has to be truly preventative. To begin, a more detailed description of the framework and its development will be discussed hereafter.

The Child Sexual Grooming Process

Before we go any further, let us discuss further of child sexual grooming – *“it is a premeditated behaviour intended to secure the trust and cooperation of children prior to engaging in sexual conduct. It is a process that commences with sexual predators choosing a location or target area likely to be attractive to children. A process of grooming then commences during which offenders take a particular interest in their child victim to make them feel special with the intention of gaining their trust. As trust is developed between the child victim and the offender, offenders then seek to desensitise child victims to sexual conduct by introducing a sexual element into the relationship. All this is able to be achieved with ease in the online environment. Social networking through blogging, instant messaging, chatrooms and short message services all enable children to communicate with friends quickly, effectively and ostensibly with confidentiality”^{xxxv}*. Other communications technologies such as email, WhatsApp, WeChat and mobile phones can also be used in the grooming process. Acronyms and other non-linguistic signs (so-called ‘emoticons’) are often used to accelerate the writing process, and many of these are used to represent sexual content. The anonymous nature of the internet allows offenders to

masquerade as children in cyberspace to gain the confidence and trust of their victims over a period of time before introducing a sexual element into the online conversation and eventually arranging a physical meeting.

According to a survey, CyberSAFE 2015, more than 90 per cent of schoolchildren in Malaysia use the Internet, and 83 per cent are susceptible to online dangers due to poor supervision. The survey found that some respondents had sent intimate photos or videos to someone on the Internet, others had been asked to upload intimate photos or videos of themselves on the Internet and some respondents accessed pornography on the Internet^{xxxv}.

Current Legislation and International Recognition on Child Sexual Grooming Worldwide

International Recognition

With the rapid occurrence of such cases has emerged some countries worldwide to introduce their own specific laws that deals with child grooming. The international conventions such as the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse have been introduced in order to ensure the children are safe in the online and offline environment, and child exploitation offences. With such recognition, countries such as Australia, Canada, Netherlands and the United Kingdom have also introduced online child grooming offences. Singapore also has criminalised such act:-

Singapore

Malaysia's next-door neighbour, Singapore, had laws to prosecute those who meet, communicate even through chat apps or travel with a minor on two or more occasions with intent to commit a sexual offence with the underaged child.

Section 376E of the Penal Code provided a maximum three years' imprisonment for the offence.

Australia

Under Section 474.26 and 474.27 of the Criminal Code Act, an individual could be charged with grooming if they communicated with another person posing as a minor (that included a police officer).

It prohibited the use of carrier service (online chat apps) to communicate with an underaged child below 16 for the purpose of grooming.

Canada

Section 172.1 (1) of the Criminal Code of Canada stipulated that it was an offence to lure a child by means of telecommunication.

Netherlands

Section 248e of the Criminal Code stated that an individual who, by means of a computerised device or system, arranged to meet with someone below the age of 16, with the intention of engaging in lewd acts or of creating an image of a sexual act was liable to a maximum of two years' imprisonment or a fine.

United Kingdom

The Sexual Offences Act 2003 covered a wide range of child sexual offences, including Section 15 -- meeting a child following sexual grooming.

The following Figure 1 shows the grooming laws worldwide as above stated^{xxxv}:

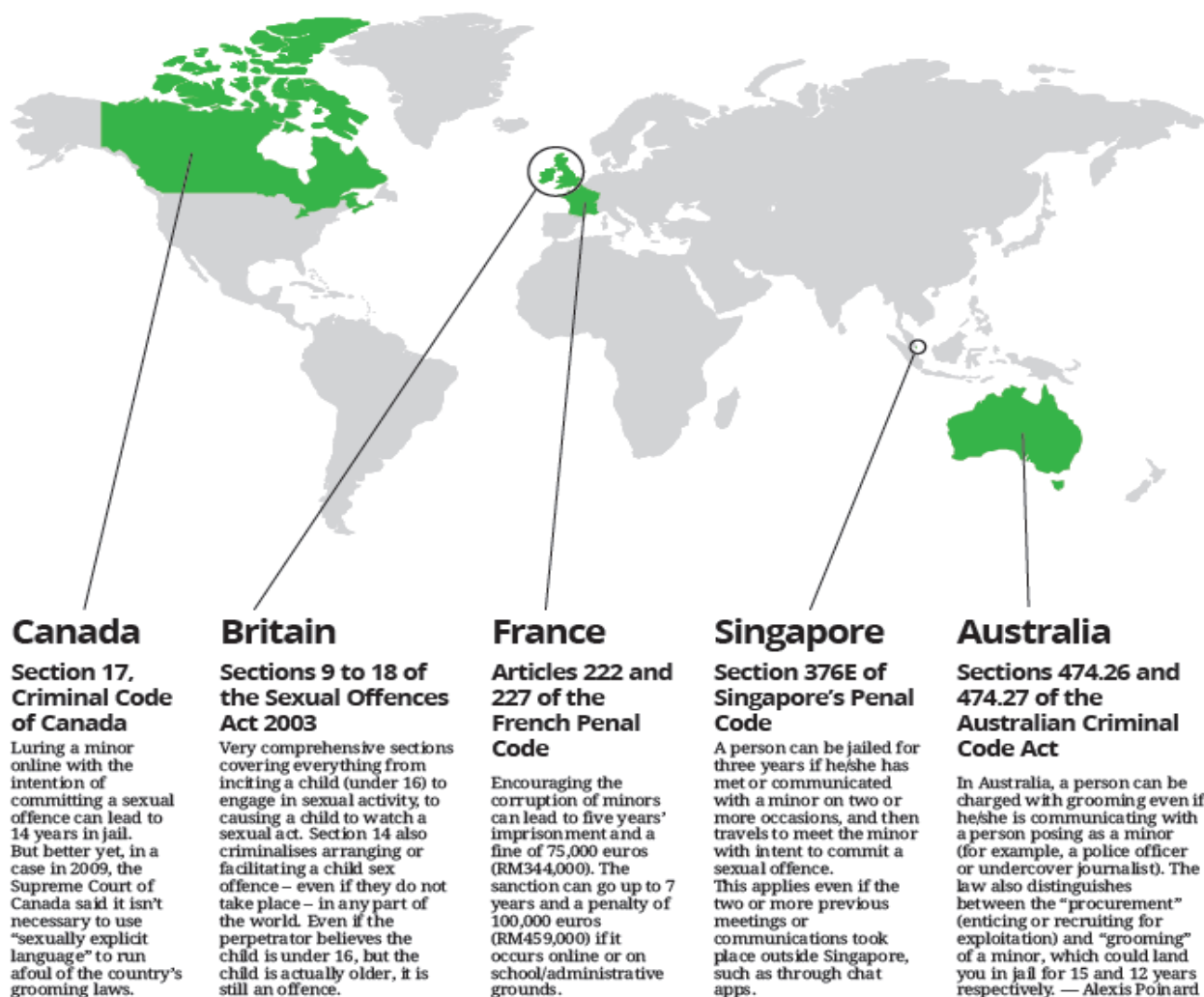


Figure 1: Grooming Laws Worldwide

Source: <http://asklegal.my/p/malaysia-needs-law-to-fight-child-grooming>

The jurisdictions as above figure have legislated in place that criminalises child grooming for the purposes of sexual contact. For the Commonwealth countries in which of its countries that don't have jurisdictions or no specific child grooming legislation, it can be used to prosecute offenders, in certain circumstances. For example, if an adult pretends to be a child in order to establish contact with the victim. It cannot be considered as an impediment to prosecution as child grooming, instead it is viewed as an act preliminary to commission of a sexual offence. This action somehow is clarified and regulated in some legislation like the United States^{xxxv} whereby such behaviour of sexual offenders will be registered and for community notification. Some countries such as Syria, Malaysia and China have introduced the internet filtering by restricting their internet users from accessing online social

networking sites and websites that has potentially hosting materials of child exploitation and racial vilification. However, the extent of internet filtering varies among countries and regions.

Non-Legislative Recognition

Obviously, fighting against child exploitation is a multidimensional challenge that requires effective coordination and collaboration with a various parties such as government and private-sector. Different bodies and corporations have recognised their responsibilities to ensure that the online environment is both safe and secure for users. Among them are R.AGE, Unicef, Women’s Centre for Change, P.S The Children and Malaysia Crime Prevention Foundation have been proactive in working with law enforcement agencies to protect children against sexual offenders either online or offline environment.

Current Legislation on Child Sexual Grooming in Malaysia

Malaysia does have laws to protect children against harassment and exploitation. The Penal Code, Child Act, and Communications and Multimedia Act covers things like inciting a child to gross indecency, physical harm or abuse towards children and sending or receiving obscene material. Such can be illustrated as below mentioned:

“ Inciting a child to an act of gross indecency

377E. Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term ****of not less than three years and not more than fifteen years, and shall also be liable to whipping.**”^{xxxv}

“Section 211. Prohibition on provision of offensive content

(1) No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

(2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.

“ Section 233. Improper use of network facilities or network service, etc

1) A person who —

(a) by means of any network facilities or network service or applications service knowingly —
(i) makes, creates or solicits; and
(ii) initiates the transmission of,
any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or
(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

(2) A person who knowingly —
(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or
(b) permits a network service or applications service under the person 's control to be used for an activity described in paragraph (a),
commits an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction^{xxxv}.

Sadly, Malaysia has nothing on child pornography laws but Section 292 of the Penal Code^{xxxv} and Section 5 of the Film Censorship Act 2002^{xxxv} prohibited possession of pornographic images and films. The danger to these existing law is that the perpetrators can easily slip away as literally, incitement will come handy. Children are an easy prey to be influenced as they have no maturity in their emotions to sense that danger is there. As such, an anti-grooming law is much needed to catch this psychopath and take them down the right way. Immediate proposal should include training to police officers and personnel so they be well-trained to spot possible child groomers, especially those behind the computer keyboards. The police should also be trained to get the evidence out of children, who are mostly traumatised by the sexual abuse, to ensure prima facie cases against the accused.

To add further, by ratifying the Convention on the Rights of the Child (CRC), Malaysia has legislated Child Act 2001 (Act 611) in order to protect children from all forms of sexual exploitation and sexual abuse which includes the exploitative use of children in pornographic performances and materials. However, specific legislative measures have not been taken to prohibit the child sexual grooming activities. Even is the current package of law is there to protect the children, the coverage is not sufficient as the predator is lurking to the children in gaining their trust to do what the predator wishes. Now that has to be tackled in a different way.

Scope of Proposed Framework on Child Sexual Grooming Legislation in Malaysia

Defining and Identification the Sexual Grooming Behaviour

There is no doubt that Malaysia needs to introduce anti-grooming laws. The new law must clearly define all sexual crimes including intended sexual grooming, which would empower our law enforcement agencies to detect and nab the perpetrators before the actual sexual exploitation occurs. First of all, the term ‘child sexual grooming’ must describe a wide range of behaviours, and furthermore the definition, description and theory should varies in the types of behaviours, settings and/or circumstances that constitute child sexual grooming. Thus, the overall picture and understanding of grooming would be clear and incorporate to the full range of behaviours, for example, attempts/methods used to gain access to children, to ‘engage’ children in sexually grooming behaviours. Not to forget, an age target for adults over 18 years must be mentioned - who groom people aged under 16 years. Thus, a person who commits an offence of meeting a child following sexual grooming if they have communicated with a child aged under 16 years, on few occasions (must be specified), and then travelled to meet the child with the intention of committing a sexual offence involving that child. Following to this, if the public, who might report such suspicious behaviour to the police, or the police themselves, would be able to identify sexual grooming, and proceed according to the next action. It should be noted that it is not sexual grooming per se that is a criminal offence, but meeting, or arranging to meet, a child following sexual grooming.

Scope of Legislation and Producing of Evidence

The pivotal point of the legislation is that a suspect can be arrested and charged under this offence once they travel to meet the child, subject to the specifics of the behaviour as prescribed above; the meeting itself does not have to take place. This means that the police have the ability to apprehend a suspect

before they become physically involved with a child, resulting in more protection for children. Furthermore, the risk presented by offender convicted therein can be managed more easily and he/she will be registered as sex offender.

Some other scope to be considered would be the modus operandi over the suspect on sexual grooming. This would be covered in our Police Act and Criminal Procedure - the police or the public (*emphasis needed*) may conduct proactive policing via the Internet; by using the anonymity that the Internet affords; playing child sex offenders at their own game. These operations entail police officer/person posing as vulnerable children in Internet chat rooms, and waiting for suspect to prey on him/her. The suspect, who arranges to meet the undercover police officer/person, will then be arrested subject to the availability of evidence that proves their sexual intent.

The next highlight is obtaining proof of sexual intent, which would vary depending on the medium used to sexually groom children. Internet grooming is much more likely to make the grooming evidence explicitly can be obtained, that is, via the computer trail that remains (or through records of conversations with undercover police officer/person). In addition, the suspect may set out to meet the child armed with pornography, condoms, etc; this would provide a further source of evidence of sexual intent.

Not to forget, provisions on the convicted offender also should be included. Convicted paedophile must undergo therapy, treatment and medication. Perhaps this type of paedophilia should be treated as psychiatric disorder in which an adult or older teenager experiences a primary or exclusive sexual attraction to prepubescent children. Treating paedophile may still be a new area in Malaysia but, various therapies, treatments and medications can be developed based on the experience of countries that have such cases.

Some Recommendations and Conclusion

In coming out with the anti-grooming law, relevant authorities and agencies such as the police, the Malaysian Communications and Multimedia Commission and the Women, Family and Community Development Ministry and various child protection NGOs must collectively cooperate. We should also learn from other countries' experience in introducing effective laws to deal with child grooming. Our enforcement personnel or agencies should be trained to identify possible child groomers, especially those behind the computer keyboards. Further, a good reference and analysis of legislation from other

countries should be made based on its application and implementation. To introduce a new legislation has not always been easy and proven in just a split second, but rather it has to be preventative in nature.

Besides legislation, it is time for us to introduce a suitable sex education in schools. As taboo as it sounds, the children has to be educated in a right way for them to understand the implication to have been induced by the predator. They should be taught how to differentiate between acceptable and unacceptable conduct of adults, recognise inappropriate touching and what to do if they are approached sexually or have been sexually abused.

Public awareness campaigns are always necessary to educate them about child sexual abuse, pornography and the paedophiles. Some people in our society prefer to keep child sexual abuse under wraps for fear of social stigma, especially if the abusers are family members. Some still dismiss a person's obsession with videos and photographs of child pornography as a small matter. For whatever action has to be taken immediately as the damages is far from what it seem. The effect to the children is a stain that last forever.

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Child Rights Act 2003 in Nigeria: What Implications for the Application of Child's Rights in Islam?

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Abstract

Child's Rights Act 2003 in Nigeria as examined in this paper has bearing with the domestic implementation of the United Nation's (UN) convention on the rights of the child and the African Union's (AU) Charter. The act as passed by the Nigerian National Assembly generated heated debate within the Muslim *Ummah* as it revolved round the congruence and lack of congruence of the act with Islamic teachings on child upbringing and parental control. The *Jama 'at Nasr al Islam*, the main umbrella Nigerian Islamic Organization condemned the act as a western inspired effort designed to make children conform more to western values, thus making it unpopular especially in many Muslim controlled States of the country. Arising from this problem, this paper attempts to examine the human rights concept from the Western and Muslim perspectives to see how they are related and then proceed to examine the 2003 Nigerian Child Rights Act side by side with the Child's Rights in Islam with a view to bringing to light the gulf between the two. In order for the gap to be narrowed if not eliminated, the paper stresses the need for the domestication process of the act that takes into account the pristine Islamic value system in the enactment of the law by the various State Assemblies for it to enjoy the Muslims' general acceptance across the country.

Keywords: Act, Child, Islam, Nigeria, Rights

Introduction

Nigeria as a nation state is multi religious and multi ethnic. The three religions practiced in Nigeria are Indigenous Religion, Islam and Christianity in their chronological order of arrival. Onaiyekan (2000) remarked that Nigeria, the most populous African country is the greatest Islamo – Christian country of the world. By this he means that Nigeria is about the only country of the world where large population of Muslims and large population of Christians co-exist side by side in fairly equal proportions. The country made up of 36 states is zoned into six. The giant North predominantly Muslim, made up of 19 states, has 3 zones. The South with 17 states equally has 3 zones. The two zones in the South East made up of 11 states are predominantly Christian while the South West zone made up of 6 states has balanced Muslim- Christian population. In effect Nigerian states can be classified into three in terms of their citizens' religious affiliation: 12 Muslim homogenous states of the North; 11 Christian homogenous states of the South East and 13 states with balanced Muslim- Christian population located in the South West and the Middle Belt.

Seeing Islam as a way of life, the 12 states of the North that are homogenous, opted for the full implementation of *shri'ah* in 1999 when Nigeria returned to democratic governance. The Muslims' obsession with the Islamic value system makes the enactment of Child Rights Act 2003 unpopular especially in the Muslim dominant states across the country. The Child Rights Act 2003 is meant to combat the rampant child rights abuses to which children are exposed including child labour, torture, sexual exploitation, trafficking, abduction, ritual killing, kidnapping, corporal punishment and drug abuse among others.

It is in an attempt to curb these abuses that municipal laws on children were enacted including: a) The Children and Young Persons' Law which is the basic children law in most states of the Federation; b) The Criminal Code Laws in the South and the Penal Code in the North; c) Adoption of children law in some southern states and Abuja; d) Day Care Centre Law of Osun State; e) Infants Law of Osun State 2013; f) Child Marriage Prohibition Law 2004; g) Legitimacy Law; i) Trafficking in Persons/Prohibition Law Enforcement and Administration Act

The latest of the laws in Nigeria is the Child's Rights Act 2003 which is intended to be a comprehensive collection of the major rules relating to the children in the country including issues of child's legitimacy, succession, marriage, fostering, guardianship and corporal punishment among others as will be discussed below. For the Nigerian society that is plural with dominant Muslim population, the Child's Rights Act is bound to have implications for the Muslims' cherished Islamic value system within the society. It is the problem arising from this which borders on the Muslim child's identity formation that this paper seeks to examine and proffer solution.

The Human Rights Concept

In discussing the Child Rights Act 2003 in Nigeria, there is the need, right from the outset, to examine what the concept of human right is all about and also to correct the misconception that the idea is western, when the concept in actual fact is as old as Islam. Human rights can be defined as rights of humans. They are the basic rights that every human has to be treated fairly and not in a cruel manner by any government. They emanate from the inherent dignity of the human person.

In discussing the concept in terms of its origin, reference is made to two schools of thought as postulated by Baderin (2003). The first being the view that human rights' idea is as old as humans, which explains why they are discussed in the revealed scriptures including the Judeo- Christian and Muslim scriptures. They are, therefore, rights granted by God and as such they are immutable as they cannot be withdrawn or abrogated. Consequently, they are binding on the believers, Muslims and Christians alike. The second school of thought perceives the idea as a new business and a creation of

the West. This latter view links the concept with the emergence of international human rights regime occasioned by the first and second world wars. The war atrocities and the cruel treatments of individuals and groups during the period, and the misuse of state apparatus to abuse human beings elicited international concern for the general protection of human rights. Consequently, there was determination by all parties at the end of the second world wars that an international commitment to the protection of human rights should be part of the post war settlement. Hence, the UN member states declared their determination to reaffirm faith in fundamental human rights.

The Universal Declaration of Human Rights (UDHR) was the first UN document adopted containing a list of internationally recognized human rights. It was adopted as a simple resolution of the General Assembly of the UN in 1948. Some of the rights covered by the UN and UDHR have their Islamic equivalents, as if they are inspired by Islam as can be seen from few Qur'anic provisions on such basic human rights and freedom as the right to life (Q. 5: 32/ Q. 6: 151); right to dignity of human person (Q. 17:70); right to free movement (Q. 4: 97); freedom of religion (Q. 2: 256/ Q. 109: 1-6); freedom of opinion (Q. 4: 147); right to property ownership (Q. 4: 32) etc

Contextualizing Nigeria's Child's Rights Act 2003 within the Islamic Child's Rights Provisions Frame

Islam as a belief system and a way of life puts in place measures for special protection of the children due to their vulnerability. The Qur'an in *Surah 25:74* describes children as the "comfort of our eyes" (*Qurat 'a'yun*), hence, many verses of the scripture as well as the apostolic tradition, remind parents and the society about their responsibility to them. Discussing the child's rights in Islam, the Qur'an and the *hadith* specifically recognize their rights to life (Q. 17: 31), right to legitimacy, (Q.17:32), right to breast feeding (Q.2: 233), right to maintenance/ *Nafaqah* (Q. 2: 233), right to guardianship/ Custody (Q 65: 7), right to education (Tirmidhi,Hadith 218) and right to equitable treatment regardless of gender (Q.4 : 11/ Q.4: 7).

In the light of the foregoing, it will not be wrong to conclude that child's rights and indeed the whole idea of human rights under international convention on civil and political rights (ICPR) has Islamic antecedent. However at the close of the last century, civil organizations concerned with welfare of children started agitations for a broad based legislation that will protect the rights of children. Their efforts coupled with the domestic implementation of the UN's convention on the rights of the child and the AU charter resulted in the promulgation of the Child's Rights Act.

The Act was intended to be a comprehensive collection of the major rules relating to children. The Act has 278 sections and 11 schedules aimed at providing a uniform standard throughout the country. It

has broadened the law relating to children rights in Nigeria by dealing with several other new areas including the rights and responsibilities of children, protection of children's rights, fostering, adoption, guardianship, institutional treatment, custody, supervision and care, survival and protection of children. The Act is meant for domestication in each of the state of the federation. It is important to note however that to date, only 19 out of the 36 states of the federation have passed the law while less than 10 states have embarked on its implementation by establishing the family courts to deal with the cases. Though the domestication of the Act ought to be tailored to suit the distinct diversity and sensibility of the strata of the society in the particular state, however the reality on ground is that contrary is the case when it comes to putting the people's indigenous culture in perspective.

I would attempt at this juncture to examine the contentious aspects of the provisions of the Child Rights Act 2003 within the context of the Islamic provisions with a view to highlighting how they sometimes conflict with the Islamic value system and therefore offend Muslims' sensibility. Some of the provisions are as discussed hereunder:

a) Legitimacy

Sections 10(2) and 68 deal with the issue of legitimacy or illegitimacy. Section 10(2) reads: "No child shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth". Section 68 on the other hand reads:

"Where the father and mother of the child were not married to each other at the time of the birth of the child, the family court, on the application of the father or mother shall order that both the father and the mother have parental responsibility for the child."

The absurdity in this provision is that any man and woman without marital relationship can come together and claim paternity and maternity of a child. These provisions of the Act conflict with the Islamic tenet which recognizes marriage as the only basis for the determination of legitimacy of the child (Muslim 2008). Islam views bastardy or illegitimacy with seriousness and comes up with the solution that gives the product of illicit intercourse (*zina*) back to the owner of the bed (*al-walad li firash*) to protect the interest of the innocent child (Buhari 7182). Anything contrary to this Islamic rule is capable of turning the society into an animal kingdom.

b) Child Marriage

Sections 21, 22, and 23 deal with prohibition of child marriage. According to section 21:

"No person under the age of eighteen is capable of contracting a valid marriage, and accordingly, a marriage so contracted is null and void, and of no effect whatsoever."

Section 22 forbids any parent, guardian or any other person to betroth a child to any person. While according to section 23, any person who marries a child, or to whom a child is betrothed, or who promotes the marriage of a child, or who bathrobes a child, commits an offence, and is liable on conviction to a fine of 50,000 naira or imprisonment for a term of five years, or to both such fine and imprisonment. In addition, sexual relationship with a child is deemed by the Act as rape, punishable on conviction to life imprisonment.

These provisions conflict with the Islamic principle which allows the father as a *waliyy* to betroth his minor daughter to a man without necessarily obtaining her consent (Sabiq1365) Marriage of the minor (*inkah ghairul baligh wa ijbarul bint ala ziwaj*) though permitted is not mandatory. However the Islamic law of marriage insists on the consent of a woman that has attained the age of puberty (Nyzee 2010)

c) Adoption

Sections 125 -148 deal in detail, with the issue of adoption. Treated under these are; persons who may adopt, persons who may be adopted, religious upbringing of the adopted child etc. Section 141 in particular deserves special attention as it reads:

“On adoption, all rights, duties, obligations and liabilities, including any other order under the personal law applicable to the parents of the child or any other person in relation to the future custody, maintenance, supervision and education of the child, including all religious rights... shall be extinguished, and shall vest in, and be exercisable by, and enforceable by the adopter”

What the law is saying is that on adoption, the real father of the child forfeits all the rights and obligations on the child except if the child on his own decides to accord recognition to the father. As far as Islam is concerned, the issue of adoption (*at- tabanniyy*) has no basis in *sharī‘ah*. The practice is outlawed by virtue of *Surah* 33:4- 5 which reads:

“Allah has not made for any man two hearts inside his body. Neither has He made your wives whom you declare to be like your mothers your real mothers, nor has He made your adopted sons your real sons. That is your saying with your mouth, but Allah says the truth...Call them (adopted sons) by (the names of) their fathers, that is more just with Allah. But if you know not their fathers’ (names call them) your brothers in faith.”

In the pre-Islamic period it was permitted to name adopted sons after the father who adopted them. However the above verse puts an end to the practice as Allah commanded that they should be given the names of their real fathers, as that was more fair and just. (Al- Qurtubi, 1949). According to a narration of Abdulah bn Umar, reported by Buhari, Zaid bn Harithah, the freed servant of the Prophet

was always called Zayd bn Muhammed until this verse of the Qur'ān was revealed (Puri 2003). Instead of adoption, Islamic law provides for guardianship system to provide alternative family care for children deprived of natural parental care.

d) Guardianship/Custody

Sections 69, 82-92 deal with the issue of guardianship which touches on parental responsibility of a guardian, persons who may serve as guardians, order for guardianship of a child, revocation of guardianship and appointment of a guardian. According to Section 69 of the Act, however, the court may on the application of the father or mother of the child, make such order as it may deem fit, with respect to the custody of the child and the right of access to the child of either parent, having regard to: (a) the welfare of the child and the conduct of the parents and (b) The wishes of the mother and father of the child

This provision derives from the imposed legacy of the common law which stipulates that:

” In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration. Whenever it shall appear to a court that an order made by such court should, in the interest of the child be reviewed, the court may of its own motion, or upon the application of any interested person, vary, or discharge such order.”

According to this provision, right of guardianship of a child can be given to anyone as long as the child's welfare is guaranteed. This is contrary to Islamic principles. In Islam, the law entrusts custody of a child (*hadanah*) at his tender age to the hands of his mother (Ambali 2003). The reason for giving priority to the mother is that she has proper right to guardianship and breastfeeding of the child. This is because she is more skillful and capable of discharging the duty better than man. She is endowed with patience and time to attend to the problems of the child.

e) Corporal Punishment:

Section 22(1)(b) deals with the issue of corporal punishment. The section legislates against the use of corporal punishment for an erring child. This provision is un-Islamic as it is un-African. An adage says “spare the rod and spoil the child.” There is no gain saying that Islam allows corporal punishment as a measure of ideal and proper child upbringing of children. For instance, if a parent notices that his child

neglects daily prayers at the age of ten, the *sharī'ah* prescribes beating as a corrective measure (Sabiq 1407 H). One of the factors responsible for the general moral decay and general indiscipline of the children in the West is prohibition of corporal punishment which is being imported to other nations.

Implications of adopting Child's Rights Act 2003 for the Muslim Child

It is crystal clear from the foregoing that the perception of the child's rights as conceived by the Act and that of Islam are diametrically opposed as far as the five issues examined are concerned. Adoption of the Child's Rights Act 2003 as envisaged by the law makers has the implication of throwing into the winds the cherished Islamic values in favour of western value system which any conscious Muslim society would frown at. Its introduction meant an attempt to deprive the Muslim child the desired Muslim upbringing needed to form his Islamic identity. As would be expected, the enactment of the law generated heated debate within the Muslim *Ummah* of Nigeria in the recent past. The debate generated, as reported by *Daily Trust* 28th November, 2005 revolved round the congruence or lack of congruence of the act with Islamic teachings on child upbringing and parental control as well as the fears and suspicion which many parents have that the act is a western inspired effort designed to make children conform more to western values and become less obedient to their parents.

According to the Muslims' belief, Islam as a religion has a comprehensive code on the rights and privileges of the child, and Muslims do not need any western inspired Child Right Act. Islam attaches serious importance to discipline and parental control in child upbringing. Unfortunately, it has been observed that the Child's Rights Act as passed by the National Assembly have limited the powers of parents to train their children in accordance with the cherished religious and cultural values. The controversy generated by the Act prompted *Jamaa'at Nasril Islam* to sensitize the appropriate Islamic authorities on the areas in which the provisions of the Act conflict with Islamic principles in order to make amends.

One of the provisions of the Nigerian Child Rights Acts 2003 is the creation of Family Courts to hear and determine matters relating to children. Despite the fact that the provisions of the Act supersede the provisions of all enactments relating to children and despite the fact that the Act is intended to be a comprehensive collection of the major rules that are children related, the conventional courts including the customary and *shari'ah* courts continue to exercise jurisdiction over child matters which is contrary to the spirit of the enactment.

Conclusion and Recommendations

An assessment of the acceptability of the Child Rights Acts 2003 in the different parts of Nigeria reveals general apathy occasioned by the people's religious and cultural consideration. The attitude towards the law differs from region to region. The apathy shown towards embracing the law in the North, especially the *sharī'ah* implementing states, is due to their attachment to the *sharī'ah* legal system which, as already noted, has provision for rights of the child. The reason for the apathy in the country's Eastern part which is Christian dominated is economically motivated in view of the economic exploitations (for personal gains) to which the children are subjected. With regard to the Western part of the country where the Muslim-Christian population is balanced, the prevalent influence of the western civilization in the area accounts for relative acceptability of the law in the region, a fact which also explains the low level of Islamic consciousness of the Muslims in the region when compared with the North.

In the light of foregoing therefore, the provision of the Law making replication mandatory on all states of the federation should be reviewed by making it optional and as for the states that have already imbibed the concept, there is also the need to review its operational mode and to this end I put forward the following recommendations:

- 1) In view of the fact that the Child's Rights Act 2003 is meant for domestication in each state, such domestication must be tailored to suit the distinct diversity and sensibility of all strata of the society in the particular state. It is, therefore, the duty of all relevant government agencies to see to it that the provisions of the Act are subject to rigorous scrutiny before legislative attention. It should be seen that various positions and fears are addressed and harmonized to protect the child as well as the people's cultural values.
- 2) Arising from the first recommendation, there is need to train the family court justice administrators the rudiments of Islamic Law to help them in dealing with cases in Islamic related issues
- 3) Poverty in the land should be recognized as a major factor responsible for exposing children to various forms of abuses such as hawking, begging, prostitution etc., for effective application and implementation of the Child's Rights Acts, government should intensify efforts at reducing poverty through employment opportunities so as to improve the parents' means of livelihood.
- 4) Since the problem described in 3 above is more prevalent in the Eastern part of the country, the governments in the region should apply drastic measures in combating the menace of the child economic exploitation through legislative means.
- 5) Governments of the South Western Nigeria should put in place machinery for the establishment of *sharī'ah* legal system in the zone in line with the constitutional provisions.

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PROPOSED AMENDMENT TO SECTION 46 OF THE CHILD ACT 2001 RELATING TO CHILDREN BEYOND CONTROL IN MALAYSIA

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Abstract

In early 2015, the Malaysian government announced that a major amendment involving more than 70 per cent will be made to the 13-year-old Child Act 2001 for the purpose of enhancing the protection and welfare of the children's right. Among the provisions which is affected by the proposed amendment is pertaining to the children beyond control. Therefore, the study seeks to examine the extent of the amendment made to the related legal provisions as well as to distinguish it from the current Act. It employs library research (textual) method for data collection by analysing statutes, books, journals, reports, newspaper articles, conference proceedings and other periodicals. The study concludes that the proposed amendment to section 46 of the Child Act 2001 suggests a few changes pertaining to *inter-alia*, a) the grounds to detain a beyond control child based on the application made by the parent, guardian or Protector, and b) the types of orders made by the Court For Children upon receiving the said application.

Key words: amendment, children beyond control, the Child Act 2001

Introduction

The Child Act 2001 ("the CA 2001") which came into force on 1st August 2002 was the most significant child law development in Malaysian history, particularly after 50 years of implementing the British-era legislation, namely the Juvenile Court Act 1947. The CA 2001 was legislated to amend and consolidate three previous laws relating to the care, protection and rehabilitation of children, namely the Juvenile Court Act 1947, the Child Protection Act 1991 and the Protection of Women and Girls Act 1973 (Mohd Awal, 2002). Therefore, all children either as victims or offenders were governed by

one legislation only (Majid, 2002). The CA 2001 aimed at protecting the children's best interests which covered a wide range of issues including abuse, neglect, abduction, trafficking, crime, and beyond control behaviour as well as the constitution of the Court For Children ("the court") and rehabilitative institutions. At international level, the CA 2001 indicated Malaysia's inclination to carry out the demands of the Convention of the Rights of the Child or CRC which was ratified on February 1995 (Mohd Awal, 2002) based on its four main principles; no discrimination towards children, the best interest of the child is the primary consideration, the right of a child to life, survival and development, and to respect a child's view (Child Rights Coalition Malaysia, 2012).

However, after 13 years of implementation, the CA 2001 is now being amended by the Child Act (Amendment) 2015 [A1511] ("the proposed amendment") which had been gazetted on 25th July 2016. The review of the CA 2001 was carried out by the Ministry of Woman, Family and Community Development ("MWFCD") with the help of various government ministries and agencies including the Ministry of Home Affairs, Prison Department, Royal Malaysia Police, and Department of Social Welfare besides nongovernmental organisations and the children themselves ('Penyata Rasmi, Dewan Rakyat, Parlimen Ketiga Belas, Penggal Keempat, Mesyuarat Pertama', 2016). The Minister of the MWFCD informed that the amendment to the CA 2001 involved more than 70 per cent in order to increase its content relating to parental neglect of children ('Rohani: New Act May Replace Child Act 2001', 2015). According to the Minister, the amendment was an improvement to the CA 2001 which was made based on current child issues such as the increase number of cases relating to parental neglect in caring for their children and pedophilia cases ('Akta Kanak-Kanak (Pindaan) 2015 Diwarta Hari Ini', 2016). In cases of parental abuse and neglect, the proposed amendment would impose heavier penalty on parents found guilty and allow anybody to make reports on parental neglect in order to make them more responsible towards their children (Ramlan, 2016; 'Rohani: New Act May Replace Child Act 2001', 2015). The Legal Advisor to MWFCD added that the action was taken due to the high number of incidents occurred involving parental neglect by leaving their children without supervision which consequently caused accident or death such as leaving a child alone in the car, leaving a child alone at home without adequate basic needs, and letting the children play at shopping malls (Ramlan, 2016).

The proposed amendment stands on four basic principles. Firstly, the strengthening of care, protection and rehabilitation of children through the improvement of service delivery to the children and enforcement of penalty for prevention purpose. Secondly, the continuous commitment as a state party

to CRC to legislate children rights as recommended as long as it does not contradict the Federal Constitution. Thirdly, the enhancement of community involvement in expanding its responsibility in taking care and protecting the children. Fourthly, the introduction of family-based care which emphasise on children care in family environment ('Penyata Rasmi, Dewan Rakyat, Parlimen Ketiga Belas, Penggal Keempat, Mesyuarat Pertama', 2016). The new concept is introduced to children who need care, protection and rehabilitation including the victims of abuse and neglect, and also beyond control children (Ramlan, 2016).

Since the amendment to the CA 2001 was a major amendment which affected more than half of its provisions, this study is carried out to examine whether the proposed amendment involves children beyond control provisions as well and if so, to what extent does it affect the welfare of the children. Hence, the study also analyses in what aspects the new proposed amendment differs from the CA 2001 and how the family-based care principle is embedded.

Who are children beyond control?

Normally children beyond control are those who are uncontrollable, unmanageable, wild, unruly, disobedient, non-compliant or undisciplined ('Definition of Out of Control in English', 2015). According to Theoharis (n.d.), children are regarded as beyond the control of their parents when they repeatedly disobey their parent's or guardian's lawful orders which resulted significant problems to themselves, their parents or the environment in which they reside. Gough (1971) described the children as those who involved in a behaviour which although demonstrates rebellion and placed their future in danger, it does not violate any criminal laws.

Out of control behaviour is labelled as a status offence in some countries such as most part of the United States of America, Bangladesh and Nigeria. Status offence means an act which is regarded as an offence if it is done by children, solely because of the age factor and not because it is harmful ('Age Discrimination: Global Report on Status Offences', 2009, 'Innocenti Digest 3: Juvenile Justice', n.d.), and therefore it is not an offence if it is done by adults ('Delinquency', n.d., 'Status Offenders Law & Legal Definition', n.d.; Kim, 2010). In simple words, beyond control refers to a non-criminal act which is illegal for children but legal for adults (Arthur & Waugh, 2008). Status offence can be found in different forms based on countries and localities around the world for example running away, truancy, smoking, alcohol consumption, curfew violations, begging, gang association and disobedience ('Age Discrimination: Global Report on Status Offences', 2009, 'Status Offenders Law & Legal Definition',

n.d.). Since status offence is non-criminal in nature, it should be distinguished from delinquency whereby delinquency indicates a violation of laws which is called “crime” if it is done by an adult (Champion, 2007; ‘Delinquency’, n.d.). Status offenders should also be differentiated from those who need protection or neglected (Gough, 1971) since the latter refers to those who have parents who are unable or unwilling to care for them which allows them to be charged with committing offence (Rosenberg, 1983).

In Malaysia, children beyond control are governed by sections 46 and 47 of the CA 2001. However, the meaning of “children beyond control” is unclear. Several authors commented that the definition of children beyond control is neither provided by the CA 2001 nor earlier legislations (Dusuki, 2006; Jamaluddin, 2002; Zakaria, 1992). The Social Welfare Department (“JKM”) only states that beyond control behaviour is a behaviour which may lead to criminal or moral danger without further explanation (Jabatan Kebajikan Masyarakat Malaysia, n.d.). Some researchers labelled them as delinquent children (Akram, 2007; Bee, n.d.; Rashid, 2009) while others treated them as status offenders (Ahmad, 2013; Child Frontiers, 2013; Child Rights Coalition Malaysia, 2012; Dusuki, 2006; Zakaria, 1996). Based on the application of similar provisions in previous legislations and definitions of status offence in most countries, researchers concluded that beyond control behaviour is manifested through several acts like running away, truancy, taking drugs, involvement in sexual behaviour, disobedience to parent’s orders, and illegal motorbike racing (Child Frontiers, 2013; Dusuki, 2006). Therefore, it can be concluded that beyond control children in Malaysia are those who have been found committing all sorts of misconduct, mischief or disobedience, either criminal or non-criminal in nature, which had caused the parents or guardians incapable to control them anymore.

Amendments involving children beyond control provisions

The meaning of beyond control behaviour

Section 46 of the CA 2001 provides that if the parent or guardian of a child requests the Court For Children to detain his or her child in an institution on the ground that he or she is unable to exercise proper control over the child, the court may make an order either to detain the child or place the child under supervision. The provision states that beyond control order may be made upon application from parents who claimed that they are unable to control the child properly. However, what is meant by beyond control of the parents is vague since no criteria or guidelines are provided to determine whether certain behaviour can be labelled as beyond control. Therefore, the court has the discretionary power to decide on the alleged behaviour.

Compared to the CA 2001, the proposed amendment does not witness any major changes in terms of the meaning of beyond control behaviour although it replaces the whole section 46 with a new provision. Section 46 (1) of the proposed amendment states that an application may be made to the Court For Children to detain a child in an institution either by (i) the parent or guardian due to his or her inability to exercise proper control over the child and the child starts to involve in an unhealthy socialisation, or (ii) a Protector in cases where the child does not have parents or guardian, or the child has been thrown away by his or her parent or guardian and the parent or guardian cannot be found, due to the absence of proper control over the child and the child starts to involve in an unhealthy socialisation. Here, the provision only added a JKM Protector as a new party who may apply for beyond control order besides the parent and guardian of the child. However, the Protector can only make the application in special circumstances; on behalf of a parent who has died or cannot be found. Therefore, the amendment preserves the exclusive original right of the parent or guardian in applying for the beyond control order.

Apart from that, the amendment also touches on the grounds of beyond control application whereby the parent, guardian or Protector has to demonstrate that in addition to the incapability to control the child, he or she also has to show that the child has started to involve in an unhealthy socialisation or relationship. Even though the provision does not spell out the meaning of “unhealthy socialisation”, its inclusion at least gives an indication that the child’s misbehaviour is not a trivial or unimportant act. Instead, beyond control behaviour has to be taken into serious cognisance since it has a potential to develop into a worse behaviour as a result of such socialisation. Therefore, out of control behaviour is not limited to acts which exhibits disobedience to parent’s orders only without being influenced by external factors like peers and environment.

Jurisdiction of the Court For Children

The proposed amendment to section 46 of the CA 2001 has a big impact on the jurisdiction of the Court For Children. CA 2001 provides that court may order the children beyond control either to be (i) sent to an approved school, place of refuge, probation hostel or centre, or (ii) placed under supervision. However, the proposed Act removes the approved school and place of refuge which results children beyond control to be sent only to two types of institutions, namely the probation hostel and centre. According to *Penyata Rasmi Dewan Rakyat (2016)*, the approved school is allocated specially for

children found guilty of petty crimes to ensure effective rehabilitation. Therefore, it excludes those who commit heavy crimes and beyond control children as was previously legislated.

As mentioned earlier, the proposed amendment introduces family-based care principle. Section 46(5) of the proposed Act states that the Court For Children has to take into consideration family-based care principle before making an order. The court may either (i) place the child in the care of a fit and proper person, or (ii) place the child in a centre, or (iii) place the child in a probation hostel, or (iv) place the child under supervision. According to section 2 of the proposed amendment, such principle means placing a child in a family environment, either (i) of the parent, guardian or relative, or (ii) of the foster parent or fit and proper person, or (iii) in a centre, that is a shelter home established or managed by any individuals including the state government, either privately owned or in collaboration with the federal government, and approved by the Minister for the purpose of care, protection and rehabilitation of children. Currently, the CA 2001 does not make family-based care principle a priority whereby on the recommendation of the probation officer, the court may either send the child to an institution or place him or her under supervision. The fit person order instead has a secondary status since it is placed as the last rehabilitative choice which can be made by the Supervising Court upon amendment of any original order made by the Court For Children for unexpired period of such order (section 47(2)(b) of the CA 2001).

Besides that, section 46(6) of the proposed amendment also instructs the court to make additional order of supervision to be attached to either one of the three original order; the placement of the child in the care of a fit person, placement in a centre and placement in a probation hostel, for a period of not more than three years from the date of the order made. The purpose is to ensure that the beyond control child is supervised all the way through his or her out-of-home placement in line with the best interest principle. No such additional order exists in the current CA 2001.

Another notable distinction between both legislations is pertaining to the conditions imposed along with the original order made. Section 46(7) of the proposed amendment adds that the Court For Children may impose any conditions or instructions, as it thinks reasonable, to its order for the purpose of ensuring the child's safety and well-being. The conditions may include that (i) the parent or guardian shall visit the child regularly as ordered by the court, or (ii) the parent or guardian accompanied by the child shall attend interactive workshop organised at centres established for the purpose, or (iii) the parent or guardian accompanied by the child shall attend counselling session, or (iv) if the child is at

an educational institution, the parent or guardian shall consult with the child's teacher and headmaster or principal once a month. If the parent or guardian fails to fulfil any of the conditions imposed, he or she shall be regarded as committing an offence and upon prove of guilt, can be fined up to RM5,000. The insertion of this so called "parental liability" clause in beyond control provisions signifies the importance of parental responsibility whereby the parent or guardian can be made responsible for beyond control behaviour of his or her child. Nevertheless, the purpose is to educate the parents as well as to restore the parent-child relationship and not to punish them. It also serves as a manifestation of the government's commitment to conform to the CRC principles. Article 18.1 states that the parents have the main responsibility for the upbringing and development of their children based on their best interests, while article 5 recognises the responsibilities, rights and duties of parents in providing appropriate direction and guidance to the children (Cleland & Tisdall, 2005; 'Convention on the Rights of the Child', n.d.).

Conclusion

Children beyond control provisions are among those affected by the proposed amendment. The study found that the amendment to section 46 of the CA 2001 has widened the jurisdiction of the Court For Children for the purpose to protect the welfare of the children. Compared to the current practice of sending children beyond control to various rehabilitative institutions including the approved school, the proposed Act urges the court to apply family-based care principle in making orders. It is believed that beyond control behaviour can still be reformed or rehabilitated through continuous supervision by family members or in a family environment. Separation from family in many cases will make things worse for the children especially when they start to associate with other children with similar or worse behaviour in the institution, or blame their family for making them to stay at the institution. Apart from that, family-based care will avoid parents or guardians from being irresponsible towards their children. Besides that, the amendment also confers the court with jurisdiction to make supervision order as an additional order to all three of the original orders. The court may also impose on the parents or guardians any conditions or instructions to its original order including the attendance to interactive workshops and counselling sessions, failure of which the parents or guardians will be fined. As a conclusion, the proposed amendment supports the importance of a family role in developing good behaviour which in return will produce a good citizen. It demonstrates a shared parental responsibility between family and government, and highlights the importance of supervision over the children beyond control. On top of that, it supports the deinstitutionalisation concept by excluding the approved school

and place of refuge, and transferring the probation hostel and centre to secondary choice of rehabilitation.

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Social Media Activities Among Women Entrepreneurs

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Abstract

This paper will present the findings of women entrepreneurs' involvement in social media. Statistics have shown that women have low participation in online business using social media compared to men which also includes life-long learning, business and socialization according to data compiled by finance.com. This is due to several social issues such as lack of opportunities to use the technology and ICT and hectic and tight daily schedule in managing their household chores. This limits their time to be involved and to participate in social media regularly. Three case studies are presented based on three women entrepreneurs who struggle in using social media for marketing and online. The findings confirm that the biggest barrier is due to their limited proficiency in English, copywriting and language style used in social media which hinder the products to be accepted widely. This paper will present the social media activities and also effective online writing strategies in social media among women entrepreneurs in order to help them obtained high number of 'like' or 'reach' and thus, develop their business and online networking effectively.

Keywords: Digital literacy, English proficiency, effective online writing strategies, ICT, language style, netpreneur, online business, online women entrepreneurs, social media, women entrepreneurs.

1. Introduction

Over years, the number of women entrepreneurs has increased together with growth of economy and technology development. It can be seen from the changes of entrepreneurial landscape as reaching to the year 2016, almost 1.18 million of women entrepreneurs have registered with the Companies Commission of Malaysia (SSM) and owned their businesses in many sectors as explained by Deputy Minister of Women, Family and Community Development (Azizah Mohd Dun 2016). A special appreciation should be given to the government as a tremendous number of initiatives has been taken in order to increase the economic development and national income especially when it concerned in handling and tackling the problem faced by the Low-Income Households (LIH) under National Key Result Areas or NKRA.

According to Muhyiddin (2010) RM4.7 million were allocated by the government to help 946 women entrepreneurs in 1Azam programs under Department of women's Development in 2010. Also, almost RM50 million spent by the government in order to carry out I-Kit program that is aimed to develop skill among single mothers and also to help and develop other women entrepreneurs (Mohd Najib 2012). In 2014, Malaysian Government has increased the allocation from RM 2.0 billion in the year 2013 to RM2.2 billion for the Ministry of Women, Family and Community Development (MWFCD) and the budget has increased over years until now (Rozita Abdul Mutalib et.al 2015). Therefore, it can be seen that the government's effort and initiatives carried out in improving and engaging the entrepreneurial venture has demonstrated success with an increasing number of both men and women entrepreneurs in Malaysia.

In relation to this matter, the growth of technology seems to be linked to the economy and business development where it basically refers to digital marketing and online trading through e-commerce. As this circling digital technology evolves, a new type of media has been existed with the use of internet and the World Wide Web which we call as social media (Ukperere et.al 2014). As according to LeFever (2008), "Social media means new opportunities to create and communicate with people that care". The popularity of social media sites has also spread to companies, firms and institutions as part of their strategies especially. A study by public relation firm Burson-Marsteller shows that 86% of 100 largest companies on the Fortune 500 list use at least one of the social media sites such as Facebook, Twitter, YouTube or blogs, and 28% of them use all four platforms. This finding shows that more and more companies are becoming actively involved in social media, which also shows the emerging of social

media sites as the new marketing or promotion platform that is also known as social media marketing (Burson-Marsteller 2010).

According to Ukpere et.al (2014), the study of Social Media Platforms and their impact in determining the financial success of the women entrepreneurs globally has been widely observed and quite vital to the new generation of gender based ventures that are digitally driven through the use of technology. This technological development helps women to adapt and utilise Social Media platforms in promoting the creation of a new revolution of modern digital entrepreneurial culture. It can be seen from how this new technological wave drives the changing of the female society from a technologically challenged to a technologically savvy one by providing an ample of opportunities that are made available by the use of Social Media Platforms and the Internet. Both formal and informal women owned ventures eventually use and adopt social media platforms in order to grow their communities as a medium for keeping in touch, getting current and ground feedback on products or services from existing and prospective clients.

Regardless its popularity and advantages, there is still very limited information to answer some of the key issues concerning the effectiveness of social media marketing, ways to measure its return on investment, and its target market especially when its concerned on the informative, interesting and tactful postings that hold a crucial role in promoting and delivering their messages effectively. In relation to this matter, a good writing strategy seems to reflect and work as a remedy in producing a good posting in social media. As a reward, a thousand ‘likes’, ‘shares’, ‘tweets’, ‘retweets’, ‘friends’ or ‘followers’ and responds would be a good sign for the postings and it is the only way to measure the return of the investment in social media. Hence, this paper will make an important contribution as it may bring a new dimension and additional insights in online writing strategies for business purposes especially when it involves dos and don’ts in creating an interesting and attractive status and posting from linguistic perspective.

Objectives

This paper presents the findings of an earlier research which aims to identify the online activities among women entrepreneurs in their social media accounts. It aims to explain which postings receive the most and least like in their accounts. Lastly, to propose the effective online writing strategies in social media among women entrepreneurs.

2. Literature Review

The use of social media as a sole function in communicating and engaging with people online has become a trend in recent years. By using this platform, they can use it for many purposes including for socializing, business, shopping, playing games, delivering information and more without time limits. In a solid definition, social media is known as a platform for people to share, interact and engage their thoughts with any people without facing each other face and beyond time. In a solid definition, “social media are defined as applications, services, and systems that allow users to create, remix, and share content” (Junco 2014b, p.6) or “media used to enable social interaction” (Davis, Deil-Amen, Rios-Aguilar, & González Canché 2014, p.2). To give an idea of how much social media has ingrained in our society; Maeve Duggan, Nicole B. Ellison, Cliff Lampe, Amanda Lenhart, and Mary Madden (2015) reported that in 2014, 52% of online adults used two or more social media sites, which is a 10% increase from the same statistic reported from 2013. It shows that how the growth of this technological wave has embedded in our lives and influenced every move and ideas that we want to deliver especially when it concerns on business perspective.

Social media in business plays a crucial part to perform mutual communication, communication and contact with partners, customers, potential customers, advertising of company’s products and services and keeping in touch with current and any related information. Besides, due to the ample opportunities offered by this platform, it is possible to the user or entrepreneur to create a profile of company using social networks. For example, by putting the brand of the company in the form of logo and information related to the company, providing informative description of product and services, or putting links to home page or other sites that contain information about firm and/or its products and services (Ukpere et.al 2014).

Based on the study done by Ukpere et.al (2014), women micro entrepreneurs are proactively using the social networks to advertise their goods and services and then make use of this mobile technology, which work for them in terms of client payments and banking. This special feature offered by the social media as a mobile application where the users can manage their accounts from mobile phone and only need basic literacy to operate the phone provide them another reason to use this platform. Due to the fact that the system does not rely on any physical infrastructure such as phone wires and is accessible to a large segment of the population (Elder and Rashid, 2009 as cited in Mbogo, 2010: 164) give them another point to embrace this opportunity as well. Even so, speaking on the use of social media, there are few problems faced by some women entrepreneurs in Malaysia especially

those who came from LIH group where these people have faced their struggles in using social media for marketing and online transaction. The biggest barrier is due to their limited proficiency in English, copywriting and language style used in social media.

In terms of the language use in social media, it can be synchronized with the use of Computer Mediated Communication or CMC theory as the facilitation of this form of communication can be seen through the use of Facebook, Twitter, Instagram, You Tube, email and other social network sites instead of traditional face to face meeting. The use of language in CMC tends to be concise and informal compared to the language used in traditional way. In relation to this matter, both Tagliamonte and Denis (2014) indicated that “CMC displays informal and speech-like features, including abbreviations, short turn-taking and omission of auxiliary verbs and pronouns which attributes the temporal, spatial, and social strictures imposed by IRC or Internet Relay Chat specifically that messages be types as quickly and efficiently as possible”.

However, it is quite different from what Crystal (2001) has pointed out as he stated that “discourse on internet is a new species of communication” where her description is complete with its own lexicon, graphology, grammar and usage condition. It basically refers to the forming of new language as a result of the expansion of new technology that is formed by users in social media over years. It is probably the communication style of modern people. Due to the popularity of the use of social media nowadays, it leads to the new form of communication which particularly linked to CMC use or that emerged and changed according to current trends. Due to the rise of ‘information age’ among people nowadays; it is expected that many people include women entrepreneurs have seamlessly integrated social media into their lives. Including their way of writing postings as due to the fact that the rise of these latest technologies such as MacBook, iPad, Google, Facebook, Twitter, Wii, PS3, Android can make people to appreciate less formal communication styles, fast delivery of content, data, and images.

Today, social media has been recognized as a key asset of a successful inbound marketing strategy which can provide better online visibility through cross-channel content distribution. Keeping current with the trends emerged from the evolution of social media can be a big help in maintaining and commercializing the image of the company or even institution. For the example, the trend of using hashtag which refers to a clickable keyword used to categorize postings. Hashtags have also spread to all social media platforms and they have even reached everyday speech where it subsequently helps to promote and make it easier for the users to connect and direct to any information that they want to go

for. Now you can find hashtags all over popular culture, from greetings cards and t-shirts to the dialogue of sitcom characters. Therefore, being in the same track with the current trends in terms of language use enables the company to increase website traffic, build conversions, raising positive image association and improve communication and interaction with other users and hence, helps the them to commercialize their image to a broader network.

3. Methodology

This study utilizes qualitative research approach and thorough content analysis was conducted to achieve the objectives of the study. Three different Facebook accounts of three selected women entrepreneurs are used as case study. All of the texts studied have been written and posted on the site of the Facebook accounts mentioned. The corpus of the study or the Facebook's status messages were collected by the researchers from February 2016 until July 2016 with approximate duration of 6 months.

In the selection of the postings, there are two criteria that should be fulfilled; 1) the posts that obtained the high number of likes, shares and comments, 2) the posts that obtained the low number of likes, shares and comments in the selection of the Facebook's status messages. All of the sites have been selected as all of three women entrepreneurs selected in this study use this social media platform and these accounts are mainly constructed on the platform for business purposes. The information shared in these sites are all concerned and related to their businesses for instances, acts as a marketing tool, helps to raise brand awareness and helps to make connection and online networking with customers, dealers partners and investors. It is also a medium for business transaction and more. Thus, Facebook is the most used and preferred by among all of the women entrepreneurs compared to other social media such as Twitter, Instagram and even their official website.

The Instruments

The evaluation forms or two observation checklists are prepared in order to help the researcher to record notes systematically and to find any new components if emerged. The content analysis can be both descriptive and reflective which the researcher need to identify the component provided in the conceptual framework and add new components if the researcher thinks they are effective and relevant. In terms of the first observation checklists, it is designed and structured based on CMC concept which concerns on the language styles or specifically the text type and writing features found in the postings. As for the second observation checklist, all of the elements in AIDA model which are attention, interest, desire and action are used in looking at the comments, shares and likes obtained in the Facebook status

messages and find the components or themes that emerge from the postings. Figure 1 shows the concepts of both CMC and AIDA theory used in this study.

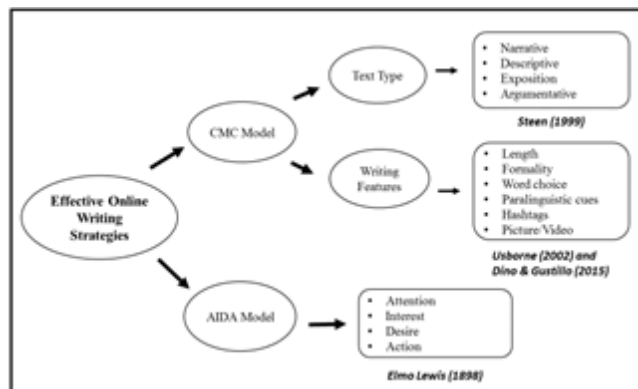


Figure 1: The conceptual framework of effective online writing strategies in social media

By conducting this qualitative method, the data is expected to answer and provide the new insight on the effective online writing strategies from the reader's perspective and at the same time, draw any new data that may contribute to this study in the aspect of language in social media.

4. Results and Discussion

The qualitative data were analysed based on three objectives aimed for this paper which focus on the online activities among women entrepreneurs in their social media accounts, postings that receive the most and least like in their accounts and lastly, proposing the effective online writing strategies in social media among women entrepreneurs based on data obtained from the observation of their online activities and postings.

4.1 The online activities among women entrepreneurs

The women entrepreneurs' Facebook accounts are identified based on the special codes given which stands from abbreviation 'F' for Facebook followed by the numbers which differentiate the codes assigned for each Facebook accounts which are F1, F2 and lastly, F3.

When it concerns on the online activities practiced in the social media, it is basically referred to the type of activities done by them in their Facebook's accounts which can be related to the domain one which is to advertise their product or business online. Based on the data collected, almost 3 out of 10 of the postings in the newsfeeds' section which includes all F1, F2 and F3 are related to the advertising and marketing their products to the viewers or friends as the primary online activities. The other activities are followed by sharing the information related to their participation in entrepreneurial programs, personal use, information related to their businesses and others.

Type of online activities in Facebook	Description	Occurrences
Advertise products	Posts any pictures, videos or related information regarding products in newsfeed.	3 out of 10
Update information related to participation in entrepreneurial programs	Posts any pictures, videos or information regarding their participation in entrepreneurial programs.	2 out of 10
Personal use	Posts any pictures, videos or information related their personal life includes close family and friends.	2 out of 10
Share information regarding business	Posts any pictures, videos or information related to business such as achievement (eg: winning awards), collaboration with other party and etc.	2 out of 10
Others	Posts or shares any pictures, videos or information which is not related to any categories above (eg: shares songs, news, playing games and etc.)	1 out of 10

Table 1: Interpretation of the online activities in Facebook

All of the women entrepreneurs selected in this study mainly used their Facebook accounts to advertise their products by using pictures, videos or any information related to their business followed by the other activities as shown in Table 1 above. However, F2 has shown low participation in any online activities interpreted in Table 1 compared to F1 except for ‘advertise products’ type of online activity. This situation may occur due to the user’s low participation in using her Facebook account during the 6 months of data collection. For example, F2’s user only posted two postings for two months which are in April and July where the F2’s user has posted the pictures of her products with caption ‘Alhamdulillah’ and categorized under ‘product advertising’ online activity in April. In July, F2’s user has posted the pictures of her daughter and herself while attending an entrepreneurial program which was categorized under ‘update information regarding participation in entrepreneurial activity’. This limited use of Facebook may happen due to their lack of knowledge, proficiency and accessibility in any form of disturbance which possibly face by women entrepreneurs. This form of problems should be identified and further investigated by future research.



Image 1: The product advertising.



Image 2: Entrepreneurial activity.

However, both F1 and F3 have shown a moderate participation in posting any related online activities shown in Table 1 above. In terms of conversing and engaging with customers, friends or other users, this type of online activity is abstract and impossible to be categorized in the same categories provided in Table 1 as the possibility of the Facebook's owner to engage with other users are general as they can reach each other through 'private messenger' or 'pm' box provided by Facebook for those who wants to converse in private, in 'comment' section or by tagging other 'friends' in their postings reflects the act of engaging and networking with other users in Facebook. Therefore, this type of online activity cannot be categorized thematically.

4.2 Data based on CMC and AIDA Models

4.2.1 The use of text type and word choice

Most of the postings posted by all F1, F2 and F3 have used 'descriptive' type of text in delivering or posting their newsfeed in the Facebook. This type of text is basically referred to the use in all forms of writing to create a vivid impression of a place, object, event, place and etc. This style of writing can be useful for variety of purposes such as to engage the reader's attention, to set a mood and to create characters. For the example, most of the postings have used a simple and straightforward sentence or caption which connected with the intended meaning that was trying to be delivered to the other users. The use of precise words such as nouns, verbs and adjectives has been applied in order to "puts the reader there" focuses on key details or intended messages.

For the example, F1 has posted a posting on product advertising with a simple 'descriptive' type of caption, 'Kami di bangunan Iskandar 26-27 June' or in translated version, 'We are available in Iskandar's building on June 26-27' which portrayed a simple and precise use of words and sentence to indicate their appearance in Iskandar's building to sell their products on selected dates. This simple

sentence or caption used in the posting together with a picture tagging along is important to make sure that the message is delivered clearly and are interpreted successfully in order to attract the customers. In return, this posting has reached 40 likes from other users which indicate a such favourable response or attention obtained from the potential customers towards the postings posted by the user. It is the same case with F2 and F3 users as both of their postings have reached high number of likes as shown in the table 2 below. However, based on the examples shown below, the length and the word choices in the text-update also play an important role in determining the number of likes achieved. Therefore, a few techniques on how to write a precise and contented text-update should be taken into consideration which includes the choice of words, text type and other invisible elements such as by providing more description about the content.

Facebook Account	Example	Number of likes	Analysis
F1	<i>Kami di bangunan Iskandar 26 – 27 June – Posted on June 26</i>	40	The caption is in the form of descriptive type of text regarding the upcoming event to sell the products. The language use is simple and direct to the point.
	<i>Alhamdulillah.. lega rasa nya setelah AGM kop usahawanita tenggara dh selesai dan berjalan dengan lancar – Posted on May 25</i>	17	The caption is directive type of text. The language use is simple. But, the short form of words has been used in this and one misspelling word, eg: lancar – lancar (correct form).
F2	<i>Alhamdulillah – Posted on April 16</i>	29	The caption is simple and straightforward to convey the writer’s satisfaction in her business.
	<i>Ju – Posted on July 31</i>	19	The caption is not complete and unrelated with the picture that was tagging along in the posting.
F3	<i>Alhamdulillah ni lah hasil gabungan idea2 ajk ngo. Tuk program jamauan aidilfitri ngos mersing Halim Rohaya.. Siti Hazrina Gee.. Nur Farahani Azirah (tagged) Batik Canting Johor zaachandory – Posted on July 28</i>	50	The caption is directive type of text. The language use is too simple and most of them in short form of words which can lead to misinterpretation on the intended message delivered.

	<p><i>Apa tugasn lakukan dgn ikhlas ap2 pun tomahan anggap stu iktibar.. ap2 pun kutukan aggap satu kelemahan bgkit dri kelemhn tuk perjugkan pe yg dihajatkan.. moga Allah permudahkan urusan kita - jdkan insan yg menghina kita ahli syurga aamin #perigtantukdirisyasendiri –</i> Posted on 30 July</p>	<p>75</p>	<p>The caption is in directive type of text. The user used a lot of short form of words and a bit complicated to be read by people from different background. The user also used hashtags.</p>
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Table 2: Examples of the text-updates in the postings.

4.2.2 The use of pictures and videos

Most of postings that included any pictures and videos have obtained a high number of likes or reaches compared to the postings that only contained a caption or sentence. For example, the postings shown in image 3 and image 4 (both F1) below shows that the differences between the postings that obtained a high number of likes and vice versa. Image 3 shows a posting of simple caption that only reached 4 likes compared to image 4 that reached 33 likes where a caption together with several pictures have been shared. It proves that the attachment of pictures or other digital tools can provide more entertaining options especially an eye-catching picture rather than using text-only updates. The use of the pictures and videos also plays a big role in pulling the attraction the potential customers to look, read, browse and to the extend to have intention to buy the products or ask for services through the comment section provided or ‘private messenger’ box.



Image 3



Image 4

In F3, most of the postings has achieved high number of likes (95 likes) and most of them were attached with pictures and videos as shown in Image 5 below. Again, it proves that the pictures and videos are essential in persuading and catching the attention of the customers to read and buy the product or services marketed. However, both of the text and pictures or videos are intertwined with one another

as they need each other in order to have a strong and effective online advertisement and marketing. Even though, the F2's user was not really active and update her account regularly; however, the postings in the F2 that contained both text and picture components seems to obtain a high number of likes (29 likes) from the viewers as shown in Image 6 below.



Image 5



Image 6

4.2.3 The length and formality of online writing used

In general, most of the women entrepreneurs selected in this study have used a simple sentence or caption in delivering any information intended. By providing a simple caption, the users can actually attract the other users or namely customers to read the message delivered and make them understand the purpose of the action. In short, the quicker it is to read, the more likely people will actually read and share it. For instance, the postings in F1 and F2 have shown the differences of using a short and simple caption (F2) compared to the long one as portrayed in the F1's text-update as the posting in F1 only obtained 9 likes compared to 29 likes in F2's posting. However, the content or issue discussed in the posting also does affect the number of likes and reaches.

In terms of the formality, most of the postings were using non-formal online writing as the users tend to use short form of word such as the word 'ini' to 'ni' which basically brings the meaning of 'here' as shown in the caption in F1's posting. Same with the F3's posting in the table 3 shown below as the user prefers to use the same ways in capturing the intended message that the user wanted to share. In return, the posting has reached 75 likes in overall. But again, speaking of the women entrepreneurs which is based on the posting in F3, they tend to use this platform to share their daily diary which basically refers to the personal use (eg: topics covered on their friends, family and any unrelated issues to business marketing). For example, when it comes to 'personal use', the users tend to use informal

and friendly tone of language compared to when they were posting or updating any information related to their product and business. In comparison, an informal and friendly tone of language used seems to be more attractive and appealing compared from a formal one. As the result, it indirectly helps to the increasing number of likes in the postings. However, in this context, the excessive use of short form of words can lead to misunderstanding for those who are not from the same background and make it difficult for the customers to understand and recognize the benefits offered by the products or services.

Facebook Accounts	Examples
F1	<i>Hari ni hari terakhir jualan produk iks anjuran pejabat pertanian di bangunan Iskanda Kota Tinggi sambal jual ada free promosikn kad petronas Angkasa – Posted on June 30</i>
F2	<i>Alhamdulillah – Posted on April 16</i>
F3	<i>Apa tugas lakukan dgn ikhlas ap2 pun tomahan anggap stu iktibar.. ap2 pun kutukan aggap satu kelemahan bgkit dri kelemhn tuk perjugkan pe yg dihajatkan.. moga Allah permudahkan urusan kita - jdkan insan yg menghina kita ahli syurga aamin #perigtantukdirisyasendiri – Posted on July 30</i>

Table 3: Examples of the length and formality of online writing used

However, the users also tend to use a formal language in their online writing which can be portrayed by a full form of word and sentence in several postings which also depends on the type of online activities and ‘content’ preferred by them. As for the ‘catchy’ phrase, there were postings that used this appealing phrase or a bit ‘narrative’ type of text in order to attract their customers to read or ‘buy’ their products. This catch phrase is known as one of the brilliant ways to market their products and brand. However, in this case, it was really rare to find any interesting or catch phrase used by the users to attract their customers.

5 Conclusion and Recommendations

In overall, F3’s user is considered as the most active followed by F1’s user as moderately active in using Facebook as their marketing platform compared to another user which is F2 as the user only posted less than 10 postings within 6 months of collecting data. Even so, all of them have shown a good participation in terms of promoting and advertising their products as almost 3 out of 10 of their online activities are occupied with product advertising followed by the other activities. They also have used several writing features and techniques to attract their potential customers to read, browse and eventually to the extend to have intention to buy the products or at least have shared about it. However, the return of investment obtained by these women entrepreneurs in the form of likes, shares or comments are still not good enough to be called successful marketers in Facebook even though this

platform is known as an advantageous tool for businesses thanks to its capability of low-cost information disclosure, instant messaging, and wide networking. This is due to their limited digital literacy in using social media as there are several features that are not been used in their online writing such as hashtags, paralinguistic cues (eg: emoticons) and also limited choice of words.

Literature has confirmed effectiveness happens when there are profits, sales, communication and attention which can be identified from the number of likes, shares and comments in the postings. Since there is no specific theory on how online writing in social media can be effective, thus the researchers have to gather some components on online writing which are believed to be important and essential based on the previous studies and also data collected from the case study. After examining various types of postings portrayed by all three Facebook accounts based on CMC and AIDA models in terms of its online writing context, all of the users only update and post their newsfeed and engage with other users or potential customers in Malay language. This could be due to their limited proficiency in English, copywriting and language style which can be seen from the limited use English language, text type and writing features in their online writing. The women entrepreneurs may not face any problems in dealing with local customers but it will be difficult for them to spread their businesses widely through online or social media even though Facebook has provided an auto translation feature for those who needs to understand and communicate in other languages. But yet, in certain context, the translation itself may not be good enough or accurate in delivering the intended messages. Next, the use of social media in marketing and advertising their products also is not solely focus on local market only but also at global level. Therefore, this paper proposes the effective online writing strategies in social media which focus on women entrepreneurs based on these case studies observed and applicable for any other languages. Each of the strategies is discussed below.

5.1 Effective online writing strategies for women entrepreneurs in Facebook

5.1.1 Use eye-catching pictures and videos

Data revealed that the use of pictures and videos in the postings can help to increase the reach of the postings in terms of the number of likes, shares and comments compared to the absence ones. This means that the existence of the pictures or any digital component such as video is important to attract attention and interest towards the postings. However, there is new finding indicates the use of pictures or videos together with a caption does make a difference compared to the posting that only put pictures as the sole material. Therefore, it shows that without caption, the postings would be not attractive enough and well-read by the readers. By alternating pictures and videos with text-only updates seem to be eye-catching enough in order to steal the interest of potential customers. Besides that, there are

several details that should be taken into accounts when it concerns on the use of digital materials or to attract the attention are by providing up to dates products, use of high definition pictures, use celebrity to promote products or services and creative as well as organize the pictures in coherence with the caption preferred. Prior to the that, the customers are able to see and read the postings easily with a good eye.

5.1.2 Keep the content short, simple and readable.

In this case study, as stated in the findings section above, most of the postings in F1, F2 and F3 preferred to use a simple and contented caption in their newsfeed. However, there are some postings that use a too simple sentence which only includes one word which is too short to be read and understand by the other readers. Therefore, a more preferable way of writing technique for online writing should be explained in more further. According to the past studies, there are several techniques that should be applied in order to persuade the customers which include short and simple or in precise manner, 80 characters at most, well explained caption which includes the use of nouns and verbs or adjectives at least in one sentence, an appealing content that can serve to reader's self-interest, the use of persuasive words, informal friendly language, humorous, showing honesty and lastly, the use of adjective and adverbs that catch attention and figurative language or precisely, known as a catch phrase. Lastly, avoiding daily dairy should be taken into consideration as the objective of this writing strategy is to advertise and sell the products or services online.

5.1.3 Be aware with the effective features offered in social media

In general, there are a lot of advertising features offered in social media which can be a crucial way in marketing the business such as the use of hashtags, use of paralinguistic cues, aware with the online traffic and be seasonal. All of these features are useful in delivering the right content at the right time. The most important thing is a good user is not afraid to try everything that works, effective and yet trendy in order to obtain high reaches widely.

5.2 The model of effective online writing in social media

Based on the new findings on the components of effective online writing in social media, the researchers have come out with a new model of effective online writing in social media exclusively in the portrait of women entrepreneurs' online marketing. The new model of online writing in social media for women entrepreneurs consists of the same feature as the conceptual framework of effective online writing strategies in social media employed in this paper. However, two components of exposition and argumentative categorized in types of text have been eliminated as the components are believed not to be essential and important in effective online writing in social media exclusively for

women entrepreneurs' online marketing. However, there are several elements that have been added in this model which are effective advertising features in social media as these features are believed to be important and essential in attracting the interest of the readers to read the postings. The model is displayed in Figure 5 below.

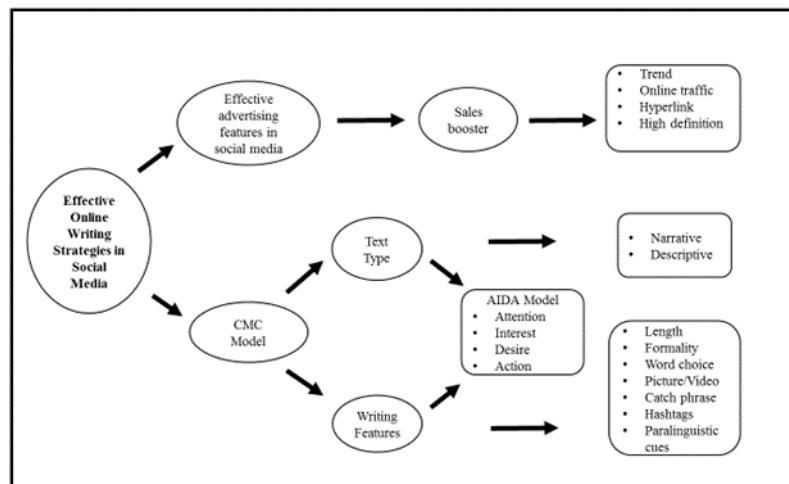


Figure 2: The Model of Effective Online Writing for Women Entrepreneurs' Online Marketing

This model is hope to help the women entrepreneurs to implement or to improve all the effective components in online writing in their existing or new social media accounts.

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The Transformation in Testamentary Freedom and Child Protection: Towards Harmonious and Prosperous Society

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Abstract

This paper is to examine the limitation power of testator in making a will. For this purpose, this paper employs a qualitative research methodology and uses the doctrinal and comparative approach. The question to be considered is whether the testator may exercise his absolute testamentary freedom in disposing his property without considering the interest of his own children. The right to devise and bequeath or dispose of property by will under the Wills Act 1959 (Act 346) prejudiced children as the Wills Act 1959 (Act 346) did not contain any limitation provisions relating to beneficiaries. This paper contends that testamentary freedom must have limit to ensure the interest of children is not neglected. The transformation in testamentary freedom will empower children and building a future for them. The harmonization between the testamentary freedom and the protection of the beneficiaries' rights leads to a harmonious and increasingly prosperous society.

Keywords: Children, Protection, Testamentary Freedom, Transformation

Introduction

This paper addressing the issue as to whether the right to devise and bequeath or dispose of property by will under the Wills Act 1959 (Act 346) should be limited to ensure the interest of children is not neglected. This paper will explore and compare the provisions of law for making a will under the civil law and the making of will or *wasiyyah* under the Islamic law.

The first part of this paper explains the privilege of making a will under the civil law. The second part of this paper explains the privilege of making of a will under the Islamic law. The third part discusses about the power of the testator under the civil law in making a will and the limitation of testamentary freedom. The fourth part discusses about the power of the testator under the Islamic law in making a will or *wasiyyah* and the limitation of testamentary freedom. The fifth part concludes the paper.

Materials and Methods

For this purpose, this paper employs a qualitative research methodology and uses the doctrinal and comparative approach. The Wills Act 1959 (Act 346), the Muslim Wills (Selangor) Enactment 1999, the Muslim Wills (Negeri Sembilan) Enactment 2004 and the Muslim Wills (Malacca) Enactment 2005 and decided cases will be examined critically.

Results and Discussion

i) The privilege of making a will under the civil law

It should be clear that a will is a written declaration of a person's intent to distribute his property after his death (Susan D Herskowitz, *Will, Trust and Estates Administration* 3rd edn.; *David Wee Eng Siew v. Lim Lean Seng & Anor* [2014] 1 CLJ 309). The meaning of a will can be seen as a declaration intended to have legal effect. Rather, it means the intention of the testator will be carried into effect after his death (section 2 (1) of the Wills Act 1959 (Act 346)).

The Court may construe the will to give effect to the intention of the testator. The language of the will is to be determined by the court (See *Perrin v. Morgan* [1943] AC 399) to ensure that the testator shall understand the nature of the act and its effect. The court described the intention of the testator as he must also understand the extent of the property of which he is disposing and shall be able to comprehend and appreciate the claims to which he ought to give effect (See *Banks v Goodfellow* [1870] 5 LR QB 549; *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90).

The executor will prove a will in the High Court (Probate and Administration Act 1959; Order 71 and 72 of the Rules of Court 2012). The will may be admitted to probate unless it is challenged on the grounds of undue influence, fraud or forgery. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will (See *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 321; *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 34 CLR 558). When a person challenges a will, it is the person who proposes the will or otherwise known as the propounder of the will who bears the *onus probandi* or the burden of proof to show that there was due execution and the testator has the testamentary capacity (*Chenna Gounder Kandasamy v Angamah Sunappan* [2016] 1 LNS 481).

Under the civil law, in Malaysia, non-Muslims are allowed to make a will as the Wills Act 1959 (Act 346) provides that every person of sound mind may make a will. However, the testator must attain the age of majority and follow the mode of execution as laid down under the Act (Section 3, 4 and 5 of the Wills Act 1959 (Act 346)). The legal effect of making a written will is that, the intention of the testator will be carried into effect after his death (section 2 (1) and 5 of the Wills Act 1959 (Act 346)). One of the principal ways to make a valid will is to ensure two or more witnesses must be present when the testator executed the will (Section 5 (2) of the Wills Act 1959 (Act 346)). Witnesses are capable of giving evidence for the purpose of proving the execution of the will (section 66 of the Evidence Act 1950). It is interesting that the evidence of one attesting witness is sufficient to prove due execution in

case the other witness could not be traced (17 *Halsbury's Laws of England* (4th Ed) para 892; *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457).

It is worth noting that the Wills Act 1959 (Act 346) does not contain any provision relating to beneficiaries. In general, section 3 of the Wills Act 1959 (Act 346) provides that every person of sound mind may devise, bequeath or dispose of by his will all his property which he owns or which he entitled either at law or in equity. The legal consequence of this provision of law is that, any person of sound mind may devise, bequeath or dispose of by his will all his property. However, it does not limit the testator's power to retain certain value of property to the children of the testator. As such, if the testator disposed of all his properties to any person he prefers and neglecting his own children, the law will consider this testamentary power as valid and his will is enforceable.

ii) The privilege of making of a will under the Islamic law

Under the Islamic law, every Muslim has an obligation of writing a will or *wasiyyah*. He can make a will or *wasiyyah* with regards to the disposition of his property after death or the arrangement of his debt and liability.

Meanwhile, under the Islamic law, the basis of the rules governing wills for Muslims are the *Qur'an*, *Hadith*, *Ijmaa'* and *Qiyas*. One writer states that together these four elements constitute Sharia law and are the basis of the rules governing wills for Muslims (Omar T. Mohammedi, 2012/13). In Malaysia, several States have enacted law governing will or *wasiyyah* for Muslims such as the Muslim Wills (Selangor) Enactment 1999, the Muslim Wills (Negeri Sembilan) Enactment 2004 and the Muslim Wills (Malacca) Enactment 2005. The *Shafi'i* school of thought is the prevalent *madhhab* in Malaysia. Part VI of the Enactments deal with the provisions relating to beneficiaries.

Under the Islamic law, children, parents, brothers and sisters are among the Quranic heirs. The distribution of properties among the Qur'anic heirs is clearly stated in the Quran (An-Nisa 4: 11). The Qur'an commands:

In the name of God, Most Gracious, Most Merciful.

“Allah (thus) directs you as regards your children (inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. (The distribution in all cases is) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah; and Allah is All-Knowing, All-Wise.” (An-Nisa 4:11).

Unlike the position under the civil law, since the testamentary power of the Muslim's testator is limited to one third of the testator's properties, it is submitted that, under the Islamic will or *wasiyyah*, the children of the testator are protected as they fall under the beneficiaries. As such, the interest of the children is protected under the Islamic law if the testator is making a will or *wasiyyah*. The will may be challenged if the testator exceeds his testamentary power.

iii) The power of the testator under the civil law in making a will and the limitation of testamentary freedom

It seems to suggest that testator has no limit to make a will under the Wills Act 1959 (Act 346) as section 3 of the said Act expressly provides that every person of sound mind may devise, bequeath or dispose of all property which he owns by his will. It can be argued that the word “all” allows the testator to dispose of his property without limit to any person. As such, if the testator disposed of his properties to any person and disregard the interest of his own children, his testamentary freedom may not be questioned in any court.

iv) The power of the testator under the Islamic law in making a will or *wasiyyah* and the limitation of testamentary freedom

Under the Islamic law, since the testamentary power of the testator is limited to one third of the testator’s properties. Besides allowing the making of a will or *wasiyyah*, the Islamic law is fair in balancing the testamentary freedom and the protection of the beneficiaries’ rights as the making of a will or *wasiyyah* will not prejudice the rights of qur’anic heirs especially children.

The children of the testator are protected as they fall under the category of beneficiaries. This is in line with Malaysian plan on Blue Ocean Strategy as building for a future for children is one of the target in empowering them (YAB. Dato’ Sri Mohd Najib Bin Tun Haji Abdul Razak, 2016).

Conclusion

This paper makes three contributions. First, it shows that the Wills Act 1959 (Act 346) allows the testator to dispose of his property without limit to any person. Second, if the testator disposed of his properties to any person and disregard the interest of his own children, his testamentary freedom may not be questioned in any court. And third, the Islamic law is fair in balancing the testamentary freedom and the protection of the beneficiaries’ rights as the making of a will or *wasiyyah* will not prejudice the rights of qur’anic heirs especially children.

This paper contends that testamentary freedom under the civil law must have limit to ensure the interest of children is not neglected. The transformation in testamentary freedom will empower children and building a future for them. The harmonization between the testamentary freedom and the protection of the beneficiaries’ rights leads to a harmonious and increasingly prosperous society. As such, the Wills Act 1959 (Act 346) should make a provisions relating to beneficiaries to ensure the interest of children is not neglected when the testator make a will.

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AN EMPIRICAL STUDY ON WOMEN'S PLIGHT IN *TA'LIQ* AND *FASAKH* PROCEEDINGS IN THE MALAYSIAN SYARIAH COURT

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Abstract

This study analyzes the procedural law on *ta'liq* and *fasakh* currently practiced in the Syariah court. The study works on the premise that despite the presence of the provisions in current relevant Enactments, there are still loopholes and drawbacks in implementing the procedural law that cause delay in disposing divorce cases on the grounds of *ta'liq* and *fasakh*. In appraising the efficacy of the existing laws and implementation of it, an empirical research was conducted utilizing a qualitative method apart from conducting library research. The discussion will be divided into two parts, that is, firstly on problems associated with the difficulty on the part of judges in addressing factual situations to the legal provisions on *ta'liq* and *fasakh* and secondly, on problems with procedural and evidentiary requirements in terms of burden and standard of proof. The study proves that Syariah Court procedures in disposal of divorce cases under the ground of *ta'liq* and *fasakh* are comprehensive as far as the substantive and procedural law is concerned. However, there are rooms for improvement in the context of implementation of certain provisions such as service of summons where there are inconsistencies in actual practice especially in the absence of standard operating procedure. These inconsistencies contribute to the delay in the proceeding for *ta'liq* and *fasakh* cases in the Syariah Court in Malaysia.

Keywords: Procedural law, delay, divorce, *Ta'liq*, *Fasakh*, Malaysia.

Introduction

1. INTRODUCTION

For so many years now, there have been complaints especially among Muslim women that they have to go through a lengthy litigation process when applying for divorce in the Syariah Court. This litigation process is so drawn out that the delay (delay is defined in *Black's Law Dictionary* as 'the act of postponing or slowing and also the period during which something is postponed or slowed') becomes unbearable to the women. Even though Islamic Family Laws in Malaysia grant women many rights and protection from injustice, there are never-ending complaints from women that they are not able to enjoy fully those rights granted to them (Memorandum on Reform of The Islamic Family Laws and The Administration of Justice in The Syariah System in Malaysia, submitted to the Government of Malaysia March 1997. Formulated and approved at the National Workshop on The Reform of Islamic

Family Laws and The Administration of Justice in the Syariah System in Malaysia on January 4, 1997). This never-ending phenomenon of delay shows that something is not right in the details of implementation by officials entrusted to dispense Islamic justice in the Syariah Courts in Malaysia.

Essentially, the delay is commonly associated with the husband's failure to appear in court on the hearing date or with other reasons related to procedural requirements, for example, failure to provide evidence required by the court or failure to serve the summons to defendants. In some cases, delay extend over several years before being finally dismissed on procedural inadequacy simply because the husband claimed that he gave false evidence and the case was ordered for re-trial (*Harian Metro* dated 5th October 2009).

There are readily available literatures on the subject matter of disposition of divorce cases in the Syariah Courts in Malaysia. A number of researches have been conducted on the issue of delay in disposition of matrimonial and divorce cases in the Syariah Courts in Malaysia. These writings are rather general in approach to the extent that the studies merely focus on the duration of settlement rather than extending the findings on procedural aspects of the law.

2. METHODOLOGY

The data was collected through semi-structured and unstructured interviews, court observation and content analysis of unreported cases. The interviews conducted involved fourteen (14) respondents, namely, five (5) Chief Syarie Judges, five (5) District Syarie Judges, three (3) Syarie lawyers, and one (1) Assistant Registrar. As earlier proposed, this study will analyze twenty (20) files from each of five (5) chosen states, making the number of files analyzed one hundred (100) files altogether. For court observation, only the Syariah Lower Court of Shah Alam was chosen due to its geographical accessibility. The states involved in this data collection are Selangor, Kelantan, Johor, Penang and Sarawak. They were chosen on the premise that the provisions are similar for all states in Malaysia. Analysis of data is categorized in accordance with selected variables, namely the implementation of procedural law in terms of documentation, evidentiary requirement, hearing, representation, appeal, delay and problems in implementing relevant provisions in the Syariah courts of Malaysia.

3. PROBLEMS WITH IMPLEMENTATION OF PROCEDURAL LAW ON *TA'LIQ* AND *FASAKH* IN THE SYARIAH COURT

Problems in interpreting and implementing the laws when dealing with proceedings for *ta'liq and fasakh* are among the factors that complicate matters. As observed, the judges themselves face difficulties in the application of certain provisions that contribute to the delay in giving awards.

3.1 Documentation: Pleadings and Other Relevant Documents

Documentation plays an important part in procedural requirements in any legal proceeding. The process of documentation involves pleading, that is, statement of claim, statement of defence, counterclaim, defence to counter claim and reply. Other supporting documents including marriage and *ta'liq* certificate in *ta'liq* cases, birth certificate, identity of the parties, are all relevant to avoid unnecessary delay in filing of *ta'liq* and *fasakh* cases.

3.1.1 *The requirement for a Pleading to be in writing*

Pleadings are an important aspect in mal proceedings especially for *ta'liq and fasakh* cases. They both require substantial evidentiary procedures. Pleadings need to be accurate and comprehensive. Pleadings can be considered as equipment or tools to a claim and defence and evidence is based on a claim and defence (Tn. Drs. Atras bin Mohamed Zain, Syarie Judge of The Syariah Lower Court of Shah Alam, interview by Suzaini Mohd.Saufi, Shah Alam, Selangor, 25 February 2011).

Some of the documents which come within the definition of pleadings are statement of claim, defence, counterclaim, defence to counter claim and reply. It is a cardinal rule under civil law that parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded (See *State Government of Perak v Muniandy* [1986] 1 MLJ 490) . On that basis, the judge or the court would insist on proper and good pleadings. Most of the junior judges (The author categorized judges who preside in the Syariah Lower Court and having less experience as junior judges) are very strict on written pleadings. According to one judge, this is due to ISO purposes (Tn. Nik Bukhary Hashimy bin Nik Yahya, Syarie Judge of The Syariah Lower Court of Penang (Timur Laut) interview by Suzaini Mohd.Saufi, Penang, 20 April 2011 and 21 April 2011). Another judge is of the opinion that because they are more careful in selecting cases for appeals, the documentation, that is, the pleadings must be in writing and in order (Tn. Zulfahmi Bin Bunaim, Syarie Judge of The Syariah Lower Court of Johor

Bahru, interview by Suzaini Mohd.Saufi, Johor Bahru, 10 May 2011). If the pleadings are not complete, the opposing party can apply for the case to be struck out (Tn. Drs. Atras bin Mohamed Zain). Sometimes senior judges can be equally strict on pleadings in which they are of the opinion that oral claim or defence should be the last choice (Y.A.A. Dato' Hj Yusuf bin Musa, Chief Syarie Judge of Penang, interview by Suzaini Mohd.Saufi, Penang, 19 April 2011).

An example that shows inconsistencies in practice on pleadings is where parties would like to change their application or grounds from *fasakh* to divorce by *talaq* under section 47 of the Islamic Family Law. As observed, the practice varies according to the judges or states. In certain cases, the plaintiff needs to file a new application for *talaq* and after that, the application to withdraw *fasakh* (Selangor case no: 014-0545-2011(unreported)). This practice is provided under practice direction (Practice Direction no.13 of 2005) where it stipulates that application can be made orally or in writing. According to one of the senior judges (Y.A.A. Datu Haji Mohd Ali bin Mohd Sheriff Sahib, Chief Syarie Judge of Sarawak, interview by Suzaini Mohd. Saufi, Kuching, Sarawak, 6 July 2011), there is no need to file a new application for *talaq*. The case can proceed with oral application to change from *fasakh* to *talaq*. This has been practiced in the Syariah Lower Court of Kota Bharu where there is no need to apply and file in writing the application for divorce in cases where parties would like to change their application from *fasakh* to *talaq* under section 47 of the Islamic Family Law Enactment (Content analysis of the unreported cases). The opinions of senior judges (Judges at a higher court level and judges of the Syariah Lower Court that have more experience) are different. They are more tolerant on written pleadings. Therefore, if the plaintiff files a statement of claim and certain facts need to be clarified, there is no need for the plaintiff to file an affidavit to clarify the issues. The plaintiff can explain orally in court and the court will note down the facts and particulars needed. What is important is that the plaintiff's claim must fulfil the conditions of a claim according to Islamic law. The statement of claim must be complete and consists of basic things on what the plaintiff is claiming against the defendant (Tn. Murshidi Jaya, Syarie Judge of The Syariah Lower Court of Kuching, interview by Suzaini Mohd. Saufi, Sarawak, 7 July 2011 and Tn. Drs. Atras bin Mohamed Zain) . Notably, observation shows that discrepancies exist because of the differences of experience among judges.

3.1.1.2 Determination on the cause of action for *fasakh*

Another issue that arises with regards to the claim of *fasakh* cases in the Syariah court is the determination of the cause of action for *fasakh*. For example as provided under Section 53 (1) of the Islamic Family Law Enactment, a wife or husband can apply for *fasakh* on the grounds provided by

the Enactment, either using one or more grounds. The parties are free to choose any grounds as a cause of action. Therefore, the wife or husband or the lawyer needs to determine the cause of action in the petition filed in the court. The use of more than one ground actually has both advantages and disadvantages. The parties or lawyers will normally use more than one (1) ground to apply for *fasakh* in the Syariah court (Y.A.A. Dato' Mukhyuddin bin Haji Ibrahim, Chief Syarie Judge of Selangor, interview by Suzaini Mohd.Saufi, Selangor, 26 May 2011). The use of many grounds as the cause of action is actually time consuming and it is difficult to prove in court (Y.A.A. Dato' Mukhyuddin bin Haji Ibrahim and Y.A.A. Datu Haji Mohd Ali bin Mohd Sheriff Sahib). This finding is evident in many cases involving claims for *fasakh*. As observed in an unreported case in Penang, the grounds combined by the plaintiff in her application are the unknown whereabouts of the husband for a period of more than one year, the failure or negligence of the husband to provide for her maintenance for a period of three (3) months and the failure of the husband to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one (1) year (Penang case no: 07001-014-0573-2008(unreported)). There is argument that the provision for *fasakh* divorce is restrictive on the definition of inability of the husband to fulfill his marital obligations. It actually has many aspects. It could be that he is not a good father or simply that the woman is no longer in love with him, or he is not the partner she needs in her life any more (Mek Wok Mahmud & Sayed Sikandar Shah Haneef, 2007). The law mentions specifically that marital obligations means *nafkah batin*.

It is sufficient for the plaintiff to use just one ground for the application; for example, the unknown whereabouts of the husband over a long period of time or the husband has deserted her. The burden of proof for this type of case is lighter because the plaintiff needs only to produce a witness who has knowledge that the husband has not been around for a certain period of time, and that she has been living alone and has been supporting her own self (Selangor case no: 014-1064-2010(unreported)). The use of many grounds will just be a waste of time because the court needs to hear all evidence for all grounds. In another unreported case, the plaintiff used four grounds in her application for *fasakh*, that is, under Section 52 (1) (a), (d), (h) and (l) of Islamic Family Law Enactment (Selangor). At the end of the day, the plaintiff can only prove one ground, namely, under subsection (1) (a) where the husband failed or neglected to provide maintenance. The other three (3) grounds failed to be proved by the plaintiff. The court gave judgment based on one (1) ground only (Selangor case no: 014-0537-2010(unreported)).

The above case shows that one ground is sufficient to apply for *fasakh* if the plaintiff has the proof and evidence to support her case in court. The use of many grounds will delay the proceedings and result in loss of time for all parties. From general observation on the files in Kelantan, most of the

cases show that plaintiffs will use only one ground to apply for divorce on the grounds of *fasakh* or *ta'liq*. The grounds commonly used are non-payment of maintenance or desertion or cruelty. There are still cases where a combination of two (2) grounds has been used as causes of action, as observed in Penang, Sarawak, Johor and Selangor. Nevertheless, cases where parties use only one (1) ground are prevalent (Content analysis of the twenty (20) files from each state). It is of interest to note that parties can be creative with more than one (1) ground because if one ground is proved, there is no need to hear the rest, and the judge can subsequently concentrate on handing out the award.

3.1.2 Service

Service is in fact a complicated process and it is one of the major factors contributing to delay (This fact is agreed by all the respondents that have been interviewed). The study discovers that the main issue or problem causing delay in *ta'liq* and *fasakh* cases is service of summons. This happens when the summons cannot be served on the defendant or it takes a long time for it to be served. Among the reasons that contribute to the failure to serve promptly are the defendant being away from home when the process server comes to the house, the address of the defendant being incomplete, and the defendant no longer staying at his last known address.

Apart from that, the question arises whether summons can be served by way of AR Registered post as personal service. There are mixed views on this in practice. Some of the judges agreed that AR Registered post can be accepted as personal service. They are of the opinion that as long as it is not against the principle of Islamic Law, it can be used as personal service. What is important is that the defendant be informed about the case that has been brought against him. However, there must be proof to show that the defendant had accepted and signed the AR Registered post. This can be done by filing into court the affidavit of service exhibited with a copy of the AR card to prove that it is the defendant who personally accepted the AR Registered letter containing the documents about the existing case (Y.A.A. Datu Haji Mohd Ali bin Mohd Sheriff Sahib, Tn Murshidi Jaya and Tn. Zulfahmi Bin Bunaim). Conversely, an opinion does exist that AR Registered post cannot be considered as personal service. According to the Chief Syarie Judge of Johor, it is more practical to use a substituted service (Y.A.A. Tn. Haji Amir bin Danuri, Chief Syarie Judge of Johor) .

The same argument goes to whether documents can be served on the close relatives of the defendant. The documents served on close relatives can be deemed to be served as personal service provided that the defendant is still staying at that address on the second visit by the process server (Fazlina bt. Mamat @ Mohd. Nor, Assistant Registrar, Syariah Lower Court of Kota Bharu, interview

by Suzaini Mohd. Saufi and content analysis of the unreported *ta'liq* and *fasakh* files in Kelantan). As observed, there are states that allow for such practice, as in the Syariah Court of Kota Bahru and Syariah High Court of Johor Bahru (03001-057-0039-2009 (Kelantan unreported case) 03001-057-1213-2007 (Kelantan unreported case) and 01100-014-0570-2008 (Johor Bahru unreported case). There is another opinion that agrees with the practice to serve on the close relatives such as the mother who stays with the defendant, provided this second service was made in the absence of the defendant (Y.A.A. Datu Haji Mohd Ali bin Mohd Sheriff Sahib) However, there are certain judges who do not accept this type of service and deem it cannot be considered as personal service (Y.A.A. Tn. Haji Amir bin Danuri). The inconsistency on the applicability of law occurs even though the judges come from the same state because judges have differing opinions.

The problem of service is also associated with substituted service. Substituted service is commonly used in order to serve the summons and documents to the defendant in *ta'liq and fasakh* cases and to expedite the proceedings (Data collected through content analysis of unreported cases from all states i.e. Kelantan, Johor, Penang, Sarawak and Selangor). However, the problem that arises is that lawyers or parties do not know which appropriate substituted service to apply for and this has caused delay. According to the interview that has been conducted, the plaintiff or lawyer should know when to apply for substituted service. Lawyers representing the plaintiff must have the skill and knowledge to timely apply for substituted service. As suggested, the plaintiff or her lawyer can apply for the substituted service immediately on the first mention date if she can prove to the court that she had tried to serve the documents to the defendant by whatever ways but has failed. Unfortunately, the plaintiffs or lawyers do not use the opportunity to apply for substituted service immediately or as early as the first mention date (Y.A.A. Dato' Hj. Yusuf bin Musa, Tn. Murshidi Jaya and Tn. Drs. Atras bin Mohamed Zain).

There are inconsistencies of practice on whether the plaintiff or her lawyer can make an oral application for the substituted service. Here again, there are differences of opinion among the judges. Some judges are of the opinion that application can be made orally, but parties must undertake to file the necessary affidavit to support the application (Tn. Zulfahmi Bin Bunaim). Conversely, one judge (Tn. Murshidi Jaya) opine that application for substituted service rests more on the discretion of the judge in which parties can apply substituted service orally and this obviates the need to file an affidavit to support this course of action later on. Another opinion (Tn. Nik Bukhary Hashimy bin Nik Yahya) insists that parties must make a written application for substituted service as provided by the Syariah Court Civil Procedure (See Section 48(6) of Syariah Court Civil Procedure (State of Selangor) Enactment 2003). In another context, most of the senior judges are not sufficiently meticulous about

which order can be granted even though by oral application. However, sometimes an order granted is conditional upon the undertaking by the parties or lawyers to file the application and affidavit later on (Y.A.A. Datu Haji Mohd Ali bin Mohd Sheriff Sahib).

These inconsistencies of opinions and practices are the result of the absence of standard operating procedures in most of the states in Malaysia. There is no denial to the fact that these discrepancies in practice have caused needless and undeserved delay in the proceedings.

3.2 CONCLUSION

From the observation and data collected through various methods, there are a significant number of problems and issues in the implementation of procedural law and evidentiary requirements in the Syariah courts in Malaysia. Among others are the problems in interpreting the non-standardization of the wordings in a *ta'liq* certificate, the validity of *ta'liq* and additional *ta'liq*, the use of too many grounds in the claim for *fasakh*, the service of the summons and documents to the defendants, and the pleadings and problems during hearing. Even though the method on how to serve the summons and other relevant documents have not been clearly spelled out in the main Act or Practice Direction, the creativity of the judges to serve the summons by way of AR Registered post can be considered effective as an alternative way to serve the summons and to avoid delay. This method should be consistently adopted by other states because it expedites the service of the summons and other documents to the defendant.

LIST OF RESPONDENTS FOR INTERVIEW

Y.A.A Dato' Aria D'raja Haji Daud bin Muhammad, Chief Syarie Judge of Kelantan, interview conducted on 8th February 2011 at 3 pm

Y.A.A Dato' Hj Yusuf bin Musa, Chief Syarie Judge of Penang, interview conducted on 19th April 2011 at 3 pm

Y.A.A Datu Haji Mohd Ali bin Mohd Sheriff Sahib, Chief Syarie Judge of Sarawak, interview conducted on 6th July 2011 at 3 pm

Y.A.A Dato' Mukhyuddin bin Haji Ibrahim, Chief Syarie Judge of Selangor, interview conducted on 26th may 2011 at 3 pm

Y.A.A Tn Haji Amir bin Danuri, Chief Syarie Judge of Johor, interview conducted on 9th May 2011 at 3 pm

Tn Nik Najib bin Che Hassan, Syarie Judge of the Syariah Lower Court of Kota Bharu, interview conducted on 8th February 2011 at 3 pm

Tn Nik Bukhary Hashimy bin Nik Yahya, Syarie Judge of the Syariah Lower Court of Penang (Timur Laut) interview conducted on 20th April 2011 at 3 pm and 21st April 2011 at 3 p.m.

Tn Zulfahmi Bin Bunaim, Syarie Judge of the Syariah Lower Court of Johor Bahru, interview conducted on 10th May 2011 at 3.30 pm

Tn Murshidi Jaya, Syarie Judge of The Syariah Lower Court of Kuching, interview conducted on 7th July 2011 at 3 pm

Tn Drs Atras bin Mohamed Zain, Syarie Judge of The Syariah Lower Court of Shah Alam, interview conducted on 25th February 2011 at 3 pm

Fazlina Bt Mamat@Mohd.Nor, Assistant Registrar Syariah Lower Court of Kota Bharu, interview conducted on 11th April 2011 at 11 am

Agenda 21 and the Importance of Women's Participation in Protecting the Environment

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ABSTRACT

Awareness of resource depletion and environmental degradation due to pollution has increased markedly in the past decade. It has been argued that involving women in protecting the environment would help societies develop the sense of responsibility needed to maintain a good balance between humans and the earth's resources. As consumers and producers, caretakers of their families and educators, women play an important role in promoting sustainable development. Motivating them to take part in protecting the environment would harness their enthusiasm for the effort. The implementation of Agenda 21 during the United Nations Conference in Environment and Development (Earth Summit) in Rio de Janeiro in 1992 helps to generate global awareness about the important role of women in environmental sound management and development through decision making activities. However, women remain largely absent at all level of policy formulation and decision-making in natural resources and environmental management. The objective of this study is to highlight the lack of adequate recognition and support for women's contribution and management of natural resources and safeguarding the environment. This study uses the qualitative approach for legal research. Through its findings, this study has also lay out some suggestions to the Government at all levels, including local authorities to promote an active and visible policy for the involvement of women including indigenous women, to participate in environmental decision-making.

Keywords: sustainable development, environmental decision-making, environmental degradation, indigenous women, environmental law and policy formulation.

Introduction

Our Mother Earth is currently facing numerous environmental concerns. The environmental problems like global warming, acid rain, air pollution, waste disposal, ozone layer depletion, water pollution, climate change, over fishing, intensive farming, land degradation, overpopulation, resource depletion, genetic pollution and many more affect the environment, animals and human being on this tired planet. It has been argued that climate change and environmental degradation represent a great threat to poverty reduction and to achieving the sustainable development goals.

Indeed, every environmental issue, no matter where they occur should concern all of us. Contamination of fresh water used for household needs, including pollution of oceans, rivers, lakes, and reservoirs, ranks top on the list of environmental concerns for many countries. Evidence suggests that developing countries, already struggling with social, economic and environmental issues, will suffer most from greater weather extremes and the increasing incidence of droughts and floods (Litus, 2012).

Environmental protection and preservation of the planet is the responsibility of every individual and community on Earth. Women played an important role in society. Research has also shown that women's leadership leads to better conservation and sustainable development outcomes. A strong global policy framework recognises the importance and promotes the active participation and leadership of women across all level of decision making – including that on environment and sustainable development concerns. Ensuring women's unique perspectives, experience, needs, and capacities inform sound policymaking is critical to development, poverty eradication, and livelihood outcomes, among others.

Even though the role of women in protecting the environment from harm has recently increased but research revealed the lack of a specific approach to gender either through Local Agenda 21 or other sustainable development mechanisms. Women are being significantly underrepresented from the local to the global scale (UN DESA, 2010). The question that begs for an answer is why is this so? The following discussions provide a brief overview of the developments associated with the importance of the role of women in environmental protection and decision-making.

Empowering Women to Safeguard The Environment

Northouse noted that women are no less effective at leadership, committed to their work, or motivated to attain leadership roles than men. According to Crawford, women provide the collective memory and they are the keepers of stories and myths. They remember better than men because they help to preserve and strengthen cultural tradition (Crawford *et al.*, 1989). Women are more successful in verbal communication and have a sense of interacting fairly well with particular matters in different circumstances (Crawford *et al.*, 1989). Women's voice and agency are essential for the governance of natural resources because of their diverse experience as farmers, fishers, household providers, and entrepreneurs. This basically means that women have indispensable abilities to be potentially effective leaders in every aspect of life including environmental issues.

Women's traditional roles in agricultural production, and as the procurers of water, cooking fuel, and other household resources make them not only well suited to find solutions to prevent further degradation and adapt to the changing climate-they have a vested interest in doing so. Articles reviewed by the Worldwatch Institute show that women tend to be more concerned than men about the environment and are more likely to take action to protect it (Engelman, 2016). Countries with higher proportions of women in their national legislative bodies are more likely to approve environmental agreements (Norgaard and York, 2005).

Higher ratios of women's nongovernmental organisations to countries' populations correlated with lower rates of deforestation, other factors controlled (Shandra *et al.*, 2008). Forest-management groups in India and Nepal whose executive committees had higher proportions of women conserved

community forests more effectively (Agarwal, 2000). In Bangladesh, a small survey of indigenous women and men in a village near a national park found higher environmental awareness among women than men (Atiqul Haq, 2011). Wangari Muta Maathai (1940-2011), is among the best-known leaders – known for her role as the founder of the Green Belt movement in Kenya in 1997 and as the first African woman to be awarded the Nobel Peace Prize in 2004 (UN Women, 2012).

International Affirmations of Women’s Rights In Environment And Development

Women from around the world began promoting their role in sustaining the environment as early as 1985 at the United Nations Third World Conference on Women, in Nairobi, Kenya. The conference produces the Nairobi Forward-looking Strategies, which recognise women’s role in environmental conservation and management.

In 1987, the mandate of the Brundtland Commission which was named after its chair Gro Harlem Brundtland, the former Prime Minister of Norway, was to examine the world’s environmental problems and purpose an agenda to address them. The Brundtland Commission report, ‘Our Common Future’, ushered in a new thinking on sustainable development, which it defined as development that ‘meets the needs of current generations without compromising the ability of future generations to meet their own needs’. This definition laid the foundation for an approach to sustainable development that highlights inter-generational responsibility and defines the three interlinked and mutually reinforcing dimensions of sustainable development: economic, social and environmental (UN Women, 2012).

Women’s Environmental and Development Organisation (WEDO) played a key role in crafting the strategy advancing women’s participation in the UNCED process. It launched its first global women’s gathering – the First Women World Congress for a Healthy Planet in November 1991, in Miami, Florida, U.S.A. In 1993, the World Conference on Human Rights in Vienna clearly acknowledges that women’s right of are human rights and that the human rights of women are an inalienable part of universal human rights. In 1995, Fourth World Conference on Women in Beijing added a new dimension to the development discourse. The Beijing Platform for Action led the shift from a women-specific approach to a focus on gender relations by identifying gender mainstreaming, human rights and the development of partnerships between women and men as the strategic bases for the pursuit of gender equality. It asserts that women have an essential role to play in the development of sustainable and ecologically sound consumption and production patterns and approaches to natural resource management.

In 2000, at the Millennium Summit in New York, all 189 United Nations Member States commit themselves to establishing a better, healthier and more just world by 2015. The Millennium Declaration promises to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable. Subsequently, in 2002, the World Summit on Sustainable Development in Johannesburg issues the Johannesburg Declaration and Plan of Action where among others it confirms the need for gender analysis, gender specific data and gender mainstreaming in all sustainable development efforts.

Agenda 21

One of the defining moments for sustainable development has been the United Nations Conference on Environment and Development (UNCED) popularly known as the Earth Summit that was held in June 1992 in Rio De Janeiro, Brazil. More than 178 governments at the conference adopted numerous agreements in several key documents. The Earth Summit also contributed to the creation of the groundbreaking Agenda 21 and three significant environmental agreements that came to be known as the Rio Conventions: The United Nations Convention to Combat Desertification, the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change (UNFCCC). The first two advanced gender perspectives from the outset, UNFCCC did not originally incorporate a gender perspective. The Earth Summit affirmed women's critical contributions to environmental management. UNCED was an important event for women worldwide, accepting their crucial role in achieving a different type of development – one that is socially, economically and environmentally sustainable.

Agenda 21 is a comprehensive plan of action to be taken globally, nationally and locally by organisations of the UN system, Governments, and Major Groups in every area in which human impacts on the environment. Chapter 24 of Agenda 21 entitled 'Global action for Women towards Sustainable and Equitable Development' spelled out the importance of women's participation in the context of environmental protection. It acknowledges the need to integrate women and gender at all level, specially the issue of integrating women into all policies, programmes and activities. It encourages national Governments to increase the proportion of women decision makers, planners, technical advisers, managers and extension workers in environment and development skills. In addition, it recommended that national governments develop strategies to 'eliminate constitutional, legal, administrative, cultural, behavioural, social and economic obstacles to women's full participation in sustainable development and in public life'.

Taking the stand on Agenda 21, the Beijing Platform for Action asserted that women have an essential rule to play in developing sustainable and ecologically sound consumption and production patterns and approaches to natural resources management. Similarly, the World Summit on Sustainable Development states that they are committed to ensure that women's empowerment, emancipation and gender equality are integrated in all activities encompassed with Agenda 21.

WEDO formulated and adopted its own platform: Women's Action Agenda 21. It is a document of principles that women worldwide could both contribute and encourage them to take and lead action, recommending accountability measures for advocacy at the UN and other international agencies and institutions, governments, industry and non-government organisations. Governments have made some efforts to strengthen institutional mechanisms to mainstream gender perspectives in the environmental sector. Countries have also increasingly linked gender equality and the environment in national action plans and strategies.

However, while Agenda 21 has acquired considerable coverage amongst nation states, its implementation remains far from universal or effective. Progress has been patchy, and despite some elements of good practice most Agenda 21 outcomes have still not been realised. Agenda 21 is not a treaty. It has no force of law, no enforcement mechanisms, no penalties, and no significant funding. It

is not even a top-down recommendation, seeking instead to encourage communities around the world to come up with their own solutions to overpopulation, pollution, poverty and resource depletion. It is a feel-good guide that cannot force anyone, anywhere, to do anything at all (Beirich, 2014).

Challenges Women Face in Relationship to Sustainable Development and Environmental Protection

Despite the efforts by the UN to encourage women's participation in environmental protection and decision-making, environmental policies and programmes have not consistently taken into account gender differences in access to, and control over, natural resources or the impact of environmental degradation on women and men. Even though women possess the right chemistry for being the guardian of the environment but unfortunately their perspectives are often unrecognised and their needs unmet in shaping and applying environmental policy. Institutions continue to lack the capacity, knowledge and skills to mainstream gender perspectives in sustainable development and natural resource management, and in particular in relation to climate change.

Indeed, studies conducted by ICUN, only 12 per cent of environmental sector Ministers and 4 per cent of World Energy Council chairs are women, leaving tremendous room for improvement. New data from Environment Gender Index (EGI) shows that across key environmental fora, less than 1/3 of decision makers are women. According to IUCN, 29 per cent of Rio Convention government delegates are women, less than 25 per cent of Rio Convention focal points are women, 43 per cent of Rio Convention NGO representatives are women and out of 43 international environmentally focused institution, 35 per cent of the executive directors (or equivalent) are women (IUCN March 2015).

The question that begs for an answer is why women are still under represented in terms of environmental decision-making? Is it because women are less likely to self-promote than men, and they are less likely to initiate negotiation, an important tool women leaders need in order to access the right opportunities and resources both in the professional and domestic spheres? A number of reviews have illustrated that the significant development of global policy frameworks has not been translated into effective implementation at the national level (UN Women, 2012). According to WEDO the goals on environmental sustainability and global partnership remain gender-blind may due to:

1. Lack of Gender Consciousness

There is general lack of awareness among both women and men about how gender issues affect environmental issues. This has been a major obstacle to feminist environmental advocacy since UNCED;

2. Tradition

In many countries, tradition is considered a main barrier for women who engage in public processes. Although traditional gender rules may vary within different cultures and communities, women are expected to remain primarily within the domestic sphere and face barriers to entering the public sphere at every level of society;

3. Women's Multiple Rules

Probably the most common thread that unifies women who become involved in local participatory processes – whether in developed or developing countries – are the multiple responsibilities as primary caretakers of house and family and working in paid jobs outside the home, as well as voluntary work in their communities. There remains a lack of institutional support for integrating women into governing processes. Lack of flexibility in meeting hours and a shortage of childcare facilities create significant barriers to women’s participation. Primary among these barriers to participation is the lack of adequate transportation which greatly affects women’s access to education, health and water;

4. Gender Bias

Even when women’s participation and gender concerns are theoretically accepted in multi-stakeholder forums, it takes substantial effort to change the balance of power relations. Gender bias plays an important role, for example, in influencing resource allocation. Attitudinal barriers are deeply rooted in patriarchy-based socialisation, where men are considered superior to women – a systematic disempowerment that has left women with little presence in decision-making bodies, resulting in the exclusion of their issues and concerns from the policy agenda; and

5. Institutional Barriers

In this realm, poverty and illiteracy are interconnected problems that prevent civic participation, particularly for women who form the majority of the world poor (70 per cent) as well as the majority of those who cannot read or write. Political parties, electoral systems, and legislative assemblies can throw up structural barriers to women’s full and equal participation in politics. Electoral system and political parties can both advance and limit political opportunities for women (WEDO, 2001).

Recommendations

According to UN Women, only an integrated approach can build equilibrium between present and future demands for economic progress across generations, social justice and use of natural resources that respects environmental and ecological development (UN Women, 2012). Evidence from India and Nepal suggests that women’s involvement in decision-making at the community level is associated with better local environmental management.

To successful implementation of Agenda 21, UNEP has among others proposed the following objectives for national Governments:

1. Measures to review policies and establish plans to increase the proportion of women involved as decision-makers, planners, managers, scientists and technical advisers in the design, development and implementation of policies and programmes for sustainable development;
2. Measures to strengthen and empower women’s bureaux, women’s non-governmental organisations and women’s groups in enhancing capacity-building for sustainable development;

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3. Programmes to eliminate negative images, stereotypes, attitudes and prejudices against women through changes in socialisation patterns, the media, advertising, and formal and non-formal education;
 4. Governments are urged to ratify all relevant conventions pertaining to women if they have not already done so. Those that have ratified conventions should enforce and establish legal, constitutional and administrative procedures to transform agreed rights into domestic legislation and should adopt measures to implement them in order to strengthen the legal capacity of women for full and equal participation in issues and decisions on sustainable development;
 5. To formulate and implement clear governmental policies and national guidelines, strategies and plans for the achievement of equality in all aspects of society, including the promotion of women's literacy, education, training, nutrition and health and their participation in key decision-making positions and in management of the environment, particularly as it pertains to their access to resources, by facilitating better access to all forms of credit, particularly in the informal sector, taking measures towards ensuring women's access to property rights as well as agricultural inputs and implements; and
 6. Programmes to support and strengthen equal employment opportunities and equitable remuneration for women in the formal and informal sectors with adequate economic, political and social support systems and services, including child care, particularly day-care facilities and parental leave, and equal access to credit, land and other natural resources.

Conclusion

The brief discussion here shares innovative strategies, experiences and programmes by international bodies and organisations that champion the contribution of women on sustainable development and environmental protection. Women have proven to be highly effective agents of change, organising all over the world to demand and work towards a healthy environment. The international community has endorsed several plans of action and conventions for the full and equal participation of women in national and international ecosystem management and control of environment degradation. Agenda 21 was revolutionary in that it called for global action for women. However, the noble efforts of the UN commission remain challenged by a set of factors that the development community has long recognised but made insufficient progress to address. For most society in the present world, discriminatory social structures and attitudes, at personal, community and institutional levels, persist in deeply entrenched patterns of gender inequality. This marginalisation will not only hinder effective national and regional strategies but will also block development goals for better environmental protection. The challenge now is for women organisation to go all out to ensure that women's empowerment, emancipation and gender equality are integrated in all the activities encompassed within Agenda 21.

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Negotiated Justice and the Female Victims of Crimes, Whither the Protection?

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Abstract

The long practice of plea bargaining process was originally intended to reduce the burden of the courts in handling the backlog of criminal cases. Such method enables the accused to negotiate his charges or sentences with the prosecutors in exchange for some concessions from the latter. Also, such process is supposed to act as a filter of cases in the pre-trial stage and to promote an efficient delivery of procedural and negotiated justice to the accused person. However, the process seems to neglect the interests of the victims of crimes, particularly female victims since the victims are not parties to the process and that both the prosecutors and the courts are mainly concerned with the swift case management and seem to disregard the victim's interests. Hence, this paper aims at analysing the implications of the plea bargaining process on female victims of crimes. This article employs a doctrinal analysis and secondary data from the Criminal Procedure Code, law reports, academic journals, books, and online databases. The authors contend that the lack of legal protection for women victims in the plea bargaining process could be reformed through the restorative justice approach that seeks to restore the gendered harm to the female via victim reparation, offender responsibility and communities of care.

Keywords: Female Victims, Negotiated Justice, Plea Bargaining, Restorative Justice, Victimology

Introduction

The emerging trend of implementing the plea bargaining around the globe is a phenomenon. Such a process is implemented to accommodate the increasing number of cases in the criminal court, and which promises a quick alternative to case disposal and reduces the burden on the judge and the prosecutor. In practice, the plea bargaining process allows the attorneys to engage in an informal discussion with the accused person and the defence counsel, if any, on the progress of the criminal case (Alschuler, 1979). The outcome of such process would include the reduction of the charge or the sentence in exchange for the accused's cooperation as well as self-incrimination (Wan, 2007). The prosecutor's discretionary power to decide on the type of the charge on certain crimes has laid the groundwork for the criminal justice system to embrace the plea bargaining process. The process empowers the prosecutor to engage in three type of negotiation, namely the charge bargaining, the sentence bargaining and the bargain for prosecutorial leniency (Ashworth & Redmayne, 2010). The

plea bargaining process is placed within the pre-trial stage and thus, making it more of a conversational in nature rather than an oratorical in nature (Condlin, 2011).

Within the global context, the laws regulating the plea bargaining process have been created in many jurisdictions. For instance, in 1974 the USA introduced the formal provision for plea bargaining into their Federal Rule of Criminal Procedure much earlier under Rule 11 (Brand, 1975). Since its introduction, the plea negotiation process was deemed necessary to maintain its effectiveness and to facilitate the prosecutor in handling dangerous offenders (Heumann, 1981). Canada accepted the practice of plea bargaining which plays a significant role in its criminal justice system (Young, 2001). In 1989, the Canadian Law Reform Commission states that the practice of plea bargaining is not a corrupt practice and should be made open and law on such process should be enacted (Verdun-Jones, 2002). However, the law that governs the practice of plea bargaining in Canada is still non-existent. In Singapore, the plea negotiation process was not made formal in their Criminal Procedure Code (Ann et al., 2014). However, such method is provided by the Attorney General Chambers in their Code of Practice for the Conduct of Criminal Proceeding (Law et al., 2011). Since then the plea bargaining process plays a vital role within the Singapore criminal justice system to weed out the cases that could be solved in the early stage of the criminal procedure (Koman, 2016).

In Malaysia, the regulation of the plea bargaining process was formally introduced in 2010. PEMANDU Lab highlights that before 2010, the criminal courts in Malaysia was facing an increasing number of the backlog of cases. Also, during that time, due to the informal and hidden nature the plea bargaining process, at times such process was being abused by the prosecutor, which necessitates the creation of the new law (Srimurugan, 2010). The adoption of the plea bargaining process into the current Malaysian legal framework is the best solution to deal with the issue (Akram, 2005). The new amendment to the Malaysian Criminal Procedure Code (hereinafter "the CPC") added section 172C and 172D to include the practice of plea bargaining. The new law emphasizes the procedures that the prosecutor should abide in bargaining with the accused. Also, the law imposes some restrictions on the types of crimes that can be covered by the said provisions in the pre-trial process.

The literature on the plea bargaining process in Malaysia is rather scarce. The limited academic research on this process might be due to the infancy of the process being introduced in 2010 and came into force in 2012. Some early local literature on the process prior to 2010 suggests the introduction of the process into the Malaysian legal framework to counter the problem of the backlog of cases (Akram, 2005). More recent local literature compared the process and several landmark cases in Malaysia with those in the United Kingdom by affirming the previous research on the need for a proper law to regulate the said process in Malaysia (Srimurugan, 2010). The literature post-2010 can be traced to Sidhu (2015)

who examines the advantages and disadvantages of the plea bargaining process. However, the discussion on the female victim perspective and its impact after the introduction of the plea negotiation process is still a vacuum in the Malaysian literature. The objectives of this paper are to examine the implications of the plea bargaining process on female victims of crimes in the criminal justice system. As such, this article intends to fill in the lacunae and provide a significant input on the subject matter. The paper commences by explaining the concept of plea bargaining process and the protection of crime victims within the criminal justice system. The second part examines the legal position of the plea bargaining process in Malaysia. The third section examines restorative justice in empowering female victims within the plea bargaining process and as part of the reforms in providing legal protection to such victims. The last part of the paper concludes the discussion by contending that the plea bargaining process has significant implications for female victims and that the lack of any legal protection for such victim may be addressed through restorative justice.

Plea Bargaining and Crime Victims in the Criminal Justice System

In many Western jurisdictions, the plea negotiation process has been a part of the criminal justice system for several decades. The plea bargaining process had a long and established history as well as many successes in reducing the backlog of cases in several jurisdictions, such as the USA and the United Kingdom (Moore, 2005). Such process is predominantly popular among the prosecutors as it eases their burden of preparing an elaborate prosecutorial case (Mohamad Amin et al, 2014; Akram, 2015). Also, the process allows the accused person to play an active role in the pre-trial setting by micro-managing the possible outcome of his trial (Karmen, 2012). The process was incorporated into the pre-trial stage and acts to filter out the cases that could be solved without a full trial setting (Baron, 1981). Due to its informal environment, the pre-trial stage has adequately equipped the plea bargaining process, the very much needed approach to negotiation and discussion. (Condlin, 2011). Such a stage operates by focusing on the role of several important players that accommodate the process. Such actors within the plea bargaining process include the prosecutors, the accused person, the defence counsel and the judge (Mather, 1979; Williams, 1987). However, it is unfortunate that the current criminal justice system is concerned with the accused person rather than on the victim's rights (Karmen, 2012). The voice of the victims of crimes is considered as an accessory to supplement the role of the voice of the state and the view of the accused (Sidhu, 2015; Mohamad Amin et al, 2014; Akram, 2015). The rights and the interests of the victims of crimes might not be addressed sufficiently within an offender-centred system (Walker, 1992). The empowerment of the criminal justice system is directed

to ensure that the interests of the accused persons are protected, and the punishment would procedurally follow. Hence, the criminal justice system in many jurisdictions around the world punishes the offender, yet such system focuses less on the compensation for the victims. Although the movement towards victim empowerment is growing rapidly in other jurisdiction such as the United States (Morgan, 1986), however, such is not the case with the criminal justice system in Malaysia as the development are progressing at a much lower rate since 1990 (Ghaffar, 2014). Countries such as the United Kingdom, Canada, and Australia had established bodies that promote and protect the rights and the interests of the victims of crimes (Ismail, 2011; Koss & Harvey, 1991; Kennard, 1989; Erez, 1999).

The Legal Position of the Plea Bargaining Process in Malaysia

The plea bargaining process in Malaysia was introduced in the 2010 amendment of the Criminal Procedure Code 1976. The amendment added two new provisions to enable the plea bargaining process under section 172C and 172D. Section 172D provides the right of the accused person to enter into a plea negotiation process and allow the prosecutor to negotiate the charge or sentence that the prosecutor seeks from the court. Section 172D underlines the possible reduction of the sentence that the accused may get, in return for entering the plea bargaining application through Form 28A. Also, the said section set limitations on the type of crime that may not be entitled to receive half of the reduction of the sentence allowed in the previous subsection.

The landmark case of plea bargaining in Malaysia is *New Tuck Shen v PP (1982)*. This case was brought before the court before the introduction of the amendment in the Criminal Procedure Code. In this case, the agreement was struck between the prosecutor and the defence counsel in that the prosecutor must not pray for the deterrent sentence. The prosecutor purposely disregarded the said agreement and subsequently the accused was sentenced to six-month incarceration. During the appeal, the absence of any documents proving the existing agreement between the parties had caused the defendant his conviction (Husin, 2010). In contrast to the landmark case, in a later case in *Public Prosecutor v Ravindran & Ors (1993)* the court acknowledges the advantages of the plea bargaining process. The court took into consideration that the request would shorten the lengthy process of the trial and the fact that the trial will be an excruciating one as another two accused persons were still at large at that time. Visu Sinnadurai J agreed to reduce the sentence to one-quarter of the phrase.

Within the pre-trial stage, the protection for the victims appears to be non-existent. In most cases, the bargain for the charge or sentence that are being struck between the prosecutors and the accused

persons are not being disclosed to the victims (Moore, 2015). Such a situation may be because the victim of crime is not a party to the plea bargaining process (Cole, 1998; Levine et al. 1980). As such, the practice would render the victim impact statement, during the sentencing process, meaningless as the prosecutor may hold a retrospect opinion on the sentence that they would pray before the court (Kennard, 1989). Female victims of crimes might endure much more suffering in comparison to their male counterparts. A recent study suggests that male victims of crimes in Malaysia are more likely to suffer from violent crime by 64 percent more than female victims (Muhammad Amin et al., 2014). However, the percentage does not include cases of rape which would involve female victims (Muhammad Amin et al., 2014). The crimes of sexual nature would often leave the victims physically and emotionally traumatize, unstable and it might take years to recover or not at all (Harber et al., 2015). The female victims of crime, particularly rape victims, are prone to hide from the public either fears of another sexual assault, or they may feel ashamed of being a rape victim (Moore, 2015).

Similar to the other criminal justice mechanisms such as sentencing, the plea bargaining process is centred primarily on the accused person (Ota, 2003). Apparently, Sections 172C and 172D of the CPC does not provide for any provisions that place the victims of crimes in Malaysia within the context and setting of the plea bargaining process. The limitation imposed by the law under section 172D(3)(b) provides that the plea bargaining offer for a reduction of not more than half of the sentence does not apply to any sexual-related offenses (Sidhu, 2015). In contrast to the legal position in the USA, such provision provides a slightly better protection to the interests of the female victims of rape in Malaysia. In the USA, a major reduction of sentence may still be allowed to the accused person after the bargain even in sexual and violent cases (Moore, 2015). It is also important to highlight that sections 172C and 172D does not include the need for the victim to make an impact statement. On the one hand, such statement is not required as the victims of crimes are not the parties to the plea bargaining process (Sidhu, 2015). On the other hand, the prosecutors may deliberately keep the crime victims 'in the dark' on the plea bargaining so as to prevent the victims from raising any objection (Zimmerman, 2016). Although section 172D of the CPC allows the court to award compensation order to female victims of crimes, the Rape Trauma Syndrome (RTS) and Post Traumatic Stress Disorder (PTSD) occasionally suffered by women victims of sexual cases are impossible to be quantified by numbers (Ismail, 2011).

Victim Empowerment, Restorative Justice, and Plea Bargaining Reform

The existing legal framework on the plea bargaining process in Malaysia accommodates neither the interests nor the rights of female victims of crimes. Legal reform is very much needed to fill in the loopholes in the existing law and to protect the interests of such victims. The Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud in the United Kingdom makes it clear that the prosecutor should communicate with the victims before entering into a plea bargaining process under Guideline B2 (Flynn, 2011). Section 172D of the CPC should be amended to include a new provision compelling the prosecutor to communicate with the victim before the plea bargaining process. This provision should sufficiently provide that such victims may be allowed to stand and face the offender at the pre-trial stage and inform the prosecutor the impact of such crime on her.

In the broader analysis, the reform as mentioned above involving the offender-victim mediation and the inclusion of female victims into the plea bargaining process would signal the adoption of restorative justice (RJ) model in which four parties consisting of the victim, offender, community and government should be involved. While the victim's role is to describe the impact of the offense and what might be needed to assist with her healing, the offender's role is to accept the responsibility for his harmful actions and to make amends (Dancig-Rosenberg & Gal, 2013). The community's responsibility to the victim is to assist with her healing and to support rehabilitation for the offender. The government's role is to maintain order in the community and to ensure fairness to the offender and redress for the victim (Bloch, 2010). Studies on restorative justice and its impact on the victims of violent crimes in London indicates that restorative justice reduced the crime victims' post-traumatic stress symptoms and related costs. Such justice also provided both victims and offenders with more satisfaction with restorative justice than criminal justice and reduced the crime victims' desire for violent revenge against their offenders (Sherman et al., 2007).

Under section 426(1A) of the CPC, the prosecutor may apply for a compensation order and the court must fix a certain amount to be paid to the victims of crimes for any physical or reputational injuries or losses to income or property suffered by the victims resulting from the crimes committed against them. However, it is rightly argued that such section insufficient and limited (Husin, 2010) and may be inadequate to address the psychological trauma suffered by female victims of crime in sexually-related cases. The female victim of the offence may be "re-victimised" by the system when the charge on the offence committed on her was bargained for, and the accused even received a discounted sentence after the deal (Moore, 2015). To address such deficiency, perhaps a criminal injuries compensation scheme that is modelled on Criminal Injuries Compensation Authority in the United

Kingdom should be created that could provide for the psychological and economic compensation for the losses and damages suffered from any crime committed upon the victims, mainly female victims.

Conclusion

This paper identified some significant legal issues for the protection of the female victims of crime in Malaysia, particularly under section 172(D) and section 426(1A). It is apparent that the legal protection for female victims of crimes within the plea bargaining process in Malaysia is rather non-existent. Despite certain advantages of the process to the prosecutors and the offenders, the same may not be the case for the victims of crimes. The plea bargaining process has completely taken the victims away from the criminal justice system and seems to trample on the very interests that the criminal justice system aims to protect, which are the public interest and the interests of the crime victims. The impact of the plea bargaining process on female victims of crimes is even worse as the process is deemed to neglect the interests of the female victims. Such a case may occur in sexual offenses in which female victims would most likely be physically hurt, psychologically traumatized and emotionally abused. In reforming the said process, it is contended that such reforms should significantly support the victims of crimes to heal and seek solace as well as reconciliation. Finally, such reform should create a legal culture that revolves around restorative justice, which seeks not only to restore the gendered harm to such victims but also to give voice to these marginalized people through the ethos of victim reparation, offender responsibility and communities of care.

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Building Disaster Resilient Law: Protecting Women and Children in Extreme Crisis

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Abstract

The occurrence of disasters has increased tremendously during the recent past. Although emergency management efforts are designed to benefit both men and women in real practice, a larger share of advantages and resources goes to men and women continue to remain marginalised. It is widely known and accepted that disasters affect women and children and men differently. Recent studies have recognised the need to include women's contribution to disaster management and emphasised its importance in building disaster resilient communities. Hence, this study explores women's status in emergency situations and examines women in the context of emergencies; vulnerable groups may include women and children with disabilities, pregnant women, elderly women, women prisoners, women and children of ethnic minorities, women and children with language barriers, and the impoverished women and children. The fate of the disadvantaged during disasters has received little attention in the legal literature, and this article begins to fill that gap. On the discussion of that background, some preliminary assessment of the intersection of women's experiences in situations of humanitarian crisis, probing the causality and patterns that have been identified across a range of interdisciplinary scholarly research and policy-oriented analyses. It advances understanding by three important but frequently marginalised issues, namely vulnerability, masculinities, and security in situations of crisis. The goal is, to highlight greater traction to a feminist analysis of women's experiences in situations of extreme crisis. Some preliminary observations are made to help frame the way in which legal and policy solutions are articulated in such crisis contexts.

Keywords: women; gender; disaster; law; extreme crisis

Introduction

The whole world is highly prone to the impacts of natural disasters especially the Asia region. The region is regularly hit by all sorts of the natural disaster such as the typhoons, earthquakes, floods, and landslides. Natural disasters can have major impacts on the social and economic welfare of a population, and seriously an obstacle in the achievement of sustainable and better quality of life and dampen economic development. Usually, the impacts from natural disasters are not uniformly distributed within a state and tend to disproportionately affect the weakest and groups. Women are the priority and at suffer particular and peculiar risk. It is widely known and accepted that disasters affect women and men differently.

Indeed, available data suggests that there is a pattern of gender differentiation at all stages of a catastrophe: exposure to risk, risk perception, preparedness, response, physical impact, psychological impact, recovery and reconstruction of life. In a disaster studies undertaken in recent years in Southeast Asia found that more women than men died as a result of the catastrophes in the region. Economic, cultural and legal status of women and men affect their resilience in a post-disaster situation (Trohanis, Svetlosakova, & Carlsson-Rex, 2011). Specific risks encountered by women and girls after a natural disaster include increased incidences of human trafficking, violence against women and sexual abuse, which in turn can lead to unwanted pregnancies, sexual diseases and other reproductive health issues, and psychological trauma (The Gender Agency, 2015).

Women Welfare in Natural Disaster

Post-disaster interventions like relief and subsequent recovery efforts fail to pay adequate attention to the gender-specific impacts of disasters. Although emergency management efforts are designed to benefit men and women, men usually tend to receive a larger share of advantages while women continue to remain marginalised. Ayse Yonder, et.al (2010), in their paper write, that, disasters increase women's household and care-giving work dramatically for an extended period as housing and social infrastructure once destroyed is slowly replaced. They require women to manage displaced families and restore family livelihoods. Post-disaster aid efforts ignore this reality and target male-headed households as the primary claimants for government and other support. Not only does this approach to support ignore women's common claim on family assets, but it also ignores the needs of women living apart from male-headed households and is largely indifferent to the income-generating roles that women do and must play. These biases substantially undermine prospects for family and community recovery.

Gender-sensitive programming is essential during emergency relief. The central aim of disaster relief is to support and rebuild communities; what women do to keep their families and communities together in the critical moments after a catastrophe occurs often is taken for granted. Protocols must be developed that value women's priorities and contributions appropriately.

According to WHO, women are portrayed as the victims of disaster, and their central role in response to disaster is often overlooked. A woman's pre-disaster familial responsibilities are magnified and expanded by the onset of a disaster or emergency, with significantly less support and resources. Women play a central role within the family, securing relief from emergency authorities, meeting the immediate survival needs of family members and managing temporary relocation.

Impact of Natural Disaster on Women Vulnerability, Financial Stability and Security

The United Nations Handbook for Estimating the Socioeconomic and Environmental Effects of Disaster (2003) emphasises that one consequence of disaster is the recapitalisation of women and the reduction of their share of productive activities in the formal and informal sectors. Women are disadvantaged in two ways. The first refer to the situation aftermath of disaster, that is not only do they sustain direct damages or production losses (housing and means of production), but they also lose income when they have to apply themselves temporarily to unpaid emergency tasks and an increased amount of unpaid reproductive work, such as caring for their children after schools closed. Such reproductive work is usually granted a lower status than paid employment. It is also a continuous job and time consuming. This limits women's mobility and can sometimes even prevent them from exercising their rights as citizens. The gender roles and tradition dictate that women become the primary caretakers for those affected by disasters – including children, the injured and sick, and the elderly; substantially increasing their emotional and material and psychological workload. WHO Research (2010) says that women and children are particularly affected by disasters, accounting for more than seventy-five percent of them becoming a displaced person.

In addition to the general effects of natural disaster and lack of health care, women are vulnerable to reproductive and sexual health problems and increased rates of sexual and domestic violence. Women's vulnerability is further increased by the loss of men and livelihoods, especially when a male head of household has died, and the women must provide for their families. Post-disaster stress symptoms are often but not universally reported more frequently by women than men. Gender inequality in social, economic and political spheres results in vast differences between men and women in emergency communication; household decisions about use of relief assets; voluntary relief and recovery work; access to evacuation shelter and relief goods; and employment in disaster planning, relief and rehabilitation programs, among other areas of concern in disaster relief. According to Enarson (2000) women's work is heavily impacted by disasters, and their economic losses can be extensive. Domestic labour increases enormously when support systems such as child care, schools, clinics, public transportation and family networks are disrupted or destroyed. Damaged living spaces are damaged working spaces for all women. For those whose income is based on homework, the loss of housing often means the loss of workspace, tools, equipment, inventory, supplies and markets. Making it worst for married women, domestic violence appears to increase when men's sense of control is diminished in disasters.

Women vulnerable are evidently exposed during these recent natural disasters. The Nepal Disaster Risk Reduction Portal of the Government of Nepal counted a total of 18,780 deaths as of 11th June

2015, out of which 55% are female victims. UN estimates that from 5.6 million effected population after the earthquake; about 1.4 million are women in reproductive age. The fundamental issue at stake is how to assess disaster management in order to avoid the victimization women which further exacerbate their vulnerability, enabling them to overcome difficulties in a sustainable (and ideally independent) way. In Indonesia tsunami disaster put women on the verge of losing livelihoods and assets, as women's land and property rights were not acknowledged uniformly, and that affected women found it difficult to register and secure a title certificate for inherited claims. Hence, denied assistance to rebuild their accommodation (Trohanis, Svetlosakova, & Carlsson-Rex (2011). In Haiti too, the disaster impact were reflected in housing prices, which increased after the disaster. Some women, not having the same income opportunities as men, remained therefore excluded from housing facilities. In Indonesia after the 2004 tsunami, the early marriage strategy was also used by some parents in order to avoid their daughters being raped in refugee camps (Singh, 2012). There has been information on this occurring in Nepal under the present crisis as well everywhere in previous area of natural disaster, reported (UN Women, 2015). The challenge of providing medical care to women and children aftermath of natural disaster goes even worst. This is seen in most cases where the health care centres, village health posts and birthing-giving centres, and hospitals have either been destroyed or are overcrowded with injured people (Bhuvanendra, 2014). As for sanitation, the lack of clean conditions and hygiene items lead to increased risk of infections as hygiene standards for daily life (such as menstrual hygiene) and the treatment of injuries and diseases cannot be properly met. In order to access the food provision, women and children, the packing of food in bags with a carriable weight for women seem to be a real problem (Sharona, 2007), as well as the possibility of delivering to those women and children who cannot attend the distribution centre (UN Women, 2015). After a disaster irrigation systems were affected. Water is the key for agriculture and livestock care. It is crucial to integrate women in decision-making about water resources management. Even though most of the time they are not landowners, because they suffer from drastic inequalities in land distribution and inheritance in most of the disaster area, yet they are the operator of the agriculture and livestock care (Horton (2012). Disasters such as earthquakes strike hard on private housing and public infrastructure, such as roads, schools, hospitals, etc. This increases vulnerability of women, placing them out of home, schools or work placed. Trafficking and forced labour are risks that increase too. Lack of proper security or enforcement team seem to increase the danger on them. Even if women are not victims of violence, being surrounded by non-related men, for example in a temporary camp, could provoke much stress (Fionuala, (2011), so psychological assistance is the key to consider, before any process of disaster management can begin.

However the situation is different in air disaster involving women either as victim of the plane crash or the surviving spouse or families left alive. One prominent case, involving women victim who is the sole provider to the surviving families leads the new angle in dealing or protecting women in disaster.

Women as Victim in Air Disasters

Once an air disaster occurs either it is caused by human error, mechanical failure, and deliberate criminal or terrorist activity; often it involved too much life's loss. Which law applies in a particular situation depends on various circumstances surrounding the accident. As a result, pecuniary and non-pecuniary damage awards for the families of the crash victims may vary substantially from case to case. The first problem arose when action is brought against the airline for injuries sustained in the air disasters is the availability of the evidence (Ainul, et.al, 2015). The rights of the victims' families to recover damages from the airlines are only limited by a veritable ticket either bought for international travel or national destiny. If a passenger was ticketed on an international itinerary, state laws do not apply. Airlines are insured against hull losses and damages to third party property. Also, aviation insurers provide coverage for most legal liability claims that may be brought against carriers and aeroplane manufacturers by the victims of a crash. Pecuniary damages include medical expenses and lost wages suffered by those who are personally injured. The families of those passengers who were killed can recover monetary damages for the lost support no longer provided by the decedent. In addition to monetary damages, most states allow the recovery of non-pecuniary (non-economic) damages which may exceed pecuniary damages. In the case of personal injury victims, non-pecuniary damages are recoverable for pain and suffering. In death cases, the families of the decedents are usually allowed the recovery of non-pecuniary damages for the loss of care, comfort and society. Are non-pecuniary damages, such as loss of society damages, recoverable under the Warsaw Convention, requires a showing that the claimant was financially dependent on the crash victim?

This case is obviously of great interest to the families of those who died on Flight 007 as well as to the survivors of those killed on Pan Am Flight 103, destroyed over Lockerbie, Scotland, on December 21, 1988. The Court's decision will determine if survivors can claim damages for loss of society injuries that could substantially exceed the number of damages they would recover for only pecuniary injuries. Likewise, the liability exposure of air carriers will increase dramatically if the Court decides that the Warsaw Convention, as supplemented by federal law, permits the recovery of loss of society damages in cases in which the \$ 75,000 recovery cap is removed because of the wilful misconduct of the airline. Depending on the availability of the evidence, and the absent of uniform laws, the plaintiff turn to the common law of negligence. The duty owned by the operators of aircraft to their passengers depends

on whether the plane in question is a private or a shared carrier. In the USA case of *Kasanof v. Embry-Riddle Co.* [157 Fla. 677, 26 So.2d 889 (1946)], the operator of a private carrier owes only the duty of ordinary care to his passengers while a common carrier is charged with the highest degree of care consistent with the practical operation of its aircraft. If there is a possibility that specific negligence can be alleged and proved, a favourable forum would be one, for example, where both specific negligence and the doctrine of *Res Ipsa Loquitur* could be alleged by the plaintiff. As a result, monetary damages that the victims' families may claim can vary from zero to millions of dollars.

In the aftermath of an aviation accident, two parallel investigations often ensure first, the technical, or safety, study and second, is the legal research. The purpose of the former is to identify the circumstances and causal factors that produced the accident to improve aviation safety, whereas the latter is aimed at providing compensation to the victims' families or assigning blame and punishment to those at fault (West, 2016).

The International Civil Aviation Organization (ICAO) promulgates standards and recommended practices to be followed by the global aviation community. Annex 13 sets forth the international requirements for the investigation of aircraft accidents and incidents and establishes practical guidelines for conducting accident investigations. In that case, the damages that a victim's family can claim are regulated by the 1929 Warsaw Convention. In *Garcia v. Pan American Airways, Inc.*, [55 N.Y.S.2d 317] the court said that the purpose of the Warsaw Convention was "to unify rules relating to international transportation by air, and the plan of liability embodied in the Warsaw Convention appears to have been designed in part to promote international aviation by relieving it of certain liabilities." The Warsaw Convention also provides airlines with a direct pecuniary protection a damage liability limit for injuries and death based on an artificial monetary unit called a Special Drawing Right (SDR). From 1929 to 1966, an airline's liability was limited to 100,000 SDRs, equivalent to about \$9,213 (in 2010 terms). Subsequently, in 1966, the limit was raised to \$81,750 (in 2010 terms) by the Montreal Agreement that amended the Warsaw Convention. This reform that would eliminate the inequity imposed on American passengers who got injured or died while travelling overseas. However, in *Death on the High Seas Act (DOHSA) USA*, the damage claims by the family members of persons killed on the oceans. At the time, Congress intended to protect ocean liners and the U.S. government against excess damage claims brought by the families of passengers, sailors, and service members who died while crossing the oceans. Over the years, the courts have interpreted the Act as applying to all deaths on the High Seas including air crash deaths outside of the U.S. territorial waters. According to DOHSA, a survivor's damage recovery is restricted to the recovery of pecuniary damages only denies survivors any recovery for non-pecuniary damages. Those who are killed in a crash on the ocean,

outside of the territorial limits of the United States, face severe restrictions on damage recovery. Unique discussion in Marjorie Zicherman, Individually And As Executrix Of The Estate Of Muriel A.M.S. Kole, And Muriel Mahalek V. Korean Air Lines Co. The litigation involving the destruction of Soviet fighter aircraft of Korean Air Lines Flight 007 ("Flight 007") on September 1, 1983. Flight 007 was in en route to Seoul, South Korea, from Anchorage, Alaska, and was shot down over international waters. All 269 persons on board perished. United States courts already have ruled that Korean Air Lines Co., Ltd. ("KAL") was guilty of "willful misconduct" in operating Flight 007 because the flight crew was grossly negligent in setting and maintaining the computerised navigational system, an error that caused the aircraft to stray over Soviet airspace. Relying on the case of *Re Korean Airlines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991). The ruling of willful misconduct meant that the Convention's \$ 75,000 cap on damages was lifted. Ms Muriel A.M.S. Kole was a passenger on Flight 007. Following Ms Kole's death in the disaster, her sister and estate executrix, Marjorie Zicherman, and Mrs Kole's mother, Muriel Mahalek, brought claims in federal district court. The district court awarded both the sister and mother pecuniary damages along with damages for loss of society and mental injury. In awarding loss of society damages or psychiatric damages, the district court did not require proof that either relative had been financially dependent on Ms Kole before her death. The families of deceased passengers pressed their claims for damages. The survivors sought to recover pecuniary damages for financial losses directly attributable to the death of their respective relatives; they also attempted to recover non-pecuniary damages for the intangible injury of losing a loving relationship, known as loss of society damages, as well as damages for the emotional distress of losing a loved one and psychiatric damage. Thus, women and families dissatisfaction is always seen as the end drama in court. Elaine D. Solomon and Dina L. Relles (2011) stated nowadays, the risk that the threat of criminal prosecution places on the future safety of air travel significantly outweighs any societal benefit in satisfying the inherent human desire for revenge or punishment in the wake of a terrible loss, suing the air carrier or the State or any other related person. Could this finding shows a need to further study the inclusion of psychiatric damage in any damages claim by victim or family of the air disaster's victims before the matter reach an uncontrollable level and effected the bigger audience, the society as a whole.

Discussion

Preparing for post disasters has been high on the agendas of many federal, state, local, and private entities for several years. These efforts, however, often disregard the special needs of vulnerable populations as mentioned in the abstract earlier. The post disaster preparedness for vulnerable populations raises challenging ethical questions (Awan, 2006). In the midst of a disaster, how should

limited resources is allocated? To what extent should the needs of vulnerable populations be prioritized according to gender? According to the theory of utilitarian principles, actions are appropriate if they produce the greatest amount of good for the greatest number of people (John C. Moskop & Kenneth V. Iserson, 2007). Perhaps the second approach to rely on the distributive justice and the principle of equal chances. This principle requires health care providers to give each individual an equal chance to survive on the theory that each person's life is equally valuable to another but without women and children, the nation society will weaken for lack of future population (Lawrence O. Gostin, 2007). As for air disaster situation involving women and children, they should be allowed to claim besides the usual claim according to legislation (international, federal or state) under torts. A differentiation could be made on the basis of the type of damage and in particular that a distinction should be made between pecuniary and non-pecuniary damage was discussed in the first US case applying the test was in *Hül v. Kimball*, 76 Tex. 210,13 SW 59 (Texas 1890). US courts do not have a clear rule as to what will qualify as a sufficient physical consequence from the damage to the psyche. The court discussed that the psychiatric damage may result in both pecuniary damage (e.g., doctors' fees, loss of income) and in non-pecuniary damage (e.g., stress and other emotional suffering). Of the two compensation for pecuniary damage and compensation for non-pecuniary damage the former deserves in our view the greater priority. The absence of compensation for pecuniary damage places a heavier burden on the everyday life of the victim (particularly if this damage is not covered by insurance) than the absence of compensation for non-pecuniary damage. Our suggestion therefore is that, particularly in the case of victims outside the zone of danger in air disasters, a legislature (by Statute or treaty) is call for to distinguish between pecuniary and non-pecuniary damage claims. If the legislature concludes that the potential disaster of claims is too great and arbitrary choices have to be made, it might adopt a more generous approach to the claims for compensation for pecuniary damage caused by psychiatric injury than to the claims for compensation for non-pecuniary damage, which that legislature might well conclude deserve lower priority (Carel J.J.M. Stoiker & David I. Levine (1997).

Conclusion

During and after a catastrophic event, both federal and state laws addressing emergency preparedness should be revised and strengthened to maximise protection. The suggested legal interventions are designed to bolster accountability and ensure that specific tasks are undertaken. Federal law should thus provide for greater accountability. The State Emergency by-laws should also require the appointment of officials with particular responsibility for at-risk groups, women and children as apriority, because not all emergencies will be declared at the federal level. Hence, steps must be quickly

taken to address the legal issue above, paying attention to place women as the priority, as suggested in the Beijing Agenda for Global Action on Gender-Sensitive Disaster Risk Reduction adopted at the International Conference on Gender and Disaster Risk Reduction, organised by ILO in 2009 which recommends “achievable actions” to deal with the issue and we suggest them to be adopted and inherited under the wings of the Ministry of Women Family and Society, if in Malaysia. The first move is to increase cooperation and collaboration between Ministries responsible for disaster risk reduction, with the participation of civil society to include the situation involving natural and air disaster under one Plan of Action. Second, to improve and review available national policies, relevant laws, strategies, plans and budgets and take immediate action to mainstream gender especially, the vulnerability, and security of women and children into national development policy. Malaysia already have one dealing with women’s welfare but not inclusive of air disaster impact on women. Third, create research institutions to study the cost-benefit and efficiency of gender-sensitive policies and programmes in all type of disaster risk reduction education. Therefore survey could be done on gender-specific data and statistics on the impact of disasters, carry out gender-sensitive vulnerability, risk and capacity assessments and develop gender sensitive indicators to monitor and measure progress. It is necessary to increase public and media awareness of the gender sensitive vulnerabilities and capabilities in any disasters and concerns in any disaster risk reduction management and administration. Therefore, what is needed is the "re-gendering" of available policies, treating gender victim (the women and children) as the important element of rebuilding the nation instead of paying attention solely on repairing infrastructures and injecting economic stability. Our suggestion is to have a design for an ADR system which honour victims’ construction of the meaning of damages in such a way that is effective, efficient, and politically feasible when a disaster occurs, natural or air bound.

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Motherhood: I Am A Woman

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Abstract

Surrogacy arrangement has received publicity worldwide and become a popular choice among infertile couples who seek for viable alternative for parenthoods. There are two types of surrogacy, namely altruistic surrogacy and commercial surrogacy. Due to the demand, it has been commercialized in nature and legalized in some developing countries such as India, which involved a fee paid to the surrogate mother who agrees to carry a child of another to maturity in her womb. However, this practice of commercial surrogacy is also prohibited in some countries as it raises a number of ethical, social and mostly legal issues. Eventhough some of the countries have prohibited commercial surrogacy, altruistic surrogacy still allowable with some limitations. For this reason, this paper will be focused on the development of surrogacy law and procedure in India and Thailand, especially on commercial and altruistic basis and to identify whether surrogacy can be adopted in Malaysia. The focus of this paper will be the non muslim community in Malaysia. Therefore, the writers will not discuss the religious perspective in this paper. The writers have conducted this research by using qualitative methodology with comparactive appraoach. From the critical analysis which has been done by the writers, the writers concluded that the current law in Malaysia has prohibited in total the surrogacy for non muslim as well as muslim in Malaysia. To experience motherhood is a fundamental right as a woman. Therefore, the writers will propose a new law to legalize the altruistic surrogacy in Malaysia.

Keywords: *altruistic, commercial, surrogacy, , motherhood, infetile, couples.*

Introduction

To become parents is the nature of a human being. Most of the married couples are looking to settle down and build a family with their own children. However, not every woman is able to conceive a child. A WHO study from 1991 estimated that 8 to 12% of couples with women of childbearing age are infertile. Note that the definition of fertility may vary depending on the length of time after a couple having regular unprotected sexual intercourse and not getting pregnant are deemed infertile ((World Health Organization 1991). Surrogacy is the best answer to ease the pain of infertile couples. However, surrogacy has always been the endless debate in terms of ethical, parenthood and autonomy issues. Most religions and relevant organisations are against surrogacy, since they see it as immoral, against the unity of marriage and procreation, or against the dignity of the child to be carried by their biological mother; as a result, they call upon the law to maintain surrogacy as illegal. Liberal approaches, however, emphasise the need for the state and the law to stay neutral towards competing moral standards, drawing among else, on John Stuart Mill's principle that only harmful practices should be prohibited by law and that one is ultimately sovereign over one's body and mind (Hartzis 2003). Kimbrell (1993) draws parallels between surrogacy and slavery, since slave women were often used as birth mothers without any legal rights. Fears are expressed that poor women might be transformed into an army of surrogate labour or a caste of pregnancy carriers. Anderson (1993) considers surrogacy as the extreme form of alienated labour which is more about generating profits and reproducing sexism, rather than about generating life. However, according to liberal legal view, the parties involved in surrogacy arrangement are the best judges of their own welfare; therefore a contract that makes all parties better off should be enforced, rather than prohibited by law (Hatzis 2003). The desire for perpetuating one's gene will make infertile couples search of ways to fulfill their procreation aspirations (Gamble and Ghevaert 2009). Therefore, regulating the surrogate practice towards mutually beneficial ends is a key direction (Deonandan 2013). The writers will discuss the surrogacy law and procedure in India and Thailand and thereafter continue with critical analysis on Malaysia law which is related to surrogacy.

Concept and Definition

Surrogacy is a practice whereby a woman will become pregnant with the intention of giving the child to someone upon birth. Surrogate mother is the woman who carries and gives birth to the child and intended parent is the person who intends to raise the child. Altruistic surrogacy is a surrogacy arrangement where the surrogate mother is paid nothing, or only remunerated for her expenses associated with the surrogacy. Usually, the intended parent(s) cover such expenses. Meanwhile,

commercial surrogacy is a surrogacy arrangement where the surrogate mother is remunerated beyond expenses associated with the surrogacy. This may be termed a ‘fee’ or ‘compensation’ for pain and suffering. Usually the intended parent(s) cover such payment (Morgan 1989).

Development of Surrogacy Law and Procedure

1. India

Even though India has legalized commercial surrogacy and been a popular choice destination for surrogate mothers, there are no law to govern surrogacy, but only mere guidelines which is the closest legal framework for surrogacy in India is the Indian Council of Medical of Medical Research’s 2008 and the draft of Assisted Reproductive Technology (Regulation) Bill. Both with the aims to regulate surrogacy in India and tries to address foreseeable complexities. Again, there is no codified surrogacy law in India as the ART Bill is yet to be passed in Parliament.

Legal Position in India: Legislative Development

The Indian Council of Medical Research (ICMR) published National Guidelines for Accreditation, Supervision and Regulation of ART clinics in India in 2005 (India Council of Medical Research 2005). These guidelines were set up by members of expert group which are divided into nine chapters and some of the main points that can be extracted from the guidelines are (1) DNA tests are compulsory to determine that the intended parents are indeed the genetic parents. If this is not the case the child must be adopted instead; (2) surrogacy should normally only be an option for patients whom it would be physically or medically impossible or undesirable to carry a baby to term; (3) the payments received by the surrogate mothers should be documented and cover all genuine expenses associated with the pregnancy; (4) the responsibility of finding a surrogate mother should rest with the couple, or a semen bank, not the clinic; (5) a surrogate mother should not be over 45 years of age. The ART clinic should ensure possible surrogate woman satisfies all the testable criteria to go through a successful full-term pregnancy; (6) no woman may act as a surrogate more than three times in her lifetime; (7) the surrogate mother must declare that she will not use drugs intravenously, and not undergo blood transfusion excepting of blood obtained through a certified blood bank; and (8) a relative, a known person, as well as a person unknown to the couple may act as a surrogate mother for the couple (Center for Social Research 2008).

However, these guidelines hold no legal power or authority. As a mere guideline, no one is legally bound to follow them. There is no stipulated law for breach of contract by either the clinic, the commissioning parents or the surrogate mother, thus the fate of the unborn child when the

commissioning parents refused to take the child with them, or if the commissioning parents' divorce mid-procedure or if a parent passes away, is also unclear. In the case of *Baby Manji*, Baby Manji is a child born to an Indian surrogate. Her commissioning parents were a couple from Japan, who filed for divorce shortly before the child was born. The surrogate mother was not in the best position to keep the baby as she was only doing her part under the surrogacy contract, while the contracting mother was less than interested and have no intention to take care of the baby due to the divorce. What was left was, the contracting father, who want to raise the baby, but certain provisions of the Indian law posed a difficulty as the Indian law prohibits single men to adopt. Thus, due to the complexities of both Japanese and Indian law, the fate of Baby Manji was decided after she was left for 3 months weakened in a hospital in Rajasthan. Finally, she was allowed to go to Japan with her grandmother on a one-year humanitarian visa under the cloud of citizenship (Liz Bishop 2013).

Following in this case, the Indian Council of Medical Research (ICMR) proposed the draft Assisted Reproductive Technology (ART) (Regulation) Bill 2008 (Amarchand Mangaldas 2010).

The ART (Assisted Reproductive Technology) Bill with the aims to regulate the practice of surrogacy as to avoid some of the drawbacks that may arise of the ICMR guidelines discussed above has been drafted but yet to be passed by Parliament and has been through a lot of debate during the period of 2008 until 2013. It must also be noted that this ART Bill actually relies on contract law by referring to the contract between the commissioning parents and surrogate mothers to establish their relation and duties. It defines what is surrogacy, right and duties of patients, surrogate and children, such how many pregnancies can be allowed for a surrogate mother, the age of the mother, due compensation to be paid to her, health of the women involved and including the informed consent agreement and contract between the patients and surrogates and etc. There is also a punishment for violators of the surrogacy arrangement. This bill seems promising on protecting the right of surrogate mothers, the commissioning parents and the unborn child (Zees News 2014).

Under this ART Bill, surrogacy is defined as an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a surrogate mother‘ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parents(s)” (The Assisted Reproductive Regulation Technologies (Regulation) Bill 2010). By this definition, all surrogacy arrangements in India that involve the woman bearing a child using her own egg and the

commissioning man's sperm are deemed illegal and It can be also be assumed that ART is being used only by heterosexual infertile couples.

For the first time also, the Bill will consider amount of compensation a surrogate mother is entitled to. And on the issue of lack of legal clarity surrounding the age of surrogate mother, the Bill will include a set of clear minimum and maximum age limit for the surrogate mother, where most doctors have recommended that 21 be the minimum age and 40 the maximum for being a surrogate (DNA 2014).

Besides, this suggested law, does not consider the surrogate mother to be the legal mother under any circumstance. The ART Bill explains that in cases where the surrogate bears a child with whom she has no genetic relation, the birth certificate shall have the name of the genetic parent. Therefore, if the genetic parents are the commissioning parents, who have contributed their gametes for the unborn child, they shall be automatically recorded as the legal parents, if DNA tests prove the same.

However, the Bill has its setback especially for international couples to hire Indian surrogates due to several conditions need to be fulfilled such a foreign couple wanting to enter an agreement with an Indian surrogate would need a written guarantee of citizenship for the child from their government. Plus, there is also concern that the proposed Indian legislation would also prohibit gay couples from hiring surrogates (Center of Surrogate Parenting 2016).

2. Thailand

The situations were different in Thailand, where at present the law is not clear-cut. Thailand does not have clear regulations surrounding surrogacy, but remains a popular destination for couples looking for surrogate mothers.

Legal Position in Thailand: Legislative Development

The case that been popular and controversial in Thailand is known as '*Baby Gammy Incident*' case, Baby Gammy first garnered international attention as a tragedy.

Pattharamon Chanbua, a 21-year-old woman from a poor village in Thailand, acted as a surrogate for David and Wendy Farnell, a couple from Western Australia. Chanbua became pregnant with twins, one of whom was a boy with Down syndrome and the other one was healthy. The Australian couple who has abandoned Gammy denied leaving the boy to the surrogate mother who was paid about \$15000 to carry the twin. But Chanbua claims the Farnells asked her to abort when they found out that one of the babies had Down syndrome during four months of pregnancy. When she refused, the Farnells were reported to have abandoned the baby and only took his healthy twin sister. The existing regulations issued by Thailand's Medical Council cover doctors and medical institutes, but not surrogacy agencies or surrogate mothers. This, obviously, left a room for commercial surrogacy to take place with lack of supervision from responsible body.

Before this case, the Medical Council of Thailand, issued a notification in 2001 specifying the terms a physician should follow when a surrogacy arrangement is performed. One of the conditions is that a surrogate mother must be a biological relative of the couple and cannot be paid. But Thai authorities didn't intervene in surrogacy cases involving foreign couples. The Medical Council of Thailand also set out several conditions, which, a surrogate mother must be a blood relative to the intended couple, a doctor must use eggs and sperm from the intended mother and father, no commercial purpose of surrogates and also parents must be a married heterosexual couple. On 22 July 2014 in Thailand, the government announced a crackdown on commercial surrogacy. Commercial surrogacy is against the Medical Council of Thailand's codes of conduct. Surrogacy is permitted with blood relatives of the couple, and the exceptions are applied if no suitable surrogate is available. The clinic was licensed only to undertake surrogacy permitted under the regulations. Even though commercial surrogacy is actually prohibited in Thailand, almost all surrogacy in Thailand is in fact commercial and some doctors who facilitate this can be regard as violating the medical council's code of conduct but not violating the law (Yeong Cheah Phaek 2014).

Subsequently, a recent law was implemented by the government of Thailand, which is the Thailand Draft Surrogacy law approved by the Office of the Council of State (Melanie Adams, 2010). The Cabinet has approved draft legislation for children born through the use of Assisted Reproductive Technologies (ART), including surrogacy. It covers two types of surrogacy, which are, firstly, where a married couple uses their own egg and sperm but the child is carried by someone else, and secondly, where a surrogate mother provides an egg and carries the child but the fertilizing sperm comes from either a donor or the commissioning parent.

This draft is implemented to provide a law on the protection of children born through assisted reproductive technologies because it is necessary to prescribe and establish a relationship of legitimate parent to a child through this process properly. The draft also intended to prevent reproductive technology not to be used in wrong way, thus, it includes the condition to be applied to children, surrogate mother, parental status and the operation itself. According to the Section 3 of the drafted law, surrogacy means pregnancy through assisted reproductive technology where the woman to get pregnant agree to a legitimate spouse before pregnancy and that baby become a child of the legitimate spouse. Then, the medical practitioner who provides the related services must have qualification and approve standard according to Medical Council of Thailand.

Further, the third part of the draft discussed on the lawful spouse, a woman who qualified to be a surrogate mother and also about the commercial purpose. Under this part, the spouses who desire to have a child by another woman must be fitted and have a healthy physical body and mind to be a parent

of the child. And for the surrogate mother, she must be a woman used to have a child, but she must obtain the consent from the husband if she is already married. There was also an attempts to resolve the issue arise in the previous case which concern about the commercial surrogacy. Section 23 of the drafted law prohibited any people to perform paid surrogacy. The Board only consents and approve some condition such the expenses gives for maintaining the health of the surrogate mother during pregnancy, childbirth and after birth, which shows that the government intended to ban commercial surrogacy in Thailand.

As the result, there are changes in the law on surrogacy in Thailand, where it considered as illegal if the intended parent or parents are unmarried, under Thai law, there is money paid to the surrogate mother and the removal of the child from Thailand will breach the law of human trafficking if make without permission of Thai authorities. Thailand authorities have approved a draft law that will ban commercial surrogacy and any person who associated advertising promotions for surrogate. The Bangkok Post reported Friday that the bill had passed on its first reading with a vote of 177 in favor, two against and six abstentions, followed by the case of baby Grammy (World Bulletin 2014). Some of them give the vote by support the argument of unethical and illegal procedures.

Any act involving payments above reasonable expenses to the surrogate and payment to an intermediary to arrange surrogacy is illegal. A draft bill also proposes the penalties for carrying up to 10 years imprisonment for anyone - doctors, egg donors, prospective parents or surrogates - found in breach of the rules, according to a government rule.

Critical Analysis: How Far Can We Adopt Surrogacy in Malaysia

As what had been addressed before, the India government has chosen to allow commercial surrogacy and Thailand government has allowed the altruistic surrogacy. Therefore, the writers will critically analys the current law in Malaysia which is inter related to the implementation of surrogacy in Malaysia.

I. Current Legal Status of Surrogacy in Malaysia

In 2008, the fatwa on banning surrogacy has been issued by the National Council of Islamic Religious Affairs (Free Malaysia Today 2010) but, this fatwa, or Islamic religious ruling didn't actually receive much publicity until recently when the demands for a surrogacy procedure by the number couples who seek for children keep increasing day by day and beginning to challenge the current law in the Muslim-majority nation. However, till now, there is no specific law in Malaysia to deal with legal requirements for a commercial and altruistic surrogacy (New Hope Fertility Center 2016).

However, the recent advent of Assisted Reproductive Technology (ART), has changed this situation dramatically. ART, however, is legalized in Malaysia and many of the couples using this alternative

through the In Vitro fertilization (IVF). However, the practice of ART in Malaysia which help married couples to obtain their dream of having a child is still restricted to the involvement of sperm taken from the husband and egg taken from the wife, which is later to be carried by the wife. It is forbidden for the married couples to use sperm from the husband and inseminated with the egg of another woman.

The practice and procedure of ART in Malaysia differ from the procedure of ART in another country, where in Malaysia, it is only involved sperm and egg taken from the husband and wife and no involvement from the third party. For example, in Thailand, they also used ART as a medium for married couples to obtain a child, but the couples will have two options which are firstly, a married couple can use their own egg and sperm but the child is carried by someone else, and secondly, where a surrogate mother provides an egg and carries the child but the fertilizing sperm comes from either a donor or the commissioning parent.

II. Whether It Should or Should Not Be Adopted in Malaysia and To What Extent?

From above discussion, we know that surrogacy does not apply in Malaysia as there is no express provision or specific act to govern or legalize surrogacy or the status of the child that's born by way of surrogacy.

a) Legal Perspective

In Malaysia, the legislation passed by the parliament will apply to every citizen, except in a personal matter, which are divided into Islamic law and Civil law. For Muslims, the current law that governs their family and personal matter is based on Shariah law, while for other religions is based on Law Reform (Marriage & Divorce) Act 1976. The legal issue here is, if we were to adopt surrogacy in Malaysia, will it contravene or put a dent in any existing law. If the answer is yes, then adoption of surrogacy in Malaysia could not be made possible and vice versa.

Firstly, we will discuss in the section 112 of Evidence Act 1950 which apply to both Muslim and non-Muslim. This section stated:

Birth during marriage conclusive proof of legitimacy

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been beaten.

Under this provision, the born child is prima facie a legitimate child of that man and woman, if he/she was born during the existence of a valid marriage, unless proven otherwise. Here, if a man wants to rebut the paternity or legitimacy, he has to prove that he had no access or sexual intercourse with the mother when the child was conceived.

The problem of this section with surrogacy is regarding the status of the child and who is the legal father and mother of the child, since it give recognition or paternity only to the husband of the surrogate mother and herself, not to the couples who commissioning the pregnancy. In fact, the commissioning father has no legal hold over the child, where only the husband of the surrogate mother may deny any the legitimacy of the resulting child to himself by proving that he and his wife "had no access to each other at any time when he (the child) could have been begotten." Thus, application of section 112 of the Evidence Act in Malaysia will definitely pose a problem with the issue of legitimacy and paternity to the child born by way of surrogacy and the commissioning parents.

Further, we will look into Section 87 and 2 of the LRA 1976 that applies to non-Muslim only, which will support the issue of legitimacy raised above. These sections stated:

Meaning of "child"

87. In this Part, wherever the context so requires, "child" has the meaning of "child of the marriage" as defined in section 2 who is under the age of eighteen years.

Interpretation

2. (1) In this Act, unless the context otherwise requires,

"child of the marriage" means a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party;

Under both of these provisions, it said child is a child born by way of marriage. Here, it means that a child which are not consumed by marriage i.e. By way of surrogacy arrangement can't be a legitimate child under this act. The child will be regarded as an illegitimate child and because of this, the commissioning father will have no right to obtain custody and guardianship over the child. Section 2 of the Adoption Act 1952 (Revised 1981) defines 'Father' in relation to an illegitimate child means the natural father.

In other word, both, Section 112 Evidence Act and Section 87 of LRA will give result to three possible outcomes, with regard to the status of the child born by surrogacy arrangement for non-Muslim parties, and these outcomes are undesirably against the right of the commissioning parents. First, the surrogate mother will be considered as the mother of the child if she is a married woman and her husband would be considered as the father. Second, in the situation where the surrogate mother is unmarried, the resulting child would most definitely be regarded as an illegitimate child under Malaysian law because

of her unmarried status. Third, in the worst possible scenario that can happen, the surrogate mother might refuse to surrender the child to the commissioning parent and these Acts will protect the right of the surrogate mother over the child and against the right of commissioning parent (Nehaluddin 2012). Next, we will look under the provision of the Contract Act 1950, to determine whether there has any chances any chances for the commissioning parents to protect their rights from the surrogacy contract they have entered in case of breach happen. However, unfortunately, under contract law in Malaysia, there most unlikely to be any remedies for breach of the surrogacy contract since the validity of the contract itself was in the question from the beginning. This is provided under Section 24(e) of Contract Act 1950. This section stated:

What considerations and objects are lawful, and what not

24. The consideration or object of an agreement is lawful, unless—

(e) The court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful.

Every agreement of which the object or consideration is unlawful is void.

Under this provision, the validity of surrogacy contract entered between the surrogate mother and the commissioning parents was deemed null and void. This is because this section expressly said that if the object or consideration of an agreement is regarded as immoral or opposed to public policy by the Court, the agreement will become void due to the unlawful object or consideration. In surrogacy contract, the object or consideration of such contract is a baby, where the commissioning parents will pay some money to the surrogate in consideration for renting her womb to carry their baby. This can be considered as the act of selling baby for money, which is clearly prohibited and immoral among Malaysian's society. Therefore, if any breach of the surrogacy contract, it is doubtful or unlikely that the parent or the surrogate mother will be able to relinquish any right or remedy under contract law in Malaysia.

Recommendations and Conclusion

From the discussions, several recommendations can be drawn out with regard to the legalization of altruistic surrogacy in Malaysia. If there comes a day when Malaysia desperately in need to adopt altruistic surrogacy, the current legislation should be changed before any adoption can take place. We had learned from development of surrogacy law in other countries that nothing good will come if no specific law that safeguards the right those involved in such arrangement. Thus, there should be legislation directly on the subject of surrogacy arrangement involving all the three parties i.e. the surrogate mother, the commissioning parents and the child. The law should also be made clear and

ongoing monitor should be done by government, so that no one can abuse or illegally profited from surrogacy arrangement, and if any exploitation occurred, a sufficient form of penalty should take place. In conclusion, with the number of infertile couples has increased worldwide, surrogacy may seem the beneficial solution for them. Some who oppose would like to ban surrogacy in total; some supporters would like to declare surrogacy as fully legal. The writers are in the opinion that experience motherhood is a fundamental right of a woman. Therefore altruistic surrogacy shall be allowed in Malaysia with certain limitations. Unlike commercial surrogacy, altruistic surrogacy does not involve any remuneration beyond expenses associated with the surrogacy. Everything is to be done on the altruistic basis. Therefore, the writers concluded that altruistic surrogacy is a Nobel action from one woman to help another woman to be able to experience the motherhood once in a life time.

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Breaking the Silence: Legal Approach in Curbing Cyber Sexual Child Grooming in Malaysia

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ABSTRACT

The problem of sexual exploitation involving children is certainly not a new phenomenon but rarely spoken. The nature of child grooming is not so apparent unlike other sexual exploitation which involves direct physical contact or abuse. Offence of child grooming with sexual motive is difficult to discover, early detection is almost impossible because initial contact usually do not involves sexual content. This paper attempt to discuss on the legal approach adopted in curbing cyber sexual child grooming in Malaysia. It is important to recognize and respond to this threat effectively than ever, since exposure to such sexual information is not needed at the early stage of life, as it could lead to moral, emotional disorder and social problems. This paper employs a doctrinal analysis. It is contend that legal approach adopted in preventing and protecting children from becoming a victim of cyber child grooming could not be said as sufficient as compared to United Kingdom and Australia. This is because the existing legislations practicable only after the child has been victimize for sexual exploitation. During this stage it is considers as too late in providing physical and mental protection toward the child's victim.

Keywords: cyber child grooming, sexual exploitation, legal measure, prevention and protection

Introduction

Children are our legacy for the future, in preparing them for the future it is important for us to ensure that they had exciting and exquisite memories while growing. Unfortunately as a vulnerable creature some of them have to face the threat of being victimized by the coldblooded sexual predators. Being exploited or abused sexually at a tender age would definitely bring a devastating impact which may involves long term psychological sequelae. Therefore as the caregiver we owe them a duty of care to ensure they are protected from being victimized. When discussing about sexual exploitation among children often come to our mind offences like child pornography, child prostitution, child being abused sexually but seldom we think about child being groomed for such sexual activities. In Malaysia, child grooming have not received so much attention by the public until recently a paedophile Richard Huckle from United Kingdom make a confession that he had groomed and abused almost 200 Malaysian babies and children between 2006 until 2016 (McVeigh, 2016). How such heinous crimes can continues for so long uncovered? The answer to this is simple, the innocent children have been groomed by the

paedophile so that they can pose as someone that can be trusted and intended no harm. Child grooming could be said as a cancer that silently kill its victim because the victim of child grooming never show any early symptom that they being groom for sexual exploitation and sometimes even the victim themselves do not even realized that they were being groomed (Graham, 2014).

To increase public awareness on danger of cyber child grooming there does however exist a number of studies conducted on grooming discourse either on real world grooming (Elliot, 2015; McAlinden, 2006) or cyber grooming (Lorenzo Dus et. al, 2015; Kolpakova, 2012) as to provide a clear understanding on the grooming process and to explain about the danger of grooming to the public. There are various measures actively been created and implemented to stop and prevent cyber child grooming. For instance technological protection measures such as internet censorship (Ida Madieha, 2004), projects and initiative implemented by the government and private institution such as Klik Dengan Bijak, and Digi CyberSafe Program. Besides that a linguistic analysis has been adopted as strategy to identify cyber child groomer (Carmody, 2015). But seldom have we discussed on the measure to overcome the problem of sexual child grooming particularly on legal measure as to whether the existing legislations are sufficient to curbing this issue. This paper seeks to discuss on the legal measure which deemed necessary for early prevention and successful prosecution against the paedophile or sexual abuser and also analyse the legal approach adopted by United Kingdom and Australia in dealing with this issue of cyber child grooming.

Sexual Child Grooming Discourse

In Malaysia, child grooming is something which is not popularly known in our society but can be classified as major social issue. It is through the process of grooming children would fall into the trap of sexual exploitations. According to Ost (2009) grooming has been the principal approach of facilitating abuse for a very long time and this is supported by Samantha Craven where she classified grooming as pre-offence behaviour of the offender. For instance, before a child were molested or sexually abused, they were groomed by the molester as to ensure that the child will surrender themselves voluntarily and never disclosed the crime to anyone. It involves a process where the paedophile builds an emotional connection with a child to gain their trust for the purpose of sexual abuse or exploitation (Craven, 2011).

During the preparatory stage, the conversation between child and the groomer not necessarily involves a sexual content as it might be on the child's general interest where on the surface of it this conversation seems innocent (Urbas, 2010). This is because the initial stage is all about developing trust and ensures compliance with the potential victim (Australian, Institute of Criminology, 2008). Throughout this

communicative process groomers started to lure his victim and finally expressing his desire for sexual acts (Lorenzo-Dus, Cristina Izura & Perez-Tattam, 2015). According to a study sexual exploitation seldom happens spontaneously whereby prior to sexual contact paedophile will developed a relationship with the victims (Leclerc, Proulx, & Beauregard, 2009). Intervention during the communicative process is regarded to be highly important as to rescue the would-be victim from falling into the trap set up by the paedophile. McAlinden in her study asserts that grooming process is not only focus on preparing the victim but also preparing adults and the environment for the abuse of child this is known as industrial grooming. A psychologist Anna Salter point out that gaining trust from the adults occupy central role whereby parents are only worried about stranger but not someone that are considers closed to them. Parents are seldom being suspicious to someone that they trust because they assume that it just a normal child-adult interaction which is a constant feature in human life (Arfan Khan, 2004). This is believed to be one of the reasons that hinder early detection of sexual exploitation against children.

Real world grooming and cyber grooming

Based on the above discussion, grooming is about interaction between groomer and the victim whereby such interaction could be in the real world (offline grooming) or cyber world (online grooming) (Eneman, Gillespie, & Stahl Bernd, 2004). Regardless whether it is real world grooming or cyber grooming the intention of the groomer is similar namely to gain trust and later sexually exploit the child victim. However there are a few distinctions between real world grooming and cyber grooming. Most of the time if the grooming activity take place in real world children are most likely to be sexually abused by those with whom they have family relationship either immediate or extended family. Despite family member groomer perhaps could be someone that is close with the parents and victim (Salter, 2003) or upstanding person in the community who helps people a lot. This can be seen in Richard Huckle's case, a paedophile and sexual abuser who posed as English teacher and humanitarian in poor Christian communities in Kuala Lumpur (McVeigh, 2016). Real world grooming usually take place in the location that frequently visited by children such as parks, schools, parties or shopping centres (McGuire, 2013) and it not impossible that the grooming activity could take place in the child own house. Furthermore, real world groomer spends a less time grooming the victim and jump straight away to their purpose (Quayle, et al, 2006).

As for cyber grooming, technology is used as a tool in assisting criminal committing crime more conveniently. It commonly takes place via Internet Relay Chat, Instant Messaging, Facebook, Internet bulletin boards, private websites, or peer-to-peer networks (Urbas, 2010) and it may extend to the usage

of webcams. Law enforcement agencies across the globe are concerned about cyber child grooming because of its complexity and rampancy. The complexity is due to the nature of cyberspace whereby groomer can conceal their true identity (Eneman, Gillespie & Bernd, 2010) and anonymity principle in the cyberspace making it difficult to identify and arrest the groomer. Furthermore, the nature of cyber related crime itself is extra territorial whereby the use of internet has stretched the opportunities for groomer in committing the offence beyond the limit of national boundary, where it is classified as transnational and global offence (Hui, 2015). For instance, an American cyber groomer was arrested and among his victim was a Malaysian (Joibi, 2016). Groomer also more prone to use internet as internet offers them with abundance of potential victims. According to 2014 data by UNICEF, children are among the highest internet user whereby Malaysia stands out as having the fourth-highest proportion of 'digital natives'. In addition, children are considers as vulnerable creature that can be easily influence and unable to make a proper judgment about the motives and intentions of their virtual friends. In term of time spent grooming the victim, cyber grooming usually takes much longer time compared to real world grooming since there is no face-to-face interaction (Roberts, 2011). However, even grooming take place in the cyber world, it does not mean that it will not escalate to actual physical contact whereby sexual relationship in the cyber space could involve cybersex or physical sex (Davidson, & Gottschalk, 2011). Due to the alarming threat of cyber child grooming the Royal Malaysian Police has set up a special task force known as Child Cyber Sexual Investigation Task Force with intention to clamp down sexual predators that targeting children (Joibi, 2016)

Current Legal Position of Cyber Child Grooming in Malaysia

Law is an important instrument to prevent and stop crime cases. If an act is not formally prohibited by law thus it may not be considers as an offence. Therefore it is important to examine whether are there any available legislation that could be made applicable in curbing the issue of sexual child grooming particularly in prosecuting the groomer. If the answer is yes, the next question to be asked is whether such law is applicable even at the early stage of communication where police are allow to take action before the actual touching or abuse is materialize.

Protection of child against sexual exploitation is considers as international agenda whereby various international treaties and convention were concluded as an agreements to protect the interest of child and that should be primary consideration of the member states. For instance, the Convention on the Rights of a Child 1995 and Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography, 2000. Article 19 of the Convention on the Rights of a Child 1995, states that member states must take appropriate legislative measures to protect

a child from any form of physical or mental violence, injury or abuse or negligence or exploitation, including sexual abuse. Therefore, as a member state to the convention, Malaysia is obliged to have a legislative framework on child protection and in relation to this Child Act 2001 [Act 611] was enacted and came into force in 2001. But then, whether Child Act 2001 affords sufficient protection to child in relation to cyber grooming shall be discussed later. Furthermore, it should be noted that in relation to sexual child grooming; real world or cyber grooming there is no specific convention that regulate on effort to curb this social epidemic unlike child prostitution or child pornography which is govern by the Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography, 2000. Even the Budapest Convention i.e convention on cybercrime only regulate on cyber child pornography.

Penal Code [Act 574]

Penal Code is the main legislation that regulates on criminal offences which includes sexual exploitation against child. Though it is a legislation that commonly used to regulate traditional criminal offences, but in certain situation it could be invoked to regulate cyber related crime. In relation to child grooming however, there is no specific provision that concern sexual child grooming either real world or cyber child grooming. The closest provision that could be used to govern cyber child grooming is Section 377E. This provision concerns the act of inciting a child under the age of fourteen years to any act of gross indecency either with him or another person. The prominent feature of Section 377E is to afford greater protection to young girls and women against sexual violence (Mohammad Nazeri, 2010). What amounting to incitement and gross indecency is not defined in the Penal Code. In the case of *Young v Cassell* [1914] 33 NZLR 852 court define the word incite as means to rouse, to stimulate, to urge or spur on, to stir up, to animate. The Oxford Dictionary defines indecency as offending against recognised standard of decency.

Based on the wording of Section 377E, the conviction under this section will succeed only if the elements of incitement and any act of gross indecency are present and the immoral conduct has been materialized. The *actus reus* of the offence does call for any act of gross indecency and motivation to commit sexual behaviour must be present as a requirement for *mens rea*. If groomer only had general intent to persuade the child for sexual relationship with him, charge under Section 377E could not be established against him due to the absence of incitement and indecent conduct. Therefore, this provision only applicable after the child have been sexually exploited and victimized. But what happens if, the grooming process is still at the preparatory stage where sexually motivated behaviour is absence and the interaction only concern child general interest where the illicit content that can

stimulate or incite act of indecency is not present. Definitely Section 377E is not viable to be invoked and this is the reason against successful prosecution. If we have to wait for indecent act to be present, then at that stage it is considered as too late to rescue and to provide physical and mental protection to the child victim since they have been exposed with the immoral behaviour. Besides that, Section 377E also not a suitable legislation to govern cyber child grooming. This contention is made based on Section 1 of the United Kingdom's Indecency with Children Act 1960 which is *in pari materia* with Section 377E of the Penal Code. Section 1 of the ICA read as follows “*Any person who commits an act of gross indecency with or towards a child under the age of sixteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding £400, or to both.*”

During the debate in the House of Lords, it has been argued that ‘incitement’ under Section 1 may extend to online child grooming (House of Lord, 2003). However it has been found that it is difficult for the prosecution to prove the case in establishing the element of “an act of gross indecency” which the victim has been incited with (Childnet International, 2000). In the case where serious criminal offence is on trial the law will be construed narrowly and therefore the prosecution need to establish that there is an intention to commit, and incitement to be involved with and the specific act of indecency (Childnet International, 2000). The charge cannot be made out on the basis that the offender only has the general intent to convince the child to have sexual relation with him, without any specific evidence of incitement to commit particular unlawful acts (Childnet International, 2000). For instance, in the case of Kenneth Lockley the Police had set up a sting operation whereby they had arranged a meeting at a hotel in London. Lockley thought he was about to meet a nine years old girl and was arrested at the hotel. Four condoms were found on him however the charges was dropped as the defence had argued that there was no actual attempt of unlawful sexual intercourse as there was no child that actually involved (Lane, 2000). In addition, Section 377E only restricted to child under the age of fourteen years old. This is inconsistent with the definition of child under the Child Act 2001 [Act 611] where child is define as a person under the age of eighteen years. What happen if the victim above the age of fourteen years old? Does it mean that Penal Code is inapplicable? Should the heartless groomer be left free?

Child Act 2011 [Act 611]

To perform the obligation under the Convention on the Right of Child, Malaysia has enacted Child Act 2001. This is the key legislation that affords protection for child against abuse and exploitation by providing care, protection and rehabilitation without regard to distinction of any kind, such as race,

colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any status as illustrated in the preamble of Act 611. In relation to cyber child grooming, there is no dedicated provision governing this offence, but then reference can be made to Chapter 3 which is on offences connected to the health and welfare of children. Section 31 (1) explains on the offence of causing physical or emotional injury and offence of sexual abuse of child or causes him to be sexually abused. The wording of Section 31 (1) indicates that the subsection could be made applicable for offence of cyber child grooming because victim of child grooming definitely will suffers emotional and physical injury especially when they being sexual abuse by the groomer. However if we properly analyse Section 31(1), the *actus reus* requires infliction of injury toward the victim in which abused must be materialize and the victim has suffers injury either physical or mental injury. Hence, this provision is deemed to be insufficient to provide early protection toward the child against groomer which is similar to Section 377E of the Penal Code. Additionally, paedophiles are often reluctant to physically hurt the child, since any injury to the child would risk the termination of their relationship. (Miller, n.d).

Another issue is when the child itself is not aware that they had been exploited by groomer where they believe that it is a mutual feeling in a romantic way or loving relationship (Whittle, Hamilton-Giachritsis & Beech, 2014). Thus, in this situation neither injury nor abuse suffers by the child, it just an act sexual exploitation consented by the innocent child without even aware of groomer's true intention and most of the time grooming victims are not usually raped or being forced into sexual activity. What's more, Section 31(1) is also not suitable if it is intended to be use as a prevention measure because if the intervention by the authority takes place during the preparatory stage, no action could be taken against the groomer because no evidence of injury or abuse.

Communication and Multimedia Act 1998 [Act 588]

As cyber child grooming is offence committed through internet therefore it is also relevant for this paper to examine the other legislation that regulate offences committed in the cyberspace. The Communication and Multimedia Act 1998 [Act 588] is a legislation that regulates Malaysia's Internet sector including its services and content particularly on communication and multimedia industry. Since communication between victim and groomer take place in cyberspace therefore the content of communication can be subjected to this Act particularly Section 211 and Section 233.

Section 211 stated that no content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person. Meanwhile Section 233 prohibits the use of network facilities to make, create or solicit and transmit the communication which among

others contain obscene content. Both provisions require an obscene content transmitted by the offender to the victim or vice versa. It is acknowledge that in the midst of grooming the victim, the conversation might involve an illicit content (Urbas, 2010) such as exchange of sexual messages or image i.e obscene image with each other. The prosecution then may rely on these two provisions in prosecuting the cyber groomer if evidence of obscenity is found and transmitted during the course of communication with an intention to sexually abuse the child. Unfortunately this seems a bit conflicting with the concept cyber child grooming itself, whereby the communication between victim and offender does not necessary requires a transmission of an obscene content where most of the time it may concern child's general interest (Urbas, 2010). Whereby victim may never feel harassed or annoyed until the day they meet and physical sexual harassment has actually occurred. Thus, such situation charge could not be made either under Section 211 or Section 233.

Current Legal Position of Cyber Child Grooming in United Kingdom and Australia

The United Kingdom is among the pioneer jurisdiction that legislate a law on cyber child grooming. Previously, when United Kingdom was a member of the European Union (EU) she was bound to abide by the law enacted by European parliament. In 2003, the EU adopted a Council Framework Decision 'on combating the sexual exploitation of children and pornography' that criminalising all child sexual exploitation. Later in 2008, the EU had adopted The Council of Europe Convention on the Protection of Children against Sexual Exploitation (CETS No.201) whereby Article 23 of the convention contains the provision that dealt with child exploitation and specifically cyber child grooming. The main concern of Article 23 is on the acts of preparatory to the commission of sexual offence rather than grooming itself.

In relation to this, the United Kingdom had amended the Sexual Offences Act 2003 by inserting new provision on child grooming (Davidson & Gottschalk, 2011). Currently, the cyber child grooming offence is regulated by Section 14 and 15 of the Sexual Offences Act 2003 which explains that where an adult meets or travel to meet a minor with the intention of committing a sexual offence, will be guilty of an offence if the person had met or communicated with the minor on two or more previous occasions regardless of whether the prior meeting had taken place on real world or over the Internet (Davidson & Gottschalk, 2011).

What is remarkable about the amendment is that the new provision is wider compared to what is contained in the convention and applicable to real world and cyber grooming (Arfan Khan, 2004). Plus it is also a practical provision for the enforcement agency in the sense that it allows the police to take action against groomer at the early stage of grooming process since it take into account the element of

intention that the offender possessed at the time of meeting or during the travelling to place of meeting. Thus, it can prevent the child from any further harm since police may act before the groomer meets the child (Davidson & Gottschalk, 2011) and protect the child from being sexual exploited which may caused physical and psychological abuse. For the prosecution, they could prove that there has been number of communications between the offender and the child, after which he had arranged for a meeting and actually travel to meet her with the intention of committing sexual offence against the child. But the shortcoming of Section 15 is it has potential to interfere with the interaction of a child in normal family life and impeding the normal child-adult interaction, which is a constant feature of human life (Arfan Khan, 2004). This is because Section 15 applies across the board to grandparents, parents and the police who would be reluctant to comfort a child in need through fear that it might be considered as 'grooming' (Arfan Khan, 2004).

A similar step has been taken by the Australian Law Reform Commission in 2008 by introducing the legislative amendment to counter the problem of cyber child grooming to all states within its jurisdiction. State of Victoria is one of the jurisdictions that have a comprehensive legal framework on child grooming which were inserted into the Crime Act 1958 through the Crimes Amendment (Grooming) Bill 2013 (Australia Institute of Criminology, 2008). Section 49B stated that a person of or over the age of 18 years must not communicate, by words or conduct, with a child under the age of 16 years or a person under whose care, supervision or authority the child is with the intention of facilitating the child's engagement or involvement in sexual offence with that person or another person. From the wording of the provision, it allows the enforcement authority to take action against groomer only by relying to the content of communication between groomer and victim without having to prove exploitation, abuse, injury, or content of indecent material. The communication also may include any acts such as inappropriately giving them gifts or favours with the intention of engaging in later sexual activity (Department of Justice, 2014). The prosecution just need to prove that such communication is done with the intention for involvement in sexual offence. Section 49B also expressly mentioned that the term communication includes electronic communication which directly covers cyber child grooming. Another noteworthy feature of Section 49B is that it covers industrial grooming where sometimes groomer also groomed the adult i.e family member of the child so as to signify that they present no risk to the child. In addition to the amendment of the Crime Act 1958, the State of Victoria also amended the Victim's Charter Act 2006 to allow family member of the victim to provide a victim impact statement to the court (Department of Justice, 2014).

Conclusion

From the discussions above, it is noted that in Malaysia there is no specific legislation governing sexual child grooming particularly cyber child grooming. The three legislations mentioned above are relevant to prosecute groomer but from a different perspective it is believed that these legislations are deemed to be insufficient to address grooming issue particularly when the grooming process is in the preparatory stage where on the surface of it such conversation seems to be an innocent conversation without any bad or sexual intent. A proper legal framework or legislation is vital as to allow early intervention and police should not be made to wait for actual sexual exploitation before taking an action against the groomer. Section 15 of the Sexual Offences Act 2003 and Section 49B of the Crime Act 1958 could be a point of reference if the authority in Malaysia decided to introduce a specific legislation on cyber child grooming. By having a legislation that specifically dedicates to govern cyber child grooming it would be sufficient to send a chilling effect to would be sex predators and for those who persist will be apprehend more easily.

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Antarctica: The ‘weaker sex’ Involvement in Scientific Expedition

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Abstract

Women involvement in Antarctica science is very new as compared to men relationship. This is due to the aspect that women are ‘the weaker sex’ and the rough terrain of Antarctica is not suitable for women lifestyle. The first women recorded to spend winter over on Antarctica were Edith Ronne and Jennie Darlington in 1946, a half a century after the first man, Scott arrived. It was the International Geophysical year of 1957 that allows the first involvement of women scientists in an Antarctica national programme. At the beginning of their scientific endeavours in Antarctica, women faced many social issues and working hurdles. However, they are now readily accepted in the traditionally male-dominated environment of Antarctica scientific expeditions. As for Malaysia, an all-women scientist’s team only left for a scientific expedition in 2003, almost fifteen years after the first Malaysian male scientist expedition. Relying on limited literature, this article aim at tracing the development of women scientists’ involvement in Antarctica in general and Malaysian women scientist’s in particular. The study attempts to evaluate the implementation of the policies of the environmental regime created under the Antarctic Treaty System on women scientists and their ability to endure the challenges in scientific expeditions being the weaker sex in the domain of man. It is the hope that the article may result in the elevation by government’s policy makers to address the issues confronted by women in the practice of science, especially in Antarctica expeditions.

Keywords: Antarctica, Malaysia, policy, women scientists, diplomacy

Introduction

Women are half the population, but only a tiny percentage are scientists. This is certainly not due to lack of ability. That old canard about women not being suited to science is a much heard argument resting on the practice of cultural pressures against girls going for science. Many more women are now registering in science in universities, and graduate schools all over the world but more will have to be done. Traditional societies tend to be overwhelmingly patriarchal. In primary and basic education, the gender gap is systematically against girls wherever it exists. In employment, there are many disparities in many parts of the world. Worse, women are frequently still legislated against in many countries,

from personal status law to inheritance to political participation. Therefore readdressing this situation is part of the overall struggle of women everywhere for dignity, equality and recognition of their common humanity. Let us recognize the claims of cultural specificity that would deprive women of their basic human rights, but, definitely not to change the essence of tradition that supports and acknowledged women's rights in life.

The Value of Sciences

What is the actual value needed from the scientists, in the world of science? The value of science is not to be measured by the strength in physic but on its quality. The quality of men or women is not the issue principle to debate, but it is the quality of the science that is being discovered, invented or created. Jacob Bronowski (1956) so eloquently described the value of science in his classic on Science and Human Values over a generation ago as such. *The ability to systematically search for the Truth:* No scientist would ever be forgiven the reporting of false data. Mistakes in interpretation are one thing, but falsifying data is unforgiven in the community of scientists. *The measures are recorded with Honor:* The second most heinous crime is plagiarism. An elaborate system of footnotes and reference citation is maintained in the arsenal of scholarship. Giving due honor where honor is due is fundamental. *A constructive subversiveness in the Findings:* Science advances by having a new paradigm overthrow the old, or at least expand its applicability in new ways. Thus inherent in the scientific outlook is a willingness to overturn the established order of thinking, or else there will be no progress. *Tolerance plus engagement:* The very openness of science to the new means that there is a tolerance of the contrarian view—provided that it can be backed up by evidence, subjected to the rigorous test of replication and meets the falsifiability criterion. This means that scientists must remain tolerant and engaged. In that sense the tolerance based on the adoption of the values of science is different from the understanding of political liberalism, which may mask indifference to the behavior of others, dismissing them without engaging them. Understanding among scientists requires respect for the contrarian view and a willingness to test unusual ideas against the rigor of proof. *An established method to settle disputes:* scientists everywhere are willing to accept the arbitration of differences by the testing of hypothesis and accumulation of evidence. The larger the claim, the more compelling the evidence must be. But the appeal to reason, to debate and the rational interpretation of proof is overwhelming in the scientific community. *Creativeness and Imagination:* Thus the ability to pursue the new, to respect the contrarian view, is important parts of the scientific enterprise. Science values originality as a mark of great achievement. But originality is a corollary of independence, of dissent

against the received wisdom. It requires the challenge of the established order, the right to be heard however outlandish the assertion, subject only to the test of the rigorous method.

As Bronowski observed, independence, originality and therefore dissent—these are the hallmarks of the progress of contemporary science and modern civilization. These scientists women from Marie Curie, the first person ever to win two Nobel Prizes, to Maria Goeppert-Mayer, to Rita Levi–Montalcini to Rosalyn Yates to Barbara McClintock to Linda Buck, they are clear testimony that such value is admirable in women as much as in men. In the old discussion, some would argue that women more intuitive, more cooperative, or more patient because they are weaker in physic. Thus, this ability made up for what is lacking. According to Leakey (2012), it is true, women are better suited for certain scientific tasks, such as the patient work of studying animal behavior, and thus encouraged such luminaries as Diane Fossey and Jane Goodall to be a successful and leading scientist in that field.

The Women in Sciences

The weaker sex, woman, in science go back to the ancient Egyptian period. Merit Ptah, the first woman scientist who flourished shortly after Imhotep, c. 2700 BCE, and is said to have been a physician. However, much earlier women in science would have to be En Hedu' Anna, who lived in Babylon around 2350 BCE. Later in the 4th century BCE in Athens: Physician Agnodice was put on trial for pretending to be a man to practice medicine, which was formally illegal. Her women patients (many of whom were wives of prominent men) saved her and had the law repealed! Eight-hundred years later, in early 5th century CE, in Alexandria, a girl, Hypatia was killed for her scientific views. She was not even given a trial! A Christian zealot mob hacked her to pieces. The fourteenth century in France, Jacoba Felicie was tried for impersonating a physician to practice medicine. Even when the law was not prohibiting them from practicing science and medicine, women were still expected to attend to their female societal roles. They are expected to raise the family as they do their science experiences. Still, some have done both of that magnificently. Laura Bassi in 18th century Italy, Europe's first woman Physics professor raised eight children! Madam Marie Curie, a first female professor at the Sorbonne and the first woman Nobel Laureate a widowed mother who wins two Nobel Prize for herself, brought up a daughter Irene, also a scientist and the daughter also, wins a Nobel Prize! Incredible history. An incredible achievement on behalf of a woman in science (Serageldin,2006).

Obstacles to Women in Science

The barriers are plenty (Milne et.al., 1986) There are many barriers, but they can be grouped into five broad themes: double standard, barriers to access and advancement, widespread discrimination, social

ostracism and psychological barriers. In all aspects of social behavior today, we note a double standard that puts on women an added burden. Science is regrettably not different. Women are assumed to be the assistants to men, not their peers, much less their leaders. The old double standard is alive and well even in the dispassionate scientific community. Women have to prove themselves time and again before being assumed to be the equal of men. Women suffer from many barriers to access throughout their careers in science. First and foremost, there is a universal discrimination against the girl child in many parts of the developing world, with enrolment and graduation rates lagging boys. Then subtle and not so subtle societal pressures operate to reduce their attendance at science and mathematics courses in higher education facilities. Accordingly, it was inappropriate for a “decent” woman in society to publish scientific material; while the men could gain fame and honor for so publishing. Social ostracism on women (Fogg, 1992). Much of the networking that helps people advance in their chosen careers occurs at social gatherings where women have frequently been denied entry into any science club, I fact here are arcane rules and formal rules, or unstated practices, at clubs and professional societies, denying entry to women (Griffin, 2007). The Cosmos Club in Washington did not allow women as full members until 1988, and the Royal Society had no female members till 1945. Psychological obstacles and prejudice often carry onto the mind of the men and women becomes the victim. It is a wonder, “that divine spark from heaven, will it be not be granted to the female sex” wrote a Madame Currie before she died.

The Women Scientists in Antarctica expeditions

This section begins with the premise that social and political attitudes in a country affect the science that is undertaken, and that science is therefore inextricably entangled with politics, especially in Antarctica. Since the signing of the Antarctic Treaty in 1959, establishing a continent dedicated to peace and science (Berkman et al., 2011). Even though Antarctica is considered as Scientists Paradise (Rohani, 2012), but this is one heaven that woman is prohibited upon its establishment. However, today, only one hundred and seventy women have involved in Antarctica expeditions, as compared to men. Ingrid Christensen was a Norwegian explorer, thought to be among the first women to view Antarctica in the 1930s. She also had part of the coast named after her. American Lois Jones led the first all-women team of scientists to the icy continent in 1969. In-Young Ahn is the first South Korean woman to visit Antarctica *and* the first Asian woman to lead an Antarctic station. Nevertheless, women are still catching up after decades of being prevented from having Antarctic careers at all. Women scientists were mostly banned from staying on the continent for projects until well into the 20th century.

Soviet geologist Maria Klenova is considered to be the first woman to begin scientific work in Antarctica in 1956, but many countries didn't change their rules until the 1970s.

This late start has led to a very limited public conception of just who can be an Antarctic scientist. Despite their contributions since women comprise only 11% of medal winners from the Scientific Committee on Antarctic Research. Our aim is to raise the profile of prominent female researchers to inspire the roughly 60% of early-career polar scientists who are women. Notable contributions by women include the discovery of Potential methane reservoirs beneath Antarctica (Wadham, 2012). Secondly, the finding that snow melting accelerated in the twentieth century (N. J. Abram et al., 2013) and insights into life in the deep Southern Ocean by A. Brandt (2007). The directors of the two largest polar institutes, the British Antarctic Survey and the Alfred Wegener Institute in Germany, are women. Leading Palaeobotanist Dr Marie Stopes was rejected for Scott's historic 1910 expedition to the South Pole, then soon afterwards 1300 women applied for another British Antarctic Expedition and none was accepted.

The Malaysian Women scientists in Antarctica

The presence and impact of female Antarctic researchers have increased rapidly, in the west. In the 1950s most countries did not allow women to work in Antarctica, and there were few female Antarctic scientists. Today women are playing leading and influential roles in Antarctic research. The progress of Malaysian women scientists is pretty slow. Malaysia just signed the Antarctica Treaty in 2011, but Malaysian participation in Antarctica science goes way back to 1989. However, Malaysian women scientist only appeared in Antarctica expedition in 2005. Even though Malaysia is now a party to Antarctica Treaty, there is a lot more work to be done, Firstly is to commit itself to be a member of APECS (Association of Polar Early Career Scientists). With 55% of APECS members being female, it is time to promote and celebrate the achievements of female Antarctic scientists within the Scientific Committee of Antarctica Research, community in order to increase the visibility of these leading and influential role models for our younger female researchers and to stimulate girls on Malaysia to pursue in science careers (Samah, 1989).

It is vital we give the next generation of scientists, both male and female, a real sense of who does Antarctic research. Women have been playing an increasing role in Antarctic research since the 1950s. The time has come for them to gain far greater public recognition. It's challenging enough

dealing with funding, the weather and drifting sea ice, there should be no other limits on recognising women's achievement.

Recent appreciation to women scientists in Antarctic

Accordingly, on the 25 August 2016, in line with SCAR Open Science Conference in Kuala Lumpur, Wikipedia through "Wikibomb Nite" will be highlighted and dedicated to women scientists who at one time were locked out of Antarctica. Women now comprise 60 per cent of early career Antarctic researchers, but account for only about 10 per cent of relevant awards, prizes and plenaries at scientific conferences. The Wikipedia expert on the international scientists' team, Dr Thomas Shafee (2011), says Wikipedia is now the world's most widely viewed reference site. When it began, less than 10 per cent of scientists featured on Wikipedia were women, now that number is just over 16 per cent, but despite such heroic efforts, it's still an up-hill battle. The Wikibomb project is part of the global Athena Swan Charter for advancing the careers of women in science, technology, engineering, maths and medicine. University of Queensland School of Biological Science ecologist and Antarctic researcher Dr Justine Shaw is one of the organisers of a global "Wikibomb". The aim is to tell the world about the many great and under-recognised female Antarctic research role models and the profiles of about 100 leading female scientists from 30 countries, will be officially unveiled.

In reviewing Malaysia involvement with Antarctica, a lot of ground must be covered. Over the last 30 years a significant change in the level and kind of political engagement can be seen, from being one of the ATS's greatest critics to recent accession to the Treaty. Funding has concomitantly altered to meet the demand to engage with scientific activities in Antarctica, which themselves have developed from capacity building exercises to a large number. While we cannot know the consequences of Malaysia's accession for certain, we do know something about the regulations of the Antarctica Treaty System, and the emerging themes of Malaysia's intentions in Antarctica. Whether or not this leads to conflict or robust discussion in the future cannot be known except that the political will of relevant parties will play a role in the outcome. Social awareness of the Malaysian public will be a factor, as will the world's economic state. Global climate change will affect us all but how each country responds to that cannot be foreseen, and the links with Antarctica may be understood as even more important in both theory and reality. Malaysian scientist, Dr Siti Aisyah Alias from the National Antarctic Research Centre, is among 170 scientists from 30 countries who have been nominated to be listed in the Women Antarctic Researchers. The Scientific Committee on Antarctic Research (SCAR) celebrated a special occasion with them, namely the "Women in Antarctic-Wikibomb event here yesterday, according to Ministry

Of Science Technology and Innovation (Mosti) statement yesterday in Bernama, 25 August 2016. This is an international effort to increase the visibility of these leading and influential women as the role models and as an attempt to stimulate women around the world to pursue science careers. The response was tremendous; Dr Aisyah had conducted many types of research on biodiversity and conservation, biotechnology and applied microbiology as well as mycology. Besides her, other Malaysian scientists in the field of geology, biology and climatology were nominated, about five others Malaysian women scientists were a profile in the Wikipedia, too.

Conclusion

Even though the obstacles for the ‘weaker sex’ in science are enormous, but they are not insurmountable. The journey is known as scientist in Antarctica is long, but women have already come a long way, and thanking the modern society today, where men increasingly recognize their responsibilities to help remove the many enormous obstacles and shorten the journey of recognition on the weaker sex, accepting them and welcoming them to rise to their full potential and to give society the full measure of their talent, as women scientists in Antarctica science.

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When a Man Stalk a Woman: The Governance of Cyber Stalking in Malaysia

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Abstract

The victimization of women in many traditional crimes such as domestic violence, rape, and criminal intimidation is an age-old phenomenon that has been going on for centuries within many jurisdictions. With the advent of the World Wide Web (WWW) and the Internet, women too are at risk of being victimized. Traditional crime such as stalking has now moved to cyberspace and is becoming more dangerous and invasive than its conventional counterpart regarding its harm or impact on the victim. In the past decade, cyber stalking has escalated alarmingly, and while such crime can be committed by intimate partners and strangers alike, the gender-based perpetration by men and the victimization of women cannot be ignored. It is within this context that this paper seeks to examine the gendered nature of cyberstalking as a type of technology-facilitated violence against women in cyberspace. Also, the paper aims at analysing the relevant traditional and computer-specific anti-stalking legislations governing such crime in Malaysia. This article employs a doctrinal analysis using secondary data from academic journals, books, and online databases. The authors contend that women are the most vulnerable targets in cyberstalking victimization as the modus operandi of the crime is concealed by the shadow of anonymity and the crime is committed through trans-border connectivity. The anti-stalking laws in Malaysia are in dire need for a review to provide adequate protection and remedies to the victims of cyber stalking and most importantly for women victims.

Keywords: Anti-stalking laws, Cybercrime, Cyber Stalking, Stalking, Victimization, Women

Introduction

Stalking is a traditional crime that has become phenomenal in the past four decades. From the stalking of celebrities and public figures, the crime has also affected and changed the lives of ordinary people (Tjaden & Thoennes 1998). With the advent of information and communication technology and social networking platform in the last decade, cyber stalking emerged as a new threat to computer users (Spitberg & Cupach, 2007). Traditional and cyber stalking is at a juncture where domestic violence was twenty years ago before it has been classified as violence or crime against women. Such crime is considered as a type of gender-based crime that is primarily and exclusively committed against women. Since 1993, the UN Declaration on the Elimination of Violence Against Women highlights that violence against women is an exhibition of the disparity of powers between males and females and that

by social mechanisms, women are forced to take subordinate positions as compared to men. In 2006, Koffi Annan in this speech through the United Nations Development Fund for Women stated that violence against women and girls in the real world had become a pandemic.

Within the global context, since the late 1990s the criminalisation of stalking and cyberstalking have begun in many jurisdictions around the world with the amendment of the traditional criminal laws. For instance, California became the first state in the US to enact its anti-stalking law (Reyns, 2012). Vasiu and Vasiu (2013) observe that the USA has passed cyber stalking laws that explicitly include electronic forms of communications within its more traditional stalking laws. In 1993, Canada amended its Criminal Code to include real-world stalking. Australia's anti-stalking law began with the Queensland Criminal Code 1899 (CCPL, 2013). Mishra (2008) contends that only Victoria and Queensland have included cyber stalking in their criminal laws. Other jurisdictions have also created specific legislation for stalking apart from the traditional criminal statutes. For instance, in 1997 the UK enacted the Protection of Harassment Act 1997 and New Zealand created the New Zealand Harassment Act 1997 that covers both civil and criminal harassment (CCPL, 2013). In 2010, Scotland enacted the anti-stalking laws under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 and Singapore passed the Protection from Harassment Act in 2014 (CCPL, 2013).

The extant literature on traditional stalking suggests that such crime is frequently being perpetrated by intimate partners or ex-partners which led to the term intimate partners stalking (Woodlock, 2016, Reyns, 2012, Ahlgrim, 2015, Spitberg & Cupach, 2007). The literature also indicates that men are the main perpetrators of both stalking and cyber stalking in many parts of the world including the UK and Australia (Kuehner, Gass, & Dressing, 2012; Logan & Walker, 2009; Strand & McEwan, 2011). The review of international studies indicates that women are more likely to be stalked rather than men and that females experience considerable fear due to stalking (Logan, 2010, Spitzberg & Cupach, 2007, Sheridan & Lyndon, 2010).

The literature in the USA, the UK and other jurisdictions on cyber stalking suggests that the veil of anonymity of the Internet attracts stalkers to stalk their victims in cyberspace (Reyns, 2011, Ahlgrim, 2015, Heinrich, 2015, Middlemiss, 2014). That cyber stalkers can operate anonymously or pseudonymously while online and they can stalk one or more individuals from the comfort of their home is also well documented (Leong, 2015; Heinrich, 2015; Reyns, 2011; Tavani and Grodzinsky, 2002). The extant literature in the USA, Australia, and the UK also shows that both traditional stalking and cyber stalking are gender-bias in which women are most likely to be stalked rather than men (Godwin, 2003, Medlin, 2002, Reyns, 2010, Nobles, 2013).

The literature in Malaysia on stalking and cyber stalking is rather scarce. However, the available recent literature seems to indicate the unwillingness of female victims of cyber stalking to report the crime to the police has (Haron, 2010). Similarly, Cybersecurity Malaysia (2010) states that the problem of cyberstalking is merely on the tip of the iceberg because the actual number of cyberstalking victims may be higher and not all victims are willing to come forward with their report. The severe nature of the threat of cyberstalking which must not be taken lightly have also been documented (The Star, 2010). The literature on the legislative response to such crime suggests that computer-specific law such as the Communications and Multimedia Act 1998 may be the answer in prosecuting cyber stalking and cyber harassment in Malaysia (Hamin and Wan Rosli, 2016). Hence, there appears to be the lacuna in the literature on the extent to which the existing traditional and the cyber law may apply to govern cyber stalking in Malaysia. As such, this paper aims at examining the current legal position governing cyber stalking in Malaysia and intends to fill in such gap in the literature.

The first part of this article explains the concept of stalking and cyberstalking and the second section highlights the gendered nature of such crimes indicating the tendency of women to be the victims of such offences. The third section examines the existing legal position relating to cyber stalking from the traditional criminal law and the cyber law perspectives, and also the recommendation for the reform of such legislations. The last section concludes the paper.

Conceptualization of Stalking and Cyber Stalking

Over two decades, stalking has become increasingly prevalent throughout the civilized world (Ahlgrim, 2015, Walklate, 2003, Lamplugh, 2003). The literature mainly defines stalking as a repeated unwanted pursuit that causes fear to another person. For instance, the early literature describes stalking as harassing or threatening behaviour that is repetitive and creating a threat to the individual (Thomas, 1993). More recent research shows that the nature of the offence remains the same. For example, the Modena Group on Stalking (2007) states that stalking is a phenomenon characterized by a variety of different behaviours which makes the analysis of the causes of such violence rather difficult. The most recent literature on stalking also indicates the unchanging nature of the crime. Heinrich (2015) contends that stalking is a type of harassment involving some persistent threats or putting in fear to the victim. Brady and Bouffard (2015) suggest that stalking is a repeated variety of behaviours directed to another individual which causes reasonable fear to the victim. In Australia, criminal stalking is defined as a conduct intentionally directed at a person repeatedly and involving specific acts such as contacting a person through email, phone, fax, mail or through any other technology (Reyns, 2010).

The literature on cyber stalking indicates that cyber stalkers harass victims by using technological means such as sending threats via the Internet, harming the victim's reputation or 'smearing' through the social media, causing damage to data or attempt to access confidential information on the victims (Bocij, 2003). Cyber stalking also covers activities such as bullying, harassment, defaming and threatening (Bocij, 2003; Aa, 2011). The more recent literature on such crime suggests that cyber stalking is a collection of behaviours conducted through technology such as e-mail, forums, blogs and social networking websites. The perpetrator repeatedly harass and pursue the victim, by making threats, accusations, monitoring and also impersonation, which causes alarm or fear in such victim (Mutawa, 2016). Cyberstalking may also be defined as inappropriate, unwanted social exchange behaviours initiated by a perpetrator via online or wireless communication technology and devices (Heinrich, 2015, Piotrowski, 2012). Cyberstalking may be more dangerous and common than traditional stalking as the ICT including the Internet are providing tremendous opportunities to target any victims around the world (Aa, 2011). The fact that the crime is technology-enabled and the difficulty in detecting the offender has made it easier for the cyber stalkers to conceal their identities, alter critical data, move and delete information quickly and destroy the evidence (Aa, 2011).

The literature also indicates that the threat of cyberstalking is imminent and that cyber stalking is becoming a serious and growing problem around the world (Bocij, 2002). It is estimated that about 20 percent to 40 percent of Internet users are victimized through cyber stalking (Tokunaga and Aune, 2015). In 2007, cyber stalking victims ranged from 474,000 to 18.7 million across the globe, and the current number is unknown due to flawed and outdated statistics (Aa, 2011). In Australia, 98 percent of the domestic violence victims have also experienced cyberstalking (Rawlinson, 2015). More than 38 percent of cyberstalking victims fears that the offensive behaviour of the offender online would develop into a face-to-face confrontation (Al-Khateeb and Epiphaniou, 2016). The duration of the crime which the victim may have to endure may be quite long. For instance, Paladin (2014) contends that more than 42 percent of victims of stalking and cyberstalking are being stalked for more than 24 months. That the victims of cyber stalking may have prior relationships that ended bitterly with the offender are also documented (Valentine, 2001) and in 45 percent of all cases, the offenders are usually ex-partners (National Stalking Helpline, 2015).

Gendered Nature of Cyber Stalking

Many commentators observed the gendered nature of the crime in that the majority of stalking victims are women and the majority of perpetrators are men (Godwin (2003); King-Ries (2001); Reyns (2012);

Aa, (2012); Strategy and Policy Directorate research team, (2014)). Furthermore, the available statistics indicate that women have a higher level of victimisation of such crime than men. For example, early figures in 1998 found that women are three to four times more likely to be the targets of stalking rather than man (National Violence Against Women Survey, 1998). In the USA, one out of 12 female (8.2 million) and one out of 45 male (2 million) had been stalked (Medlin (2002). Recent reports indicate the status quo in female victimization for cyber stalking. For instance, in 2011 the National Stalking Helpline statistics show that the majority of cyberstalking victims are women (80 percent) and the majority of perpetrators are male (70.5 percent). Patel (2013) contends that majority of victims are female (80.4 percent), and the majority of offenders are male (70.5 percent). The most recent figure from the British Office for National Statistics (2015) reported that in 2014 to 2015, twice as many women rather than men said having experienced stalking which is more than 1.4 million female victims. The age of the majority of the victims appears to be less than 30. For instance, in England and Wales, women aged between 16 to 19 and aged between 20 to 24 are more likely to be victims of stalking compared to other age groups (British Office for National Statistics, 2015). In Australia, the Australian Bureau of Statistics reported that one in every five women above the age of 15 years had been stalked (Australian Bureau of Statistics, 2006).

The rationale for the tendency for such gendered victimization of women may be because women tend to spend more time online (Heinrich, 2015). The percentage of the actual stalking victims is not very accurate as no proper data on victims of stalking and cyberstalking are made available (Mutawa, 2016). The literature suggests that cyber stalking may have a grave impact on the victims. The high prevalence of such crime may lead to many strains in the victims' personal and professional life ranging from personality changes, insomnia, post-traumatic stress disorder (PTSD) and other psychiatric and psychological complaints (Bocij and Mcfarlane, 2002; Aa, 2011; Maple, Short and Brown, 2011;)). It is reported that thirty percent of female victims sought psychological counselling, almost 7 per cent of victims does not return to work. Eleven percent of women victims relocated to another place and changed their identities in order to protect themselves and their loved ones, as a result of stalking and cyberstalking (Aa, 2011).

Governing Cyber Stalking and Reforming the Anti-Stalking Law

In Malaysia, cyberstalking may be prosecuted under the traditional criminal law, which is the Penal Code, and the computer-specific law, which is the Communications and Multimedia Act 1998 (CMA 1998). Under the Penal Code, section 503 and section 506 may accommodate stalking and cyber

stalking as the section cover criminal intimidation. Criminal intimidation under section 503 is when a person threatens another with any injury to his person with the intent to cause alarm to that person. Under section 506 the punishment for criminal intimidation is incarceration for a term that may extend to two years or fine or both. To date, there are about eleven cases on criminal intimidation; however, none of these cases involved stalking or cyber stalking. Examples of cases prosecuted under section 503 are *Sinnasamy A/L Kaliappan v PP (2005) MLJU 1999* whereby the offender threatens the victim with a parang to instill fear into the victim. In *Abdul Wahab bin Mohd Noor v PP (1993) MLJU 331* the defendant was found guilty of putting in fear of injury towards the victim if the victim failed to pay the money demanded by the accused.

Apart from section 503 on criminal intimidation, section 351 on criminal assault and section 354 on assault or criminal use of force to a person with intent to outrage modesty could be applicable in prosecuting stalking and cyber stalking. If found guilty, the offender shall be punished with imprisonment for a term which may extend to ten years or fine or whipping or with any two such punishments. To date, there are about forty-seven cases reported under the offence of section 354. Two examples of such cases is *PP v HAHS (2012) 8 MLJ 109* which concern the outrage of modesty of a 12-year-old girl by an accused who was an Imam. *Mohd Hanafi Bin Ramly v PP (2011) MLJU 475* involved the defendant who was charged under section 354 for outraging the modesty of the victim by kissing the victim on the cheek. However, there have been nobody have been prosecuted for stalking or cyberstalking under both the sections on assault.

Section 233 of the CMA 1998 may be available for prosecuting cyberstalking cases. Such provision covers the improper use of network facilities or network services. A person that commits an offence under this section shall on conviction be liable to a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding one year or both (CMA 1998). A person can also be further fined for one thousand ringgit for every day during which the offence continued after the conviction (CMA 1998). Even though section 233 could be used to prosecute the perpetrators for cyber stalking, up until today, no prosecution has been brought before the court. The only case that has been prosecuted under section 233 of the CMA 1998 is the case of *Rutinin b Suhaimin v PP (2014) 5 MLJ 282* whereby the accused had published a comment via his internet account that ‘Sultan Perak sudah gila!!!!’. However, the decision was overturned as there was evidence that anyone can access the defendant's account as his computer and his internet account was accessible by other persons and on the day mentioned in the charge and that his IP line was on continuous login from the 8 am to past 7 pm (*Rutinin Suhaimin v PP, 2014*).

A recent case in 2013 involving cyberstalking by a female perpetrator against her former boyfriend indicates a missed opportunity for the Malaysian court to decide on such crime as the case was brought by the victim of cyber defamation (*David Clayworth v Lee Chiang Yan*, 2013 (Unreported)). Since 2010, after the break-up of her relationship with her boyfriend, Lee Chiang Yan, a Malaysian, relentlessly cyber stalked Lee David Clayworth, a Canadian teacher. The accused posted numerous false posting on the Internet and some of which contained nude pictures of him with a caption ‘Genital herpes’ (*David Clayworth v Lee Chiang Yan*, 2013 (Unreported)). The defendant also took over the victim’s e-mail and skype accounts and post messages that the victim was a child molester, paedophile and preferred having sex with his students. The victim sued the defendant for defamation and won the case. The court ordered the defendant to pay RM66, 000 for damages. However, the online assault did not stop even after a contempt of court order was issued against her. The defendant had since fled the country to live in Australia. The victim’s requests to the search engines to remove his name from the search engines were futile as the search engines merely ignored his requests (*David Clayworth v Lee Chiang Yan*, 2013 (Unreported)). Had the case been dealt with through the criminal law avenue and on a charge of cyberstalking, perhaps the court would have the opportunity to apply either the traditional criminal law or the cyber law to decide this case.

Another controversial case involving a female victim is a Singaporean case of Colin Mak Yew Loong. Loong who stalked American Opera singer Leandra Ramm since 2005 after he saw her performed on television (*PP v Colin Mak Yew Loong*, 2013 (Unreported)). He sent her threatening e-mails and voice messages for more than six years, which included threats of personal violence. The accused was charged for criminal intimidation under sections 503 and 506 of the Singapore Penal Code and was sentenced to three years of imprisonment and SD5000 fine (*PP v Colin Mak Yew Loong*, 2013 (Unreported)). This case occurred before the creation of the Protection from Harassment Act 2014 (PHA 2014) in Singapore. If the case were to happen and be decided in Malaysia, the same provisions would apply as the said criminal intimidation provisions in Singapore is in *pari materia* with section 503 of the Malaysian Penal Code. However, if the case were decided post-PHA 2014, the accused would have been charged with cyberstalking under section 7 of the PHA 2014, which on conviction, the accused can be liable to a fine not exceeding \$5,000 and imprisonment not exceeding twelve months or both (PHA 2014). If the harassment towards the victim continues after the conviction, the accused may also be charged with that subsequent offence(s) and may be liable to a fine not exceeding \$10,000 and an imprisonment for a term not exceeding two years or both.

The legal landscape in Malaysia relating to cyber stalking indicates the deficiency of the laws, be it the Penal Code or the CMA 1998, as there is no specific provision to cover the real world stalking or

cyberstalking. Be that as it may, any incidence of such crime may be prosecuted for criminal intimidation or assault under the Penal Code or Section 233 of the CMA 1998 discussed above. Despite the deterrent utility of these provisions in punishing the offender, they lack the legal protection for female victims, including the physical protection for the victim of the stalker, restraining the stalker from coming into contact with the victim, or stopping the perpetrator from committing further stalking the victim. Given the lack of protection for female victims of stalking and cyberstalking in Malaysia, there is a dire need for the existing law to be reformed to include the provision of a protection order, restraining order and injunction along the lines of those orders provided in the Domestic Violence Act 1994. In this context, Malaysia should create several provisions in the existing Penal Code to include the particular substantive law and the penalty for cyber stalking. Beyond this scope, the procedural law should also be created to include the orders that would allow the court to make any cyber stalking decision. Another legislative mechanism is to establish a new anti-stalking law modelled on the Protection from Harassment Act (PHA) 1997 in England and Wales that has distinct sections for stalking in Section 2A & Section 4A. Similar to the PHA, any female victim in Malaysia could be well protected from further harassment with the available remedies such as injunctions, protection orders, and restraining orders. Whatever the right model that is adopted by the anti-stalking law in Malaysia, such law should be technology-neutral and gender-neutral to cater for all types of stalking and all victims.

Conclusion

In the last two decades, the threats of the real world stalking and cyber stalking have become more prevalent than ever before. However, the concern of many people in such crime is the gendered nature of the offence in which women are usually the victim of stalking and cyberstalking. More often than not, there seems to be a prior relationship between the stalkers and the female victims. The fact that no prosecution have been brought before the courts on such crimes compounded the problem of the applicability of the traditional criminal law and the cyber law to such crimes. Having said that, due to the persistent and hidden nature of cyberstalking and the enormous impact on the victims, such victims deserve more legal protection than what is currently available, regardless of their gender. Hence, the anti-cyber stalking legislation should not be gender-bias and should cover any victim. The Malaysian legal framework on stalking and cyber stalking is in dire need of an immediate review so that new provisions or a new law could be created to provide adequate protection and remedies to the victims of cyber stalking and most importantly for women victims.

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Protecting Children against Exposure to Content Risks Online in Malaysia: Lessons from Australia

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Abstract

Children are the most vulnerable group in any civil society. The rise of digital technology has made them more exposed to threats of content risks online through exposure to illegal and harmful Internet content. To make matters worse, the legal framework regulating the Internet in Malaysia i.e. self-regulation does not mandate service providers to implement technical measures that could help reduce children's exposure to content risks. Continuous exposure to content risk could lead to dilution of traditional values among younger generation. In order to reduce this outcome, all Internet stakeholders in Malaysia must take Internet regulation more seriously. The first part of this paper argues that content risks are a real threat to children in Malaysia as seen in previous studies. In the second part of this paper, library research and focus group discussions with Malaysian Communications and Multimedia Commission (MCMC), selected Internet service providers in Malaysia and the Communications and Multimedia Content Forum (CMCF) were conducted to analyse regulatory measures practiced in the Malaysian self-regulation framework. Non-censorship policy that does not mandate service providers to classify nor filter prohibited content was found problematic since it had greatly exposed children to content risks. Australian co-regulation was critically examined in the final part of this paper. The scheme has been focusing on protection of children online through classification and filtering measures. Lessons learnt from the Australian jurisdiction could be of reference to Malaysia in its effort to reduce children's exposure to content risks online.

Introduction

The emergence of content risks means bad news especially towards children. The Organisation for Economic Co-operation and Development (OECD) described that 'content risks' emerged from access to illegal, age-inappropriate, and harmful content online. Websites offering pornographic, violent and hate speech content clearly fall under this context. However, what amounts to 'illegal content' differs across jurisdictions and subject to national interpretations (Byron, 2008, p. 48; The Organisation for Economic Co-operation and Development, 2012, p. 25). In the Malaysian context, content risks emerged from access to 'prohibited content' that are indecent, obscene, false, defamatory, offensive and menacing in nature^{xxxv}. These vast categories of 'prohibited content' are considered illegal according to Malaysian law. However, it is fair to question how Internet regulation should take place in light of protecting children when the categories of 'prohibited content' are so extensive.

Exposure to content risks - a real threat to children

The global community has expressed concern on children's exposure to content risks, particularly to online pornography. Declaration of the Rights of the Child emphasised that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Children spend about 8 hours per day on television, video games, watching DVDs, surfing the Internet and the hours spent on the Net increases with age (Gutnick, Robb, Takeuchi, & Kotler, 2011; The International Communication Union, 2009). Faster Internet connectivity and accessibility have intensified children's exposure to content risks.

The EU Kids Online surveyed children from 9 - 16 years old in 25 European countries and their parents. 55% of those children agreed that there were annoying online content. Pornographic content was listed as the top-disturbing content followed by violence and hate speeches (Livingstone, Kirwil, Ponte, Staksrud, & EU Kids Online Network, 2013). 14 % of the respondents have seen images online that are "obviously sexual – for example, showing people naked or people having sex." However, 33% from the respondents told a friend, and only 25% told a parent (Livingstone et al., 2013). Since there were no studies of similar nature in Malaysia or ASEAN countries, it is expected that the figures to be slightly equivalent.

Exposure to content risks amongst children in Malaysia is threatening our national values (Kelly et al., 2013). Some of the effects of content risks have affected children and adolescence in real life as seen in previous studies. For example, Syed Shah Alam reported that young adults were the most obsessive Internet users in Malaysia. They accessed pornography, violent games, and online gambling due to Internet addiction (Alam et al., 2014). As a result, they have lesser social interactions with family members, wasted money for online gambling, excessive shopping, and sex addiction. Children's exposure to content risks increased along with the amount of time spent online (Hassan & Rashid, 2012).

Furthermore, social problems were getting rampant in younger generations (Chlen & Mustaffa, 2008; Liang, 2013; Rahman, 2009; Sinar Harian, 2012). Statistical reports from government departments revealed that, sexual intercourse between unmarried young couples, being rude to parents, cyberbullying, skipping schools, smoking, drug abuse and others are becoming norms in the society (Ahmad et al., 2008; Arsat & Besar, 2011; Jalil, 2015; Kasnoon, 2013; Mohamed, 2011; Seadey, 2009). These actions are considered as serious social ills among younger generations since they went against cultural, moral and religious values of the Malaysian society. The fast development of ICT was blamed

for exposing negative influence to the society (Persatuan Pegawai Tadbir dan Ikhtisas Universiti Kebangsaan Malaysia, 2011).

It was observed that social harmony among races in Malaysia could be stirred through abusive use of social media. Publication of false news over social media with an attached doctored picture could simply cause public anger and stir social unrest (Thien, 2011). This has direct effect towards children when they too can access similar content online. Furthermore, threat of content risks online becomes more serious when it can be ‘user-generated’ (Cormode & Krishnamurthy, 2008; O’Reilly, 2006). Netizens can create and upload their own ‘prohibited content’ to social media that could be accessed by anyone including children. This makes Internet regulation more difficult when content can originate from anywhere – not just content providers. These findings shown that exposure to content risks is a real threat to children both offline and online. More seriously, self-regulation scheme as practiced in Malaysia does not shade any hope into resolving the above issues, as seen in the next part.

Self-regulation scheme in Malaysia – an overview

Section 124 of the CMA 1998 provides that Malaysia embraced ‘self-regulation’ scheme as framework for Internet regulation. Self-regulation is a governance scheme that “involves a group of economic agents, such as firms in a particular industry or a professional group voluntarily developing rules or codes of conduct that regulate or guide the behaviour, actions, and standards of those within the group” (The Organisation for Economic Co-operation and Development, 2006, p. 34). Self-regulation enables participating industry members to develop its own self-regulatory codes, conduct monitoring and compliance, develop accreditation standards and to enforce them voluntarily. The industry conducts self-discipline for the benefit of its own market through minimised governmental interference. However, this is not the case for Malaysia since the government (through MCMC) is strictly regulating its Internet industry through enforcement of the CMA 1998 and Content Code. This is to ensure service providers comply to standards applicable in the communication and multimedia industry to transform Malaysia into major ICT hub in line with Vision 2020 (Mohamad, 1991; MSC Malaysia, n.d.).

Non-censorship guarantee – ‘the roots of evil’

Despite the growing content risks, the self-regulation framework does nothing significant to reduce its exposure towards children. This is primarily because of the non-censorship guarantee adopted by the scheme based on Section 3(3) of the CMA 1998 and Part 7 of MSC Bill of Guarantee. One may argue that non-censorship has been making self-regulation stronger – and this is what self-regulation is all about – to self-discipline. However, in the context of reducing children’s exposure to content risks, non-censorship does nothing proactive to assist. For example, Part 5 of the Content Code does not

require Internet service providers (ISP) in Malaysia to provide any content rating systems, monitor netizens online activities, and retain any data in connection thereto. Similarly, ISPs are not required to filter online content. In contrast, other self-regulation regimes such the United States do not omit to impose obligations onto ISPs to filter illegal content. This shows that despite promoting online freedom, protection of children against exposure to content risks remains crucial.

However, there are exceptions to the above general rules. Section 263 of CMA 1998 provides that “a licensee shall *use his best endeavour to prevent* the network facilities that he owns or provides or the network service, applications service or content applications service that he provides *from being used in, or in relation to, the commission of any offence* under any law of Malaysia”. Consequently, all of the non-requirements stated above transformed into active duty as and when required by the MCMC. This usually relates to providing assistance in investigations and prosecutions. Unless required by the law, the ISPs can rest assured that they have no active duty to monitor any prohibited content that passes through their domains. This is confirmed by the ‘innocent carrier’ provisions in Part 5 of the Content Code that does not put liability onto ISPs for hosting prohibited content since they were merely content conduits.

Consequently, the non-censorship guarantee has not reached its ultimate objective to promote self-discipline. Rather, Internet industry in Malaysia has taken the ‘easy way out’. Active initiatives to develop specific measures to reduce children’s exposure to content risks were absent. Hence, ISPs were not required to develop any classification scheme that could classify online content into specific categories suitable for children. The only classification scheme that is available at present is operated by Lembaga Perfileman Malaysia that simply applies to films (Ministry of Home Affairs, 2012). However, its scope does not cover content such as games, videos and online content that children access. Online videos streamed directly do not require classification nor censorship. This brings in new challenges to combat exposure to content risks. In comparison with Australia, all kinds of content are subject to its National Classification Scheme. This reduces the need to revise the scheme when new media surfaces (Australian Communications and Media Authority, 2008a).

Non-censorship guarantee also made ISPs complacent because there is no active duty to filter prohibited content at the network level. Subsequently, access to prohibited content becomes easier. ISPs merely advised its customers to subscribe to filtering software available online at a fee should they want extra protection. It is submitted that this should not be the case. The importance of awareness campaigns is not denied. Nevertheless, higher level of technical initiatives should also be in place. The Internet industry in Malaysia should develop our own filtering software that is in line with Malaysia values – because we know what is best for our society. In turn, it could help the industry to boost its

research and development to drive innovation. Sadly, this is absent and it is submitted that non-censorship is the main ‘stumbling block’. The effort to filter prohibited content is shouldered by the MCMC to block illegal websites upon notice. Although there was no provision in the CMA 1998 that calls for blocking as specific measure to reduce content risks, the MCMC is taking such initiative under the broad provision of Section 263 of CMA 1998. Consequently, this effort was heavily criticised by human right lawyers. Some argued that the MCMC has stretched its powers too far (Leong, 2015). Despite such *lacuna* in the law at this point, the MCMC continues to double its effort to combat dissemination of illegal content online (Bernama, 2016).

On the other hand, Australia is practicing a co-regulatory model that requires government, service providers and Internet users to participate actively in the scheme. Due to active participation by all stakeholders, this made co-regulation in Australia more comprehensive in regulation of content risks online for protection of children as seen in the next part.

Co-regulation scheme – an overview

Co-regulation scheme is about “joint responsibility of all affected parties” where the public sector is the “final authority” with ability to provide corrective measures should private self-regulation has failed to serve its purposes. It is a “process of creating private spaces for free interaction. This is not about giving ‘new responsibilities’ to providers and users. It is about returning to them the responsibility that was originally theirs within a system that places its trust in market forces while still remaining true to the notion of social responsibility.” (Machill, Hart, & Kaltenhauser, 2002, pp. 41–42) Technically, “states, and stakeholder groups including consumers, are stated to explicitly form part of the institutional setting for regulation...It is clearly a finely balanced concept” (Marsden, 2011, p. 46). Co-regulation is a legal framework that empowers all Internet stakeholders including governments, industry actors, and Internet users to perform social responsibilities towards safer online experience.

The Australian experience

The Australian Communications and Media Authority (ACMA) is the media regulator in Australia that supervises the Australian co-regulation of the Internet (Marsden, 2011). Co-regulation of Internet should consist of the following legal and technical mechanisms (Bartle & Vass, 2005, p. 22):-

1. Strong partnership between government, industry actors, and Internet users.
2. Internet industry develops its own code of practice, accreditation, or content rating schemes with legislative backing from government.
3. The co-regulatory scheme is supported by government enforcement and statutes.

In this regard, Australia designed its Internet co-regulatory model to subscribe to the above characteristics. The Australian co-regulatory scheme is very specific and relevant towards regulation of content risks online. It has increasingly becoming a preferred model of Internet regulation where Australia became a benchmark for the implementation of co-regulation in the European Union.

Co-regulation in Australia comprises of *regulatory* and *non-regulatory measures* for broadcasting and online content supplemented with complaints-based mechanism for assessment of content (Australian Communications and Media Authority, 2008a; Australian Law Reform Commission, 2012b). *Regulatory measures* include administrative mechanisms to remove prohibited content from Australian servers. Further, measures extend to enactment of criminal provisions on illegal online activities, such as child pornography, grooming, and exploitation. *Non-regulatory measures* focused on education and awareness initiatives, which is relatively common in many countries including Malaysia (Lindsay, Rodrick, & Zwart, 2008). Guided by the Internet Industry Associations (IIA) Content Codes of Practice, Australia enforces its own National Classification Scheme administered by the Attorney General's Department to rate all media content including the Internet. The Australian National Classification Scheme contains three legislative instruments i.e. the Classifications (Publications, Films and Computer Games) Act 1995, the National Classification Code and the Guidelines for the Classification of Publication and Guidelines for the Classification of Films and Computer Games. These legislations formed an integral part of the co-regulation scheme in Australia.

ACMA takes charge of a hotline specifically tailored for complaints regarding potentially prohibited Internet content, a similar effort to Malaysia. Potentially prohibited contents are likely to be classified as Restricted to Adults (X18+) or Refused Classification (RC) by the Classification Board. If prohibited content is found hosted in Australia, the National Classification Code shall require ACMA to issue direction to the content host for removal of such content. However, if such content host is situated in an offshore server, ACMA shall inform the suppliers of accredited Internet filters under the Internet Industry Association's (IIA) Content Codes of Practice and filters under the Australian National Filter Scheme for content removal (Australian Communications and Media Authority, 2008b).

If ACMA decides a content to be of 'sufficiently serious' (such as child pornography) it shall be treated with highest concern. Upon receipt of complaint, ACMA shall refer the matter to law enforcement agency (such as the Australian Federal Police) for criminal investigation. If such content is hosted abroad, ACMA will refer the matter to INHOPE member countries for it to be taken down (International Association of Internet Hotlines, n.d.). However, if such content is hosted in a country that is not a member of INHOPE, then ACMA will refer the matter to Australian Federal Police where Interpol shall further pursue it. The ACMA has signed formal agreements with law enforcement



agencies across Australia for assistance in investigations in ‘sufficiently serious’ cases. ACMA works collaboratively with other supranational regulators and does not regulate the Internet on its own. Meanwhile, the MCMC works as sole regulator of the Internet in Malaysia. With non-censorship guarantee, MCMC’s responsibilities have multiplied and the effectiveness of self-regulation could be questioned.





The Australian National Classification Scheme

Australia had moved away from direct censorship by government into classification of broad media content prior to 1970s. The Australian Law Reform Committee argued that classification is better than censorship since it “provides prior information to prospective consumers as to the nature of media content.” (Australian Law Reform Commission, 2012c, p. 48) Administered by the Attorney-General’s Department, the National Classification Scheme stipulates four key principles, namely:-

- a) adults should be able to read, head and see what they want;
- b) minors should be protected from materials likely to harm or disturb them;
- c) everyone should be protected from exposure to unsolicited material that they find offensive; and
- d) there is a need to take account of community concerns about:
 - i. depictions that condone or incite violence, particularly sexual violence; and
 - ii. the portrayal of persons in a demanding manner.

The four key principles stated above are the underlying principles governing classification of content in Australia. The National Classification Scheme adopted content classification that provides descriptions of content consumed by Australians as stated in the Classification Act. The following explains content classification, descriptions, categories and logos of content in Australia. There are seven categories of classifications under this scheme as provided in Clause 2, 3 and 4 of the Australian National Classification Code:

Classification	Details	Categories	Logo
‘G’ (General)	Suitable for everyone	Advisory (no restriction)	 General
‘PG’ (Parental Guidance)	Parental guidance required. Content should be mild or of lower impact, however may contain content that confuses or upsetting towards children.	Advisory (no restriction)	 Parental guidance recommended

‘M’ (Mature)	Content may be of moderate impact and recommended for teenagers aged 15 years and above.	Advisory (no restriction)	
‘MA 15+’ (Mature Accompanied)	Material is classified to have strong content and legal access is only granted to teenagers 15 years and above. Prior to purchasing or viewing content of this category, consumers may need to show proof of age. Children under the age of 15 shall only be allowed to view under the supervision of adult or parents	Restricted category for films, computer games and publications	
‘R18+’ (Restricted)	Content is only restricted to adults where proof of age shall be required to be asked. Materials may contain sex scenes and drug use that are high in impact.	Restricted category for films, computer games and publications	
‘X18+’ (Restricted for Adults)	Content is restricted to adults and contain sexually explicit content, that is, actual sexual intercourse and other sexual activities between consenting adults.	Restricted for adults ^{xxxv}	
‘RC’ (Refused Classification)	Content is banned for sale or distribution in Australia. RC content contain materials which:- a) Depicts, express or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or	Prohibited	No logo

	b) Describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or c) Promote, incite or instruct in matters of crime or violence ^{xxxv} .		
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The Australian government regulates content risks by expanding the applicability of the National Classification Scheme to all media content in Australia including the Internet. The National Classification Scheme created the Classification Board, an independent statutory body that decides classification categories for contents. Parties dissatisfied with classification decisions made by Classification Board may appeal to the Classification Review Board for further reviews.

Conclusion

The above findings suggest that co-regulation as practiced in Australia is organised towards regulation of content risks online through classification. It is timely for the Malaysia to mandate content and service providers to classify online content into specified categories. Future works should also involve development of a national classification scheme. Australian co-regulation should be studied in detail as promising legal framework regulating the Internet in Malaysia. Internet Industry should look into possibility to design a certified national filter. This filter should be installed onto computers upon purchase. If all parties concerned play more proactive roles, regulatory burden on the MCMC could be reduced. In the end, we can develop more responsible netizens that cares for children online safety.

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Defending Women's Fundamental Dignity Against Rape Through the Constitutional Protection

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Abstract

Both international and domestic laws recognised rape as a heinous crime on humanity that has a high impact, especially to women's dignity. Rape victims, in particular women, sustained physical, emotional and psychological trauma in experiencing the violence. It placed them in a serious psychological and emotional crisis in dealing with life. Dignity is vital to human life and needs constitutional protection. The way forward to defend women's fundamental dignity against rape is through the constitution. Malaysian Federal Constitution currently made no express provision for such the protection. However, it does have fundamental right to "life" under Article 5(1). The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* case interpreted the right to "life" under Article 5(1) to incorporate all facets that are an integral part of life itself and those matters that form the quality of life. This provision if rightly construed housed women's dignity as part of life that is fundamental under Article 5(1). Indian jurisdiction has adopted a creative jurisprudential approached on the meaning of the right to life under Article 21 of its Constitution after the decision of *Maneka Ghandi v Union of India*. Consequently, their jurisprudence and constitutional framework on women's dignity against rape are well developed. Malaysia having a similar provision under Article 5(1) may make reference to the Indian Model in moving forward to develop a constitutional framework on defending women's dignity against rape.

Keywords: Women's dignity, Article 5(1) Federal Constitution, Article 21 Indian Constitution, right to life, fundamental rights

Introduction

In general, rape is a crime of forcing another person to have sexual intercourse with the offender against their will.^{xxxv} Under section 375 of the Malaysian Penal Code, a man is said to commit "rape" if he has sexual intercourse against a women's will or consent. Rape is a serious crime that is heinous. It has a high impact, especially to women's dignity. Rape victims, in particular women, sustained physical, emotional and psychological trauma in experiencing the violence. According to Jaycox, Zoellner and Foa (2002:892), "most rape victims display post-traumatic stress disorder symptoms immediately subsequent to a rape and for some, these symptoms may persist for years, with devastating consequences."^{xxxv} Meanwhile, Kinchin (2007:21) noted that "rape victims are 50% more likely to suffer from post-traumatic stress disorder."^{xxxv} Jaycox, Zoellner and Foa (2002:892) further said that "most rape victims display post-traumatic stress disorder symptoms immediately subsequent to a rape and for some, these symptoms may persist for years, with devastating consequences."^{xxxv} It is important to note that post-traumatic stress disorder (PTSD) involves an anxiety-based reaction to a traumatic

event involving three primary symptom clusters: firstly, reexperiencing the event; secondly, psychic numbing and avoidance of stimuli related to the trauma and thirdly, hyperarousal symptoms.^{xxxv}

The serious nature of the crime, especially to women has received international recognition under Rule 93 of Customary International Humanitarian Law. The prohibition received recognition since the establishment of the Liebel Code on the prohibition of rape offence under Article 44. Meanwhile, Article 3 of the Geneva Conventions, although did not expressly provides prohibition against rape, it mentioned prohibition against “violence to life and person” which includes “cruel treatment and torture”^{xxxv} and “outrageous upon personal dignity.”^{xxxv} Protection against “outrageous upon personal dignity” is recognised as fundamental rights under Additional Protocols I and II. Further, Article 75 of the Additional Protocol 1 states that the protection includes “humiliating and degrading treatment ...any form of indecent assault.” Further, Article 4 of the Additional Protocol II had added “rape” to the list. More to the point, the Fourth Geneva Convention and Additional Protocol I gives protection amongst others, freedom rape.

Rape is also categorise as offence against war crime under the Statutes of International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone. Rape too, constitute crime against humanity under the Statutes of International Criminal Tribunals for the former Yugoslavia and Rwanda.^{xxxv} The case of *Takashi Sakai*^{xxxv} before the War Crimes Military Tribunal of the Chinese Ministry of National Defence decided that rape constitutes war crime. In line with the international norms on offence against rape, states in the world enacted legislations to control the offence. For instance, in Malaysia, sections 375 and 375A of the Penal code made provisions on offences against rape. Meanwhile, section 426(1A) Criminal Procedure Code also provides that a convicted accused is liable for compensation for the personal injury caused to the victim of the offence committed. Although there is statutory protection against rape, the security is not high enough to secure adequate protection of the dignity of women as it is not mandated by the constitution.

Human dignity is vital to human life as it forms the heart of human identity. For that reason, it must be respected. The dignity of the human person is not only a fundamental right in itself but constitutes the basis of fundamental rights in international law.^{xxxv} The preamble of the 1948 Universal Declaration of Human Rights recognised the inherent dignity and equal and inalienable rights of all human on freedom, justice and peace in the world. Therefore, the dignity of the human person is part of the substance of any right protected by international human rights law that must be respected, even where a right is restricted.^{xxxv}

Women, who faced a greater risk of being a rape victim in performing their daily activities, need the stronger legal protection of their dignity. The constitutional recognition of the right to dignity of women as the human or fundamental right is the platform on the more robust protection. This framework that provides for women’s dignity, which includes offences against rape as a matter of infringement of the fundamental or human right.

In the Malaysian legal framework, no express provision or clear jurisprudence on the constitutional protection of women against rape. What is available in the system is the prohibition of rape offences and penalty provided in sections 375 and 375A of the Penal Code and a general provision for payment by the convict for the personal injury caused to the victim under section 426(1A) of the Criminal Procedure Code. Hence, it is considered an ordinary infringement of the right to person under a statute not a constitutional infringement on fundamental right under the Federal Constitution although dignity of women is fundamentally affected.

For that reason, an effective move is needed to properly develop the right jurisprudence and constitutional framework that can recognise that physical, emotional and psychological trauma, which includes post-traumatic stress disorder due to rape is a serious crime to a person that affect the fundamental dignity of women. The way forward is to read the right to life under Article 5(1) of the Federal Constitution innovatively. In the effort of developing the jurisprudence and constitutional framework, it is desirable to refer to the Indian jurisdiction as a model. The reason is, the right to life under Article 5(1) of the Federal Constitution is similar to Article 21 of the Indian Constitution. With the active attitude adopted by the judiciary, the Indian jurisdiction is progressive in recognising rape as an offence that infringes dignity of women that is fundamental to women's life. With the active development of the constitutional framework on women's dignity as part of the fundamental right, it is appropriate to examine how the system work and to what extent the Indian Model could be used as a reference in developing a framework to defend women's fundamental dignity against rape through the constitutional protection.

“Right to life” under Article 21 Indian Constitution

As mentioned earlier, the right to life provided under Article 21 of the Indian Constitution is similar to the provision stipulated under Article 5(1) of the Malaysian Federal Constitution. Hence, it is essential to examine how the Indian jurisdiction successfully develops its public law jurisprudence and constitutional framework in defending women's dignity against rape. In analysing the development, the attitude of the judiciary in interpreting the term ‘right to life’ is carefully studied to see how the dynamic approach is capable in expanding the ambit of a fundamental right that extend to include dignity of women.

Prior to *Maneka Ghandi v Union of India*^{xxxv} right to “life’ was given a literal meaning by the Indian Court.^{xxxv} The strict construction had led to the limitation on the protection of a fundamental person's life or liberty under the constitution. Hence, the ambit of fundamental rights is limited. But, a sea change of the Indian public law jurisprudence come along with the decision of *Maneka Ghandi*. The Supreme Court, in this case, had opted a liberal attitude in interpreting the right to life under Article 21 that had to widen the scope of fundamental rights. As a result, the Indian courts now can apply more fundamental rights under Article 21 of its constitution.

In the effort to liberalise the meaning of right to “life” the Indian Supreme Court often refers to the remark by Field, J in *Munn v Illinois*.^{xxxv} According to him, “life” means something more than mere animal existence and the inhibition against its deprivation extends to all those limbs and faculties by

which life is enjoyed.^{xxxv} Meanwhile, in *Fracis Coralie*^{xxxv} Bhagwati J read ‘life’ to include the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, free movement and mixing and co-mingling with fellow human beings.^{xxxv} Additionally, the Supreme Court in *Board of Trustees, Port of Bombay v Dilikummar*^{xxxv} states that ‘life’ does not merely imply animal existence or a continued drudgery through life but instead it has a much wider meaning. In agreement with decisions of the Supreme Court judges after *Maneka Ghandi*, Jain interpret right to ‘life’ to mean ‘the right to live with human dignity’.^{xxxv} Thus, in his opinion right to ‘life’ would therefore, includes all those aspects of life which go to make a life meaningful, complete and worth living.^{”xxxv}

As discussed earlier, rape victims faced traumatised life and devastating consequences after the incident which includes post-traumatic stress disorder. It is a crime against basic human rights; it violates victim’s most cherished fundamental rights, especially women. The severity of the offence and the need to recognise rape as a crime that infringed dignity of women that affect their right to life to live healthily was laid down clearly in the judicial pronouncement of the Indian Supreme Court. Reading the expanded meaning of right to life under Article 21 of the Indian Constitution, the Supreme Court in *Bodhisattwa Gautam v Subhira Chakraborty*^{xxxv} states that rape was a crime against not only the women but also to the entire society.^{xxxv} It was a crime that destroyed the entire psychology of a woman and put her in a deep emotional crisis.^{xxxv} The decision demonstrates that rape is a crime that affects fundamental human rights that violate the right to life as provided in Article 21 of the Constitution. The Court further elaborated that right to life means the right to live with human dignity which includes all aspects of life to make life meaningful, complete and worth living.^{xxxv} A similar approach was adopted by the Supreme Court in *Chairman Railway Board v Chandrima Das*.^{xxxv} In the instance case, the Court had decided that rape was an offence that violated fundamental rights protected under Art. 21.

The above analysis shows that the Indian jurisdiction had taken the stance that right to life under Article 21 must be given a broad meaning which includes dignity of a person. In determining the ambit of the dignity of a person the Indian Court have taken a dynamic attitude to look into the impact of the violator’s act against the victim. In the case of rape, the court has looked into the damaged done which includes psychological and emotional impact not only on the victim but also the society. The attitude is positive that allows a stronger protection given to women against rape. Malaysia whose provision on the right to life under Article 5(1) is in pari materia with those under Article 21 of the Indian Constitution may make reference to the latter in working on a constitutional framework on developing constitutional protection to women against rape in preserving their dignity.

“Right to life” under Article 5(1) Federal Constitution

Article 5(1) of the Malaysian Federal Constitution provides:

“No person shall be deprived of his life or personal liberty in accordance with law.”

The term “life” was not expressly defined in the Constitution. For that reason, it is essential to determine the scope of the right to life under Article 5(1). In this perspective, it is necessary to firstly lay down the right jurisprudence to be adopted by the Malaysian judiciary in interpreting the Constitution. Azlan Shah Ag. LP (as he then was) in *Dato Menteri Othman Baginda & Anor v Dato’ Ombi Syed Ahir Bin Syed Darus*^{xxxv} said that in interpreting the Constitution two points that must be noted:

- 1) Judicial precedent plays a lesser part in interpreting ordinary statutes
- 2) Constitution is a living legislation and must be construed broadly and not in a pedantic way.

According to the Court:

“...A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: ‘a constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. Its is quite consistent with this, and with the recognition that rules of interpretation may apply, to take part as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms’. The principle of interpreting constitutions ‘with less rigidity and more generosity’ was again applied by the Privy Council in *Attorney-General of St. Christopher, Nevis and Anguilla v Reynolds* [[1979] 3 All ER 129].”

In the case of *Dewan Negeri Kelantan & Anor v Nordin Salleh*^{xxxv} the court said:

“...Secondly, the Judicial Committee of the Privy Council held in *Minister of Home Affairs v Fisher* ([1980] AC 319) at p 329, a constitution should be construed with less rigidity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.”

In this context, it is worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relations Mc Kinley v Commonwealth of Australia* ((1975) 135 CLR 1 (refd)) at p 17:

“The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.”

The cases illustrate that a liberal approach is needed in reading the meaning and scope provided in the constitution. Since the Constitution is a living instrument an up to date interpretation, it needed to ensure that the meaning of the provision is contemporary and suit the current needs. Adopting the liberal stance, the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*^{xxxv} interprets right to “life” expansively. According to the Court ‘life’ in Article 5(1) must be given a broad and liberal meaning in order to implement real intention of the framers of the Federal Constitution.

In examining the issue the Court of Appeal, referred to the decisions of the Indian Supreme Court in *Olga Tellis v Bombay Municipal Corporation*^{xxxv} and *Delhi Transport Corporation v DTC Mazdoor Congress & Ors* that interpreted ‘life’ embodied in Article 21 (the equivalent of Article 5(1)). Applying the broad and liberal approach as shown in the Indian Supreme Court decisions, the Court of Appeal concluded that ‘life’ appearing in Article 5(1) incorporates all facets that are integral parts of life itself and those matters which form the quality of life. The liberal approach in *Tan Teck Seng* was later followed by the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*^{xxxv} and the Federal Court in *Rama Chandran*. It is also essential to note that the Federal Court in *Lembaga Tata tertib Perkhidmatan Awam v Utra Badi a/l K Perumal*^{xxxv} did not no comments on the view given by the Court of Appeal with regards to the interpretation of the term ‘life’ under Article 5(1). Hence, the analysis could be used in developing jurisprudence on the ambit of “right to life” under Article 5(1).

Since case law shows that the Malaysian judiciary encourages the dynamic approach in the interpretation of the constitution, the right to “life” under Article 5(1) should be interpreted expansively to include women’s dignity. As the right to “life” under Article 21 of the Indian Constitution is similar to Article 5(1) of the Malaysian Constitution, the Indian model may be the source of reference in identifying the scope of the right to “life.” As analysed earlier, after the decision of the Indian Supreme Court in the case of *Maneka Ghandi India* is progressive in expanding the meaning of the right to “life”.

In recapitulation, the interpretation Supreme Court in *Francis Coralie v Union of India*^{xxxv} decided that right to include protection on human dignity. In *Bodhisattwa Gautam v Subhira Chakraborty*^{xxxv} and *Railway Board v Chandrima Das*^{xxxv} had decided that right to “life” under Article 21 include protection of women’s dignity against rape. The innovative approach adopted the Indian Courts have allowed the Indian jurisdiction to establish a clear jurisprudence and constitutional framework on protection of women’s dignity against rape through constitutional protection. Consequently, the structure allows a stronger protection to women against rape.

Reverting to the position in Malaysia, since provision on right to “life” under Article 5(1) is similar to Article 21 of the Indian Constitution, alike reading should be adopted by the Malaysian jurisdiction so that right to “life” is meaningful and able to provide the basis of the jurisprudential and constitutional framework on the protection of women’s dignity against rape under the Federal Constitution. The constitutional framework and jurisprudence put forward, with some modification made, could be used as a model not only in Malaysia but also in other parts of the world.

Conclusion

Rape is serious on humanity that has a high impact, especially to women's dignity. Rape victims, especially women, sustained physical, emotional and psychological trauma in experiencing the violence. As dignity is vital to human life, strong constitutional protection is needed. Malaysian Federal Constitution currently made no express provision for such the protection. However, it does have fundamental right to "life" under Article 5(1). The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* case interpreted the right to "life" under Article 5(1) to incorporate all facets that are an integral part of life itself and those matters that form the quality of life. This provision if rightly construed housed women's dignity as part of life that is fundamental under Article 5(1). Indian jurisdiction has adopted a creative jurisprudential approached on the meaning of the right to life under Article 21 of its Constitution after the decision of *Maneka Ghandi v Union of India*. Consequently, their jurisprudence and constitutional framework on women's dignity against rape are well developed. Malaysia having a similar provision under Article 5(1) may make reference to the Indian Model in moving forward to develop a constitutional framework on defending women's dignity against rape.

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The Danger Of Counterfeit Cosmetics : Is The Current Legislations Adequate To Combat Such Sales

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Abstract

Just like diamond, cosmetics are women best friend. And now it has become accepted as the modern men best friend. Cosmetics are substance and preparation that is not medicines and applied to skin, to lips, to scalp, to hair to nail, to lips, to faces and all over the body. And for purposes of commercialization , established cosmetic companies will have trade marks or “ get up”which accompany such cosmetic products. These trade marks plays a very dominant public roles as means of identification of manufacturers of product and quality of products . Yet having cosmetic products that enters the commercial market even with intellectual property protection carry a higher risk of free loaders taking advantages of the product that had received market acceptance. Counterfeit cosmetics are produce without any regards to hygiene . The main interest of the countefeiters is to maximise profit while riding on the goodnames of legitimates producers of cosmetics. This paper will discuss the danger of counterfeit cosmetic and the Malaysian legislation available in addressing the sales of counterfeit cosmetics . Particular attention will be given to the protection available under intellectual property law since intellectual property provides protection for these down stream products. Highlight will also be given to other legislation to stops such sales. And it will conclude on guidelines on how to indentify counterfeit cosmetic so as to foster awareness amongst women and all members of the public on the danger of counterfeit cosmetics. This research will utilized primary and secondary data.

Keywords: counterfeit cosmetics

Introduction

Just like diamond, cosmetics are women best friend. And now it has become accepted as the modern men best friend. Cosmetics are substance and preparation that is not medicines and applied to skin, to lips, to scalp, to hair to nail, to lips, to faces and all over the body .And for purposes of commercialization , established cosmetic companies will have trade marks or “ get up”which accompany such cosmetic products. These trade marks plays a very dominant public roles as means of identification of manufacturers of such product and the quality of their products . No reputatble manufactures of cosmetic are willing to risk their goodwill and good names by manufacturing low

quality cosmetics. It takes years for the company to generate goodwill and market acceptance. Yet having cosmetic products that enters the commercial market even with intellectual property protection carry a higher risk of free loaders taking advantages of the product that had received market acceptance. Counterfeit cosmetics are produce without any regards to hygiene . The main interest of the countefeiters is to maximise profit while riding on the goodnames of legitimates producers of cosmetics. The question then beg the issues whether the present international and national legal regime are adequate to address such issues.

International Legal Regime

The selling of counterfeit cosmetics and other product counterfeiting is an Intellectual Property (IP) crime. The general public has accepted that counterfeiting can be defined as a deliberate attempt to deceive consumers by copying and marketing goods bearing well-known trade marks, together with packaging and product appearance. Thus counterfeits cosmetic look like those made by a reputable manufacturer when they are, in fact, inferior illegal copies that can have a serious impact on the health and safety of the consumer. Trading in counterfeit goods is a global phenomena. To eradicate such trade The TRIPS Agreement (Agreement on Trade Related Aspect of Intellectual Property) which is a multilateral treaty signed in 1994 and came into effect in 1995 have strong anti-counterfeiting provision. Members of the Agreement desires to reduce distortions and impediments to international trade, and by taking into account the need to promote effective and adequate protection of intellectual property rights as well as to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. Yet it recognizes the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.

Towards this end Members shall give effect to the provisions of the TRIPS Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by TRIPS provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice. But TRIPS have very strong enforcement provision. Members must ensure that enforcement procedures as specified in the Agreement are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by the Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements of intellectual property rights.

Border Measures

One of the mandatory provision in the TRIPS Agreement is the provision on Border Measures. Members countries are obligated to provide for an administrative procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation. This definition will includes counterfeit cosmetics. There are also provision laid down that enable Member countries competent authorities that will be the Customs authority to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed. This Ex_Officio action will enable the Customs officers on its own initiatives to importation of counterfeit cosmetics. To assist them the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers.

Criminal Procedures

TRIPS provides that Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

The Malaysia Legal Regime

In order to be TRIPS compliance Malaysia amended its intellectual property legislation to accommodate all the mandatory provision. In 2003 Malaysia had fully complied with all the TRIPS requirement. One of the important provision incorporated into the Trade Marks Act 1976 was the provision on border measures under section 70 C in the Trade Marks Amendment Act 2000. An administrative procedure was put in place to enable the right holder to request via notification to the Registrar of Trade Marks for these measures. Section 4 of TRIPS provides for special requirements related to border measures. The TRIPS Agreement on border measures was used as a guide for the operation of border measures in Malaysia. 10 articles act as a guiding principles for national legislation to stop trade in counterfeit trademark goods and pirated copyrighted goods.

Counterfeit goods was given the following definition that is it means “any goods including packaging, bearing without authorisation a trademark which is identical with or nearly resembles the trade mark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trade mark, and which infringes the rights of the proprietor of the trademark under this Act.” This definition mirrored the definition given by the TRIPS Agreement. The trade marks protected will include a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof that are used by the cosmetic company for commercialization of their products. Thus counterfeit cosmetics products that bears similar or nearly similar marks would be infringing the right holders right and be liable for trade marks infringement.

The border measures provision under Section 70C enables a proprietor of a registered TM or the agent to apply to the Registrar to get the assistance of the Malaysian customs to stop the importation of counterfeit cosmetics into Malaysia. Application must be made in Form TM 30 together with the payment of fee, one affidavit and 5 copies of the application. The problem with Form TM 30 is that the application must state the date, the time and place where the counterfeit goods are expected to be imported. It is very difficult for the trade marks owner to precisely state the time and place of importation of such counterfeit cosmetic. Up to date no such application to stop importation had been made to the Registrar of Trade marks.

Caveat Emptor

At the end of the day since counterfeit cosmetics are dangerous to the consumers, it is the consumers themselves who must be diligent to detect counterfeit cosmetic. Consumers awareness must be raised to

be able to detect counterfeit cosmetic. One such guidelines is the pricing of the product. A lipstick that retails for nearly rm90 in the big department stores cannot be genuine if it cost only rm10 in the sidewalk or online sale. Additionally look at the place of sale. Branded cosmetics are sold through chain of authorised dealers and not in street market or night market. So if such perfume are available at the night market and sold at such low prices these are indicators that consumers should be made aware off that that such cosmetic are counterfeit. Lastly look at the brand packaging itself. Low-quality packaging, a poor replica of a genuine logo, and misspellings of brand names, marketing text or guarantees are the most frequent signs of a counterfeit product.

Conclusion

Counterfeit cosmetics is a danger to public healths. The legal provision has its loophole and some brand owners may not be able to stop such sales of counterfeit cosmetics. Therefore the best self help to consumer is to be diligent and purchase cosmetic from legitimate authorised dealers.

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CHILD CARE PROTECTION IN CHILD CARE CENTRES IN MALAYSIA: AN ANALYSIS

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Abstract

The objective of this paper is to explore the literature on child care protection and services and to analyse existing laws and policies involving child care centres in Malaysia. The cases of maltreatments and negligence in child care centres happening around the country are alarming. Though there are already existing laws and policies governing this issue, the repeated cases occurring year by year illustrate to us that the existing legal mechanism need to be scrutinized for improvements. It is high time for the laws on child care to be reviewed to suit the current demands. Therefore, this paper is undertaken not just to deal with the present problems on child care centres, but also aim to enhance the quality of service provided by child care centres in order to prevent more problems in the future. Existing provisions, case laws, conference papers, academic journals, text books, reports, studies, evaluations and other materials on child care in Malaysia are scrutinised.

Keywords: child care, child protection, quality

1.0 Introduction

Child care services are one of the necessities of the families. The increasing percentage of women getting involved in the labour force in Malaysia which is 54.1percent in 2015 compared to 46.8percent in 2011 (Talent Corp, 2016) boosts the demand for child care centres (Sulaiman, Othman, Perumal, & Hussin, 2013). It is interesting to note that the escalation of child care services is happening around the world, not just in Malaysia (Omar, Abu, Sapuan, & Aziz, 2010). Moreover, in the Eleventh Malaysia Plan, the government aims to increase women's participation in the labour force to 59percent by 2020 (Economic Planning Unit, 2015). Therefore, it is predicted that there will be a higher demand for child care services in future to accommodate women's participation in the workforce.

In Malaysia, the multiple types of child care centres can be generally names as Taman Asuhan Kanak-Kanak (TASKA) (Ministry of Education, 2008). There are four categories of child care centres as can

be seen in Section 5 of Child Care Centres Act 1984 (CCCA) which are home based child care centre, work place based child care centres, community based child care centre, and institution based child care centre.

There is a requirement under the law specifically under Part II of CCCA for the child care centres to register with the Ministry of Women, Family and Community Development (MWFCD). In 2014, according to the statistics from Social Welfare Department (SWD), there are 3760 registered child care centres and 14 234 registered caregivers in Malaysia catering 68 432 children (Department of Social Welfare, 2014). Nevertheless, this statistics does not reflect the exact number of registered child care centres since it includes four to six years old children who attend pre-schools instead of TASKA. Furthermore, according to P.H.Wong, the president of Association of Registered Child Care Providers Malaysia (ARCPM), the current number of registered child care centres is not enough to accommodate almost 3.4 million children below four years old. She also expresses her concern that the present number is far behind the target set under Government Transformation Programme which is 13 200 child care centres by the year of 2020 (Yuen, 2014).

Moreover, the situation discussed above is mainly on the registered child care centres. What about child care centres which are operating illegally without any licence? It is suggested for an investigation to be conducted to find the reasons of their reluctance to register their centres. Some may want to escape from liabilities and procedures burdened upon them and budget constraint in order to complete the registration process (Chiam, 2008). In addition, the reasons may cause by the non-adherence to the legal requirements and the unsystematic monitoring system by the government (Pheng, 2007).

2.0 Materials and Methods

The literature review of this paper is done through library-based data collection analysing the relevant textual documents. Various sources such as the legislations and relevant policies especially policies on early child care development are also referred. Besides that, materials are collected from conference papers, academic journals, text books and case reports. Basically, this paper involves desk study by collecting sources from libraries and also online databases including the websites from the government departments, NGOs' websites, relevant international bodies concerning the right of children such as UNICEF, OECD, and United Nations Educational, Scientific, and Cultural Organization (UNESCO).

3.0 Discussion

3.1 Child Care Centres Services

Although there are legal provisions on child care centres in Malaysia, the quality of the services is still questionable as the problem of maltreatments in child care centres is still alarming. It shocks everyone in Malaysia when it becomes viral in the social media, the news on the death of three month old baby girl at a child care centre in September 2014 (Cheng, 2014). The baby was found unconscious and was reported to be surrounded by ants at the time the parents picked her up from the child care centre (Sinar Harian, 2014). It is reported that the child care centre only hired four caregivers for thirty nine children, where it supposed to be nine caregivers. In response to this case, the child care centre was ordered to be closed temporarily (The Star, 2014).

This is not the first incident in Malaysia that involves the death of infants in child care centres. There are numerous incidents alike such as what happened to a six month old baby girl, Nur Sofea Insyirah Mohd Sharil who was admitted to the hospital for suffering various injuries caused by her babysitter (News Straits Time, 2014). Another example can be seen on November 2014 where the owner of a child care centre has been charged in the magistrate's court for abusing one year old child in the centre (News Straits Time, 2014).

The statistics from DSW in 2012 has shown that six infants died at child care centres and until July 2012, seven cases has been reported involving infants deaths in child care centres (BERNAMA, 2012). It is worrying to see the increasing cases of malpractices in child care centres especially when it involves the death of infants. These are only some examples of the cases reported for child abuse. It is believed that there are more cases happening in the country go unreported due to various reasons (Ministry of Women Family and Community Development & UNICEF, 2013). Therefore, it is acceptable when an empirical research indicates that parents are not confident with the safety of the children in the child care centres (Kahar & Mohd Zin, 2011).

Those registered child care centres may be required to close their centres temporarily if there were any danger or risk of danger to anyone in the centre as enshrined under Section 16 of CCCA. Section 16 specifically mentions that this order can be made to a registered child care centre. How about unregistered child care centre? It is claimed by ARCPM that, the increasing statistics of child abuses can be attributed by the non-registration of the child care centres which tend to employ unskilled workers (News Straits Time, 2014).

Though there are already existing laws and policies governing this issue, the repeated cases occurring year by year illustrate to us that the existing legal mechanism need to be scrutinized for improvements.

3.2 New Laws And Policy Needed?

Chiam (2008) in her research on child care centres in Malaysia asserted that it is timely for a recent research on child care centres to be done so that the policies drafted, the provisions legislated, and trainings provided to child care providers and caregivers suit the current time and demand. In addition, it has been almost 30 years since the birth of CCCA 1984. Therefore, it is reasonable for an evaluation to be made to the provisions of the act itself. The act which was passed with the main focus to set minimal standards and requirements (Chiam, 2008) should be upgraded to ensure more quality protection of children is provided especially by the child care centres.

Besides that, it is undeniable that Malaysia has progressively developed various policies and plans in protecting children. Nevertheless, a holistic child protection legal mechanism is still not in place. It is claimed that, this may due to the birth of ‘instant policy’ which is invented reactively in response to the society’s need and demand (Kahar & Mohd Zin, 2011).

Therefore, study on the current laws and policies are needed. The loopholes in the existing legal mechanism should be remedied with necessary modifications. There is a need to develop basic standards and principles of child care protection in child care centres in order to enhance the quality of child care protection in the country. In addition, it is suggested that improvements and lessons may also be taken from other jurisdiction’s experience to be suited in Malaysia context.

3.3 Child Care Centres: Theoretical Framework

3.3.1 The Right of Children in Malaysia

Malaysia has ratified The United Nations Convention on the Rights of the Child (UNCRC) with reservations in 1995. Malaysia also became the state party to the International Labour Organization (ILO) Minimum Age Convention 138, and ILO Convention 182 on the Worst Forms of Child Labour. However, Malaysia has not acceded to the two Optional Protocols to the UNCRC or the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Ministry of Women Family and Community Development & UNICEF, 2013).

Ratifying UNCRC is one of the concrete proofs that the government is ready to protect children through domestic laws and at the same time adhere to the international conventions. However, the question is

how effective the legislations are in protecting children especially those who are placed at the child care centres?

3.3.2 Child Care Centres Act 1984 & Child Care Centres Regulations 2012

A survey was conducted by The United Nations Children's Fund (UNICEF) and Ministry of Social Welfare in 1982 on overview of the services and standards of care of child care centres in Malaysia. The outcome of the survey reported that child care services in Malaysia did not even reach the level of satisfactory (Yusof, Wong, Ooi, & Hamid-Don, 1987). Consequently, CCCA was passed to set minimal standards and regulations for child care services (Chiam, 2008).

This act mainly highlights on the registration, control and inspection of child care centres. This act regulates child care centres which take care of children under the age of four years for a fee. Amongst the programme strategies to ensure that child care centres are run as demanded by the act include training programmes for child care providers, programme formulation for children, monitoring and evaluation of the programme, and awareness campaign (ASEAN, 2007).

Meanwhile, Child Care Centre Regulations 2012 (CCCR 2012) are enforced starting from 1 January 2013. One of the vital issues addressed in these regulations is on the adult to child ratio. The ratio for children from birth until one year old is one child care provider to look after three children. For children aged one year and above the ratio is one caregiver to take care of five children, while for three years until four years old, the ratio is one caregiver to look after ten children. Besides that, the child care centres are required to prepare and display a balance diet menu schedule and schedule of daily activities appropriate to the age of the children. These regulations shed a new light for a better care and protection for the children in the child care centres. However, the implementation needs to be closely examined. One of the salient parts of CCCA is on registration. Child care centres are required to register with DSW. When a centre is registered, DSW may monitor the centre to ensure that it abides the provisions in the act. Through registration, it is believed that quality of child care providers would be maintained (Ministry of Education, 2008). It is claimed that one of the obvious gaps in monitoring child care centres is ensuring registration on part of the private centres. Legal action can be taken against child care centres which do not comply with CCCA 1984, CCCR 2012 and Child Care Centre Regulations (Compounding Offences) 2011. For each offence, a maximum compound of RM5000.00 may be imposed. Cancellation of registration, instruction for temporary closure of the child care centre and seal of the premise or prosecution may also be imposed to the offenders (Department of Social Welfare,

2013). If a person were to be prosecuted, upon conviction he shall be fined not exceeding RM10000.00 or imprisoned not exceeding two years or both as enshrined in Section 17 of CCCA 1984.

It appears that, there is a positive development after the launch of the campaign “Jom Daftar Taska dan Pusat Jagaan” in June 2011. In 2010, there are only 483 registered child care centres. However, starting from June 2011 to May 2012, the numbers raised 124percent to 1086(Parliament, 2012). On top of that, a positive development may also be seen when the DSW reported that registered child care centres in 2014 was 3760 (Department of Social Welfare, 2014).Nevertheless, the numbers of illegal or unregistered child care centres are still high. Since 2014, there are 1685 illegal child care centres identified across Malaysia. It is stated that failure to adhere to the ministry requirements was one of the reasons why child care operators reluctant to register their centres (BERNAMA, 2016b).

Therefore, there is an urgent need to review the legislation on registration as to find the solutions on how to cater this problem. The reluctance of child care centres to register their child care centres may jeopardise the children’s safety. Furthermore, the child care providers of illegal child care centres too are not professionally trained and this may lead to abuse and negligent cases involving children in child care centres.

In addition, it is a requirement for the child care providers and child minders to join ten days basic child care courses run by agencies approved by MWFC (Ministry of Education, 2008). Nevertheless, starting from 2013, Basic Child Care Course is no more available. Instead, there is a requirement for all the child care providers to attend PERMATA Child Care Course. The content of the course is based on PERMATA curriculum which has been developed referring the ‘Sure Start’ curriculum used in Pen Green Centre, Colby, England. The content was then enhanced to suit the local culture and the spirit of National Education Philosophy (Mansor, 2011). This curriculum has also taken into consideration the curriculum of the Basic Child Care Course implemented by DSW and Certificate in Basic Early Education for Children in Care Centres from KEMAS. During pioneer project from 2007 to 2009, the curriculum has been revised few times and has been developed and acknowledged as the National Curriculum under the Child Care Education and Early Education Policy in 2008 (Bahagian pendidikan awal kanak-kanak PERMATA, 2013).

PERMATA child care course may be a solution in training the child care providers to be more professional in dealing with the children. However, the effectiveness of the trainings still needs to be scrutinized. The more alarming problem is the reluctance of child care operators to send their child care providers to training due to various reasons including the cost of the courses. This may be one of the requirements which make the child care operators unwilling to register with DSW.

On the part of examination and inspection, a taskforce was set up in 2006 to examine three major issues with regards to early childhood care and development. One of the issues was to develop a Quality Improvement Accreditation System (QIAS) to rate child care centre (Chiam, 2008). This system is a mechanism of quality control by using standardised instrument. Inspection may be done by the DSW officer four times annually. In addition, star rating was also suggested to be included in the plan involving registered child care centres (Ministry of Education, 2008). Nevertheless, Chiam (2008) criticised that thorough inspection involving all child care centres may have problems due to limited numbers of inspection officers. Moreover, as the system includes self-assessment by the child care centres apart from the inspection from DSW officers, not all child care centres are ready to do this. On top of that, this system may not be fruitful in improving overall qualities of child care centres since unregistered childcare centres will not participate in this accreditation.

The increasing maltreatment cases in child care centres which to the extent causing death is one of the pushing factors for amendment to be done to CCCA in 2006. Nevertheless, the amendments were more on administrative purposes (Chiam, 2008). The amendments *inter alia* highlight the additional categories of child care centres (Mohd & Kadir, 2012). Besides that, the amendments also touch on increasing duration for issuance of licence, and the requirement to display of licence in a conspicuous place in the premise. Nevertheless, Chiam (2008) praised the positive action to lower the adult to child ratio from 1:5 to 1:3 for children aged below one year. The requirement of home-based child care centres to register is also worth to be mentioned as one of the efforts to enhance quality of child care in Malaysia.

3.3.4 Child Act 2001 (CA)

The introduction of CA was one of the positive responses in the effort to promote children best interest in accordance with UNCRC (Kahar & Mohd Zin, 2011). Under Section 31(1) of CA, a person who neglects, abandons, or exposes the child to abuse shall be liable to a fine not exceeding RM20 000.00 or to imprisonment up to ten years or both. On July 2016, Child Act (Amendment) Bill 2015 has been gazetted involving amendment to Section 31(1). The punishment has been increased to RM 50 000.00 and maximum imprisonment from 10 to 20 years (Mahmood, 2016). The child registry containing criminal records of convicts of crimes against children will also be expanded. This allows for the employers to screenings the potential employees' criminal records before hiring them (BERNAMA, 2016a).

Despite various efforts and measures taken by the government in curbing child abuse cases, children are still exposed to danger of abuse seeing from the increasing number of abuse cases through years. According to statistics from DSW, from 2011-2013, 11378 abuse cases are reported (Parliament, 2014). Meanwhile, as from January to April 2014, 1430 abuse cases were reported (Mohd Zain, 2015). It is predicted that the number does not reflect the whole situation as presumably there are cases that are not reported to DSW.

It is claimed that the country's existing development plans and policies are not comprehensive to protect all children in Malaysia. Children who are highly risked for family violence and heinous crimes within society are not well protected under the existing legal mechanism (Kahar & Mohd Zin, 2011). Indeed, the birth of Child Act 2001 is a vital response in upholding child's best interest to be in conformity with the principles of UNCRC. However, it is asserted that there are still room for improvements for the act the provide a better protection to the children (Mohd, 2007). Moreover, the act is claimed to be more victim-centred and does not has enough emphasis on family. It appears that, in Malaysia, the government interventions with regard to child protection is mainly through statutory provisions to protect children who have already abused, maltreated, rather than preventive approach (Ministry of Women Family and Community Development & UNICEF, 2013).

Internationally, looking at the practice done by other countries such as United Kingdom, New Zealand, and United States, Canada, and Australia, child protection legislation gives more emphasis on preventive measure rather than reactive mechanism once the child has experienced maltreatment or abuse. This is done through voluntary cooperation with parents and more family-based approach (Ministry of Women Family and Community Development & UNICEF, 2013).

Nevertheless, the recent amendment to CA 2001 was a great move made by the government. The amended act is hoped to be a comprehensive tool in providing a better protection to the children especially from abuse and maltreatments.

4.0 Conclusion

As the demand for child care services are increasing nowadays, quality of the service should be scrutinized diligently. The existing laws and regulations are amongst the aspects to be examined in providing a better protection to the children placed in the child care centres. The inadequacies of the law especially the CCCA were highlighted firstly on the issue of registration. There is a need to tackle the issue of enforcing laws upon the illegal or unregistered child care centres. Furthermore, another aspect of this issue is the problem of implementation. As highlighted by Rozita Kamil who is the

President of Negeri Sembilan Association of Child care, as far as child care centres are concerned, the question now is on the issue of implementation^{xxxv}. The insufficiency of monitoring and enforcement may contribute to low quality and increasing abusive cases amongst infants and toddlers in child care centres.

The increasing maltreatments on children happening across the country should be the pushing factor for a better legal mechanism to be implemented as soon as possible. The worries of the parents sending their children in the hand of child care minders should be taken into account. The laws providing protection of children from abuse too need examination. CCCA is silent on the issue of sanction upon the children abusers amongst the child care providers. Cases are now dealt under Child Act 2001. Therefore, there is a need to examine whether protection provision should be included in CCCA in stressing the seriousness of the offence of children abuse in child care centres.

Therefore, an enhancement on the written laws as well as effective approaches in implementing the laws is needed to be the basis for developing basic principles and standards of child care protection of child care centres in Malaysia. This is to ensure that children especially those in the vulnerable age are given a better protection. Proven models from the developed countries may be taken into consideration to set as an example to our system in Malaysia.

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Career Woman: Economic Empowerment or a Threat to Family Value

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Abstract

The prevalent view of the successful woman nowadays is based upon the Western model of the successful working woman. Working woman is portrayed to be the epitome of empowerment, respect and happiness. As such, Muslim women are aspired to this model of success. They want to pursue employment or a career just to feel valued in their family or within their society. Numerous campaigns and programs are conducted across the Muslim world to instigate women into the workplace as a means of ending poverty and empowering them. In other words, the scenario actually transpires from the need to support the family expenses, high cost of living, the modern life style, etc. This ultimately resulted to the complicated family lives that affect the family value, which includes the child upbringing, despicable marital relationship and increase of social ill among the society. The objective of this study are to engage in an analytical discourse on the Islamic Jurisprudence of the *fiqh* of *awlawiyat* pertaining to working woman and to analyse the effect on the main role and responsibilities imposed on women. This research adopts qualitative methodology as it provides a deeper understanding on primary role of women in Islam. The outcomes of the study highlight the effect of the working woman towards the deterioration of family value. At the end of this paper, recommendations will be made to provide better environment for Muslim woman to work without neglecting their primary role.

Keywords: Carrer Woman, Economic Empowerment, Family Value, Islamic Jurisprudence, Woman's Role

Introduction

Today the prevalent view of the successful woman is based upon the Western model of the successful working woman. They seem to be financially independent, pay their own bills, and do not need a man to support them. The Western model of the successful working woman who apparently 'has it all' has been broadcasted to many generations of women internationally. The images can be seen in the media, and in the words of famous people like Michelle Obama who has stated in many interviews that there is no conflict for women in having a job, managing children, husband and having free time. In short the working woman is portrayed to be the epitome of Empowerment, Respect and Happiness. Therefore many women in the West as well as Muslim world aspire to this model of success or feel pressure to

pursue employment or a career just to feel valued in their family or within their society. In addition, there are numerous programs today across the Muslim world instigate women into the workplace as a means of ending poverty and empowering Muslim women. On the other hand, working women actually face dilemma to manage their family. For the individual woman, the resolution of this conflict is a private, personal choice. In the U.S., family has always been considered a private world, a refuge from public life, free from politics and governmental intervention. Politicians may proclaim support for “family values,” yet governmental policy may serve instead to limit the options available to a woman and her family (Pleck, J., 1977). As such, this paper will analyse the priority imposed on Muslim women when it comes to their main role and responsibilities towards their family. In some of the cases, women are forced to go out for work to support the family, in such a situation, this paper would then propose recommendation to solve the problem.

Materials and Method

This study forms a conceptual paper that utilizes the qualitative methods which are primarily based on the theoretical analysis and fact findings activities. The data are gathered using the library-based approach. This method provides a deeper understanding of the current scenario and the discourse on relevant theory and jurisprudential, particularly on the human value, current issues on deficiency of the woman’s main role as a caretaker for their family, administrative practice and norms associated with career woman. The discussion used the descriptive approach and explanatory approach on the existing practise and application of law, if any.

Results and Discussion

Economic Empowerment vs Family Value

There is ample evidence that when women are able to develop their full labor market potential, there can be significant macroeconomic gains. (Loko and Diouf, 2009; Dollar and Gatti, 1999). GDP per capita losses attributable to gender gaps in the labor market have been estimated at up to 27 percent in certain regions (Cuberes and Teignier, 2012). Aguirre and others (2012) suggest that raising the female labor force participation rate (FLFPR) to country-specific male levels would, for instance, raise GDP in the United States by 5 percent, in Japan by 9 percent, in the United Arab Emirates by 12 percent, and in Egypt by 34 percent. Based on International Labour Organization (ILO) data, Aguirre and others

(2012) estimate that of the 865 million women worldwide who have the potential to contribute more fully to their national economies, 812 million live in emerging and developing nations.

As a result, the message that the society often promulgates is that only women with careers outside the home do work that really “matters” compared to women who take care of children and run households full-time and punch no timecards. Accordingly, modern society does not credit them with doing valuable work and grants them only minimal status. Ultimately, many of these women feel undervalued. Although they may know that raising children is eternally important, they receive many subtle cues from the world that they really ought to be doing something more with their lives (Jan Underwood Pinborough, 1986). The same believe goes to Muslim women, the believe that they should go out for work to help economic growth, and the feeling of being undervalued of their main role and responsibilities which is the care taker of their family. When they go out for work, they will abundant their primary role and the problem arise when they put themselves in a dilemma as to which one should be given the priority. In other words, Muslim women should not follow the profile of the Western working woman. Are they really being ‘empowered’ economically yet at the same time they neglect their duties towards family and children? In fact, all talk of women's empowerment through employment by Western states is driven by the capitalist agenda of securing economic gain rather than improving the lives of women.

Samuel Smilles, (Sheikh `Abdul `Aziz, 2012) a pioneer in Renaissance thinking, said when governments sought to employ women, despite their contribution to the nation’s wealth, it resulted in traumatic consequences as the entrance and dependence on women in the workforce increased. Attacking the structure of the domestic life, depriving children of their mothers, husbands of their wives, and children of their relatives, it robbed women of their right and duty to their families.

As far as empowerment is concerned, an economic philosopher, Jules Simon, stated in the Journal of Magazines v. 17, women have been introduced into different fields from sewing mills to banking institutions yet many of these women were far superior to their employers only to gain a few pounds. The husband now had the materialistic benefit of having a wage-earning wife; while simultaneously threatening to take his place in the workforce. He further noted that employers have stripped women of their homes and families.

On top of that, Dr. Ida Ellen claimed in her research findings there is a high correlation between the number of working women and the high rate of crime in that society. She concluded that the root of the family crisis in America and the high level of crimes in the community are due to the wife leaving her home to double the family income. As the income level arose as did the level of morality decreased. Dr. Ellen called for the return of the wife to her home to rectify the society and its ethics being the only way to save the new generation of degradation.

On the same note, an American professor called Adeline (Sheikh `Abdul `Aziz, 2012) said that the reason for family crises in the United States and the increase in the crime rate is because a woman has abandoned her house in order to double the family's income. The income increased but the morals declined. She added that woman's return to her house is the only way to save the new generations from deterioration.

More truthful statement shared by Lord Byron, (Sheikh `Abdul `Aziz, 2012) an English poet, he claimed that women should tend to their homes and teach religion to their children while cautioning against the free mixing of men and women.

How far Employment Empower Women?

The issue never ends when there are a lot of questions arose. One might also wonder, are women in the West more empowered with employment? One of the most important aspects of women's empowerment is giving value to that which makes them unique to men, and this includes their important role as the child-bearers of humanity. However, within Western capitalist states, the man and his responsibilities and rights are constantly placed as the gold standard that women are expected to measure up to, including in the workplace. The consequence is that many women delay or avoid marriage or having children in order to climb the career ladder or even keep their job. Motherhood has therefore been devalued under capitalism which gives more value to wealth creation than creating and nurturing new life. Where is the empowerment in this? By getting married and having children, they are seems as less potential. Those piercing eyes have questioned their credibility. They have been belittled for their efforts just for being a 'mother'? So, is the situation better off for working mothers? They bore the brunt of unrealistic expectation, both indoor and outdoor. Along with an avalanche of criticism, they are seen as 'suspicious' in their role of a wife and mother! The truth is, there is nothing

good or bad associated with the status of mothers, whether they are working or not and they should not be judged with a preconceived notion existent in the society.

Understanding the real issue

This paper is not going to argue whether women should go to work or not. Therefore the problem does not lie in the dos and don'ts. The issue arises when one transgresses the realm of one role for another. It comes when women abandon their primary defined role, as a mother and wife simply for material pursuits, unconventional lifestyle and financial independence.

The repercussions are very obvious either to be seen or to learn from. The breakdown of families, rebellious children, unhappiness and dissatisfaction have set the trend. In earlier times, women were not confused about their role, whether working or non-working. She was aware of the fact that their primary role is taking care of her family, her husband and nurturing of her children. There is an old adage: If you educate a woman, you educate a whole generation. So, now women are highly educated, qualified and liberated too, they should have raised a whole enlightened generation. Unfortunately the reality betrays it. The youth today have a very different story to tell entangled in the web of identity crisis, loneliness, confusion, drugs, illicit relationships, depression, suicide, behavioral problems, crime, theft etc.

Therefore what is not right here? There is a very beautiful quote, once said by a companion of Prophet Mohammad SAW, when they were on an expedition to spread the message of Islam, "*I have come to free you from the servitude of the slave and bring you to the servitude of the Lord of the slave.*" Here lies the crux of the problem, this remark is a stark reminder of the situation of women today. They have allowed other elements to define their worth, successes and failures. They become slave of both, their opposite gender as well as or the corrupt system. Society asked them to leave their homes, children and to sit in the industry and become a money-minting machine. Sadly, women, without any regret whatsoever, embraced it. Women accepted the lure of the society, the financial independence above and higher than raising the children, through which the human race survives. So, what have these women achieved in the end? Sadly, the answer is, strange children, broken homes, emptiness on a personal and emotional front etc.

Allah SWT has created women with a physique completely different from men, so that women will be able to carry out domestic affairs as well as other feminine duties.

When a woman engages in men's work, this is considered against her physique and nature. It is a grave crime against women, for it destroys her character. The effect continues to her children, as they lose love and compassion. This is because no one can perform the role of a mother who, when she dismisses herself from her kingdom, she cannot find rest, stability, or tranquility elsewhere. The reality of these societies is the best example.

Islam entrusted the two spouses with different duties and each has to undertake their responsibilities to help build up their community both inside and outside home.

A man's role is to earn livelihood and support his family financially while a woman's role is to rise and love children and show compassion toward them. This is in addition to nursing, breastfeeding, teaching children, administrating female schools, treating women medically, as well as other duties proper for women. Abandoning the domestic duties destroys the whole family and, eventually, the society becomes an empty entity, a form without reality or substance.

Allah SWT says: *“Men are the protectors and maintainers of women, because Allâh has made one of them to excel the other, and because they spend (to support them) from their means”*. [An-Nisa (4):34] It is Allah's Law upon His creation that guardianship is the duty of man.

And this is the reason of plethora of problems among children. How can a child be able to love his mother, when he/she has never had one? What they have known is just the namesake! Can the crèches or nanny, ever replace the precious moment the mother has with her child? In return, it hampers a child's emotional and social development. The common unhealthy and unruly behavior of the staff affects a child's psychological health. It is therefore indeed a need to rethink who defines women's basic roles and responsibilities, the one who created them or the trend of some insensitive chaps have set to fulfill their material greed? Something that need to be understood, the capitalist-inclined policymakers, is exploiting women, for their own benefit.

Muslim Women, Role and Responsibilities

Islam raised the status of women, and gave her enduring rights for as long as the Islamic rules were implemented, and gave her care in all aspects of her life, lifting from her the burden of earning her daily living and putting that on the shoulders of men, even if she enjoyed abundance of wealth, as this *nafaqah* is her right from her male guardian and it is not a charity from him, for Allah SWT says, *“Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for*

maintenance] from their wealth.” [AnNisa (4):34] It is therefore an obligation on her “Wali Amr” (guardian) to provide for her in all circumstances and when she does not have this Wali Amr, her nafaqah is an obligation on the state. So she is honoured in all aspects of her life and during all ages of life.

Woman in Islam is a mother and a wife and an honour to be protected because that is her main role that should not suffer as a result of other roles. This role that she bears a great responsibility over, namely raising children and bringing forward men and women who are a source of goodness for the State, does not forbid her from gaining an education and pursuing work if she chooses. She can practice in many jobs and professions as long as there is no conflict with her nature and her primary role and no conflict with the Islamic rules. She is also permitted to engage in the same economic transactions as men. The woman is half the society and she is the man's partner in life, but today due to the absence of implementation of Islamic rules, and the hegemony of the capitalist system, her working became a necessity. Many women now work as the sole breadwinner as a result of the death of her husband or father, or divorce or abandonment.

The capitalist view is that Islam's concept of the primary role of the woman as a mother and homebuilder lessens her and limits her role and her status, but in reality it is capitalism that lessens her and views her as a consumer of goods and services. In order to fulfill this role she needs her own source of income through her work. Capitalism also views her as a commodity rather than a human being and seeks to exploit her femininity by actions that humiliate her dignity as a means to market goods. The issue of diverting the role of women from their true role of raising generations, building the Islamic *Shakhsiyyah* of their children, and bringing forth heroes who are the devoted servants of Allah has been a central preoccupation for the West and their agents as they know that by this they will destroy a whole generation of potential workers for re-establishment of Islamic leader who will rule by *Al-Qurán* and *as-Sunnah*.

According to Islam, the primary role of the woman is of a mother and homemaker because it is through this action that generations are raised...

“Mothers play a great role in building a generation. The better a mother is at raising her children, the more successfully the Ummah is built and the more successful it is at producing heroes. You hardly ever see a great man except that a great woman is behind him who left some of her traits in his

personality by way of the milk from which he was fed and the warm embrace in which he sought refuge.” Sheikh Abdullah Azzam (*Rahimahullah*).

And it is very important for women today to link their actions to the Islamic law to save them from the *fitna* outside. Women should not raise their children just because it is the laid down norm of the society or this is what women have been doing for centuries, but rather to know that it is the responsibility Allah SWT has bestowed them with, for which they are accountable, and for their small gestures, they would be rewarded by Allah SWT. Furthermore is an *ibadah* (act of worship) for them.

It is Allah, who has honored them in their own distinctiveness of being mother, the most supreme.

One woman said to the Prophet SAW “*O Rasulallah, you brought tidings to men but not to women*”. He (Prophet SAW) said, “*Does it not please any of you that if she is pregnant by her husband and he is satisfied with her that she receives the reward of one who fasts and prays for the sake of Allah? And when the labor pains come none in heaven or earth knows what is concealed in her womb to soothe her. And when she delivers, not a mouthful of milk flows from her and not an instance of child’s suck that she receives for every mouthful and for every suck, the reward of one good deed. And if she is kept awake by the child at night, she receives the reward of one who frees 70 slaves for the sake of Allah.*” [Tabarani]

Motherhood in Islam is a soul and feelings as a mother who is caring, gentle, selfless, love of children, and even willing to sacrifice and bother of carrying out works in the affairs of the household. Motherhood also means strengthening the position of the family which formed the basis of the Islamic generations in a family environment. The role of motherhood is very important because the mother is among those who will shape and mold the personality of their children, as intended in the Hadith: “*No one is born except upon natural instinct, then his parents turn him into a Jew or Christian or Magian*” [Bukhari and Muslim]. Sahih Bukhari 1292, Sahih Muslim 2658.

If Muslim women do not play their real role in shaping and provide education to their children, then the effect will be seen either in this world or the hereafter. So woe to the mothers in the world who never bother them maintain their children, it also had to be accounted for in the afterlife because they neglect to give proper education. The mother should know that children actually look forward to the

perfect upbringing of the mother. How much care and education can be given if the mothers are always busy with other roles outside their domestic affairs?

Conclusion

Living in a modern world where lifestyle is complicated and comprehensive, a role of a woman in workplace would be something that would assist the productivity of a country's economic growth and the family economy status. Nevertheless this celebrated role of a woman should not be over powered with their natural role which is the noble role of a mother, wife and family care taker. It could not be denied that the sustainability of a country economic status is very much supported by the stability of family institution. Thus, balancing both role of a woman is a significant factor to safeguard the existing stability of a country as well as the shaping of future generation. The policy maker needs to address the relevant issues on working woman who is also a care taker of the family. The policy need to incorporate woman friendly working environment.

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Kingdom of Arab Saudi Fatwa

BITING THE HANDS THAT FEED-FINANCIAL ABUSE OF ELDERLY WOMEN

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Abstract

The proportion of the population aged above 60 years is increasing, from 7.9% in 2010 to 8.8% in 2014. This figure is expected to grow to 10.6% by 2020. The lifespan for women is higher as compared to men, for example in 2013, i.e. 77.2 years for women as compared to 72.6 years for men in Malaysia. Hence, it is indeed important that the financial position of elder women is seriously taken into account to ensure supportive environment for the elderly and promoting active ageing amongst elder women. The position of elder women is more vulnerable than elder men as studies has shown that elder women are perceived as weak by perpetrators, women's dependent attitude apart from the noble role of everlasting loving mother and caregiver in cases of financial abuse by children. It is not uncommon that children financially abused their mothers through joint signature authority on a joint account, misuse their credit cards or asking them to sign a will or power of attorney through deception, coercion or undue influence. A Canadian national survey found that 62% of elder victims of financial abuse were female. The statistics shows a more alarming condition in the US, where the National Center on Elder Abuse report has concluded that 91.8% of the victims of financial abuse of the elderly were women. Although research on financial abuse of elder women is not common in Malaysia, however, existing case laws in Malaysia has proven that such abuse do exist. In view of the absence of such research in Malaysia, using the qualitative approach, this paper analyses the prevalence of such situation in Malaysia and discusses the laws and the judicial decisions which involve financial abuse by adult children towards their elderly mothers. Using the comparative approach with selected countries, the paper concludes with suggestions for the betterment of the legal position, which could better protect elder women from financial abuse.

Keywords: elder women, financial abuse, vulnerable, mother, children

Introduction

In Malaysia, according to figures from the Malaysian Department of Statistics (DOS), there are now more people aged 60 years and older than there are children younger than five years old (Khazanah Research Institute, 2015). The proportion of the population aged above 60 years is increasing, from 7.9% in 2010 to 8.8% in 2014. This figure is expected to grow to 10.6% by 2020. By the year 2040, Malaysia is expected to reach ageing population status at which point 16.3% of the total population will be 60 years and older (National Population and Family Development Board's website, 2016). The lifespan for women is higher as compared to men, for example in 2013, i.e. 77.2 years for women as compared to 72.6 years for men in Malaysia (11th Malaysia Plan 2016-2020). These elderly play a major role in raising their children and when they turn elderly, the role is reversed. The children should shoulder the responsibility of taking care of their aged parents. In the USA, Hannah, Jeanne M. (2016) states that as America ages, the Baby Boomers experience stress as they become responsible for their aging parents. There are also many American seniors who reside in nursing homes or other facilities. No matter where a senior resides, he or she may be a subject of elder abuse. The National Center on Elder Abuse has defined seven different types of elder abuse, namely physical abuse, sexual abuse, emotional abuse, financial/material exploitation, neglect, abandonment and self-neglect (Tatara T, Kuzmeskus L, 1997). According to the US National Center on Elder Abuse, it is estimated that between one and two million Americans older than 65 years of age have been the victims of abuse (NetCE, 2014). The US National Center on Elder Abuse report has concluded that 91.8% of the victims of financial abuse of the elderly were women (Richard J Bonnie and Robert B Wallace (2003). Podnieks E. (1992) stated that in Canada, a national survey found that financial abuse was the most common type of elder abuse in that country, and 62% of elder victims of financial abuse were female. Some of the reasons cited are because women live longer than men, perpetrators may perceive women as weak and many women have not been in a position to make financial decisions because previously their husbands handled them, thus these women make particularly good targets for abusers who offer "help" but instead exploit available assets (Dessin, 2000). According to the World Health Organization ("WHO"), "although there is no systematic collection of statistics or prevalent studies in the developing world, crime records, journalistic reports, social welfare records and small scale studies contain evidence that abuse, neglect and financial exploitation of elders are much more common than societies admit" (Tengku Aizan Hamid, Yadollah Abolfathi Momtaz, Rahimah Ibrahim, Mariani Mansor, Asnarulkhadi Abu Samah, Nurizan Yahaya, Siti Farra Zillah Abdullah, 2013). In terms of region, the information on elder abuse in Malaysia is sparse. However, the findings from previous studies show that risk factors that may make an older adult more vulnerable to abuse are increasing among older Malaysians. Literature identifies persons like family members, caregivers, friends, neighbours, advisors as possible abusers because they are in a position of trust with the potential to commit financial abuse on the elderly. Not to mention, being elderly persons, they are prone to forgetfulness as well as at risk of other physical, mental and emotional impairments. In the only US national study that attempted to define the scope of elder abuse, the vast majority of abusers were family members (approximately 90%), most often adult children, spouses/partners and others. (The Center of Excellence on Elder Abuse and Neglect, University of California, 2009). Thus, women are normally more susceptible to being abused, including from their own flesh and blood, their own children.

Although research on financial abuse of elder women is not common in Malaysia, however, existing case laws in Malaysia has proven that such abuse do exist. In view of the lack of such research in Malaysia, this paper analyses the prevalence of such situation in Malaysia and discusses the laws and the judicial decisions which involve financial abuse by adult children towards their elderly mothers. The paper will conclude with suggestions for the betterment of the legal position, which could better protect elder women from financial abuse.

Definition of Financial Abuse

Financial or exploitative abuse is unlawful possession or hiding and that a specific other individual (or individuals) is responsible for causing or failing to prevent it (Aishath Muneeza, 2010). The WHO (2002, p. 127) defines financial or material abuse (exploitation) as the “the illegal or improper exploitation or use of funds or resources of the older person”. In Malaysia, older persons are defined as those who are 60 years and above (National Policy For The Elderly, 1995), which is consistent with the World Health Organization’s and the United Nations’ definition (Fealy, G., Donnelly, N., Bergin, A., Treacy, M.P., Phelan, A. (2012). Financial exploitation of the elders has been dubbed by some experts as the crime of the 21st century (Shelly L. Jackson, 1993). Elder financial exploitation is generally defined as the illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder at risk for harm due to decreased physical or mental capacity (Kathryn Boose, 2008). According to Cindy Hounsell J.D.(2009), elder financial abuse is the misuse of an older person’s property or financial resources without their consent or understanding. It is a crime that affects hundreds of thousands of elderly persons each year. Financial abuse can cover a broad range of activities, from misusing credit and debit cards to stealing from joint bank accounts or writing checks without authorization. Financial abuse can escalate from theft of pension or benefit checks to identity theft. It can involve pressure or threats that make the abused person transfer or give away money or possessions. It can also be deceitful financial salespeople whose only goal is to sell inappropriate products such as trusts, long-term care insurance, reverse mortgages, and annuities that individual buyers do not understand or may not need. Evidence of financial abuse can include loss of jewellery, bank books or personal property, unprecedented funds transfers, unpaid bills where a third party has been entrusted to pay them, unexplained bank withdrawals and cashing of personal cheques (Retirement & Estate Planning Bulletin Newsletter, 2007).

Laws in Malaysia

In Malaysia, the abuse of the elderly is recognized as a form of domestic violence (Asiah Bidin & Jal Zabdi Mohd Yusoff, 2015). The elderly comes under the definition of incapacitated adult as stated in the (Domestic Violence (Amendment) 2012 (Act 1414) which defines *incapacitated adult* as “a person who is wholly or partially incapacitated or infirm, by reason of permanent or temporary physical or

mental disability or ill-health or old aged, who is living as a member of the family of the person alleged to have committed to the domestic violence” (section 2, Domestic Violence Act). Any abusive acts committed against the elderly which falls under the definition of the domestic violence under the Domestic Violence Act, and constitutes an offence under the Penal Code, will be prosecuted for crime as it involves the intentional maltreatment of one individual by another (Asiah Bidin & Jal Zabdi Mohd Yusoff et. al., 2015). Despite having the Domestic Violence Act which is applicable to elderly (incapacitated adult), literatures pointed out that the legislation is still lacking to cater the problem of elder abuse which is applicable to elderly (incapacitated adult), as the intention of the Parliament in enacting the Domestic Violence Act is to protect the victims particularly women and children (Asiah Bidin & Jal Zabdi Mohd Yusoff et al, 2015). Apart from the Domestic Violence Act 1996 and the Penal Code, if the elderly enter into highly disadvantageous contracts or not as what they thought the contracts were, or sell or transfer away property or items of value unwittingly or for less than their true value (Locknie Hsu, 2013), the general law under the Contracts Act 1950 such as breach of contract, fraud, misrepresentation, breach of fiduciary duty and undue influence is relevant. Common law and equity may also be relevant. The Sunday Star newspaper dated 16 October 2016 reported that the Malaysian Health Ministry intends to introduce the Aged Healthcare Act to elevate standards of elderly care in old folks home. Whether the new statute will cater for financial abuse of the elderly remains to be seen.

Judicial cases in Malaysia

The three Malaysian cases discussed below highlight the scenarios of financial abuse of a mother by his own child.

Suspicious circumstances

In the Johor Bahru High Court case of *Lim Kang Hai & Ors v Lim Chik Lock* [2013] 1 LNS 539, the elderly woman, Madam Ho has died but three out of her six children are claiming that her will for distribution of her properties and assets is not valid because Madam Ho did not have testamentary capacity when she executed the will, there are suspicious circumstances surrounding the making of the will and the second son, who was the defendant procured the execution of the will by exercising undue influence over Madam Ho. Madam Ho was an elderly 78 year old woman. She could only read Chinese newspapers and spoke the Mandarin, Hokkien and Teochew dialects. Madam Ho could not read or write in English but she made a will in English in favour of his second son’s two sons, his son’s wife and the mother’s two daughters. Her signature and initials in the will are all in Chinese. Her other three children were the plaintiffs while his second son were the defendants. In deciding the case, the Court had examined the existence of mental capacity of Madam Ho and discovered that there is the absence of evidence that she possessed the mental capacity at the time of execution of the will. All eight circumstances brought before the court were carefully examined and scrutinized with one witness being disinterested witness and the Court decided the circumstances surrounding the making of the will by the late Madam Ho were highly suspicious, one of them being the defendant had misappropriated the

money of his late mother and sold her shares without her authority. By being the sole executor and trustee of the estate of Madam Ho under the will, the defendant was placed in a position whereby he could shield himself from being made accountable to the estate of madam Ho for those misappropriations. The defendant has failed to remove any of those suspicious circumstances. All in all, it appears that the Court has exercised caution in dealing with the will left by the elderly woman. Many relevant cases were cited by the Court in arriving at its decision.

Elderly Duress of a Power of Attorney

In the case of *Salut Rugo v. Bayan Gisau* [2016] 1 LNS 86, the mother, who was at material time was an elderly lady of 61 years, was taken advantage of by her eldest son by forcing her to thumb print a power of attorney without first being informed of the nature or the contents of the same. The power of attorney if valid, would effectively grant the son the power to deal with the mother's property which included the land in question. The mother as a plaintiff (81 year's old at the time of the suit) sought a declaration that the power of attorney granted by her to his son, the defendant is void. The defendant argued that he is the co-owner or joint owner of the land when the purported power of attorney was thumb printed. The mother had never affirmed the son's authority to act as her attorney. The Court ruled in favour of the mother as when she thumb printed the power of attorney, she was under duress and further she did not understand the nature and contents of the document. The power of attorney was held to be void ab initio. The Defendant must vacate any part of the said land which he or his agents and nominees are or may be in occupation. In deciding the case, it appears that the Court had made an evaluation as regards the position and standing of the mother as against the son. The Court stated that there existed an unequal relationship between an illiterate 61 year old mother who never went to school and could not read or write and her eldest son who had a secondary school education and working for a company at the material time. Further, the son admitted that his mother, the plaintiff could not understand English and the power of attorney was written in English. Nothing on the Power of Attorney indicates that the contents of the Power of Attorney was interpreted to the Plaintiff in the language she understands ie, Lun Bawang. Due to this fact, the mother did not affix her thumb print on the power of attorney voluntarily but had been under duress from her son. The Court in determining on the validity of the power of attorney had made reference to Powers of Attorney Act 1949 (revised 1990) but acknowledge that it applies only to Peninsular Malaysia, and has no application to Sarawak. The Court had to refer section 3(1)(c) of The Civil Law Act 1956 wherein English common law as at 1949 is to be applied in determining the validity of Powers of Attorney made in Sarawak

Alleged Undue Influence

In the 2015 case of the *Immi Lim v Mimi Lim & Anor* [Guaman Sivil No: 22-554-2009] (Pulau Pinang High Court), the Court had to deal with the issue as to whether an elderly woman had the necessary mental capacity when she executed a transfer of property in Form 14A to one of her daughters, the first defendant. The plaintiff, the younger daughter alleged that the deceased did not have the necessary mental capacity at the time when the deceased executed Form 14A because her mother was suffering

from severe leg swelling, jaundice, feeling breathlessness and abdominal fluid retention (ascites) and severe heart failure at or around the time the transfer form was signed, as stated in the doctor's medical report. This, according to the court, is proof of her mother's (deceased) status of health and not about the state of mind of the deceased. The Court observed that the deceased's signature on Form 14A was firmly and clearly written, with no signs of unsteadiness, and this shows that the deceased's hand was not shaking and unsteady at the material time when she signed on the said document. It further shows that the deceased was normal and was in full control of her physical and mental faculties. Thus, the deceased had the mental capacity at the time the will was made and that her health status then had not in anyway been proven to have affected her mental faculty. In addition, the court must also determine whether the first defendant was in a position to exert undue influence and dominate the will of a sick mother. The Plaintiff is suing in person for the invalidation of the transfer of the said property to the First Defendant and have it reverted back to the estate of the deceased where the Plaintiff claimed as to the next of kin entitled to half share of the said property. The Court stated that since this is an *inter vivos* transfer, the parties to the contract are the deceased and the first defendant. Hence, where an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was to caused (Section 20 Contracts Act 1950). The plaintiff did not have any *locus standi* to challenge the transfer of the said property as she was not a party to the contract. However, the Court proceeded to discuss the merits of the case. The law on burden of proof for undue influence where the transfer of the property is from mother to daughter involves personal relationship and where there are suspicious circumstances surrounding the transaction, the burden of proof is on the first defendant to disprove undue influence and dominance over the will of a person to the transaction. The plaintiff had raised events of suspicious circumstances which were mostly baseless according to the Court but, the Defendants nevertheless have explained and given answers to the alleged suspicious circumstances and as such have proven that the whole transaction is *bona fide* and righteous, not tainted by undue influence or dominion over the will of the deceased. Therefore, we can see in this case that the decision of the court showed the transaction undertaken by the elderly woman was valid as it was not tainted with undue influence and at the time of signing the transfer form, she had the capacity to do so. Her decision is not as a result of coercion but out of her own accord. In deciding the case, the Court referred to the Contracts Act 1950 as well as common law cases.

Learning from Other Jurisdictions

The legal framework of other jurisdictions can be referred to as regards specific protection to be granted to the elderly.

Powers of attorney

The Australian Royal Commission into Family Violence claimed that in 2013-14 alone, Victorians lost close to \$57 million due to abuses of powers of attorney. (Anna, 2015) The elderly are particularly vulnerable to financial abuse and abuse of powers of attorney, and the number of Australians aged over 65 years and over is expected to rise from 14% of the population to 22% in 2061 and to 25% in 2101. In view of this fact, a new legislation governing powers of attorney, which is the Powers of Attorney

Act 2014 has come into effect as of 1 September 2015, wherein one of the purpose of the new statute is to improve protections against the abuse of powers of attorney. Sections 135 and 136 create new offences by an attorney or supportive attorney, which relate to dishonestly obtaining, using or revoking attorney appointments and are punishable by up to five years' imprisonment.

In the USA, in order to help strengthen state laws designed to prevent misuse of financial powers of attorney and to meet the needs of the aging society, the United States' Uniform Law Commission, which is a state-supported organization in the United States has developed the United States Uniform Power of Attorney Act 2006, which has been adopted in these 18 States, namely Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, Virginia, West Virginia, Wisconsin and introduced in Washington. The Uniform Power of Attorney Act 2006 allows a third party to refuse to honor a power of attorney agreement if there is a good faith belief that the principal may be subject to abuse, and requires the third party to report to adult protective services.

In comparison, Malaysia has a Powers of Attorney Act 1949 but it is general in nature and does not expressly address the issue of capacity of the principal.

Mental capacity

Recognizing the fact that Singapore's population is ageing rapidly, Singapore has enacted the Mental Capacity Act ("MCA") which came into operation on 1 March 2010 to protect the vulnerable members of the society, including the elders. (Cynthia Chan, 2010) In Singapore, at the age of 65 years, one in 20 may have dementia and the incidence could be as high as one in 10 by the age of 75 years. The MCA empowers individuals while they still have capacity, to plan in advance for a time when they may lack the capacity to make decisions for themselves, with respect to the areas of personal welfare and financial matters. Even if the individual does not choose to elect a proxy decision maker in advance, applications can be made to the Court to appoint a deputy to make decisions on an individual's behalf, when he loses his capacity. Under the MCA, acts of ill-treatment and/or willful neglect towards the person who lacks capacity will be treated as criminal offences. Any caregiver, donee or deputy found guilty of such an offence can be imprisoned, fined or both.

Ill-treatment of an incapacitated person is defined in the MCA to consist of acts that will cause the victim to experience unnecessary physical pain, suffering or injury, emotional injury; and injury to health and/or development. Ill-treatment can also be carried out in the form of financial abuse, for example, financial fraud.

The MCA is identical in material regards to the United Kingdom's Mental Capacity Act 2005 (Alex Ruck Keene, 2015).

There is absence of such a statute in Malaysia. Malaysia has enacted Mental Health Act 2001 but the issue of capacity is not addressed.

Protection and Care

A new law called the Vulnerable Adult Act will be introduced in Singapore to protect adults who cannot care for themselves or abused by family members. (Janice Tai, 2015) Under the proposed Vulnerable Adult Act, social workers and other professionals will get the powers to enter the house of a suspected victim to assess the situation and remove him to safety if necessary. Right now, a son could be thrashing his elderly mother every evening, but a social worker cannot step into their home to help without permission. Help workers have no powers to intervene even if they encounter cases of a frail senior citizen with dementia, living in filth. The new law will protect people aged 18 and above who are incapable of protecting themselves from harm, due to mental or physical incapacity or disability.

In England, the Care Act 2014 came into force on 1st April 2015. Prior to the Care Act 2014, there was no English law that dealt specifically with safeguarding adults who might be at risk of abuse or neglect. People who may need safeguarding are defined under section 42 of the Care Act 2014 as adults who have care and support needs, are experiencing, or are at risk of abuse or neglect; and because of their care and support needs cannot protect themselves against actual or potential abuse or neglect. In the Care Act 2014, it is stated that “abuse” includes financial abuse; and for that purpose “financial abuse” include having money or other property stolen, being defrauded, being put under pressure in relation to money or other property, and having money or other property misused.

The United States’ Elder Justice Act 2009 was enacted as part of the Patient Protection and Affordable Care Act on March 23, 2010. The United States Elder Justice Act 2009 is a comprehensive elder abuse prevention law which was designed to provide federal resources to prevent, detect, treat, understand, intervene in and, where appropriate, prosecute elder abuse, neglect and exploitation. The term ‘elder justice’ in the United States Elder Justice Act 2009 includes the recognition of an elder’s rights, including the right to be free of abuse, neglect, and exploitation, and the term ‘exploitation’ means the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets (Nurazlina & Nuraisyah Chua, 2015). There is absence of such statutes in Malaysia.

Recommendations

The case laws show indeed the existence of financial abuse cases involving mothers and their children. The cases may be the tip of the iceberg as literature reviews have stated that many financial abuse cases are underreported and difficult to detect. It appears from this paper that there are general laws enacted in Malaysia that are applicable to protect the elderly against abuse including financial abuse. It may be of relevance for the laws in Malaysia be reviewed to specifically address the financial abuse on the elderly as have already been enacted in other jurisdictions, especially in view of the fact that Malaysia will become an ageing country in year 2035. This is consistent with the Strategy B5 of the 11th Malaysia Plan which is to enhance the living environment for the elderly by improving the supportive environment for the elderly and promoting active ageing.

Conclusion

Studies have shown that although greater attention has been given to financial abuse of the elderly in recent years, most of the accompanying commentary relies on anecdotal evidence, personal experience, or commonly shared beliefs. But, one thing is sure, the financial abuse does exist and our role is to try as best as possible to appreciate the elderly and give them the uttermost respect, as stated in the Quran “And your Lord has decreed that you worship none but Him. And that you be dutiful to your parents. If one of them or both of them attain old age in your life, say not to them a word of disrespect, nor shout at them but address them in terms of honour” (Quran 17:23).

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